

THE SUPREME COURT AND RESTRICTIONS ON POLICE INTERROGATION

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I. INTRODUCTION

This article concerns one of the major problems of criminal procedure: the scope and effect of constitutional restrictions on the interrogation of persons suspected of crime.

A woman has been viciously beaten and raped in a deserted alley. Now, at the police station, she looks at "mug shots," but she is unable to identify her assailant. She can give the police only the most general description. He was probably under thirty, of medium height and weight, and either a swarthy Caucasian or a light-skinned Negro. The description is hardly enough to warrant an arrest, but the police mechanism does not depend on such technical concepts as probable cause. Within a few hours, four men are taken into custody and booked "for investigation of rape." Each lives in the vicinity of the crime; each fits the general description; each has been convicted or suspected of rape or attempted rape; and each, in his turn, will be interrogated.

The interrogation room is windowless. Windows in a police station require bars; bars suggest imprisonment; and the thought of imprisonment is a deterrent to confession. The room is bare of distracting ornamentation and pictures; there is no telephone; there are no small objects to finger in relief of tension; the absence of ashtrays indicates that smoking is prohibited. The room is fur-

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nished with a desk and several straight-back chairs. The chairs discourage slouching or leaning. They are placed close together. The desk does not intrude between them. Interrogator and subject will face each other man to man.

Adjoining the interrogation room is a room from which other law-enforcement officers may observe the interrogation through a two-way mirror. No friend or representative of the suspect will be permitted in either the interrogation room or the observation room. The interrogation concerns only the subject and his interrogator. When the subject is brought into the interrogation room, he finds his interrogator in conservative civilian dress. The interrogator displays neither pencil nor paper. He appears disinterested in taking notes. He gives an impression of patience, an impression of having an unlimited amount of time for the interrogation. Should the subject ask to see an attorney, he may be met with the advice that truth is cheap and that he can save an attorney's fee by telling the truth. Should the subject decline to answer questions, he may be informed that he has a privilege of silence, but that silence carries an inference of guilt. The interrogation is already under way.¹ The interrogator's techniques are effective, and they produce a confession. Because the confession contains an accurate description of the victim and the scene of the crime, the case is solved. Without the confession the case probably would not have been solved. Precisely which techniques of interrogation were used and how they produced a case-solving confession may be disputed at the subject's trial. It is not unlikely that the subject will claim that he was beaten or that he was subjected to other impermissible pressures or inducements. If the claims are made, they will be denied by the interrogator.

Because confessions can be very important in the criminal process and because interrogations are conducted in secret, it might be expected that legislatures, the source of comprehensive codes of substantive and procedural criminal law, would prescribe controls for the police interrogation stage. Surprisingly, they have not done so. It is true, of course, that in most states a person who is arrested is entitled to a prompt preliminary hearing;² that in some states he has a statutory right not to be held incommunicado;³ and that in

¹ The description of the interrogation room and the interrogator is found in Inbau & Reid, *Criminal Interrogation and Confessions* 7-9, 13-16 (1962). The suggested response to a request for counsel is found *id.* at 112. The parry to the thrust of privilege is found *id.* at 111.

² For a collection of the statutes, see La Fave, "Detention for Investigation by the Police: An Analysis of Current Practices," 1962 Wash. U.L.Q. 331, 332-33.

³ *Crooker v. California*, 357 U.S. 433, 448 n. 4 (1958) (dissenting opinion).

two jurisdictions he must be advised of his privilege of silence.⁴ But with these exceptions, it has been correctly observed that "in the Anglo-American law there is no regular provision for police examination of a person suspected of crime."⁵ In the face of legislative silence, courts have attempted to resolve the problems of police interrogation by creating certain exclusionary rules. Until January 1963, the significant restrictions were the *McNabb-Mallory* rule⁶ at the federal level, and the coerced confessions rule⁷ at both state and federal levels. The *McNabb-Mallory* rule is unrelated to what happened during the interrogation. At least in theory, its focal point is the failure of the police to bring the arrestee before a magistrate without unreasonable delay. The confessions rule, however, relates directly to what happened during the interrogation. Although the question is said to be whether the confession was "voluntary,"⁸ the rule has developed with an emphasis on opprobrious police conduct.⁹ The *McNabb-Mallory* rule, in its origin and present application, is a rule of statutory interpretation. The confessions rule, however, is a due process requirement, and, until recently, it was regarded as the only federal constitutional restriction on police interrogation.¹⁰

In January 1963, in *Wong Sun v. United States*,¹¹ the Supreme Court held inadmissible incriminating statements made shortly

⁴ This requirement is imposed in the military jurisdiction, U.C.M.J. art. 31(b), 10 U.S.C. § 831(b) (1959), and in Texas. Tex. Code Crim. P. art. 727 (Vernon 1941).

⁵ Paulsen, "The Fourteenth Amendment and the Third Degree," 6 Stan. L. Rev. 411 (1954). It is also correct to observe that there is no general statutory regulation of the admissibility of confessions. For exceptions, see U.C.M.J. art. 31(d), 10 U.S.C. § 831(d) (1959); Tex. Code Crim. P. arts. 726, 727 (Vernon 1941), both dealing with improperly obtained confessions. In some states there is a statutory requirement of proof of *corpus delicti*. See, for example, N.Y. Penal Law § 1041.

⁶ See *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943). The rule bars the admissibility of confessions obtained during a detention in violation of Fed. R. Crim. P. 5(a). For discussions of the rule, see Hogan & Snee, "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," 47 Geo. L. J. 1 (1958); Note, 68 Yale L. J. 1003 (1959).

⁷ See, for example, *Culombe v. Connecticut*, 367 U.S. 568 (1961).

⁸ *Id.* at 602.

⁹ Kamisar, "What is an 'Involuntary' Confession? Some Comments on Inbau and Reid's 'Criminal Interrogation and Confessions,'" 17 Rutgers L. Rev. 728, 741, 747-55 (1963); Paulsen, *supra* note 5, at 429-35; Comment, 31 U. Chi. L. Rev. 313, 317 (1964). *But see* Spanogle, "The Use of Coerced Confessions in State Courts," 17 Vand. L. Rev. 421 (1964), in which it is argued that the confessions rule makes sense only if it is analysed in terms of compulsory self-incrimination.

¹⁰ See Mueller, "The Law Relating to Police Interrogation Privileges and Limitations," in *Police Power and Individual Freedom* 131, 134-35 (Sowle ed. 1962).

¹¹ 371 U.S. 471 (1963).

after an unconstitutional arrest. Thereby the Court suggested a fourth-amendment restriction on police interrogation. Less than five months later, in *Haynes v. Washington*,¹² the Court held a confession inadmissible because the police had refused "to allow a suspect to call his wife until he confessed."¹³ Thereby the Court changed the contour of the confessions rule. Before the effect of these decisions could be felt, the Court added two new dimensions to constitutional restrictions on police interrogation. In *Massiah v. United States*¹⁴ and *Malloy v. Hogan*,¹⁵ respectively, the Court held that the sixth-amendment right to counsel barred the admissibility of a post-indictment confession obtained in the absence of counsel, and that the fifth-amendment privilege against self-incrimination applied to the states through the due process clause of the fourteenth amendment. Then, on the last day of the 1963 term, came what may prove to be the most significant decision ever made in the area of criminal procedure. In *Escobedo v. Illinois*,¹⁶ a case in which most of the previous restrictions coalesced, the Court held that the right to counsel extended to the police interrogation stage of the criminal proceeding.

A preliminary assessment of the impact of all of these decisions, but particularly of *Escobedo*, is the subject of this article. Development of the problem in terms of a chronology of the cases would put *Wong Sun* first. However, because the coerced confessions rule has been the traditional constitutional limitation on police interrogation, and because many aspects of the recent decisions derive from dissatisfaction with the operation of that rule, consideration will first be given to the due process restriction barring the admissibility of coerced confessions.

II. THE COERCED CONFESSIONS RULE

As developed by English courts, the confessions rule was designed to increase the accuracy of the guilt-determining process by excluding from evidence confessions obtained under pressure which, as viewed retrospectively and unscientifically by judges, was sufficient to create a fair risk of falsity.¹⁷

¹² 373 U.S. 503 (1963).

¹³ The quotation is from *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

¹⁴ 377 U.S. 201 (1964).

¹⁵ 378 U.S. 1 (1964).

¹⁶ 378 U.S. 478 (1964).

¹⁷ For a discussion of the history and scope of the confessions rule, see 3 Wigmore, *Evidence* §§ 815-20 (3d ed. 1940) [hereinafter cited as 3 Wigmore]. The operation of the rule is also considered in Maguire, *Evidence, Common Sense and Common Law* 120-23 (1947); Maguire, "Involuntary' Confessions," 31 *Tul. L. Rev.*

The rule and its rationale were adopted by the Supreme Court in 1884:

But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession *voluntary* within the meaning of the law.¹⁸

From 1884 through 1940, the rule remained substantially unchanged,¹⁹ and, although the word "voluntary" was used to describe admissible confessions, it was clear that the test of admissibility was whether the confession was obtained under reliability-impairing circumstances.²⁰ However, in 1941, in *Lisenba v. California*,²¹ a different tack was taken. Although the Court stated that "the aim of the rule that a confession is inadmissible unless voluntarily made is to exclude false evidence,"²² five sentences later the Court observed that "the aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence whether true or false."²³ Of the two statements, the latter has proved the more durable. Although the Court has continued to mask its decisions with the test of

125 (1956); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 Texas L. Rev. 239 (1946).

That the rule was intended to serve the purpose of "reliability" appears from the holding in *The King v. Warickshall*, 1 Leach C. C. 263, 168 Eng. Rep. 234 (K.B. 1783), that tangible evidence derived from an inadmissible confession is admissible. See also *Culombe v. Connecticut*, 367 U.S. 568, 583 n. 25 (1961). It should be noted that the phrase "fair risk of falsity" is not used in any sense of mathematical probability. Rather, the phrase has meaning only as the subject of an intuitive judgment expressed in the context of a system that has traditionally sought to minimize erroneous determinations of guilt.

¹⁸ *Hopt v. Utah*, 110 U.S. 574, 585 (1884). (Emphasis added.)

¹⁹ In *Bram v. United States*, 168 U.S. 532 (1897), the Court held that a confession was obtained under circumstances that violated the privilege against self-incrimination. However, the impact of the self-incrimination theory was not felt until *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁰ See *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Ziang Sun Wan v. United States*, 266 U.S. 1, 14 (1924). *But see* Comment, 31 U. Chi. L. Rev. 556, 563 (1964).

²¹ 314 U.S. 219 (1941).

²² *Id.* at 236.

²³ *Ibid.*

voluntariness,²⁴ and although the decisions can be harmonized with a theory of reliability,²⁵ a police-methods theory has emerged. In *Spano v. New York*, it was stated:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must *obey the law* while enforcing the law; that in the end life and liberty can be as much endangered from *illegal methods* used to convict those thought to be criminals as from the actual criminals themselves.²⁶

The point was reiterated in *Blackburn v. Alabama*, where the Court added:

Thus a *complex of values* underlies the stricture against use by the state of confessions which, by way of convenient shorthand this court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.²⁷

*Haynes v. Washington*²⁸ clearly demonstrates the extent of

²⁴ See *Haynes v. Washington*, 373 U.S. 503, 514 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); *Rogers v. Richmond*, 365 U.S. 534, 541 (1961); *Kamisar*, *supra* note 9, at 742, 746.

²⁵ *Kamisar*, *supra* note 9, at 753-55. Professor Kamisar suggests a two-step theory of reliability:

(A) Is *this particular* defendant's confession "unreliable" or "untrustworthy"? or (B) what is the likelihood, objectively considered, that the interrogation methods employed in this case create a substantial risk that a person subjected to them will falsely confess—*whether or not this particular defendant did?*

Id. at 753. All of the Supreme Court cases in which confessions have been held inadmissible are consistent with reliability theory (B). *Id.* at 754.

It is interesting to note that when the commentators speak of an unreliable confession, they apparently mean a confession that is wholly false. See 3 Wigmore §§ 824, 867; *Kamisar*, *supra* note 9, at 755; *McCormick*, *supra* note 17, at 239; *Paulsen*, *supra* note 5, at 429. However, I am convinced by a relatively brief criminal law practice that there is a much greater risk: the interrogee who is guilty of some wrongdoing may, either through ignorance or in order to end the pressure of interrogation, accede to a more serious version of the offense. The resulting confession is partially true. However, the one or two-line inaccuracy or falsity may spell the difference between an aggravated offense and a mitigated offense. For an example of the risk of "partial unreliability," see *Record*, p. 138, *Stroble v. California*, 343 U.S. 181 (1952), in which the defendant, under the skillful interrogation of an assistant prosecutor, admitted an intention to kill. The risk of partial unreliability has moved the Supreme Court of New Jersey to grant to a defendant pre-trial discovery of his confession. *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

²⁶ 360 U.S. 315, 320-21 (1959). (Emphasis added.)

²⁷ 361 U.S. 199, 207 (1960). (Emphasis added.) See *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

²⁸ 373 U.S. 503 (1963).

the restriction imposed by the police-methods theory. Shortly after a filling station robbery had been reported, petitioner was seen in the area by several policemen. After stating that he lived nearby, he walked to a house, fumbled with the screen door, then returned to the police car and stated, "You got me, let's go."²⁹ He admitted the robbery and, en route to the police station, identified the filling station. At the police station he was interrogated for about thirty minutes and he made a second oral confession. The next morning he made a third oral confession and it was transcribed. Shortly thereafter, he was taken to the office of a deputy prosecutor where he made a fourth confession which was also transcribed. Although Haynes refused to sign the transcribed confession, he did sign the transcript of the confession given earlier that morning. Prior to signing the confession, he had been held incommunicado for about sixteen hours, contrary to state law, and, although he had requested permission to call his wife on the morning following arrest, he was told that "when I had made a statement and cooperated with them that they would see to it that as soon as I got booked I could call my wife."³⁰ Apparently at no time had Haynes been advised of a right to remain silent or to consult counsel. On the other hand, Haynes made no claim of physical abuse, lack of food or sleep, or prolonged interrogation.

Using the traditional jargon of voluntariness, a five-judge majority held the confession inadmissible.

Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be *the voluntary product of a free and unconstrained will*, as required by the Fourteenth Amendment.³¹

In no case of an adult defendant prior to *Haynes* had a confession "secured by so mild a whip"³² been held inadmissible.³³ Unlike the "composite defendant" of prior cases, Haynes was not mentally subnormal, young, or naive and impressionable.³⁴ To the contrary, he was an adult, of at least average intelligence, who, in the eleven

²⁹ *Id.* at 520 (dissenting opinion).

³⁰ *Id.* at 509. Haynes also claimed that he had been denied permission to call his wife on the evening of the arrest. This claim was contradicted by the police and was therefore not considered by the Court. *Ibid.*

³¹ *Id.* at 514. (Emphasis added.)

³² *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

³³ See *Haynes v. Washington*, 373 U.S. 503, 522 (1963) (dissenting opinion).

³⁴ *Ibid.*

years preceding his trial, had been convicted of drunken driving, resisting arrest, being without a driver's license, breaking and entering, robbery, breaking jail, and taking a car.³⁵ Moreover, he had volunteered a threshold confession. Measuring the result in *Haynes* by its facts, it is a good bet that a majority of the present Court would hold inadmissible the confessions found to have been admissible in such cases as *Lisenba v. California*,³⁶ *Gallegos v. Nebraska*,³⁷ *Stroble v. California*,³⁸ and *Stein v. New York*.³⁹ *Haynes* clearly stands at the periphery of the confessions rule.

In the hands of the current majority, the confessions rule operates with a doctrinal sweep that permits little, if any, police pressure to obtain a confession. Yet, police interrogation depends in large part upon an application of pressure which is made effective by isolating the accused from those who give him strength.⁴⁰ Under *Haynes*, therefore, productive interrogation (interrogation followed by a constitutionally admissible confession) is, *in theory*, substantially jeopardized.⁴¹ I stress the words "in theory" because, in the area of criminal procedure, law in the Supreme Court cases frequently does not reflect the reality of law in its operational aspects at the police station and in its doctrinal aspects in state and lower federal courts. If it is clear that a confession is essential to conviction, it is unlikely that the police will refrain from hard interrogation. If the police are forced to choose between no-conviction-because-no-confession and the more remote risk that a conviction

³⁵ *Ibid.*

³⁶ 314 U.S. 219 (1941). Defendant was questioned in relays throughout the night; he was slapped in the face the next night; he remained in custody for twelve more days; on the twelfth day, after an eight-hour interrogation during which he requested but did not receive counsel, he confessed.

³⁷ 342 U.S. 55 (1951). Defendant confessed in Texas to a crime committed in Nebraska; the confession came after repeated interrogation during several days of incommunicado detention; six days later, in Nebraska, he again confessed.

³⁸ 343 U.S. 181 (1952). Shortly after his arrest, defendant was kicked and was threatened with a blackjack; about an hour later, defendant was interrogated; after two hours of interrogation, he confessed; during the interrogation, an attorney was denied permission to see the defendant.

³⁹ 346 U.S. 156 (1963). Defendant Cooper confessed after repeated interrogation during two days of incommunicado detention; defendant Stein was interrogated for ten hours during sixteen hours of incommunicado detention; he confessed on the following morning.

⁴⁰ Incommunicado detention is a recommended device of interrogation. "The principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." Inbau & Reid, *Criminal Interrogation and Confessions* 1 (1962).

⁴¹ See Inbau, "Police Interrogation—A Practical Necessity," in *Police Power and Individual Freedom* 149 (Sowle ed. 1962).

will not be sustained because of coercive interrogation, the latter is the likely choice.⁴²

Moreover, the sweep of the confessions rule is mitigated in practice by the Court's own adherence to the terminology of voluntariness which hides the values now underlying the confessions rule.⁴³ The doctrine emphasizes police conduct as is made abundantly clear by *Haynes*. The terminology of the rule, with a substantial assist from Mr. Justice Frankfurter's treatise in *Culombe v. Connecticut*,⁴⁴ emphasizes the interrogee's reaction. The reaction, measured by the terminology of voluntariness, is, at best, a mixed question of law and fact.⁴⁵ To be sure, the fact is of constitutional dimension, but it is still a fact. The result is that the fact-finding process⁴⁶ cuts against the grain of the theory by dealing with the wrong issue. Further, because the issue frequently involves contradictory testimony, there arises a question of credibility, a contest between the defendant (whose guilt is manifested by his confession) and the police. Whether the question is resolved by judge or jury, it will in most cases be resolved against the defendant⁴⁷ and he will be convicted. If he does not appeal, the matter is ended. If he does appeal, he runs up against the reluctance of appellate courts to overturn findings of fact⁴⁸ and the impossibility of adequate policing by the Supreme Court.⁴⁹ Although he does

⁴² Comment, 31 U. Chi. L. Rev. 313, 320 (1964).

⁴³ Kamisar, *supra* note 9, at 753; Meltzer, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 21 U. Chi. L. Rev. 317, 328 (1954); Paulsen, *supra* note 5, at 434.

⁴⁴ 367 U.S. 568, 602 (1961). Mr. Justice Frankfurter's insistence on the test of voluntariness is criticized in Kamisar, *supra* note 9, at 744-47, 752-53, 759.

⁴⁵ *Culombe v. Connecticut*, *supra* note 24, at 603-05; Paulsen, *supra* note 5, at 433-34.

⁴⁶ Under the recent decision in *Jackson v. Denno*, 378 U.S. 368 (1964), *overruling* *Stein v. New York*, 346 U.S. 156 (1953), a judge or a special jury (but not the trial jury) must resolve the question of voluntariness.

⁴⁷ The rationale of *Jackson v. Denno*, *supra* note 46, is based on the assumption that the jury's resolution of the credibility problem will be affected by its knowledge that the defendant has confessed it. It may be questioned, however, whether a significantly greater protection is afforded by allocating the responsibility to a judge or to a special jury.

⁴⁸ See, for example, *People v. Escobedo*, 28 Ill. 2d 41, 190 N.E.2d 825 (1963), *rev'd on other grounds*, 378 U.S. 478 (1964); *People v. Everett*, 10 N.Y.2d 500, 180 N.E.2d 556 (1962), *petition for habeas corpus granted sub nom. United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir. 1964); *State v. Haynes*, 58 Wash.2d 716, 364 P.2d 935 (1961), *rev'd*, 373 U.S. 503 (1963); Spanogle, *supra* note 9, at 457-59.

⁴⁹ Since 1935, the Court has decided thirty-seven coerced confession cases. See Comment, 31 U. Chi. L. Rev. 313 n. 1 (1964).

have a federal habeas corpus remedy,⁵⁰ he is in jail during the pendency of the proceedings and whether the proceedings prove fruitful rests in large part upon whether the federal court has in mind the very standard from which its attention is diverted by the terminology of voluntariness. Thus, the result probably is an uneasy compromise in which the operation of the rule lags behind theory and thereby encourages the police to undertake the sort of interrogation that the theory prohibits. If the Court continues vigorously to proscribe "mild whips," as in *Haynes*, and particularly if the Court abandons the terminology of voluntariness, the theory of the confessions rule may filter down to other courts, and the area of compromise may shrink. But, unless the confessions rule has been made obsolete by recent developments,⁵¹ there will still be some compromise and there will still be productive police interrogation.

III. FOURTH-AMENDMENT RESTRICTIONS ON POLICE INTERROGATION

Until the decision in *Wong Sun v. United States*,⁵² it had generally been assumed that the fourth amendment had little impact on police interrogation,⁵³ and a substantial majority of courts had refused to suppress confessions as derivatives of an unlawful arrest.⁵⁴ In *Wong Sun*, six or seven federal narcotics agents, acting without probable cause, broke into the house of petitioner Toy and followed him into a bedroom. When Toy reached into a drawer, an agent drew a gun, pulled Toy's hand out of the drawer, arrested him, and then handcuffed him. Interrogated in the bedroom, Toy made incriminating statements and thereafter led the agents to the house of Yee where the agents found narcotics. Toy was then brought before a United States Commissioner for a preliminary hearing and was released on his own recognizance. Several days later, in the office of the Narcotics Bureau, Toy was again interrogated and he made further incriminating statements. At Toy's trial, the court accepted into evidence the narcotics, the statements made in the bedroom, and the statements made in the federal office. Toy was found guilty and his conviction was affirmed by the court of

⁵⁰ 28 U.S.C. §§ 2241-54 (1959). See generally, Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441 (1963).

⁵¹ The possibility of obsolescence is discussed *infra* at 472-73.

⁵² 371 U.S. 471 (1963).

⁵³ Kamisar, "Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure," 1961 U. Ill. L.F. 78, 84-85.

⁵⁴ *Ibid.*

appeals.⁵⁵ In the Supreme Court, the conviction was reversed on the ground that the bedroom statements and the narcotics were the derivatives of an unconstitutional arrest.⁵⁶ Regarding the statements, the Court, following *Silverman v. United States*,⁵⁷ held that the protection of the fourth amendment and the purpose of the exclusionary rule apply to verbal as well as physical evidence.⁵⁸

In determining whether *Wong Sun* is a significant restriction on police interrogation, there arises the preliminary question whether *Wong Sun* applies to the states. Although microscopic analysis of different parts of the opinion yields different conclusions,⁵⁹ the matter has probably been put to rest by the generally unnoticed per curiam decision in *Traub v. Connecticut*.⁶⁰ In *Traub*, the defendant was arrested without probable cause for the offense of arson and was taken to a police station where, after interrogation, he confessed. Following conviction, he appealed on the ground that his confession was inadmissible because it had been obtained after an unlawful arrest or during an unlawful detention or both. The Connecticut court, relying on the appellate court decision in *Wong Sun*,⁶¹ held that "the existence of an illegal arrest and detention does not automatically render inadmissible confessions made after the arrest or during the period of detention."⁶² Traub then filed a petition for a writ of certiorari, and the Supreme Court, in a unanimous decision, vacated the judgment and remanded the case for reconsideration in the light of *Wong Sun* and *Ker v. California*.⁶³ In *Ker*, the Court had held that fourth-amendment questions in state courts were to be governed by federal standards. Consequently, *Traub* must be taken as establishing that the *Wong Sun* rule is applicable to the states.

However, the decision of the Connecticut court on remand indicates that pressing problems remain. The court held that *Wong Sun* created no absolute, fourth-amendment barrier to admissibility; that a confession is inadmissible under *Wong Sun* only if there is

⁵⁵ *Wong Sun v. United States*, 238 F.2d 366 (9th Cir. 1961).

⁵⁶ *Wong Sun v. United States*, 371 U.S. 471 (1963). The Court held that the statements made in the federal office were inadmissible for want of sufficient corroboration. *Id.* at 491.

⁵⁷ 365 U.S. 505 (1961). The Court held inadmissible verbal evidence obtained by the trespassory attachment of an electronic listening device to petitioners' house.

⁵⁸ *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963).

⁵⁹ See Broeder, "Wong Sun v. United States: A Study in Faith and Hope," 42 Neb. L. Rev. 483, 557-64 (1963).

⁶⁰ 374 U.S. 493 (1963).

⁶¹ 288 F.2d 366 (9th Cir. 1963).

⁶² *State v. Traub*, 150 Conn. 169, 173-74, 187 A.2d 230, 232 (1962), *vacated and remanded*, 374 U.S. 493 (1963).

⁶³ 374 U.S. 23 (1963).

a causal relationship between the illegal detention and the confession; and that this rule of inadmissibility is the only change made by *Wong Sun* in the coerced confessions rule.⁶⁴ A slightly different rationale in favor of admissibility was used in *Hollingsworth v. United States*.⁶⁵ The court held that the gauge of admissibility is still the voluntariness of the confession, and that, in *Wong Sun*, the Court held only that the unlawful arrest made the confession involuntary.⁶⁶

On the other hand, in several state and federal cases, confessions not claimed to have been involuntary have been held inadmissible under *Wong Sun* apparently solely because they were obtained shortly after an unconstitutional arrest or search.⁶⁷ Typical of the uneven treatment accorded *Wong Sun* is *Commonwealth v. Palladino*.⁶⁸ There, immediately after an arrest assumed by the court to have been unconstitutional, the defendant made certain statements. About an hour after his arrest, he made additional statements at a police station. The court held that what the defendant said immediately after arrest was inadmissible, but that what he said an hour later was admissible.

The picture, then, is one of judicial disagreement over the meaning of the *Wong Sun* rule (a disagreement that parallels the theory-practice gap under the confessions rule), and the blame must be borne entirely by the unsurpassedly vague opinion of Mr. Justice Brennan in *Wong Sun*. The ambiguities have been explored in detail elsewhere⁶⁹ and need not be considered here. It is sufficient for present purposes to note that isolated passages of the opinion support all of the subsequent, divergent decisions. Until the rule is clarified by the Supreme Court, it will probably have little impact on police interrogation, and, at this juncture, appraisal can be made only in the alternative. If the *Wong Sun* result is based on a test

⁶⁴ *State v. Traub*, 151 Conn. 246, 196 A.2d 755 (1963).

⁶⁵ 321 F.2d 342 (10th Cir. 1963).

⁶⁶ The same result was reached in *United States v. Burke*, 215 F. Supp. 508 (D. Mass. 1963), *aff'd*, 328 F.2d 399 (1st Cir. 1964); *Peal v. State*, 232 Md. 329, 193 A.2d 53 (1963); *Stewart v. State*, 232 Md. 318, 193 A.2d 40 (1963); *Prescoe v. State*, 231 Md. 486, 191 A.2d 226 (1963); *State v. Lavelle*, 104 N.H. 443, 189 A.2d 475 (1963). See also *United States v. McGavic*, 337 F.2d 317 (6th Cir. 1964); *United States v. Smalls*, 223 F. Supp. 387 (S.D.N.Y. 1963).

⁶⁷ *United States v. Marrese*, 336 F.2d 501 (3d Cir. 1964); *Gatlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963); *United States v. Sims*, 231 F. Supp. 251 (D. Md. 1964); *People v. Mickelson*, 59 Cal.2d 448, 380 P.2d 658 (1963); *Commonwealth v. Jacobs*, 191 N.E.2d 873 (Mass. 1963); *State v. Mercurio*, 194 A.2d 574 (R.I. 1963). See *Rogers v. United States*, 330 F.2d 535, 540-41 (5th Cir. 1964).

⁶⁸ 195 N.E.2d 769 (Mass. 1964).

⁶⁹ Broeder, "Wong Sun v. United States: A Study in Faith and Hope," 42 Neb. L. Rev. 483 (1963).

of voluntariness, it adds nothing to the confessions rule. Similarly, it will prove to be illusory if it is based on a causal relationship between the unconstitutional arrest and the confession. Because it is highly unlikely that many arrestees will know that the arrest is improper, it will be impossible to establish a causal relationship between the illegality of the arrest and the confession.

If, however, the *Wong Sun* rule rests exclusively on the unconstitutionality of the arrest, as some commentators have suggested,⁷⁰ the rule may have drastic consequences for police interrogation. Available evidence indicates that the police frequently arrest on less than probable cause.⁷¹ Consequently, unless the constitutional standard of probable cause is watered down in subsequent cases,⁷² a stringent interpretation of the *Wong Sun* rule against the state will make inadmissible a confession obtained after a dragnet arrest or after the so-called "arrest on suspicion" or "arrest for investigation."⁷³ The result will be a second giant step toward the end of

⁷⁰ Shadoan, *Law and Tactics in Federal Criminal Cases* 102 (1964); Broeder, *supra* note 69, at 531; 51 *Geo. L.J.* 838 (1963). *But see* Kamisar, "What is an 'Involuntary' Confession? Some Comments on Inbau and Reid's 'Criminal Interrogation and Confessions'," 17 *Rutgers L. Rev.* 728, 754 n. 172 (1963). It is quite likely that this position is correct. Of the various reasons urged in support of the exclusionary rule, perhaps the most persuasive is this: those persons who drafted the federal and state constitutional prohibitions against unreasonable search and seizure expected compliance from law enforcement officers and contemplated that, in some cases, compliance would interfere with the gathering of evidence. Under the exclusionary rule, the case is treated as though compliance had taken place. See Paulsen, "The Exclusionary Rule and Misconduct by the Police," in *Police Power and Individual Freedom* 87, 88 (Sowle ed. 1962). Given this view of the exclusionary rule, it makes no sense to distinguish verbal from tangible evidence. Consequently, absent any question of standing, a strong argument can be made that the *Wong Sun* rule does rest exclusively on the unconstitutionality of the arrest.

⁷¹ See Trebach, *The Rationing of Justice* 4-7 (1964); Foote, "Safeguards in the Law of Arrest," 52 *Nw. U.L. Rev.* 16, 20-27 (1957); Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 *Minn. L. Rev.* 1, 48 (1963); La Fave, "Detention for Investigation by the Police: An Analysis of Current Practices," 1962 *Wash. U.L.Q.* 331, 336-37, 362-64. Indirect evidence that the police arrest on less than probable cause may be found in the fact that the standard work on police interrogation, Inbau & Reid, *Criminal Interrogation and Confessions* (1962), contains a section entitled "Tactics and Techniques for the Interrogation of Suspects Whose Guilt is Doubtful or Uncertain." *Id.* at 88.

⁷² For an argument that the exclusionary rule may result in a weakening of the probable cause standard, see Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 *Sup. Ct. Rev.* 46, 65-66. See also Traynor, "Mapp v. Ohio at Large in the Fifty States," 1962 *Duke L.J.* 319, 331-32.

⁷³ For an example of the dragnet arrest, see Note, "Philadelphia Police Practice and the Law of Arrest," 100 *U. Pa. L. Rev.* 1182, 1206 (1952); for an example of the investigative arrest, see *Gatlin v. United States*, 326 *F.2d* 666 (D.C. Cir. 1963). On the constitutionality of detention without probable cause for the purpose of interrogation, see Foote, "The Fourth Amendment: Obstacle or Necessity in the Law of

“productive” police interrogation. This step, it should be noted, has nothing to do with the accuracy or reliability of the guilt-finding process. But it has everything to do with the constitutional value of privacy—the right to be free from governmental restraint unless the state has probable cause to take action—a value which is hard to accommodate with present procedures of police interrogation.⁷⁴

IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION

In 1908, in *Twining v. New Jersey*,⁷⁵ eight judges of the Supreme Court held that the fifth amendment's privilege against self-incrimination did not apply to the states. Thirty-nine years later, in *Adamson v. California*,⁷⁶ five judges of the Supreme Court adhered to *Twining*. Both cases involved comment on the defendant's failure to testify at trial, and, in spite of sweeping language in both opinions, there was some reason to believe that the Court would not tolerate more severe sanctions.⁷⁷ However, in *Cohen v. Hurley*,⁷⁸ five judges held that New York could constitutionally disbar an attorney who, on grounds of self-incrimination, refused to testify at a judicial inquiry into ambulance chasing. In a dissenting opinion, Mr. Justice Brennan argued that the privilege should be applied to the states with full force; that there was no historical or logical basis for partial application; and that, in fact, there had already been a partial application. In support of the last point, he observed:

The case before us presents, for me, another situation in which the application of the full sweep of a specific is denied, although the court has held that its restraints are absorbed in the Four-

Arrest?” in *Police Power and Individual Freedom* 29 (Sowle ed. 1962). An incisive analysis of arrests for investigation in the District of Columbia is contained in Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation (1962) (the Horsky Report). For a review of the report, see Kamisar, Book Review, 76 Harv. L. Rev. 1502 (1963).

⁷⁴ For a hint that the requirement of probable cause may also be applicable to legislative inquiries, see *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 554-55 (1962). The point is suggested in Professor Harry Kalven's forthcoming book, *The Negro and the First Amendment*, the manuscript of which was presented at the Ohio State University Law Forum Lectures, April 7-9, 1964.

⁷⁵ 211 U.S. 78 (1908).

⁷⁶ 332 U.S. 46 (1947). On the problem of selective incorporation, see Kadish, “Methodology and Criteria in Due Process Adjudication: A Survey and Criticism,” 66 Yale L.J. 319 (1957); Comment, 58 Yale L.J. 268 (1949).

⁷⁷ See *Malloy v. Hogan*, 378 U.S. 1, 15-16 n. 1 (1964) (dissenting opinion); *Cohen v. Hurley*, 366 U.S. 117, 134 n. 10 (1961) (dissenting opinion).

⁷⁸ 366 U.S. 117 (1961).

teenth Amendment for some purposes. Only this Term we applied, admittedly not in terms but nevertheless in fact the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment to invalidate a state conviction obtained with the aid of a confession, however true, which was secured from the accused by duress or coercion. *Rogers v. Richmond*, 365 U.S. 534; and see *Bram v. United States*, 168 U.S. 532.⁷⁹

In the critical comment that followed *Cohen*,⁸⁰ no notice was taken of Mr. Justice Brennan's obvious effort to effect an engagement between the privilege against self-incrimination and the coerced confessions rule. Indeed, most lawyers, judges, and commentators, if pressed on the matter, probably would have said that the point was a cute forensic device but otherwise not meritorious.⁸¹ For all practical purposes, the point was ignored until, infused by the vote of Mr. Justice Goldberg, it became a cornerstone of Mr. Justice Brennan's opinion in *Malloy v. Hogan*.⁸²

In 1959, William Malloy was convicted of the misdemeanor of gambling in Hartford, Connecticut. About sixteen months later, he was ordered to testify at a judicial inquiry into gambling. Asked a series of questions concerning his arrest and conviction, he invoked the privilege against self-incrimination, was committed for contempt, and sought his release through a petition for habeas corpus in which he specifically raised the federal constitutional issue.⁸³ The superior court denied relief and Malloy appealed to the Supreme Court of Errors. Although the latter court stated that the federal constitutional privilege was inapplicable to state proceedings, it recognized that some restrictions were imposed by the due process clause of the fourteenth amendment. However, relying on both state and federal cases, the court held that Malloy had not sufficiently demonstrated a risk of incrimination.⁸⁴ Relief was denied, but Malloy's petition for certiorari was granted by the Supreme Court.

⁷⁹ *Id.* at 159.

⁸⁰ 26 Albany L. Rev. 89 (1962); 47 A.B.A.J. 821 (1961); 47 Cornell L.Q. 255 (1962); 47 Iowa L. Rev. 507 (1962).

⁸¹ See 8 Wigmore, Evidence § 2266 (McNaughton rev. 1961) [hereinafter cited as 8 Wigmore]; Kamisar, "Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure," 1961 U. Ill. L.F. 78, 84 n. 24; Meltzer, "Required Records, The McCarran Act, and the Privilege Against Self-Incrimination," 18 U. Chi. L. Rev. 687, 697-98 (1951). But see Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 Minn. L. Rev. 1, 50-51 (1963); Morgan, "The Privilege Against Self-Incrimination," 34 Minn. L. Rev. 1, 27-30 (1949).

⁸² 378 U.S. 1 (1964).

⁸³ *Malloy v. Hogan*, 150 Conn. 220, 223, 187 A.2d 744, 746 (1963).

⁸⁴ *Id.* at 230-31, 187 A.2d at 749-50.

Three issues were presented to the Court: whether the fifth-amendment privilege applied to the states; if so, whether it applied with full, federal constitutional content; and whether the privilege had been violated. The Court answered all three questions in the affirmative. Only the first and second answers will be considered herein.

In support of his contention that the fifth amendment's privilege against self-incrimination applied to the states, counsel for the petitioner made a deceptively simple, three-step argument: (1) the fourth and fifth amendments are "so intertwined as to be complementary,"⁸⁵ (2) the fourth amendment applies to the states through the due process clause of the fourteenth amendment; (3) therefore, the fifth amendment should be applied to the states.⁸⁶ Counsel for Connecticut, however, conceded an even more persuasive argument: that underlying the confessions rule was the privilege against self-incrimination, and that the Court, in the guise of the confessions rule, had been applying the privilege as a bar to state inquiry. In a statement that magnificently pointed up one prosecutor's view of the relationship between the various possible constitutional restrictions on police interrogation, counsel for Connecticut observed:

Underlying the decisions excluding coerced confessions is the implicit assumption that an accused is privileged against incriminating himself, either in the jail house, the grand jury room, or on the witness stand in a public trial. The principal motivation for incommunicado coercion by the police is the effort to circumvent the suspect's right of silence which will be available to him in the formal proceedings. *cf. Culombe v. Connecticut*, 367 U.S. 568, 571. The principal reason for excluding confessions coerced by the police is to preserve the right of silence available in later proceedings.

Even if an accused could be compelled to testify against himself in a trial, there would still be some motive for attempting to pry a confession from him before he had counsel. The coerced confession cases, therefore, also tend to preserve the right to counsel. Yet no federal right to have counsel present at all official interrogations has been recognized by the Court. See *In re Groban*, 352 U.S. 330; *Anonymous v. Baker*, 360 U.S. 287. So it is not merely protection of the right to counsel that is involved, but preservation of the right of silence. It is fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station. Frank recognition of the fact that the Due Process Clause prohibits the States from enforcing their laws by compelling the

⁸⁵ Brief for Petitioner, p. 7, *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁸⁶ *Ibid.*

accused to confess, regardless of where such compulsion occurs, would not only clarify the principles involved in confession cases, but would assist the States significantly in their efforts to comply with the limitations placed upon them by the Fourteenth Amendment.⁸⁷

And the Court took him at his word. Although the Court might have distinguished *Twining* and *Adamson*, or might have disagreed with their rationales outright, it chose to do neither. Rather, the Court, speaking through Mr. Justice Brennan, stated that "Decisions of the Court since *Twining* and *Adamson* have departed from the . . . view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions."⁸⁸ Following an analysis of cases through *Haynes v. Washington*, the Court asserted:

[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. . . . Since the Fourteenth Amendment prohibits the States from inducing a person to confess through "sympathy falsely aroused" [citing *Spano v. New York*] or other like inducement far short of "compulsion by torture" [citing *Haynes*], it follows *a fortiori* that it also forbids the states to resort to imprisonment, as here to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasions the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will*.⁸⁹

In a dissenting opinion, Mr. Justice White, joined by Mr. Justice Stewart, took no issue with what might have seemed to some a shotgun wedding of the privilege to the confessions rule.⁹⁰ His point was that the record did not disclose a risk of incrimination.⁹¹ Only Mr. Justice Harlan, joined by Mr. Justice Clark, was moved to complain that "[I]n none of the cases cited in which was developed the full sweep of the constitutional prohibition against the use of coerced confessions at state trials was there anything to suggest that the Fifth Amendment was being made applicable

⁸⁷ Brief for Respondent, pp. 11-12, *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁸⁸ 378 U.S. at 6.

⁸⁹ 378 U.S. at 7-8. (Emphasis added.) The Court also accepted the petitioner's argument of the relationship between the fourth and fifth amendments. *Id.* at 8.

⁹⁰ *Id.* at 33 (dissenting opinion). The most vigorous argument against blending the privilege and the confessions rule has been made by Dean Wigmore. See 3 Wigmore § 823, at 250 n. 5.

⁹¹ *Malloy v. Hogan*, 378 U.S. 1, 35 (1964) (dissenting opinion).

to state proceedings.”⁹² However, even he was forced to note that “[the coerced confession cases] do, it seems to me, carry an implication that coercion to incriminate oneself, even when under the form of law . . . is inconsistent with due process.”⁹³

The significance of *Malloy* lies not in the belief that the privilege is something new to state criminal procedure. To the contrary, all states have recognized the privilege as a matter of local law.⁹⁴ What is significant is that, by necessary inference from Mr. Justice Brennan’s opinion, the privilege, as a matter of constitutional law, applies at the police station.⁹⁵ If the privilege gives the defendant greater protection than is accorded by the confessions rule, the latter has become obsolete in determining the admissibility of confessions. The critical questions then, are two: (1) What is the test for determining whether the police have obtained a confession

⁹² *Id.* at 18.

⁹³ *Id.* at 15-16 n. 1.

⁹⁴ 8 Wigmore § 2252, at 319.

⁹⁵ Even if Mr. Justice Brennan had not specifically linked the privilege to the confessions rule, alert defense lawyers surely would have argued that the admissibility of a confession is governed by fifth-amendment standards.

It is an open question whether the history of the privilege supports application at the police station. “History is invoked both by those who view the privilege as applicable only to judicial proceedings and by those who view it as operative during police interrogation.” Comment, 31 U. Chi. L. Rev. 556, 559 (1964). For a collection of authorities, see *id.* at 561 nn. 24-28. In addition, see Maguire, Evidence, Common Sense and Common Law 104-7, 121 (1947); Franklin, “The Encyclopédiste Origin and Meaning of the Fifth Amendment,” 15 Law. Guild Rev. 41 (1955); Kauper, “Judicial Examination of the Accused—A Remedy for the Third Degree,” 30 Mich. L. Rev. 1224, 1232-36 (1932); McCormick, “The Scope of Privilege in the Law of Evidence,” 16 Texas L. Rev. 447, 453 (1938).

Prior to *Malloy* and *Escobedo*, there was no well settled rule, even in federal case law, that the privilege applied to police interrogation. Compare *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955) (privilege applicable) with *Wood v. United States*, 128 F.2d 265, 268 (D.C. Cir. 1942) (privilege inapplicable) (dictum). However, the Supreme Court had never specifically rejected the privilege. In *Wilson v. United States*, 162 U.S. 613 (1896), the Court held admissible incriminating statements made to a United States Commissioner even though the defendant claimed that he had not been advised of his privilege. However, in *Bram v. United States*, 168 U.S. 532 (1897), six judges of the same Court held that a confession had been obtained by a detective in violation of the privilege. Nevertheless, in *Powers v. United States*, 223 U.S. 303 (1912), the Court reaffirmed the *Wilson* rule. For statements supporting an argument that the privilege is the appropriate test, see *Culombe v. Connecticut*, 367 U.S. 568, 583 n. 25 (1961) (Frankfurter, J.); *id.* at 639 (Douglas, J., concurring); *Leyra v. Denno*, 347 U.S. 556, 558 n. 3 (1954) (Black, J.); *Stein v. New York*, 346 U.S. 156, 197-98 (1953) (Black, J., dissenting); *id.* at 208 (Douglas, J., dissenting). But see *Stein v. New York*, *supra* at 191 (Jackson, J.). For an argument that the history of the right to counsel supports application at the police station, see Comment, 73 Yale L.J. 1000 (1964).

in violation of the privilege; and (2) does the privilege give more or less protection than the confessions rule?⁹⁶

In attempting to ascertain the test to be used in deciding whether the privilege has been violated by police interrogation, a stumbling block is immediately encountered: most of the federal self-incrimination cases do not involve police interrogation. The paucity of case law may be attributed to two factors. First, until *Malloy*, there was no well settled rule, even in federal courts, that the privilege applied at the police station.⁹⁷ Second, the creation of the *McNabb-Mallory* rule made it unnecessary in most cases to consider the confession problem in any terms other than delay. Indeed, since the decision in *McNabb*, the Court has reviewed only one federal case involving the confessions rule.⁹⁸ Accordingly, if a case-law test is sought, reliance must be placed both on the many cases that do not involve police interrogation and on the few cases that do.

An examination of the cases that do not involve police interrogation discloses three basic fact situations that deserve comment. In the first, the court must decide whether the information sought by the government is within the protection of the privilege, that is, whether the information is testimonial as opposed to demonstrative,⁹⁹ or whether the information tends to incriminate.¹⁰⁰ These cases are irrelevant to the problem under consideration because by hypothesis the instant problem involves an oral or written confession, a clearly incriminating, testimonial utterance.

In the second group of cases, the state imposes a sanction upon the defendant for exercising his privilege.¹⁰¹ Here, the only question is whether the sanction is an impermissible compulsion.¹⁰² The cases involve such questions as whether a doctor may be prohibited from performing medical duties because he refused to divulge information when applying for a military commission,¹⁰³ and whether a discharge in bankruptcy may be conditioned upon

⁹⁶ In the following discussion consideration will not be given to the problem of adoptive admissions after arrest. This problem is admirably treated in Comment, 31 U. Chi. L. Rev. 556 (1964). See Note, 5 Stan. L. Rev. 459 (1953). Nor will consideration be given to the question whether the confessions rule applies to admissions. See *Stein v. New York*, 346 U.S. 156, 162 n. 5 (1953).

⁹⁷ Cases cited note 95 *supra*.

⁹⁸ *United States v. Carignan*, 342 U.S. 36 (1951).

⁹⁹ *Holt v. United States*, 218 U.S. 245 (1910).

¹⁰⁰ *E.g.*, *Hoffman v. United States*, 341 U.S. 479 (1951).

¹⁰¹ 8 Wigmore § 2272, at 440-45.

¹⁰² *Id.* at 440-41.

¹⁰³ *Orloff v. Willoughby*, 345 U.S. 83 (1953).

an incriminating explanation of lost assets.¹⁰⁴ Although the cases are obviously distinguishable from cases involving police interrogation, they raise a question that may also be relevant in the context of police interrogation: whether the police conduct leading to the confession constitutes an impermissible compulsion.

In the third group of cases, the defendant answers some questions, but invokes the privilege as to others.¹⁰⁵ Here, the only question is whether the defendant has waived the privilege.¹⁰⁶ The same question may be relevant to a determination of whether the privilege has been violated by police interrogation.

Separation of the questions in terms of compulsion and waiver should not be taken as an indication that the terms are unrelated. Even though inquiry has not yet been made into the content of the terms, it is clear that they overlap. If, yielding to impermissible pressure, the defendant confesses, both terms may be applied. The defendant has been compelled to incriminate himself and he has not waived his privilege. On the other hand, pressure may be lacking to such an extent that an argument of compulsion would be frivolous. At the same time, it could be argued that the defendant had not waived his privilege. Perhaps he did not know that he had a privilege; perhaps he was tricked into making a statement; or perhaps he did not realize the incriminating import of his statements. Whatever the situation, if the argument of non-waiver is permissible, and if, as permitted, it is broad enough to cover the case, the traditional law of confessions has been shattered. An examination of the few self-incrimination/confessions cases indicates that the devastation may already have occurred.

Three cases must be noted, *Bram v. United States*,¹⁰⁷ *Brock v. United States*,¹⁰⁸ and *Escobedo v. Illinois*.¹⁰⁹ In *Bram*, the defendant, an American seaman, was suspected of murdering his captain, and was interrogated by a detective in Halifax, Nova Scotia. Prior to the interrogation, the defendant's clothing was removed for inspection. While the defendant was nude, the detective told him that a fellow-sailor claimed to have observed him

¹⁰⁴ *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949).

¹⁰⁵ *E.g.*, *Rogers v. United States*, 340 U.S. 367 (1951).

¹⁰⁶ *Ibid.* Also pertinent are the few state cases in which, at trial, an unrepresented defendant voluntarily testifies without first being informed of his privilege of silence. It has generally been held that the defendant's testifying does not constitute a waiver of the privilege. *People v. Kramer*, 38 Cal. Rptr. 487 (App. 1964); *Annot.*, 79 A.L.R. 2d 643 (1961). The cases stand for the proposition that the relevant criterion is not compulsion but waiver.

¹⁰⁷ 168 U.S. 532 (1897).

¹⁰⁸ 223 F.2d 681 (5th Cir. 1955).

¹⁰⁹ 378 U.S. 478 (1964).

commit the murder in the captain's cabin. When Bram was informed that the fellow-sailor had been standing at the wheel, he replied, "He could not see me from there."¹¹⁰ This denial was accepted into evidence for its implication of guilt, and Bram was convicted. The Supreme Court, however, held the statement inadmissible under the self-incrimination clause of the fifth amendment.¹¹¹

Much of the opinion is couched in the language of the confessions rule,¹¹² and, in view of the fact that Bram had been stripped prior to the interrogation, the case may represent nothing more than a recognition that an interrogee who is stripped may reasonably fear a beating.¹¹³ However, the Court also stressed the fact that the statement resulted from an accusation:

But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not have naturally arisen, that by denying there was hope of removing the suspicion from himself.¹¹⁴

Although the quoted passage is not irreconcilable with the confessions rule, it can be interpreted as a rejection of all confessions that result from interrogation, all confessions, that is, except those that are volunteered. Such an interpretation would flow from a deep-seated distrust of the techniques of interrogation. That the Court entertained such a distrust is clear from its reference to the statement in *Brown v. Walker*¹¹⁵ regarding the origin of the privilege:

¹¹⁰ Bram v. United States, 168 U.S. 532, 539 (1897).

¹¹¹ *Id.* at 542.

¹¹² *Id.* at 542-43, 545-49.

¹¹³ This was the rationale of *Malinski v. New York*, 324 U.S. 401 (1945).

¹¹⁴ Bram v. United States, 168 U.S. 532, 562 (1897).

¹¹⁵ 161 U.S. 591 (1896).

if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, *to entrap him into fatal contradictions* . . . made the system so odious as to give rise to a demand for its total abolition.¹¹⁶

However, to question the techniques of interrogation and to say that the privilege bars the admissibility of a confession that is not volunteered is not to establish with any precision a test for determining when the privilege has been violated. Nor is a test established by regarding a confession as volunteered only if the defendant desires to confess. As noted above, a determination of whether the privilege has been violated may be made by either of two overlapping tests: whether the defendant was compelled to incriminate himself, and whether the defendant waived his privilege. In *Bram*, primary emphasis appears to have been placed on the compulsion test. However, there is nothing in *Bram* that constitutes a rejection of the waiver test. Moreover, because it is required that a waiver be voluntary,¹¹⁷ the same result would have been reached under either test. In short, insofar as the articulation of a test is concerned, *Bram* is probably a standoff.

In *Brock v. United States*,¹¹⁸ federal revenue agents discovered an illicit still near a house. Looking through a window, they observed the defendant sleeping. One of the agents, pretending to be a fellow-moonshiner, said, "Come down to the still and help us."¹¹⁹ The defendant, still asleep, said, "No, I am not going down there today."¹²⁰ The agent then stated that a blower had broken and that help was needed. The defendant replied in his sleep, "You . . . wouldn't help me last night, and I am not going to help you today."¹²¹ This statement was accepted into evidence at his trial, and the defendant was convicted. On appeal, the statement was held inadmissible by the United States Court of Appeals for the Fifth Circuit:

Evidence obtained at the end of a whip is no less voluntary than that derived by insidious and more subtle means where the oppor-

¹¹⁶ *Id.* at 596. (Emphasis added.) The passage is quoted in *Bram*, 168 U.S. at 544.

¹¹⁷ See 8 Wigmore § 2276, at 456.

¹¹⁸ 223 F.2d 681 (5th Cir. 1955), noted in 34 Texas L. Rev. 472 (1956), 1956 Wash. U.L.Q. 127.

¹¹⁹ *Id.* at 684.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* (Omission in original.)

tunity to exercise the right against self-incrimination is absent. Before a man can be compelled to testify against himself, he must have a fair chance to exercise his right under the Fifth Amendment.¹²²

The court thus blended the language of compulsion with the language of waiver. The principal ingredient, however, is waiver. If the agents had simply overheard incriminating statements made in sleep, it could not fairly be argued that they had compelled the remarks. Even though they induced the statements in *Brock*, they used no pressure. What must be emphasized, then, is that the defendant was unaware that he was making a statement, that it was incriminating and that it was being recorded in the agent's memory. In sum, the defendant had no opportunity to assert or waive his privilege. However, it should be noted that the incriminating statements in *Brock* probably would have been inadmissible as involuntary even under the confessions rule.¹²³ Consequently, although *Brock* suggests the waiver test, it, too, is probably no more than a standoff.

In *Escobedo v. Illinois*,¹²⁴ the defendant was arrested on suspicion of murder and was interrogated during a fifteen hour period. He made no incriminating statements and was released on a writ of habeas corpus obtained by his attorney. Eleven days later, he was re-arrested and was taken to the police station. He requested an opportunity to see his attorney but the request was denied. Shortly after the defendant's arrival at the police station, his attorney arrived and demanded to see him. The demand was refused. At one point, the attorney saw the defendant through an open door and made a gesture which the defendant interpreted as an admonition of silence. This was the only contact between attorney and client at the police station.

During the interrogation, the defendant was accused by a co-defendant of firing the gun. He replied, "I didn't shoot Manuel, you did it,"¹²⁵ thereby admitting some knowledge of the crime. The admission was apparently used as a wedge and the defendant made further incriminating statements. At no time did anyone at the police station advise the defendant of his rights. Although the defendant had consulted counsel during the period between arrests, the record disclosed only that counsel had told the defendant "to tell the officers in a nice way that [he] was sorry but that [he]

¹²² *Id.* at 685.

¹²³ See Herman, "The Use of Hypno-Induced Statements in Criminal Cases," 25 Ohio St. L.J. 1, 44-48 (1964).

¹²⁴ 378 U.S. 478 (1964).

¹²⁵ *Id.* at 483.

could not talk to them until [he] had the advice of [his] lawyer."¹²⁶ The record did not disclose that the attorney had specifically advised the defendant of his privilege against self-incrimination.

After the defendant's conviction had been affirmed by the Supreme Court of Illinois,¹²⁷ the Supreme Court of the United States granted certiorari. In his brief, the defendant argued that the confession was inadmissible under the confessions rule¹²⁸ and that it was inadmissible under a right-to-counsel theory.¹²⁹ In support of his confessions-rule argument, the defendant stressed, as part of the "totality of the circumstances," that he had not been advised of the privilege,¹³⁰ and that, as in *Bram*, incrimination resulted from the defendant's attempt to deny an accusation of guilt.¹³¹ In support of his right-to-counsel argument, the defendant claimed that the presence of counsel was necessary to effectuate the privilege.¹³² Thus, although the Court did not have before it the form of the privilege argument,¹³³ it did have the substance.

As will be discussed in detail later,¹³⁴ the Court, in an opinion by Mr. Justice Goldberg, held the confession inadmissible on a right-to-counsel theory. However, the privilege argument did not go unnoticed:

the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement.¹³⁵

If, after *Malloy v. Hogan*, there was any basis to question the applicability of the privilege at the police station, *Escobedo* answers the question. The privilege is applicable. Moreover, by inference from *Escobedo*, the privilege supplants the confessions rule as a test for determining the admissibility of confessions obtained by the police.¹³⁶ On the facts of *Escobedo*, the confession

¹²⁶ Brief for Petitioner, p. 19, *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹²⁷ *People v. Escobedo*, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).

¹²⁸ Brief for Petitioner, pp. 10-32, *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹²⁹ *Id.* at 33-42.

¹³⁰ *Id.* at 18-20.

¹³¹ *Id.* at 22-23.

¹³² *Id.* at 37.

¹³³ *Escobedo* was argued on April 29, 1964. 32 U.S.L. Week 3384 (May 5, 1964). *Malloy* was decided on June 15, 1964.

¹³⁴ *Infra* at 485-90.

¹³⁵ *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964).

¹³⁶ In his dissenting opinion, Mr. Justice White observed that the majority had abandoned "the voluntary-involuntary test for admissibility of confessions." *Id.* at 496.

could have been held inadmissible under the confessions rule.¹³⁷ Indeed, *Escobedo* probably was a stronger case for inadmissibility than *Haynes v. Washington*.¹³⁸ Like Haynes, Escobedo had been held incommunicado. Unlike Haynes, Escobedo was twenty-two years old and of Mexican extraction. Apparently he had no prior criminal record, he had not made a threshold confession, he was interrogated while handcuffed in a standing position, he was nervous and upset during the interrogation, he had not slept well for a week prior to the interrogation, he was cut off from the only person who had previously given him advice,¹³⁹ and part of the interrogation was conducted by a Spanish-speaking policeman who grew up in the defendant's neighborhood and who knew the defendant's family.¹⁴⁰ The major part of the defendant's brief was devoted to the confessions rule,¹⁴¹ the traditional test for the admissibility of confessions. The Court, however, ignored the test and used instead a right-to-counsel/privilege approach. Although the opinion purports to rest on sixth-amendment grounds,¹⁴² the privilege is not just another item under the heading of right to counsel. To the contrary, the privilege is one of the bases of the right-to-counsel argument. The defendant so urged in his brief,¹⁴³ and Mr. Justice Goldberg so stated in his opinion.¹⁴⁴ Responding to the contention that it would be more difficult to obtain confessions if the interrogatee were given an opportunity to consult counsel, Mr. Justice Goldberg stated that "our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."¹⁴⁵

However, to say that, as a result of *Escobedo*, the privilege has supplanted the confessions rule is not to say that the privilege accords greater protection. Consideration still must be given to the test for determining whether a confession has been obtained in violation of the privilege. To this problem two parts of the *Escobedo* opinion are relevant. After launching a vigorous attack on

¹³⁷ The confessions rule is discussed *supra* at 452-58. The dissenting judges, all of whom dissented in *Haynes*, would have held the confession admissible under the confessions rule. *Id.* at 494, 496.

¹³⁸ 373 U.S. 503 (1963), discussed *supra* at 454-56.

¹³⁹ *Escobedo v. Illinois*, 378 U.S. 478, 482 (1964).

¹⁴⁰ *Ibid.* This aspect of *Escobedo* suggests the similar circumstances in *Spano v. New York*, 360 U.S. 315 (1959).

¹⁴¹ Brief for Petitioner, pp. 10-32, *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁴² 378 U.S. 478, 491 (1964).

¹⁴³ *Supra* notes 130, 132.

¹⁴⁴ 378 U.S. 478, 486, 488 (1964).

¹⁴⁵ *Id.* at 488.

the reliability of methods of criminal-law enforcement that depend on confessions, Mr. Justice Goldberg stated:

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' *abdication through unawareness* of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.¹⁴⁶

In a footnote, Mr. Justice Goldberg continued:

The accused may, of course, *intelligently and knowingly waive his privilege against self-incrimination* and his right to counsel either at a pre-trial stage or at the trial. . . . But no *knowing and intelligent waiver of any constitutional right* can be said to have occurred under the circumstances of this case.¹⁴⁷

From these quotations, there is reason to suggest that, in future cases, the admissibility of a confession obtained by the state will depend upon whether the defendant waived his privilege against self-incrimination. But under what circumstances can it be said that the privilege has or has not been waived? What is the meaning or content of waiver? As it bears on these questions, Mr. Justice Goldberg's opinion is susceptible to a number of interpretations.

As already noted¹⁴⁸ the opinion sets out in detail the factors that would have been relevant to a confessions-rule determination. These factors are also relevant to the problem of waiver. If the defendant was subjected to pressures impermissible under the confessions rule, it can hardly be argued that he voluntarily waived his privilege against self-incrimination. On the other hand, if waiver exists in every case in which such pressure is absent, the privilege accords no greater protection than the confessions rule, and the impact of *Escobedo* on the law of confessions will be negligible. It is possible to argue that minimal pressure, insufficient for invalidation under the confessions rule, would be sufficient for a finding that the defendant had not voluntarily waived the privilege. The argument, however, borders on the frivolous not only because it involves an impossible, metaphysical comparison but also because the confessions rule, as applied in *Haynes*,¹⁴⁹ allows almost no latitude for pressure.¹⁵⁰ Consequently, it must be concluded that the

¹⁴⁶ *Id.* at 490. (Emphasis added.)

¹⁴⁷ *Id.* at 490 n. 14. (Emphasis added.)

¹⁴⁸ Text accompanying notes 139-40 *supra*.

¹⁴⁹ *Haynes v. Washington*, 373 U.S. 503 (1963).

¹⁵⁰ See text to notes 32-39 *supra*.

theory of waiver, if tested by voluntariness, represents no addition to the protection of the confessions rule.

Voluntariness, however, is not the only requirement for a finding of waiver. If a waiver is to be effective, it must also be "intelligent" and "knowing."¹⁵¹ In *Escobedo* it was said that such a waiver did not occur "under the circumstances of [the] case."¹⁵² Why? Different answers of the drastically different impact, may be derived by implication from Mr. Justice Goldberg's opinion.¹⁵³

The first answer is an easy one: *Escobedo* did not know that he had a constitutional privilege and therefore he could not knowingly waive it. No one at the police station warned him of his rights. Although he had consulted counsel before his second arrest, and although counsel had told him to remain silent, the record did not reflect that counsel had specifically advised him of his constitutional privilege. Nor could counsel's gesture at the police station be taken as such advice. If, in future cases, *Escobedo* is limited to this answer, then it adds only the following small morsel to the confessions rule: the defendant must be advised of his constitutional privilege before he is interrogated.¹⁵⁴ Such a warning is now required by a Texas statute¹⁵⁵ and by the Uniform Code of Military Justice,¹⁵⁶ and there is some evidence that neither in Texas nor in the military jurisdiction has the requirement impaired productive interrogation.¹⁵⁷ A constitutionally required warning probably would have no greater effect.¹⁵⁸

¹⁵¹ *Escobedo v. Illinois*, 378 U.S. 478, 490 n. 14 (1964).

¹⁵² *Ibid.*

¹⁵³ In his dissenting opinion, Mr. Justice White indirectly denied the applicability of the waiver test and thereby emphasized its importance: "[The fifth amendment] addresses itself to the very issue of incriminating admissions of an accused and resolves it by proscribing *only compelled statements.*" *Escobedo v. Illinois*, 378 U.S. 478, 497 (1964). (Emphasis added.)

¹⁵⁴ At the very least, *Escobedo* stands for this proposition and overrules, *sub silentio*, *Powers v. United States*, 223 U.S. 303 (1912), and *Wilson v. United States*, 162 U.S. 613 (1896). *Powers* and *Wilson* are discussed at note 95 *supra*.

¹⁵⁵ Tex. Code. Crim. P. art. 727 (Vernon 1941).

¹⁵⁶ U.C.M.J. art. 31(b), 10 U.S.C. § 831(b) (1959).

¹⁵⁷ As part of a research project the results of which are contained in an unpublished paper entitled *Police Interrogation and the Psychology of Confession*, Dr. David L. Sterling asked the Chiefs of Police in three Texas cities whether the statutory requirement of a warning made it more difficult to obtain confessions. One stated specifically that the statutory requirement had little effect; another indicated the same result. The third stated that the requirement made it difficult to get confessions. *Id.* at 60. The paper is on file in the Law Library of the Ohio State University College of Law.

During thirty months as a trial lawyer in the Judge Advocate General's Corps, I asked many investigators whether art. 31(b) was a detriment to obtaining confessions. Invariably the answer was no.

¹⁵⁸ A modified version of the question referred to in note 157 *supra* was answered by eleven Chiefs of Police, all from different states. Nine stated that a warning

The second answer is a more difficult one: Escobedo was not advised of his constitutional privilege at that critical point in the interrogation when he was accused by a co-defendant of firing the fatal shots. Therefore, and without regard to any previous warning, he did not knowingly waive his privilege when, in an effort to deny the accusation, he admitted incriminating knowledge of the incident which was thereafter used to obtain additional information from him.¹⁵⁹ The factual component of this answer is correct,¹⁶⁰ and the legal component finds some support in Mr. Justice Goldberg's opinion:

At the time of his arrest and throughout the course of the interrogation the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his *absolute right to remain silent in the face of this accusation*, the police urged him to make a statement.¹⁶¹

In a footnote, Mr. Justice Goldberg added:

Although there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets.¹⁶²

Finally, in a capsulization of the salient facts of the case, Mr. Justice Goldberg noted that "the police [had] not *effectively* warned him of his absolute constitutional right to remain silent."¹⁶³

would not make it more difficult to obtain confessions. Two disagreed. Sterling, *supra* note 157, at 59. Mr. Justice Frankfurter's opinion was that "even to inform the suspect of his legal right to keep silent will prove an obstruction." *Culombe v. Connecticut*, 367 U.S. 568, 580 (1961).

The requirement of a warning suggests two problems neither of which will be considered in this article: (1) does the privilege against self-incrimination prohibit wiretapping, and (2) does the privilege render inadmissible a volunteered, threshold confession made by one who is unaware of his constitutional rights? Regarding the second question, it may be worth noting that in his summary of the important facts of *Escobedo*, Mr. Justice Goldberg used the following words: "the police carry out a process of interrogations that lends itself to eliciting incriminating statements. . . ." 378 U.S. at 491.

¹⁵⁹ Somewhat at odds with this theory is the common-law rule that fraudulently induced consent to have sexual intercourse is a defense to a charge of rape. Perkins, *Criminal Law* 124-26 (1957). On the other hand, fraudulently induced consent to enter does constitute a breaking under the common law of burglary. *Id.* at 151-52.

¹⁶⁰ Text accompanying note 125 *supra*.

¹⁶¹ *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964). (Emphasis added.)

¹⁶² *Id.* at 485 n. 5. It may be inferred from this quotation that waiver will not be presumed and that the government bears the burden of proving waiver.

¹⁶³ *Id.* at 491. (Emphasis added.)

If, in subsequent decisions, this answer to the waiver question proves correct, then a tremendous restriction will be imposed upon police interrogation. The entire thrust of police interrogation is to put the defendant in an emotional state in which his instinct for self-preservation is dulled¹⁶⁴ and (building upon the passage already quoted)¹⁶⁵ in which the defendant, through temporary unawareness, abdicates his constitutional privilege against self-incrimination.¹⁶⁶ If, at the critical points in the interrogation, it is required that the defendant be advised of his privilege of silence, the fluidity of the interrogation will be interrupted, and the defendant, emboldened by both the interruption and the advice, may remain silent. The result will be that the police will obtain far fewer confessions than they now obtain. In all probability, only the volunteered confession, the confession made by one who, with knowledge of his rights, desires to confess, will be admissible.¹⁶⁷ Under this interpretation of *Escobedo*, the privilege will give far more protection than the confessions rule.

The third answer is even more difficult: when he made his abortive denial, *Escobedo* did not know that he was incriminating himself because he did not realize the legal significance of his statement. Consequently, he did not knowingly and intelligently waive the privilege. Again, the factual component of the answer is correct¹⁶⁸ and, again, the legal component has a basis in Mr. Justice Goldberg's opinion. As has already been noted, some emphasis

¹⁶⁴ It is standard interrogation technique to give the interrogee no opportunity for tension-relieving activities, Inbau & Reid, *Criminal Interrogation and Confessions* 8, 15-16 (1962); to give him no opportunity for repeated denials of the charge from which denials he may derive strength, *id.* at 24-25; and to indicate disbelief in exculpatory statements, see *id.* at 30-33.

¹⁶⁵ Note 146 *supra*.

¹⁶⁶ Recommended devices of interrogation include (1) inserting into a written confession a statement that the defendant has been warned of his rights (but apparently not giving a warning prior to interrogation), see Inbau & Reid, *op. cit. supra* note 164, at 195; (2) pointing out to a suspect who refuses to talk that an inference of guilt may be drawn from silence, *id.* at 111; (3) minimizing the moral seriousness of the offense, *id.* at 34-43, 87; (4) refraining from advising the subject of the possible consequences of confessing, *id.* at 112; (5) exaggerating the seriousness of the offense in order to elicit a denial pregnant with an admission, *id.* at 62-64; and (6) avoiding the impression that the interrogator wants a confession or conviction, *id.* at 13-14.

¹⁶⁷ In his dissenting opinion, Mr. Justice White complained that the majority opinion made inadmissible even a voluntary confession. *Escobedo v. Illinois*, 378 U.S. 478, 495 (1964). There is, of course, a difference between a confession that is voluntary within the meaning of the confessions rule and one that is volunteered. See *Culombe v. Connecticut*, 367 U.S. 568, 596 (1961); *Ashcraft v. Tennessee*, 322 U.S. 143, 160-61 (1944) (dissenting opinion).

¹⁶⁸ See *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964).

was placed on the facts that Escobedo was not "effectively warned . . . [by the police] of his absolute constitutional right to remain silent,"¹⁶⁹ and that the pre-interrogation advice of counsel did not include instructions regarding Escobedo's response to an accusation that he had fired the gun.¹⁷⁰ Moreover, it was observed that:

Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of mere complicity was legally as damaging as an admission of firing the fatal shots. . . . The guiding hand of counsel was essential to advise petitioner of his rights in this delicate situation.¹⁷¹

The most effective warning would, of course, advise the defendant of the significance of what he was about to say, and that he had a right to make no statement. Obviously, the police hoped that, in response to the accusation of what might be regarded as a more serious offense, Escobedo's denial would be pregnant with an admission of a lesser offense. Indeed, this is a recommended technique of interrogation,¹⁷² just as it is a recommended technique of interrogation to minimize the moral seriousness of the offense charged.¹⁷³ In either case, it is quite likely that the defendant does not realize the importance of what he is saying, and the police intend to capitalize on his unawareness. Consequently, if in subsequent cases it is held that such unawareness vitiates waiver, a restriction of enormous dimension will circumscribe police interrogation: recommended and highly effective techniques of interrogation will be forbidden. Again, the likely result will be the inadmissibility of all confessions that are not volunteered, the privilege will give far greater protection than the confessions rule, and effective interrogation will be constitutionally impermissible.

Of the three possible interpretations of *Escobedo*, the first interpretation is certainly viable, unless *Escobedo* is meaningless on the fifth-amendment point.¹⁷⁴ The important question, therefore, is whether either of the remaining interpretations will be adopted by the Court. The question is important not only because an answer will shed new light on the privilege¹⁷⁵ but also because

¹⁶⁹ *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

¹⁷⁰ *Id.* at 485 n. 5.

¹⁷¹ *Id.* at 486.

¹⁷² *Inbau & Reid, op. cit. supra* note 164, at 62-64.

¹⁷³ *Id.* at 34-43, 87.

¹⁷⁴ Note 154 *supra*.

¹⁷⁵ Analysis of the privilege in terms of waiver requires a definition of waiver. To date, the Court has considered only a limited aspect of the problem. Notes 105-06 *supra* and accompanying text. Application of the privilege to police interrogation will force the Court to redefine waiver.

the answer will determine the role that the defendant's attorney must be accorded during the police interrogation.¹⁷⁶

In his dissenting opinion, Mr. Justice White reads the majority opinion as standing for more than the first interpretation:

The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. *But this worry hardly calls for the broadside the Court has now fired.* 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.¹⁷⁷

There is no indication in the dissenting opinion of the cases that Mr. Justice White had in mind. One can guess, however, that they concern the right to counsel because it is in those cases that the Court has most vigilantly guarded against the waiver of constitutional rights.¹⁷⁸ For example, in *Glasser v. United States*,¹⁷⁹ the defendant, formerly an Assistant United States Attorney, objected to the trial court's suggestion that his attorney be appointed to represent a co-defendant. Thereafter, when the co-defendant indicated that he would accept appointed counsel, the appointment was made, and the defendant remained silent. The Court held that by his silence the defendant did not waive his right to the effective assistance and undivided loyalty of his attorney.¹⁸⁰ In *Von Moltke v. Gillies*,¹⁸¹ the defendant, charged with wartime espionage, purportedly waived her right to counsel and pleaded guilty. Four judges were convinced that the record disclosed no intelligent waiver; three judges held that the right had been waived; and two judges found the record incomplete. Because a majority of the Court was unwilling to affirm, the case was remanded for further findings. However, the plurality opinion of Mr. Justice Black, concurred in by Mr. Justice Douglas, merits consideration:

The fact that an accused may tell [the trial judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the

¹⁷⁶ The attorney's role is discussed at note 228 *infra*.

¹⁷⁷ *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964). (Emphasis added.)

¹⁷⁸ See Comment, 31 U. Chi. L. Rev. 591, 593 (1964).

¹⁷⁹ 315 U.S. 60 (1941).

¹⁸⁰ *Id.* at 70-72.

¹⁸¹ 332 U.S. 708 (1948).

range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.¹⁸²

In *Carnley v. Cochran*,¹⁸³ the Court, in holding that the trial judge had not adequately protected the rights of an unrepresented defendant, stated:

it appears that, while petitioner was advised [by the trial judge] that he need not testify, he was not told *what consequence might follow if he did testify*. He chose to testify and his criminal record was brought out on his cross-examination. For defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf. For petitioner, *the question had to be decided in ignorance of this important consideration*.¹⁸⁴

If the right to counsel cases furnish an appropriate analogy,¹⁸⁵ they fully support the suggestion that *Escobedo* should be read for all three interpretations of the waiver theory.¹⁸⁶ This suggestion is reinforced by the fact that in recent cases, including *Escobedo*, the Court has surrounded the pre-trial stage with safeguards traditionally associated only with the trial.¹⁸⁷ Insofar as the privilege is

¹⁸² *Id.* at 724.

¹⁸³ 369 U.S. 506 (1962).

¹⁸⁴ *Id.* at 511. (Emphasis added.)

¹⁸⁵ Conceptually, there appears to be no basis for denying the analogy. The right to counsel is essential to the adversary system. The privilege is the foundation of the accusatorial system. Because he is unaware of the plethora of problems arising at a trial, the layman, absent specific advice, is unable to comprehend the scope and importance of the right to counsel. Similarly, because he is unable to anticipate the devices or techniques of interrogation, the layman may, without wanting to do so, relinquish his privilege. The only basis for denying the analogy is that, although society can tolerate a right to counsel at trial, an *effective* privilege against self-incrimination at the police station would hamper law enforcement intolerably.

¹⁸⁶ Additional support is found in the federal cases considering claims of waiver or consent in the context of search and seizure. Federal courts have carefully evaluated such claims and have resolved all doubts against waiver. See Day & Berkman, "Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of *Mapp v. Ohio*," 13 W. Res. L. Rev. 56, 80-81 (1961); Kamisar, "Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure," 1961 U. Ill. L.F. 78, 117-18.

¹⁸⁷ In *Escobedo* it was stated that a requirement of counsel at the interrogation stage makes effective the right to representation by counsel at trial. *Escobedo v. Illinois*, 378 U.S. 478, 486-488 (1964). The same point was made in *Massiah v. United States*, 377 U.S. 201, 204 (1964).

concerned, the accused need not testify for any purpose unless he chooses to do so. He cannot be called as a witness without his consent.¹⁸⁸ Before consenting to testify, he will have been primed by his attorney for cross-examination. Moreover, the attorney can by objection protect his client against trick questions and abusive cross-examination. If the substance of these safeguards is available at the police interrogation stage, the privilege has been accorded all of the interpretations discussed above, and productive police interrogation is, in theory, at an end.¹⁸⁹

However, once again the words "in theory" are relevant. It is quite likely that state and lower federal courts will attempt to narrow the scope of *Escobedo*. Impetus for a restrictive interpretation will undoubtedly come from the impact of a broad interpretation. Because the possibilities of restrictive interpretation must be assessed on the basis of the opinion as a whole, a consideration of these possibilities will be deferred until the right-to-counsel aspect has been discussed.¹⁹⁰ For now, it is sufficient to observe that the critical question for future resolution is this: how *effective* a privilege against self-incrimination does a majority of the present Court want? The answer to that question will resolve the constitutional theory of police interrogation.

V. RIGHT TO COUNSEL

In 1958, in the cases of *Crooker v. California*¹⁹¹ and *Cicenia v. Lagay*,¹⁹² the Court was faced with the question of whether there was a constitutional right to counsel at the police station. In *Crooker*, the defendant was a thirty-one-year old college graduate who, during one year of law school, had studied criminal law. Prior

¹⁸⁸ 8 Wigmore § 2268, at 406-8. This immunity has been attributed to (1) the accused's common law, testimonial disqualification; (2) the prosecution's opportunity to cross-examine the accused if he chooses to testify; (3) the fact that, if the prosecution were permitted to call the accused as a witness in order to ascertain whether he would claim the privilege, the claim of privilege would suggest guilt; and (4) statutory prohibition. *Id.* at 407-8. It must be admitted that none of these reasons is particularly relevant to interrogation at the police station. However, a non-party witness also may claim a privilege. Although he has no right not to be called, and although questions may be put to him, he may refuse to give any incriminating answer. *Id.* at 402-03.

¹⁸⁹ Under the confessions rule, a confession is inadmissible if obtained as the result of a promise of benefit. Maguire, "Involuntary" Confessions," 31 Tul. L. Rev. 125, 136 (1956). In such a case it might be argued that the interrogee has chosen to make the disclosure and, assuming knowledge of the privilege, has therefore waived the privilege. If this argument is tenable, the privilege would not in some cases oust the confessions rule.

¹⁹⁰ See 494-95 *infra*.

¹⁹¹ 357 U.S. 433 (1958).

¹⁹² 357 U.S. 504 (1958).

to interrogation, he was advised by a policeman of his privilege against self-incrimination. After the police had denied his request to consult a named attorney, he was interrogated. By answering some questions and refusing to answer others he indicated that he understood his privilege. Ultimately he confessed to murder. The Court, in a five-to-four decision, first held the confession to be voluntary.¹⁹³ Then, applying the prevailing standard of *Betts v. Brady*,¹⁹⁴ the Court held that the confession was not inadmissible for want of counsel.¹⁹⁵ The Court rejected as too broad the defendant's argument that the right to counsel was absolute and independent of the existence of special circumstances. This argument, the Court observed, would result in the invalidation of a conviction even though the defendant did not confess.¹⁹⁶ The test applied by the Court was whether the existence of special circumstances at the interrogation so prejudiced the defendant at his trial as to require the presence of counsel at the interrogation.¹⁹⁷ Finding no special circumstances, the Court held the confession admissible. Quite clearly, the Court evaluated the right to counsel as of the outset of the interrogation, and the fact that the defendant thereafter confessed was not regarded as a special circumstance.

In *Gicenia*, decided on the same day as *Crooker*, the Court held that a confession was not rendered inadmissible by a refusal to permit the defendant to consult retained counsel.¹⁹⁸ After *Crooker* and *Gicenia*, there was every reason to believe that the admissibility of a confession was to be tested by the confessions rule and not by a requirement of counsel. Although the absence of counsel was, under the confessions rule, relevant to a determination of voluntariness,¹⁹⁹ the absence of counsel was not per se an invalidating factor.

One year later, in *Spano v. New York*,²⁰⁰ a capital case, a unanimous Court held inadmissible a post-indictment confession obtained under pressure after the police had refused to permit the defendant to consult his retained lawyer. Chief Justice Warren, a dissenter in *Crooker* and *Gicenia*, wrote the majority opinion, the rationale of which was that the confessions rule had been violated.²⁰¹ However, Justices Black, Douglas, Brennan, also dissenters

¹⁹³ 357 U.S. at 438.

¹⁹⁴ 316 U.S. 455 (1942).

¹⁹⁵ *Crooker v. California*, 357 U.S. 433, 440-41 (1958).

¹⁹⁶ *Id.* at 440.

¹⁹⁷ *Id.* at 439-40.

¹⁹⁸ *Gicenia v. Lagay*, 357 U.S. 504, 509-10 (1958).

¹⁹⁹ *Id.* at 509. See *Payne v. Arkansas*, 356 U.S. 560, 567 (1958).

²⁰⁰ 360 U.S. 315 (1959).

²⁰¹ *Id.* at 320.

in *Crooker* and *Cicenia*,²⁰² and Justice Stewart concurred on the basis of a right-to-counsel theory. Said Mr. Justice Stewart:

Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. Indeed the right to the assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial.²⁰³

Although *Spano* was decided under the confessions rule, a majority of the Court—Mr. Justice Stewart and the dissenters in *Crooker* and *Cicenia*—now favored a sixth-amendment theory of the admissibility of post-indictment confessions. A small breach had been made in the wall of *Crooker* and *Cicenia*. The breach was enlarged a bit in *Gideon v. Wainwright*.²⁰⁴ *Crooker* and *Cicenia* had been decided during the ascendancy of *Betts v. Brady*. Indeed, the special circumstances test of *Betts* was an important part of the *Crooker* rationale.²⁰⁵ The overruling of *Betts* in *Gideon* thus sapped *Crooker* and *Cicenia* of more of their vitality.

Another blow was delivered toward the end of the 1963 term in *Massiah v. United States*²⁰⁶ when the Court held inadmissible, specifically on sixth-amendment grounds, incriminating statements obtained after indictment and in the absence of retained counsel. Mr. Justice Stewart, writing for a six-judge majority, relied on his concurring opinion in *Spano*:

It was said that a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said [by Mr. Justice Douglas in a separate concurring opinion], might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'²⁰⁷

By its stress on the need for counsel at the pre-trial stage and on the relationship between representation by counsel at trial and at the pre-trial stage, the rationale of *Massiah* is broad enough to en-

²⁰² Mr. Justice Brennan did not participate in *Cicenia*.

²⁰³ *Spano v. New York*, 360 U.S. 315, 327 (1959) (concurring opinion). (Citations omitted.)

²⁰⁴ 372 U.S. 335 (1963).

²⁰⁵ See note 194 *supra* and accompanying text.

²⁰⁶ 377 U.S. 201 (1964).

²⁰⁷ *Id.* at 204. The same result was reached in *Lee v. United States*, 322 F.2d 770 (5th Cir. 1963), noted in 42 Texas L. Rev. 898 (1964). *But see* *Lyles v. Beto*, 329 F.2d 332 (5th Cir. 1964), *vacated and remanded*, 85 Sup. Ct. 613 (1965).

compass a right to appointed counsel as well as to retained counsel. If *Gideon* is added to *Massiah*, it is clear that a post-indictment confession is inadmissible whether counsel is absent as the result of an investigative end-run, as in *Massiah*, or whether counsel is absent because he has not yet been appointed.

A question left unanswered by *Massiah* is whether a post-indictment confession is inadmissible solely for the reason that it was elicited in the absence of counsel. In *Massiah*, the confession was obtained by electronic eavesdropping, and the defendant did not know that his words were being recorded by government agents. If his attorney had advised him not to make any statements, the advice was nullified not only by the defendant's willingness to talk but also by the government's use of electronic deception. Consequently, on its facts *Massiah* was a fairly strong case for an extension of the right to counsel. The question remains, however, whether the statements would have been inadmissible if *Massiah* had known that his words were being recorded. In his dissenting opinion, Mr. Justice White argued that the test of admissibility should continue to be one of voluntariness under the confessions rule.²⁰⁸ As viewed by the dissenting opinion, the majority opinion emphasized only the absence of counsel and not the defendant's knowledge. This interpretation is buttressed by the majority's reliance on *Spano*, a case in which the defendant was interrogated at the police station in the absence of his attorney but after his attorney had warned him not to make any statements.²⁰⁹ Obviously, *Spano* knew that he was speaking to law enforcement officers. Thus, there is a substantial basis for predicting the inadmissibility of all post-indictment confessions obtained by agents of the state in the absence of counsel. Because the presence of counsel will make it impossible to obtain a confession, the result of *Massiah*, as a practical matter, is that all post-indictment confessions are inadmissible. However, and also as a practical matter, it is unlikely that *Massiah* will have much impact on criminal procedure. Excepting cases in which an indictment is based on weak evidence or in which the government needs additional information for the apprehension of co-defendants,²¹⁰ there is no need for post-indictment interrogation. From an investigative standpoint, the critical stage is the police interrogation prior to preliminary examination by a committing

²⁰⁸ 377 U.S. at 210. See *State v. McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).

²⁰⁹ *Spano v. New York*, 360 U.S. 315, 317 (1959).

²¹⁰ In *Massiah*, the government argued the necessity of apprehending codefendants. Mr. Justice Stewart's answer was that regardless of necessity, the defendant's confession was inadmissible at *his* trial. *Massiah v. United States*, 377 U.S. 201, 206-07 (1964).

magistrate. *Massiah* does not compel the conclusion that there is an absolute right to counsel at that stage. *Escobedo*, however, probably does.

The facts of *Escobedo* have already been stated in detail. For present purposes, it is sufficient to note that *Escobedo* bears a striking factual resemblance to *Cicenia*. In both cases, counsel had been retained prior to interrogation; the interrogation was conducted in the absence of counsel; the police denied the defendant's requests to see counsel; and counsel's efforts to see his client were similarly rebuffed. In *Cicenia*, the confession was held admissible. In *Escobedo*, it was held inadmissible:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.²¹¹

This holding, incorporating some of the important facts of the case, can be taken as a hint that the right to counsel at the police station is to be determined by a test of special circumstances analogous to the test announced in *Betts v. Brady* regarding counsel at trial.²¹² The *Betts* test "had a troubled journey through-

²¹¹ *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964). On the basis of state law, the New York Court of Appeals has held inadmissible a confession obtained before preliminary examination and after retained counsel was prohibited by the police from seeing the defendant. *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), noted in 13 Buffalo L. Rev. 498 (1964); 52 Geo. L.J. 629 (1964).

²¹² A similar suggestion may be inferred from Mr. Justice Goldberg's statement that the police interrogation in *Escobedo* was as critical a stage in the proceedings as the preliminary hearing in *White v. Maryland*, 373 U.S. 59 (1963), and the arraignment in *Hamilton v. Alabama*, 368 U.S. 52 (1961). However, although *Hamilton* was decided before *Gideon*, and although *White* specifically relied on *Hamilton*, the cases do not represent an application of the special circumstances test. To the contrary, *Betts* was clearly on the wane, and in neither *White* nor *Hamilton* did the Court require any showing of prejudice. See *Gideon v. Wainwright*, 372 U.S. 335, 350 (1963) (Harlan, J.); Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 Minn. L. Rev. 1, 57 (1963). However, *Hamilton* and *White* were capital cases, and it may be asked whether they "presage a revival of the capital-noncapital dichotomy for pre-trial

out the years" and existed "in form while its substance [was being] substantially and steadily eroded."²¹³ It was discarded in *Gideon v. Wainwright*²¹⁴ in favor of an absolute right to be represented by counsel at trial. Consequently, the first question raised by *Escobedo* is whether the right to counsel at the police station is absolute (in the sense of excluding a confession obtained in the absence of counsel if the right has not been waived) or whether the right to counsel depends on a search for elusive special circumstances. In spite of the hint referred to above, Mr. Justice Goldberg's opinion supports a conclusion that the right is absolute.

Two main themes run through the opinion. The first is that the right to counsel at the police station makes effective the privilege against self-incrimination. The second is that the right to counsel at the police station makes effective the right to counsel at trial. If the right to counsel is evaluated only in the context of the privilege, then whether the right to counsel is absolute depends upon the meaning of the privilege and the necessity for protection of the privilege through the presence of counsel. The meaning of the privilege has already been considered and three interpretations have been suggested: that the defendant is entitled to a warning at the outset of the interrogation; that he is entitled to a warning at the critical point in the interrogation; and that he is entitled to know the legal significance of what the police expect him to say. Under the first interpretation, it is difficult to argue that the presence of counsel is necessary for protection of the privilege. It is not at all unlikely that an understandable warning could and would be given before the interrogation by someone other than counsel—a policeman, for example.²¹⁵ Thus, if the defendant is entitled to a warning only at the beginning of interrogation and if the right to counsel is based on this interpretation of the privilege, the presence of counsel is not necessary, the right to counsel is not absolute, and *Escobedo* is nothing more than a grand illusion.

Under the second and third interpretations of the privilege,

proceedings." Kamisar & Choper, *supra* at 58. A negative answer is suggested by the fact that *Escobedo* was a non-capital case in that the defendant was sentenced to imprisonment for twenty years. *People v. Escobedo*, 28 Ill.2d 41, 42, 190 N.E.2d 825, 826 (1963).

An inference that *Escobedo* does not represent an application of the special circumstances test may be derived from the fact that the coercive aspects of the interrogation played no part in the rationale.

²¹³ *Gideon v. Wainwright*, 372 U.S. 335, 350 (1963) (Harlan, J.).

²¹⁴ 372 U.S. 335, 339 (1963).

²¹⁵ During my experience as a military trial-attorney, I found that most of my confessor-clients did understand the warning given to them pursuant to U.C.M.J. art. 31(b), 10 U.S.C. § 831(b) (1959).

the communication could be made by someone other than counsel. In theory, therefore, the right to counsel would not be absolute. However, it is unlikely that either the second or the third communication would be made by anyone other than counsel to the detriment of productive interrogation. Consequently, as a practical matter, the right to counsel would be absolute. As has been suggested above,²¹⁶ a strong argument can be made that all three interpretations of the privilege are correct. Accordingly, the right to counsel would be absolute. However, until the Court resolves the problem of interpreting the privilege, the right to counsel, to the extent that it depends on the privilege, must remain in some doubt.

In the second theme that runs through Mr. Justice Goldberg's opinion, the right to counsel at the police station is regarded as protecting the right to counsel at trial:

This was the 'stage when legal aid and advice' were most critical to petitioner. It was a stage surely as critical as was the arraignment in *Hamilton v. Alabama*, 368 U.S. 52, and the preliminary hearing in *White v. Maryland*, 373 U.S. 59. What happened at this interrogation could certainly 'affect the whole trial' since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' . . .

In *Gideon v. Wainwright*, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination.'²¹⁷

Under this view of right to counsel at the police station, it is obvious that the right must be regarded as absolute. Moreover, the analogy between interrogation and trial is highly relevant to an interpretation of the privilege. At the trial, if the defendant cannot help himself by testifying, competent counsel will insist that he exercise his privilege. Even if the defendant waives his privilege, he will be thoroughly prepared for direct examination and he will be protected from improper cross-examination by the presence of counsel. The analogy between interrogation and trial thus suggests that the privilege be given the second and third interpretations discussed above. As has already been noted, to the extent that the

²¹⁶ *Supra* notes 185-89 and accompanying text.

²¹⁷ *Escobedo v. Illinois*, 378 U.S. 478, 486-87 (1964). (Original brackets.) (Some citations omitted.)

right to counsel is regarded as protecting the privilege, the right must be treated as absolute under either of these interpretations. Consequently, the problem presented by *Escobedo* may be stated as follows: at the police station is the defendant entitled only to a warning of his rights (by anyone) at the outset of interrogation or is he entitled to all of the safeguards provided by the presence of counsel at trial? On the basis of *Escobedo* alone, it is reasonable to predict that a majority of the present Court espouses the trial analogy, and a consideration of the antecedents to *Escobedo* dictates the same answer.

In *Crooker v. California*,²¹⁸ it will be remembered, the defendant had studied law for one year and his program included a course in criminal law. Toward the beginning of the interrogation, he was advised by a police lieutenant that he need not say anything. Apparently both before and after the warning he refused to answer certain questions. In spite of Crooker's awareness of his rights, four judges, all of whom concurred in *Escobedo*, would have held the confession inadmissible because it had been obtained in the absence of counsel. Writing for the dissenters, Mr. Justice Douglas insisted that "the right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself."²¹⁹ In addition, said Mr. Justice Douglas, the presence of counsel would at least minimize two problems inhering in the interrogation process: the defendant's inability to prove coercion in the face of contradictory testimony by his interrogator, and the risk that, at the trial, the interrogator might inaccurately relate the substance of an oral confession.²²⁰ The dissenting opinion in *Crooker* was cited in the brief dissenting opinion in *Cicenia v. Lagay*.²²¹

In *Ashdown v. Utah*,²²² decided on the same day as *Crooker*, the defendant was taken into custody for interrogation and was advised that she did not have to make a statement and that she had a right to counsel. She did not request counsel. While she was being interrogated, two relatives were denied permission to see her. In an opinion in which the absence of counsel was mentioned but not discussed, seven judges held the confession voluntary and admissible. Justices Douglas and Black, relying on their dissent in *Crooker*, dissented in an opinion in which it was asserted that

²¹⁸ 357 U.S. 433 (1958).

²¹⁹ *Id.* at 443.

²²⁰ *Id.* at 443-44.

²²¹ 357 U.S. 504, 512 (1958).

²²² 357 U.S. 426 (1958).

the record did not establish either that counsel had been waived or that the defendant "had elected to talk."²²³

In *Spano v. New York*,²²⁴ the link between counsel at the police station and counsel at the trial was clearly articulated in the concurring opinions of Justices Douglas and Stewart. Without referring to the privilege against self-incrimination, Mr. Justice Douglas stated:

This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel.²²⁵

And Mr. Justice Stewart noted that "our Constitution guarantees the assistance of counsel to a man on trial for his life. . . . Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station."²²⁶ As was previously discussed, the same link between counsel at interrogation and counsel at trial was emphasized in *Massiah v. United States*.²²⁷

Considered in the light of its antecedents, *Escobedo* must be taken as establishing at the interrogation stage all of the safeguards provided by the presence of counsel at trial.²²⁸ However, it should be noted that in *Cicenia*, *Spano*, and *Escobedo* the defendant had retained counsel prior to interrogation and had requested permission to consult counsel during the interrogation. In *Crooker*, the defendant had demanded to see a named attorney. In none of the cases, therefore, would it have been necessary for the state to pro-

²²³ *Id.* at 432.

²²⁴ 360 U.S. 315 (1959).

²²⁵ *Id.* at 325.

²²⁶ *Id.* at 327.

²²⁷ 377 U.S. 201 (1964).

²²⁸ In *Escobedo*, Mr. Justice Goldberg sought to distinguish *Crooker* by comparing the education of the respective defendants and by noting that *Crooker* had been warned of his rights. However, he also stated that "to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded by controlling." *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). Because of the factual similarity between *Escobedo* and *Cicenia*, it may be stated with confidence that the Court has, in effect, overruled both *Cicenia* and *Crooker*.

If the right to counsel at the police station is absolute, and if the presence of counsel is required in order to effectuate the privilege against self-incrimination, it follows that counsel must be permitted to attend the entire interrogation and to interrupt the interrogation in order to warn his client. The likely result is that the police will not even attempt an interrogation if counsel is present.

vide counsel at the interrogation. Thus, the second question raised by *Escobedo* is whether an indigent defendant is entitled to counsel upon request. An affirmative answer is fully supported by *Gideon v. Wainwright*²²⁹ and by the rationale of *Escobedo* that the presence of counsel at the interrogation makes effective both the right to representation by counsel at trial and the privilege against self-incrimination. Neither *Gideon* nor the rationale of *Escobedo* permits any meaningful distinction between the indigent and the affluent.

In *Escobedo*, as in *Crooker*, *Cicenia* and *Spano*, the defendant specifically requested an opportunity to consult counsel. Is such a request essential, or will silence be taken as a waiver? If the defendant knows that he has a right to consult counsel, will a waiver be inferred from his silence or from a statement that he does not desire counsel? The opinion in *Escobedo* suggests only the following: if the right to counsel is as important as Mr. Justice Goldberg indicates, the Court will not be quick to draw inferences of waiver. Clearly, if the defendant is unaware of his rights, a request is not essential and silence will not be taken as a waiver. This conclusion follows from the right-to-counsel cases discussed previously as an analogue to the privilege/waiver problem.²³⁰ Moreover, as the plurality opinion in *Von Moltke v. Gillies*²³¹ demonstrates, even if the defendant is aware of the right to counsel and purports to waive it, the waiver will be ineffective unless the defendant is aware of the importance and scope of the assistance of counsel. If the record discloses only a naked awareness of the right, it is highly unlikely that a waiver will be inferred.

In his dissenting opinion in *Escobedo*, Mr. Justice Stewart argued that there was no right to counsel prior to indictment:

[T]he institution of formal, meaningful judicial proceedings by way of indictment, information, or arraignment marks the point at which a criminal investigation has ended and adversary litigative proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial. Among those guarantees . . . is the guarantee of the assistance of counsel.²³²

In essence, Mr. Justice Stewart relied on the specific terminology of the sixth amendment ("criminal prosecutions") and insisted that

²²⁹ This point was explicitly recognized in the dissenting opinion of Mr. Justice White. 378 U.S. 478, 495.

²³⁰ *Supra* notes 179-84 and accompanying text.

²³¹ 332 U.S. 708 (1948).

²³² 378 U.S. at 493-94.

the prosecution began only with indictment. Because Mr. Justice Stewart had written the opinion in *Massiah*, an anticipatory reply from Mr. Justice Goldberg was necessary. Leading from strength, Mr. Justice Goldberg noted that in *Massiah* considerable emphasis had been placed on the relationship between effective representation at trial and representation at pre-trial stages. If, in order to insure effective representation at trial, it is necessary to have counsel after indictment and before trial, it is no less necessary to have counsel at the police station before indictment. Indeed, because post-indictment interrogation is unusual and pre-indictment interrogation is typical, from the defendant's standpoint it is far more important to have counsel at the police station. In short, Mr. Justice Stewart had painted himself into a corner in *Massiah* from which he could extricate himself only by a highly formalistic reading of the sixth amendment. Moreover, Mr. Justice Stewart's position is weak for two additional reasons, neither of which was urged by Mr. Justice Goldberg. The first is that, although the phraseology of the fifth amendment limits the privilege against self-incrimination to a criminal case, the Court has applied the privilege to such pre-indictment procedures as legislative inquiries²³³ and grand-jury investigations.²³⁴ If an effective privilege can be achieved only through the presence of counsel, the right to counsel must arise prior to indictment. The second reason is that the Court had already held that a right to counsel existed at a pre-indictment stage. In *White v. Maryland*,²³⁵ a capital case, the defendant, unrepresented by counsel, pleaded guilty at the preliminary hearing. Although this plea was not controlling for purposes of the trial, it was admitted as evidence. In a unanimous per curiam decision, the Court held that the preliminary examination was a critical stage in the proceeding, that the defendant should have had counsel, and that the plea was inadmissible as evidence of guilt.

²³³ 8 Wigmore § 2252, at 328 n. 25.

²³⁴ *Id.* at 328 n. 24.

²³⁵ 373 U.S. 59 (1963). Mr. Justice Goldberg did cite *White*, but he did not stress that *White* involved a pre-indictment stage.

The citation of *White* and a subsequent reference, in a slightly different context, to *Ex parte Sullivan*, 107 F. Supp. 514 (D. Utah 1952), *decision after conditional remand*, 126 F. Supp. 564 (1954), *reversed sub nom.* Utah v. Sullivan, 227 F.2d 511 (10th Cir. 1955), *cert. denied sub nom.* Braasch v. Utah, 350 U.S. 973 (1956), raise the question whether there is an absolute right to counsel at the preliminary hearing. A negative answer may be based upon the belief that, in the ordinary case, the preliminary hearing is merely a ritual rather than a critical stage in the proceedings. An affirmative answer may be based on the following: (1) the preliminary hearing is one of the few discovery devices available to a defendant, *but cf.* *Cicenia v. Lagay*,

Had Mr. Justice Goldberg been content to rely on the trial analogy, he could have been criticized only for not making a complete argument. However, he was not content. In what appears to be an attempt to establish a factual, as well as doctrinal, analogy between *Escobedo* and *Massiah*, he stated:

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' Petitioner had become the accused, and the purpose of the interrogation was to get him to confess his guilt despite his constitutional right not to do so. . . . It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.²³⁶

Two restrictive interpretations may be given to this factually correct²³⁷ statement. First, it may be said that the *Escobedo* rule does not apply if the interrogee has been arrested only "on suspicion." This statement, however, collides with the *Wong Sun* rule.²³⁸ The words "on suspicion" suggest an arrest that is unconstitutional for want of probable cause.²³⁹ In such a case it is likely that a subsequent confession is inadmissible on fourth-amendment grounds.²⁴⁰ Consequently, even if the first interpretation is valid, it still leads to a cul-de-sac of inadmissibility.

357 U.S. 504, 510 (1958); (2) an unrepresented defendant may prejudice his case by what he does at the preliminary hearing, see *Nance v. United States*, 299 F.2d 122 (D.C. Cir. 1962) (defendant made admissions inadvertently); and (3) the Court should not speculate as to prejudice.

²³⁶ *Escobedo v. Illinois*, 378 U.S. 478, 485-86 (1964). In his final summary of the case, Mr. Justice Goldberg noted that the investigation had "begun to focus on a particular suspect." *Id.* at 490.

²³⁷ The statement is factually correct because, shortly before the second arrest, the defendant was implicated in the killing by DiGerlando, who eventually accused the defendant of firing the murder weapon. At the time of the interrogation, the defendant was a "prime" suspect. *People v. Escobedo*, 28 Ill.2d 41, 43, 190 N.E.2d 825, 826 (1963).

²³⁸ *Wong Sun v. United States*, 371 U.S. 471 (1963).

²³⁹ See *Henry v. United States*, 361 U.S. 98, 101 (1959).

²⁴⁰ *Supra* note 70. Even in the absence of the *Wong Sun* exclusionary rule, it is highly unlikely that the Court would permit the police to avoid *Escobedo* by relying on the additional illegality of an unconstitutional arrest. In this regard, it is interesting to note that prior to *Mallory*, it was sometimes argued that an unreasonable delay was excused by the fact that the defendant had been arrested without probable cause and that the evidence was therefore insufficient to support a charge. See Hearings on S. Res. 234 before the Subcommittee on Constitutional Rights of the Senate Commit-

The second interpretation is that *Escobedo* applies only if there is "strong" probable cause to believe that the interrogee committed the offense. It would follow that, although *Wong Sun* and *Escobedo* ride tandem in some cases, neither would govern a case in which only "ordinary" probable cause existed. This interpretation probably involves an unworkable distinction in terms of quanta of probable cause. Even if the distinction is workable, at some point in the interrogation "strong" probable cause must arise because, by hypothesis, the interrogee will give some indication of a willingness to confess. At that point, the *Escobedo* rule would apply. The second interpretation, therefore, results only in delayed application.²⁴¹

A third interpretation may be given to Mr. Justice Goldberg's statement. It is that the statement is meaningless. If the right to counsel at the police station preserves the right to representation at trial and makes effective the privilege against self-incrimination, it is illogical to distinguish the case of the prime suspect from the case of any other suspect. In each case the right to counsel serves the same purpose in the same way. To suggest that the right to counsel arises only when the investigation begins to focus on the interrogee is to play hocus-focus with the right to counsel and to obliterate the very arguments urged to support the result in *Escobedo*. Consequently, although it may be inferred from Mr. Justice Goldberg's statement that only a prime suspect has a constitutional right to counsel, the inference should be ignored.

In *Haynes v. Washington*, it was observed by way of disclaimer that ". . . detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence. . . . [W]e do not mean to suggest that all interrogation of witnesses and suspects is impermissible."²⁴² But after *Wong Sun*, *Malloy*, and *Escobedo*, what is the scope of permissible interrogation? In all probability, *Wong Sun* severely limits the class of persons who may be interrogated. If the interrogee is within the class, *Malloy*

tee on the Judiciary, 85th Cong., 2d Sess. 766-67 (1958) (statement by Professor Yale Kamisar).

²⁴¹ The same result would also obtain under the first interpretation. The vice of delayed application is that it permits the police to get some incriminating information in the absence of counsel. This same vice prevailed under the English Judges' Rules prior to their amendment in 1964. Under the old rules, a suspect could be questioned until the interrogator decided to charge him with an offense. At that point, it was required that the interrogator warn the suspect of his privilege of silence. Brownlie, "Police Questioning, Custody and Caution," [1960] *Crim. L. Rev.* 298, 306-07. Under the amended rules, a warning must be given if the interrogator has reasonable ground to suspect that the interrogee has committed an offense. Home Office Circular No. 31/1964, January, 1964.

²⁴² *Haynes v. Washington*, 373 U.S. 503, 514-15 (1963).

and *Escobedo* give him the privilege against self-incrimination, and *Escobedo* makes it effective through a requirement of counsel. The total theoretical impact of these cases is that productive police interrogation is a dead letter. Unless the defendant wants to confess, his natural reluctance must be overcome. To this extent, police interrogation is, and has to be, inherently coercive.²⁴³ Effective coercion comprehends increased pressure by the interrogator and diminished resistance on the part of the person interrogated. But pressure is impermissible under the privilege and diminished resistance is unlikely if counsel is present. Through a series of cases, each of which chips away at the scope of permissible interrogation, the Court has held, in effect, that productive interrogation is impermissible.²⁴⁴

It is unlikely, however, that the theoretical impact will be felt immediately in practice. The opinion in *Escobedo* simply furnishes too many possibilities for convenient avoidance, each of which has to be resolved through litigation. It is to be expected that law enforcement officers, state courts, and lower federal courts will seize upon each of the ambiguities in *Escobedo* as a basis for distinction. In one case the basis will be that the police advised the defendant of his rights at the outset of interrogation. In another case it will be that the defendant was a mere suspect when he confessed. In still another case the basis will be that coercive circumstances were absent (remember that *Escobedo* could have been decided under the confessions rule) or that the defendant voluntarily waived his privilege and his right to counsel.²⁴⁵ All in all, the cases will resemble

²⁴³ *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (dissenting opinion). If police interrogation is inherently coercive, it may be argued that police interrogation per se constitutes an impermissible compulsion to self-incrimination. Under this argument, the test of compulsion would afford almost as much protection as the test of waiver.

²⁴⁴ "To what extent should police effectiveness be the ultimate test? The competing values of personal liberty are not entirely based on pragmatic reasoning." Weisberg, "Police Interrogation of Arrested Persons: A Skeptical View," in *Police Power and Individual Freedom* 153, 172 (Sowle ed. 1962).

²⁴⁵ After the above text was written, it was held in *Jackson v. United States*, 337 F.2d 136 (D.C. Cir. 1964) (2-1), that a confession was admissible under the following circumstances: the defendant committed murder in the District of Columbia, fled to New York, and was arrested there by FBI agents. They advised him that he did not have to make a statement and that he was entitled to counsel. Thereafter, the same advice was given by a United States Commissioner. About two hours later, District of Columbia police arrived and advised the defendant that he did not have to make a statement. After a non-coercive interrogation, the defendant confessed. In holding the confession admissible, the court stressed the advice regarding the privilege and the absence of coercion. *Escobedo* was distinguished on the ground that no request for counsel had been made in the *Jackson* case. *Accord*, *United States v. Konigsberg*, 336 F.2d 844 (3d Cir. 1964), *petition for cert. filed*, 33 U.S.L. Week 3166 (U.S.

in tenor those lower federal court decisions in the wake of *McNabb* in which it was held that the *McNabb* rule applied only if some coercion was present.²⁴⁶ They will also resemble in tenor those decisions in the wake of *Mallory* in which it was held that a particular delay was reasonable even though a confession was obtained during that period and even though it was likely that the delay was motivated by a desire to interrogate.²⁴⁷ Undoubtedly, *Escobedo* will be resisted as *McNabb* and *Mallory* were resisted. *McNabb* was decided in 1943. After twenty-one years and three subsequent clarifying Supreme Court decisions,²⁴⁸ the battle is still being fought. *Escobedo*, therefore, can hardly be regarded as more than a skirmish.²⁴⁹

Nov. 3, 1964) (No. 596) (*Escobedo* limited to its facts); *Mitchell v. Stephens*, 232 F. Supp. 497 (E.D. Ark. 1964); CM 410956, *Bostic*, DA Pam 27-101-167 (64 JALS 167/5) (1964); *People v. Hartgraves*—Ill.2d—, 202 N.E.2d 33 (1964); *Hayden v. State*,—Ind.—, 201 N.E.2d 329 (1964); *People v. Agar*,—N.Y.S. 2d— (Sup. Ct. Queens Co. 1964); *State v. Puckett*, 201 N.E.2d 86 (Ohio C.P. 1964).

In *Long v. United States*, 338 F.2d 549 (D.C. Cir. 1964) (per curiam), the court held statements volunteered to police officers in the police station corridor could not be excluded because defendant was without benefit of counsel. The court noted that neither a court nor a legislature has forbidden the admission of inculpatory statements voluntarily offered out of the presence of counsel.

In *People v. Dorado*,—Cal. 2d—, 394 P.2d 952, 40 Cal. Rptr. 264 (1964), rehearing granted, 40 Cal. Rptr. issue No. 10, I (Nov. 16, 1964), the California Supreme Court applied *Escobedo* to a case in which the defendant did not request counsel. Relying on such cases as *Carnley v. Cochran*, 369 U.S. 506 (1962), the court held that a waiver could not be inferred from the absence of a request. *Accord*, *Queen v. United States*, 335 F.2d 297 (D.C. Cir. 1964), decided by a panel different from the panel that decided *Jackson. Contra*, *State v. McLeod*, *supra* note 208.

In *Galarza Cruz v. Delgado*, 233 F. Supp. 944 (D.P.R. 1964), defendant brought a habeas corpus action charging that certain sworn statements made before a judge should not have been admitted into evidence where the judge failed to advise him of his right to counsel at that preliminary stage of the proceedings. The court held the confession inadmissible applying *Massiah* and *Escobedo*.

In *Johnson v. United States*, No. 18,243, D.C. Cir., Oct. 15, 1964 (3-0), the court held on the basis of *Escobedo* and *Queen v. United States*, *supra*, that a confession obtained after continuance of a preliminary hearing but before counsel had been retained could not be used for impeachment purposes to rebut defendant's testimony. The court refused to apply the exception as set forth in *Walder v. United States*, 347 U.S. 62, 65 (1954), distinguishing *Walder* in its facts.

²⁴⁶ The cases are collected in Hogan & Snee, "The McNabb-Mallory Rule: Its Rise, Rationale and Rescue," 47 *Geo. L.J.* 1, 6 n. 21 (1958).

²⁴⁷ The cases are collected in Kamisar & Choper, *supra* note 212, at 44 n. 187; Comment, 68 *Yale L.J.* 1003, 1015-20 (1959).

²⁴⁸ *Mallory v. United States*, 354 U.S. 449 (1957); *Upshaw v. United States*, 335 U.S. 410 (1948); *United States v. Mitchell*, 322 U.S. 65 (1944).

²⁴⁹ See Comment, 73 *Yale L.J.* 1000, 1052-53 (1964).

VI. CONCLUSION

The Supreme Court must have decided *Escobedo* with full realization that police interrogation is essential to the solution of some crimes and that, if the theory of *Escobedo* is ever translated into action, police interrogation is at an end. Why was the Court ready to sacrifice police interrogation? The answer to this question involves two factors: dissatisfaction with the operation of the confessions rule, and a recognition of the inconsistency of giving to the accused at trial a privilege against self-incrimination made effective by the presence of counsel, and, at the same time, at the critical stage of police interrogation, denying to the accused both the full reach of the privilege and the protection of counsel.²⁵⁰

Insofar as counsel is concerned, and without regard to the privilege, it is apparent that *Escobedo* represents a shift in emphasis. At the trial the participation of counsel serves the due process value of preserving the accuracy of the guilt-finding process.²⁵¹ Because "truth machines" are not available, we maintain the adversary system as the method best calculated to keep to a minimum erroneous determinations of guilt. Obviously, the system contemplates roughly equivalent adversaries, and the only surprising thing about *Gideon v. Wainwright* is that it was so long in coming. However, at the police interrogation stage, the reliability preservative has traditionally been the confessions rule. Absent a consideration of the privilege, the argument that effective representation

²⁵⁰ It has been suggested that *Escobedo* may be limited to in-custody interrogation thereby encouraging pre-arrest interrogation "which would ordinarily be free of the evil of coercion, and might enable the police to gather much of the evidence they now obtain at the police station, without subjecting the witness to the stigma and inconvenience of arrest." "The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143, 223 (1964). There is evidence that pre-arrest interrogation is effective. See Kamisar, "On the Tactics of Police-Prosecution Oriented Critics of the Courts," 49 Cornell L. Q. 436, 451-52 (1964). However, if the inconsistency referred to in the text above is an important part of the rationale of *Escobedo*, the distinction between pre-arrest and post-arrest interrogation is irrelevant. In either case, effective pre-trial interrogation would make it impossible for counsel effectively to preserve the privilege against self-incrimination at trial.

²⁵¹ On the accuracy of the guilt-finding process as a due process value, see Kadish, "Methodology and Criteria in Due Process Adjudication: A Survey and Criticism," 66 Yale L.J. 319 (1957). I do not mean to suggest that the presence of counsel preserves no other due process values. To the contrary it is clear that the presence of counsel at trial preserves, for example, the values underlying the *Mapp* exclusionary rule. See Kamisar, "The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'the Most Pervasive Right' of an Accused," 30 U. Chi. L. Rev. 1, 21-26 (1962). However, the privilege against self-incrimination aside, the preservation of such values at trial does not require the presence of counsel at the police interrogation.

at trial requires the presence of counsel at the interrogation stage must be based on one of two assumptions: that effective representation at trial means winning, or that the presence of counsel at interrogation in some way increases the reliability of the guilt-determining process. The first assumption must be rejected as without constitutional or other basis. The second assumption may or may not be true. Mr. Justice Jackson observed in *Watts v. Indiana* that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."²⁵² Advice regarding the privilege will frustrate inquiry and, in many cases, will detract from the reliability of the guilt-determining process. On the other hand, if the interrogee does submit to interrogation, the presence of counsel is a substantial hedge against pressure, unfair questions, and inaccuracies in either the recording or recollection of oral statements. Moreover, the presence of any third party at the interrogation minimizes the credibility problem that arises when the defendant's claim of coercion is resisted by the testimony of the interrogator that no pressure was used. In short, whether the presence of counsel at the interrogation enhances accuracy or reliability will depend upon the facts of a particular case, upon the details of what happened at the interrogation. Consequently, insistence upon the presence of counsel in all cases is simply an insistence upon the barrier to confession imposed by an effective privilege against self-incrimination, and a root-and-branch rejection of all confessions that are not volunteered. Why should the Court reject such confessions? One possible answer is indicated in *Escobedo*:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.²⁵³

Abusive police conduct does exist to some extent,²⁵⁴ but the extent is difficult to determine. If one theme runs through the coerced confession cases, it is that the Court does not know what happened at the police station.²⁵⁵ The defendant claims that he was beaten or threatened or was promised some benefit. All of these claims are denied by the police. A reviewing court, faced with a

²⁵² *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (concurring opinion).

²⁵³ *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

²⁵⁴ See Houts, *From Arrest to Release 76-77* (1958); Trebach, *The Rationing of Justice 41-46* (1964).

²⁵⁵ See Douglas, "The Means and the End," 1959 Wash. U.L.Q. 103, 114.

finding of fact against coercion, is forced to speculate, to state that thirty-six hours of interrogation are "inherently coercive,"²⁵⁶ and to insist that "the effect of such massive official interrogation must have been felt."²⁵⁷ The blame lies not with judges. They know that abusive practices exist and they also know that abuse seldom appears clearly from the record. The blame lies not with the defendant. He is forced to rely on his own testimony because no third party was permitted to attend the interrogation. The blame does lie with the police. For years, the police have insisted that productive interrogation can take place only in private and that an interrogee will not confess if he is aware of the presence of third persons.²⁵⁸ In practice, privacy has become secrecy,²⁵⁹ and the details of the interrogation are almost always in doubt. Steps could have been taken to maintain privacy but to avoid secrecy. The presence of a third person, unobserved, could have been provided for,²⁶⁰ but the police did not do so, and legislatures did not undertake effective control. It was not that control was impossible. The relevant literature is full of such suggestions as substituting a judicial interrogation for the police interrogation;²⁶¹ providing that police interrogation take place within time limits and only after preliminary examination;²⁶² and requiring that all interrogations be filmed.²⁶³ In the absence of legislatively prescribed controls, the burden fell on the courts. Because due process was involved, the Supreme Court was drawn into the picture only to be frustrated by the problem of proof under the confessions rule. The solutions available to legislature were not directly available to the Court,²⁶⁴

²⁵⁶ *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).

²⁵⁷ *Spano v. New York*, 360 U.S. 315, 322 (1959).

²⁵⁸ Inbau & Reid, *Criminal Interrogation and Confessions* 1 (1962); Inbau, "Police Interrogation—A Practical Necessity," in *Police Power and Individual Freedom* 147, 148-49 (Sowle ed. 1962).

²⁵⁹ Weisberg, *supra* note 244, *passim*.

²⁶⁰ If there is a risk that secrecy will gore the policeman's ox, he knows how to avoid it: "[I]n cases where a female is the subject, a policewoman or other female may be stationed in the observation room to witness [through a two-way mirror] the proceedings as a safeguard against possible false accusations of misconduct on the part of the interrogator." Inbau & Reid, *op. cit. supra* note 258, at 9.

²⁶¹ Kauper, "Judicial Examination of the Accused—A Remedy for the Third Degree," 30 Mich. L. Rev. 1224 (1932); Pound, "Legal Interrogation of Persons Accused or Suspected of Crime," 24 J. Crim. L. 1014 (1934).

²⁶² Comment, 68 Yale L.J. 1003, 1031-37 (1958).

²⁶³ Weisberg, *supra* note 244, at 180. In cases of drunken driving, some police departments use motion pictures as evidence of intoxication. *Time*, Nov. 22, 1963, p. 61.

²⁶⁴ In his dissenting opinion in *Escobedo*, Mr. Justice White complained that the Court had performed a legislative function. *Escobedo v. Illinois*, 378 U.S. 478, 498 (1964). In a recent article, it is argued that the confession problem should have been resolved by means less drastic than the rules of *Escobedo* and *Massiah*, and it is

but the Court was not without its weapons. Regarding federal procedure, the Court, as a supervisory matter, fashioned the *Mallory* exclusionary rule, the purpose of which was to solve the problem of proof by the blunt tool of minimizing, if not putting to an end, the opportunity for interrogation.²⁶⁵ The states, however, not bound by *Mallory*,²⁶⁶ refused to attach exclusionary rules to their own "prompt arraignment" statutes.²⁶⁷ The state cases, therefore, continued to be governed by the confessions rule with all of its attendant weaknesses. Ultimately, the Court, in *Escobedo*, found that it was forced to circumscribe state interrogation as it had been forced to circumscribe federal interrogation in *Mallory*,²⁶⁸ and, as in *Mallory*, the Court used a necessarily blunt device: the privilege against self-incrimination made effective by the required presence of counsel. The result is that the Court will no longer be forced to guess whether a confession is "voluntary" or "involuntary" under the confessions rule. Unless a confession is obtained under circumstances consistent with an effective privilege against self-incrimination, it is inadmissible even if "voluntary." The result may well be undesirable, but the police (by their insistence on secrecy), the state legislatures (by their failure to act effectively), and the state courts (by their failure to give meaning to prompt arraignment statutes) have brought it on themselves.

In his dissenting opinion in *Escobedo*, Mr. Justice White stated:

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.²⁶⁹

suggested that the Court should have given constitutional dimension to the *Mallory* rule. Enker & Elsen, "Counsel for the Suspect: *Massiah v. United States* and *Escobedo v. Illinois*," 49 Minn. L. Rev. 47, 49, 85-91 (1964).

²⁶⁵ Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 Minn. L. Rev. 1, 46 (1963).

²⁶⁶ *Culombe v. Connecticut*, 367 U.S. 568, 600-1 (1961).

²⁶⁷ Kamisar & Choper, *supra* note 265, at 44. Regarding judicial adoption of the *Mallory* rule in Michigan, compare *People v. Harper*, 365 Mich. 494, 113 N.W.2d 808 (1962), with *People v. Hamilton*, 359 Mich. 410, 102 N.W.2d 738 (1960).

²⁶⁸ I do not mean to suggest that the *Escobedo* rule does not apply to federal interrogations. Clearly it does. If the interrogation occurs during a period of reasonable delay, only *Escobedo* is applicable. If the interrogation occurs during a period of unreasonable delay, presumably both *Escobedo* and *Mallory* apply. However, if, during a period of unreasonable delay, a confession is obtained under circumstances that accord with the *Escobedo* rule, a strong argument can be made that *Mallory* should not apply and that the confession should be admissible.

²⁶⁹ *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964).

However, there may be a way out. Even assuming the broadest interpretation of *Escobedo*, the Court might approve less restrictive procedures if delineated by state legislation, enforced by state courts, and adhered to by state police. For this approach to be successful, however, it will be necessary to distinguish the operation of the privilege against self-incrimination at the police station from its operation in other proceedings. As matters now stand, an effective privilege against self-incrimination is an insuperable barrier to interrogation, and our crucial question is this: how effective a privilege can we afford? ²⁷⁰

²⁷⁰ This question raises another: what do we lose by an effective privilege? The answer is that in many cases we lose confessions and that in some of those cases we lose convictions because some cases cannot be solved without a confession. Assuming that obtaining convictions is not only a relevant criterion but also an important one, the critical questions are these: (1) how many cases cannot be solved without confessions; (2) what offenses do they involve; (3) how community-disturbing are these offenses; (4) how community-disturbing is the absence of a solution; and (5) what is the risk that the offender will commit similar offenses?

The general question of the extent to which we can afford safeguards in criminal procedure has been asked already in the context of the *Mallory* rule. Professor Inbau has argued that the *Mallory* rule is a significant impediment. Inbau, "Police Interrogation—A Practical Necessity," in *Police Power and Individual Freedom* 147, 151 (Sowle ed. 1962). Professor Kamisar, on the other hand, has urged that the evidence does not support such a claim. Kamisar, "On the Tactics of Police—Prosecution Oriented Critics of the Courts," 49 *Cornell L.Q.* 436 (1964); Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" 53 *J. Crim. L., C. & P.S.* 171, 190-93 (1962). Neither argument focuses specifically on the questions raised above. Until our methods of obtaining data are much improved, these questions can be answered only by dogma, and whichever side bears the burden of proof will lose. However, even in the absence of relevant data, it is not inappropriate to recall the following observation:

Crime, as well as other human behavior, is a function both of the number of persons involved and their proximity to each other. This is probably the most difficult single problem with which law enforcement must deal. . . .

[T]he war against crime does not lie on [the] front [of returning to law enforcement agencies powers taken from them by recent decisions]. Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain.

Address by David C. Acheson, United States Attorney for the District of Columbia, *Central Eastern Area Armed Forces Disciplinary Control Board Semi-Annual Meeting*, October 15, 1964.

STUDENT SYMPOSIUM: THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.