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THE NEW RIGHT—FIFTH AMENDMENT RIGHT TO COUNSEL

BARRY L. TARAN*

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INTRODUCTION

For the past two years there has been considerable speculation and wonder concerning the constitutional status of police interrogation practices. Recently, four cases concerning this issue, were reviewed on writ of certiorari from the United States Supreme Court. The Court’s decisions were consolidated into a single expansive opinion which will materially affect criminal law and procedure throughout the nation. So forceful is the text of the opinion that even a cursory reading of the holding alone will reveal the giant reach of its fingers:

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney during the interrogation, and that if he cannot afford an attorney one will

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The decision was 5-4 in Miranda, Vignera, and Westover, Clark, J., Harlan, J., White, J., and Stewart, J., dissenting, and 6-3 in Stewart, Clark, J., concurring in the result, Harlan, J., White, J., and Stewart, J., dissenting. Chief Justice Warren wrote the opinion for the majority.

2. The opinion alone covers over nineteen pages in U.S. Law Week, with separate dissenting opinions by Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice White, covering another fifteen pages. The wide reaching implications and complete meaning of the decision cannot possibly be explored in an article of this type. For a perceptive analysis of the subject in anticipation of the decision, see Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L.J. 449 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935 (1966).
be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.\(^5\) After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.\(^4\)

In all four of the separate cases confessions or admissions made by the defendant while in police custody were admitted into evidence at the respective trial which resulted in his conviction. None had been advised of his Fifth Amendment privilege to remain silent during police interrogation, or of his right to have and consult with an attorney prior to the interrogation. At the extremities, Ernesto Miranda\(^5\) confessed after only two hours of interrogation, whereas Roy Allen Stewart\(^6\) confessed after five days and nine interrogation sessions. Three\(^7\) of the four convictions

3. The Court explained earlier:
If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. Miranda v. Arizona, \(\text{supra}\) note 1, at 1612. (Emphasis added.).

4. \textit{Id.} at 1630. One week later the Court handed down Johnson v. New Jersey, \(\text{-- U.S.}\) \(\text{--},\) 86 S.Ct. 1772 (1966), which held that neither Escobedo v. Illinois, 378 U.S. 478 (1964), nor \textit{Miranda} would apply retroactively, but that each case was applicable to cases wherein the trial had begun after the respective decision dates, June 22, 1964 and June 13, 1966.

On the same day the Court revealed its decision in Schmerber v. California, \(\text{-- U.S.}\) \(\text{--},\) 86 S.Ct. 1826 (1966), which deserves notation. The decision affirmed a conviction for driving while under the influence of intoxicating liquor which was secured by admitting into evidence at his trial the chemical analysis of a blood sample taken from the defendant at a hospital where he was arrested after the auto accident in which he was involved. The sample was taken at the direction of a police officer despite the defendant's refusal to submit to the test on the advise of his attorney. The Court, in a 5-4 majority opinion written by Justice Brennan rejected four constitutional arguments advanced by the defendant. First, on the authority of Breithaupt v. Abram, 352 U.S. 432 (1957), the Court flatly rejected the defendant's contention that he had been denied due process. Next, the opinion held that the defendant was not deprived of his Fifth Amendment privilege against self-incrimination because the privilege is not applicable to this type of non-communicative compelled testimony or "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" Third, he was not deprived of his right to counsel because he was not entitled to assert the privilege, regardless that his attorney told him that he could. Finally, he was not subjected to an unlawful search and seizure because, under the circumstances, the invasion was not unreasonable nor was it conducted in an improper manner.

The opinion employs various fictions to achieve a result which can only be justified on the basis of practical considerations in accord with public policy. But in principle the case is unsound. It is inconceivable that one who has been physically compelled to submit to a blood test, the analysis of which resulted in his conviction of a crime when introduced into evidence at his trial, had not been denied his privilege against self-incrimination. Decisions such as this will only muddy the water once again.

5. \textit{Miranda} v. Arizona, \(\text{supra}\) note 1. See note 7 \textit{infra}.

6. \textit{California} v. Stewart, \(\text{supra}\) note 1. See note 8 \textit{infra}.

7. Ernesto Miranda was arrested and interrogated for two hours without being advised of his right to keep silent or to consult with, and have an attorney present during
were affirmed by the respective state's highest court; the fourth was reversed by the Supreme Court of California\(^8\) on the basis of \textit{Escobedo v. Illinois},\(^9\) because the record was silent as to whether the defendant had ever been advised of his right to counsel or his right to remain silent. The United States Supreme Court held that when the record is silent on the question of whether the defendant has been apprised of his constitutional rights, it will not be presumed that those rights were safeguarded, nor will it be presumed that he made a "knowing and intelligent waiver" of those rights.\(^{10}\) "The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights,' the interrogation which resulted in his written confession to kidnapping and rape. The statement was admitted into evidence at trial, and his conviction was affirmed by the Supreme Court of Arizona, 98 Ariz. 18, 401 P.2d 721 (1965), which found no violation of the defendant's constitutional rights. The Court reversed the conviction because failure to give the required warnings rendered the statements inadmissible, regardless that he had signed a statement which stated that he was fully aware of his rights. The Court would not presume from such a record that the defendant made a "knowing and intelligent waiver." Id. at 1636-37.

During questioning by a detective, Michael Vignera orally admitted to the robbery for which he was picked up as a suspect. Later his statement was transcribed by a reporter during questioning by an assistant district attorney. At trial, after the detective testified to the oral confession, the court sustained the prosecution's objection to the question put to the detective on cross-examination by the defense, relating to whether the defendant had been advised of his right to counsel before interrogation. The transcribed admission of guilt, which contained no warning to the defendant of his constitutional rights, was also admitted into evidence. Both the Appellate Division, 21 App. Div. 2d 752, 252 N.Y.S.2d 19 (2d Dept. 1964), and the New York Court of Appeals, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857, \textit{remittitur amended}, 16 N.Y.2d 614, 209 N.E.2d 110, 261 N.Y.S.2d 65 (1965), affirmed the conviction without opinion. The Court reversed the conviction because the defendant had not been "effectively apprised of his Fifth Amendment privilege or of his right to have counsel present. . . ." Id. at 1537-38.

After being arrested by the Kansas City Police Department, and held for fourteen hours during which time he was questioned by them without being advised of his constitutional rights, Carl Westover confessed to two robbery charges during a subsequent FBI interrogation. This time he had been warned that he could remain silent and was advised of his additional rights. The confessions were admitted into evidence at his trial at which he was found guilty. The conviction was affirmed by the United States Court of Appeals, 342 F.2d 684 (9th Cir. 1965). The conviction was reversed by the Court because the defendant was not given any warnings by local police prior to the FBI interrogation, and there was no evidence that he "knowingly and intelligently waived" those rights prior to the time that he made the statement. Id. at 1638-39.

8. Roy Allen Stewart, together with his wife and three others, was arrested at his home by the Los Angeles police. With Stewart's consent, the police searched his home and found items taken in robberies for which he was a suspect, including one robbery in which the victim died from injuries sustained during commission of the crime. After five days and nine interrogation sessions, during which he was alone with his interrogators, Stewart confessed to robbing the deceased. Thereafter, the other four were released. He was convicted of robbery and first degree murder and sentenced to death. The Supreme Court of California reversed, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965), because of a silent record as to whether the defendant had ever been advised of his constitutional rights. The Court affirmed because neither the safeguard of those rights nor a knowing and intelligent waiver will be presumed from a silent record. The Court also felt that the defendant had been compelled by the police to forego his privilege against self-incrimination through extensive interrogation. Id. at 1639-40.


does not approach the knowing and intelligent waiver required to relinquish constitutional rights."  

II. Historical Analysis

An accused's right to counsel has always been absolute in American history, but the meaning of the right was actually established during the past thirty-four years. Powell v. Alabama, in 1932, first expressed the United States Supreme Court's distaste for convictions where the defendant was without effective counsel. Under the Fourteenth Amendment a state court could not defeat an accused's right to be represented by counsel, and at least in a capital case, the court was obligated, regardless of a request, to assign "effective" counsel for an indigent defendant sufficiently in advance of trial so that counsel had time for consultation and preparation of the case. Yet, the true import of Powell was its dicta which set forth the principles and the meaning of the right to counsel. Practically every major subsequent decision affecting the right has been based on an interpretation of that dicta.

11. Id. at 1637.
For an exhaustive study, see An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L.J. 1000 (1964); see also, Beany, The Right to Counsel in American Courts 8-12 (1955).
13. Ibid.
14. U.S. Const. amend. XIV.
... nor shall any State deprive any person of life, liberty, or property, without due process of law...
15. An Alabama statute required the appointment of counsel for indigents in a capital case. That right was defeated when, at arraignment, the accused was not asked if he had, or was able to employ counsel. 287 U.S. 45, 52-53. Accord, Hamilton v. Alabama, 368 U.S. 52 (1961). See also, Chandler v. Fretag, 348 U.S. 52 (1954) (A defendant in a state criminal proceeding has an absolute right to the assistance of his own counsel.).
The Fourteenth Amendment didn't require appointment of counsel in non-capital cases. See note 43 infra.
17. Specific representation was necessary, i.e., counsel that could be effective. 287 U.S. at 71. Accord, Carnley v. Cochran, 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."); see also McNeal v. Culver, 365 U.S. 109 (1961) (silence is not a waiver of the right); Uveges v. Pennsylvania, 335 U.S. 437 (1948).
18. Powell v. Alabama, supra note 12, at 68-71. But see, Avery v. Alabama, 308 U.S. 444 (1940) (appointment of counsel three days before trial was not a denial of due process).

[During perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants ... were as much entitled to the aid of counsel during that period as at the trial itself. Id. at 57.
The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. ... Id. at 67.
[The] right to be heard would be, in many cases, of little avail if it did not com-
The admissibility in a state court of confessions or inculpatory statements made by an accused during police interrogation and prior to arraignment, was first considered by the United States Supreme Court in 1941, in *Lisenba v. California.* In affirming a first degree murder conviction, the majority felt that the illegal detention and delay before arraignment by the police for purposes of interrogation and the denial of the defendant’s request to confer with his attorney were merely factors to be weighed in determining Fourteenth Amendment due process voluntariness of the confession. The Court was compelled to examine all the facts in the record to determine the effect of the use of the confession on the “fundamental fairness” to the defendant.

Several cases had already crystallized the due process voluntariness test under the Fourteenth Amendment for determining the admissibility of confessions in state criminal trials. *Brain v. United States* reasserted and slightly modified the common law rule that a confession made by an accused while in police custody was admissible into evidence at his trial as long as it was the product of his free and rational choice; i.e., it was given freely and voluntarily, without threats, promises or inducements of any sort. Although in *Brain* and some lower federal courts, voluntariness

20. [*Powell* has been cited approvingly and decisively in many landmark cases, while its principles have been applied in numerous others. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Spano v. New York, 360 U.S. 315 (1959); Johnson v. Zerbst, 304 U.S. 458 (1938).]


23. *Id.* at 238.

24. *Id.* at 240.

Where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advise of counsel, we shall scrutinize the record with care to determine whether, by use of his confession he is deprived of liberty or life through tyrannical or oppressive means.

25. *Id.* at 236. The “fundamental fairness” test was born.

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.


27. 168 U.S. 532 (1897).


Each of these factors [extensive interrogation, delay in arraignment or preliminary hearing, failure to advise the accused of his rights, refusal to permit communication]
was said to be controlled by the Fifth Amendment privilege against self-incrimination,\(^\text{29}\) this position may have been historically erroneous and was not asserted in later cases.\(^\text{30}\) Nevertheless, the same standards were consistently employed by the Court in establishing the due process voluntariness test applicable to confessions used in state courts.\(^\text{31}\) The rule became part of the “fundamental fairness” doctrine developed in *Lisenba*, which became the sole test of admissibility in state criminal trials.\(^\text{32}\)

with friends and legal counsel at stages when the prisoner is still only a suspect, in company with all the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by the maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession. (Emphasis added.)

29. 168 U.S. 532, 542 (1897).

In criminal trials, in courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person “shall be compelled in any criminal case to be a witness against himself.”


Justice Harlan has consistently maintained that the privilege is not applicable outside court proceedings and that Wigmore's historical analysis is correct. See his dissenting opinions in both Malloy v. Hogan, 378 U.S. 1, 14 (1964), and in Miranda v. Arizona, *supra* note 1, at 4542. (U.S. June 13, 1966), and Justice White's dissenting opinion at 4548. However, Justices Black and Douglas have never agreed with that position, maintaining that the privilege is included within due process and most definitely involved in confession cases. See their separate dissenting opinions in Adamson v. California, 332 U.S. 46 (1947), to which Justice Black attached an appendix containing his analysis of the Fifth Amendment's history.


32. See notes 23, 24, 25 *supra*. 
In 1958, the Court applied that test to *Crooker v. California* and *Cicenia v. LaGay*, and arrived at substantially the same result it had reached in the earlier *Lisenba* decision. Previously, the Court had ruled that a confession made by an indigent defendant prior to state appointment of counsel was not inadmissible per se, because admissibility depended on the totality of the circumstances. Indeed, in the seventeen years between *Lisenba* and these two later decisions the Court did little more than refine the fundamental fairness test; to wit: into the rephrased version—due process voluntariness.

But the circumstances presented in *Spano v. New York* required reversal of a conviction based on a confession elicited from one already indicted for murder. Although the Court applied the "facts and circumstances" test and held the confession involuntary, four concurring Justices felt that post-indictment police questioning was within the course of judicial proceedings, and therefore, that the absence of counsel

33. 357 U.S. 433 (1958). Examination of the record did not reveal denial of due process to a 31-year-old man who had attended one year of law school, by admitting into evidence his voluntary confession, even though he had been denied a request to see his attorney prior to his admission of the killing. Furthermore the court found that he had not been denied due process, under the circumstances, because his preliminary hearing had been intentionally delayed.

34. 357 U.S. 504 (1958). Again, application of the "fundamental fairness" test did not warrant reversal because the accused had been denied his request to see his attorney during the interrogation that elicited his confession. Such denial was only one factor to be considered among all the facts in determining whether fundamental unfairness had been worked.

35. It is interesting to note here that Chief Justice Warren, Justices Black and Douglas dissented in both cases, whereas Justice Brennan dissented in *Crooker* but took no part in *Cicenia*. Justices Black and Douglas had also dissented in *Lisenba*. See note 22 supra.


38. Spano, a 25-year-old foreign-born with limited education, surrendered himself to police on the advise of his attorney, after he had been indicted for murder. He was interrogated for eight straight hours by several detectives and an assistant prosecutor, until he confessed. He was repeatedly denied his request to see his attorney throughout the interrogation. Under false pretenses he was induced into confessing by one officer who had been friendly to him for years, through "sympathy falsely aroused." The court's opinion felt the confession was unvoluntarily coerced, and distinguished *Crooker* and *Cicenia* on the totality of the facts.


Justice Douglas, joined by Justices Black and Brennan, concurring:

But here we deal not with a suspect, but with a man who has been formally charged with a crime... 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. This seems to me to be a flagrant violation of the principle announced in *Powell v. Alabama*, supra, that the right to counsel extends to the preparation for trial, as well as to the trial itself. *Id.* at 324-25.

(Emphasis added.)

Justice Stewart, joined in by Justices Brennan and Douglas, concurring:

[I]t is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment. *Id.* at 326.

(Emphasis added.)

See also, note 19 supra.
at that time was a sufficient denial of due process to render the statements inadmissible.\textsuperscript{40}

In 1963 the Sixth Amendment\textsuperscript{41} was made applicable to the States in \textit{Gideon v. Wainwright}.\textsuperscript{42} The Court overruled \textit{Betts v. Brady},\textsuperscript{43} which had applied the "fundamental fairness" doctrine to determine an accused's right to counsel, as a departure "from the sound wisdom upon which the Court's holding in \textit{Powell v. Alabama} rested."\textsuperscript{144} The Fourteenth

\textsuperscript{40} \textit{Id.} at 324. The opinion referred to \textit{Payne v. Arkansas}, 356 U.S. 560, 568 (1958). [T]hat a conviction may [not] be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. \textit{Id.} at 324.


\textsuperscript{41} U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

\textit{Johnson v. Zerbst}, 304 U.S. 458 (1938) (applicable only to the federal courts), had clearly shown that the Sixth Amendment demands adherence to the principles set forth in \textit{Powell}. The right to counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." \textit{Id.} at 462. In a federal criminal proceeding the trial court must protect that right for all defendants. The defendant must be represented by counsel unless he intelligently and competently waives that right. Otherwise (and regardless that it is a capital or non-capital case), the court must appoint counsel for the defendant in order to maintain jurisdiction and proceed to conviction. \textit{Accord}, United States v. \textit{Morgan}, 346 U.S. 502 (1954); \textit{Glasser v. United States}, 315 U.S. 60 (1942); \textit{Walker v. Johnston}, 312 U.S. 275 (1941) (failure to request plea of guilty is not intelligent waiver).

See also, \textit{FED. R. CRIM. P.} 4(b), 15(c), 44. (The Sixth Amendment is implemented in federal prosecutions through these rules.).

\textsuperscript{42} 372 U.S. 335 (1963). There was no dissent. The court reversed a Florida conviction in which the defendant had requested and been denied court appointed counsel, although he was indigent. Florida law required court appointed counsel in capital cases only. The major import of the decision was its application of the Sixth Amendment, for only four states, Florida, Alabama, North Carolina, and South Carolina, did not already provide counsel for indigents in all felony cases. Twenty-two states filed \textit{amicus curiae} briefs asking that \textit{Betts v. Brady}, \textit{infra} note 43, be overruled, for it was "an anachronism when handed down."

\textsuperscript{43} 316 U.S. 455 (1942). The facts in \textit{Betts} were remarkably similar to \textit{Gideon}. The defendant had likewise been refused court appointed counsel in a Maryland trial court for a robbery charge. But the United States Supreme Court declined to reverse the conviction because the majority felt that the concept of due process required by the states under the Fourteenth Amendment did not incorporate the specific guarantee of the Sixth Amendment, but must depend instead, on appraisal of all the facts, and the "fundamental fairness" to the defendant.

The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions in the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the \textit{totality of facts} in a given case. That which may, in one setting, constitute a denial of \textit{fundamental fairness} shocking to the universal sense of justice, may, in other \textit{circumstances} and in the light of other considerations fall short of such denial. \textit{Id.} at 462. (Emphasis added.)

Prior to \textit{Gideon}, "fundamental fairness" required appointed counsel in non-capital cases only where the gravity of punishment for the crime, age and education of the defendant, complicated by the nature of the offense and charge was so apt to result in injustice without counsel. See \textit{Cash v. Culver}, 358 U.S. 633 (1959); \textit{Herman v. Claudy}, 350 U.S. 116 (1956); \textit{Gibbs v. Burke}, 337 U.S. 775 (1949); \textit{Uveges v. Pennsylvania}, 335 U.S. 437 (1948).

Amendment embraces the Sixth Amendment as “fundamental and essential to a fair trial,” and requires appointment of counsel for an indigent defendant in a state court as in a federal court, in all felony proceedings, and at all “critical stages” of a criminal prosecution.

One year after Gideon, the reasoning of Spano was ultimately adopted by a majority of the court in Massiah v. United States. Incriminating statements “deliberately elicited from him after he had been indicted and in the absence of his counsel,” deprived the defendant of his Sixth Amendment “basic protections” and were, therefore, inadmissible at his trial. The trend was becoming clear; the right to counsel as idealized in Powell was approaching reality.

Still, the significance that the Fifth Amendment might have had relative to police interrogation was not revealed in the cases. A careful analysis of the situation indicates three probable reasons for this peculiarity. First, federal criminal proceedings are governed by the Federal Rules of Criminal Procedure, of which, Rule 5 requires the “prompt arraignment” of an accused in order to insure that he will be apprised of his right to counsel, or appointment thereof if he is indigent, and informed of his other rights including his constitutional privilege to remain silent. When there has been an unnecessary delay in arraigning the

45. Id. at 342. Betts had said the “. . . appointment of counsel is not a fundamental right, essential to a fair trial.” (Emphasis added.) 316 U.S. 455, 471 (1942).
46. Id. at 339-340. See also Fed. R. Crim. P. 44, note 41 supra.
47. Id. at 344-345. The opinion here quoted Powell v. Alabama, 287 U.S. at 68-69 (1932), note 12 supra.
48. Massiah v. United States, 377 U.S. 201 (1964). The defendant, while out on bail after indictment, made certain incriminating statements to his accomplice, who had secretly agreed to cooperate with federal agents. An automobile was “bugged” to transmit by radio, conversations between himself and this accomplice (also co-defendant), to an agent out of the defendant's sight and without his knowledge. Over objection, the agent's testimony was admitted at the defendant's trial. The United States Supreme Court reversed the conviction, holding that use of the statements so obtained after indictment and in the absence of the defendant's attorney, violated the Sixth Amendment's guarantee of the right to the "Assistance of Counsel." The Court felt that the post-indictment stage is within the period of judicial proceedings.
49. Id. at 206.
50. The Court rested its decision significantly on the principles set forth in Spano and Powell, quoting profusely from each; that the right to counsel contemplates the opportunity for effective representation.
51. See notes 30, 31 supra, and accompanying text.
53. "Without unnecessary delay" under Fed. R. Crim. P. 5, means that he may be booked by police.
55. The rule is not applicable to the States. See Gallegos v. Nebraska, 342 U.S. 55 (1951).
accused, the McNabb-Mallory54 rule renders any incriminating statements made by him prior to such an arraignment inadmissible per se. As a result of this procedure, the Court never had to squarely face and decide the issue of the existence of a Fifth Amendment privilege to remain silent during interrogation.

Second, the Fifth Amendment was not applicable to the states55 and a majority of the Court repeatedly found no need to employ it in terms because the Fourteenth Amendment standards of due process voluntariness, when applied to the accused's statement, seemed to adequately encompass the privilege.56 Finally, as noted earlier,57 many authorities felt that the privilege against self-incrimination was applicable only to prevent compelled testimony at formal court proceedings, or the like, and historically had no place in police interrogation.

But progress in the formulation, indeed, the application of constitutional justice would not be barred by mere historical conflict. In 1964, a 5-4 majority58 of the United States Supreme Court decided two cases, a week apart, which form the basis of the Miranda decision. Taken together, Malloy v. Hogan59 and Escobedo v. Illinois60 might well epitomize the instant opinion as would an artist's sketch resemble his finished painting.61

Malloy incorporated62 the Fifth Amendment privilege against self-
incrimination into the Fourteenth Amendment and thereby obligated the states to take cognizance of the privilege and its federal constitutional implications. The opinion by Justice Brennan stated that the due process confession cases recognized:

[T]hat the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . The Fourteenth Amendment secures against state invasion 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 untrammelled exercise of his own will. . . .

The forceful inference in *Malloy* that the privilege against self-incrimination applied to police interrogation permeated Justice Goldberg's entire opinion in *Escobedo*. But even more significant is that the decision in *Escobedo* rested on the Sixth Amendment right to counsel which was held to attach whenever the investigation focused on an accused, *impliedly* in order to protect his Fifth Amendment privilege and thereby effectuate the right to counsel at trial. A rule less effective "would make the trial no more than an appeal from the interrogation, and the 'right to use counsel at the former trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination.'"  

63. See note 31 supra.


Justice Harlan, in his dissenting opinion, noted that none of the due process confession cases, *supra* note 31, ever made reference to the Fifth Amendment, although he admitted that they do "carry an implication that coercion to incriminate oneself, even when under the forms of law . . . is inconsistent with due process." *Id.* at 15-16 n.1. See also, Rogers v. Richmond, 365 U.S. 534 (1961).

Also worth noting is Justice White's comment in his dissenting opinion in *Escobedo* v. Illinois, *infra* note 65, at 499. "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."


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. *Id.* at 485. (Emphasis added.) 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. *Id.* at 486.

66. Most subsequent cases in state courts, and in many federal courts, have disregarded the force of *Escobedo* as it was intended by the court, through interpretation of the case as limiting itself to the circumstances and facts therein: a specific denial of request to see one's lawyer and failure of the police to warn the accused of his right to silence while in police custody. The last sentence of the opinion says that, ". . . under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. 487, 492 (1964). (Emphasis added.) See, e.g., United States v. Drummond, 354 F.2d 132 (2d Cir. 1965); United States v. Cone, 354 F.2d 119 (2d Cir. 1965); Thompson v. Cox, 352 F.2d 488 (10th Cir. 1965); Montgomery v. State, 176 So.2d 331 (Fla. 1965); Mefford v. State, 235 Md. 497, 201 A.2d 824 (1964); People v. Agar, 44 Misc. 2d 396, 253 N.Y.S.2d 761 (1964); State v. McLeod, 1 Ohio St. 60, 203 N.E.2d 349 (1964).

67. *Id.* at 487.
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. 68

III. Miranda v. Arizona

In Miranda the Court rested its decision squarely on the Fifth Amendment privilege against self-incrimination, emphasizing the necessity for providing "proper safeguards" to protect the right. "The presence of counsel... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege... [in order to effectuate] the protection of rights at trial." 69 This it said, was actually the purpose of the Escobedo decision.

The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." Mapp v. Ohio, 367 U.S. 643, 685 (1961). 70

The impetus behind the decision is clearly the Court's distrust for police interrogation methods. Emphasizing that interrogation takes place

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68. Id. at 490-91. (Emphasis added.)
69. Miranda v. Arizona, supra note 64, at 1623.
70. Id. at 1624. (Emphasis added.)
in secrecy which "results in a gap in our knowledge as to what in fact goes on in the interrogation rooms," the opinion utilizes various police manuals to demonstrate that modern methods are psychologically designed to "persuade, trick, or cajole [the accused] out of exercising his constitutional rights." Concluding that the Fifth Amendment privilege against self-incrimination is "the essential mainstay of our adversary system," the Court is forced to accept such inherently coercive methods as a violation of the absolute right to remain silent.

We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

For these reasons the Court asserted that the warning to one about to be interrogated was essential to assure his knowledge of the right to remain silent—"the threshold requirement for an intelligent decision as to its exercise." But:

More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.

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71. Id. at 1614. The Court's concern over such secret police interrogation practices is not a new one. See, e.g., Columbe v. Connecticut, 367 U.S. 568 (1961).
72. E.g., INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1959); see also, Gerber & Schroeder, CRIMINAL INVESTIGATION AND INTERROGATION (1962).
Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." Miranda, supra note 64, at 1614.
The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than to court failure by asking the subject whether he did it. Id. at 1615.
[T]he setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advise. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights. Id. at 1617.
73. Miranda v. Arizona, supra note 64, at 1617.
74. Id. at 1620.
75. Ibid.
76. Id. at 1624.
The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process....

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.77

Finally, recognizing the settled rule that "the right to be furnished counsel does not depend on a request,"78 the Court stated:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.79 At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.80

Logically, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given,"81 or from a silent record, when there has been a confession. Furthermore, "there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."82

77. Id. at 1624-26. (Emphasis added.)
78. Id. at 1626 (quoting Carnley v. Cochran, 369 U.S. 506, 513 (1962)).
79. The opinion said here by footnote:
   If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements. Id. at 1627-28 n.44.
80. Ibid. (Emphasis added.)
81. Ibid.
82. Ibid.
It makes no difference whether the statements made by an accused were "direct confessions" or "admissions," inculpatory or exculpatory, because in the absence of proper warnings or a valid waiver "no evidence obtained as a result of interrogation can be used against him."83

The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.84

In retrospect, *Miranda* clarifies the Fifth Amendment privilege against self-incrimination together with its Knight Protectorate, the Sixth Amendment right to the assistance of counsel. Under our accusatorial system, the privilege is a person's *absolute* right which cannot be defeated. It is the essential guarantee of his freedom of choice to speak or remain silent in the face of criminal investigation. It insures that his accusers cannot coerce from him incriminating communications of any sort. The privilege attaches immediately whenever the legal authorities intentionally place an individual in jeopardy of incriminating himself, and every device must then be employed to protect the *opportunity* for its free exercise or intelligent waiver. The concept of constitutional justice implores that in order to effectively protect his privilege, the accused be entitled to the assistance of counsel familiar with the law, *i.e.*, an attorney who can fully comprehend the total implication and propriety of the exercise or the waiver of that privilege. Therefore, the "new" right is double-barreled: American standards of criminal justice demand that whenever an individual may constitutionally invoke his Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to the assistance of counsel should automatically spring to the forefront so as to *effectively* safeguard his constitutional guaranty.

Justice Clark found himself "unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough."85 His primary concern is with the new exclusionary rule which "requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof," should the police fail to follow the procedures outlined in the opinion as prerequisite. "Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient."86 Moreover, none of the police manuals, or the practices set forth therein and referred to by the majority, appear in the record of the decided cases, and there is no reason to assume, therefore, that custodial interrogation is coercive per se. The Justice would not apply the Fifth

83. Id. at 1629-30. See also, note 108 infra and accompanying text.
84. Id. at 1629.
85. Id. at 1640-41.
86. Ibid.
Amendment privilege so "arbitrarily," rather "In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary."  

In two separate opinions by Justices Harlan and White (each joined in by the other and Justice Stewart), the remaining three dissenters solidly opposed the majority's application of the Fifth Amendment to police interrogation, finding neither historical or case precedent as a basis for the decision. They are severely concerned that the new procedural requirements will totally emasculate a most valuable tool for criminal investigation and return more confessed criminals to society than can be justified, especially without more proof (other than the police manuals) that police interrogation is as inherently coercive as the majority describes. Justice Harlan points out that of the twenty-seven states plus the United States who joined the three party-states as amicus curiae, "No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own."  

These dissenters can find no reason in logic or law for abandoning the due process voluntary confession rule in its contemporary and sophisticated form; they would continue to apply that test to the facts of each case.

IV. ANTICIPATIONS AND IMPLICATIONS

Now that the due process voluntary confession rule has been overruled future decisions on the admissibility issue will most likely focus on three areas: (1) whether there was a valid waiver of rights prior to the making of the statements; (2) whether the accused's freedom was sufficiently restrained at the time he made the statement; (3) whether evidence uncovered through some violation of the accused's rights was properly admitted or excluded. Moreover, what are the "outer limits" of the Fifth Amendment privilege?

A. Valid Waiver

The Court in *Miranda* set forth the proposition announced in previous cases, that one may waive his privilege against self-incrimination or his right to counsel, but that he can only do so "knowingly and intelligently." The prosecution must now assume the burden of establishing such a waiver before the statements may be admitted into evidence. Furthermore, a waiver may be cut off or withdrawn.

87. Id. at 1642-43. (Emphasis added.)
88. Id. at 1652.
There can be no waiver until the accused has knowledge of the right or privilege and an opportunity to exercise it. The Court declared that this required knowledge cannot be presumed because only if he has actually been told of his rights can there be any assurance that he was aware of them. Because the existence of the right is independent of any request, a fortiori no request is necessary. For the same reasons, unless an accused knows of his rights he cannot intelligently waive them. Therefore, the record must reflect that he was actually apprised of his rights before the court can even reach the waiver issue.92

The problem of waiver will invariably arise whenever the prosecution attempts to place into evidence statements made by an accused to the police in the absence of counsel. If the statements were taken during a transcribed interrogation session, the record will provide the court with adequate information in order to evaluate admissibility requirements. But otherwise, what will be sufficient corroboration to demonstrate a valid waiver? What factors go into making up a valid waiver? Are those factors different for waiver of the privilege than for waiver of counsel?

The well defined body of case law applicable to waiver in the field of search and seizure will undoubtedly prove helpful as a guideline. An individual may waive his right to require the police to first obtain a warrant, by either inviting or consenting in fact to the search. However, coercion cannot be used to gain such consent, and it may be presumed if an officer demands or even requests admittance under color of authority.93 The presumption against waiver of constitutional rights requires "clear and convincing" proof that consent was freely and intelligently given.94 Thus, "waiver" while in custody, despite the lack of apparent pressure, may not be considered as freely or intelligently given under some circumstances because of the show of force and the superior authority which.

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92. Id. at 1626-28.
94. Gatlin v. United States, 326 F.2d 666 (D.C. Cir. 1963); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); United States v. Page, 302 F.2d 81 (9th Cir. 1962); Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).
the police are able to display.\textsuperscript{95} The "false bravado" test\textsuperscript{96} may often be applied to test the validity of the waiver when such coercion is indicated, although the record clearly reflects that the accused had knowledge of his rights. Moreover, consent cannot be obtained through subterfuge.\textsuperscript{97}

Assuming then, that the accused had been advised of his rights as required, the remaining issue is whether he had intelligently waived them before he spoke. One argument can be made\textsuperscript{98} that a layman cannot intelligently waive his privilege against self-incrimination. Before a person can intelligently waive the privilege he must understand the implication of his statement, and whether the communication would be incriminating implies a knowledge of the law.\textsuperscript{99} Matching a highly skilled interrogator, or assistant prosecuting attorney up against a layman who has "waived" his right to have an attorney present is really no contest. It could be said, therefore, that it is only counsel for the accused who can intelligently initiate the waiver of the privilege. \textit{A fortiori}, how can a layman intelligently waive his right to counsel?

But this result goes too far. Most courts have held that after a warning by police regarding the right to silence a confession given was a valid "knowing" waiver of the privilege.\textsuperscript{100} "However, the burden must be on the state to establish that in fact the defendant already had full knowledge of his rights; that he understood that an attempt to exercise them would not be thwarted or penalized; and that with such knowledge he acted entirely voluntarily."\textsuperscript{101} Admissibility then, will obviously rest largely on an examination of the \textit{facts and circumstances} to determine the \textit{voluntariness} of the statement.

The giving of warnings should not of itself prevent the obtaining of a confession; this has been the experience of the FBI and other law enforcement agencies.\textsuperscript{102} Having an attorney present during the

\textsuperscript{95} See Channel v. United States, \textit{supra} note 94; Canida v. United States, 250 F.2d 822 (5th Cir. 1958).
\textsuperscript{96} Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).
\textsuperscript{97} Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of a small-time criminal. But, however it be characterized it hardly establishes willing agreement that the officers search the household without first procuring a warrant. Comparable statements have been held insufficient where the victim of the search was safely in his home, his place of business, or in his automobile.
\textsuperscript{98} See Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953).
\textsuperscript{100} See notes 65, 67 \textit{supra}, and accompanying text.
\textsuperscript{101} See, e.g., Latham v. Crouse, 338 F.2d 658 (10th Cir. 1954).
\textsuperscript{102} White v. Hancock, 355 F.2d 262, 263 (1st Cir. 1966). Cf., cases cited note 98 \textit{supra}.
interrogation questioning, however, is obviously another matter. The now famous statement of Justice Jackson amply illustrates the point: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Nevertheless, in most cases the accused will not assert his right to have an attorney present because he will not want the police to infer that he has something to hide or that he may be guilty and that he needs his attorney to protect him. On the other hand, this may be one area in which the "false bravado" test should be applied in order to establish whether or not the accused really waived his right to have an attorney present.

B. Sufficient Restraint

The waiver question may extend into yet another area: whether one's freedom was sufficiently restrained to have required an appraisal of his constitutional rights at the time certain incriminating statements were made, or which led to other incriminating evidence. Of course Miranda recognized that, "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." But when is one's freedom sufficiently restrained?

The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Obviously, the Court's interpretation of the time at which the privilege attaches was intended to be liberal.

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

104. Miranda v. Arizona, supra note 64, at 1629.
105. Ibid. (Emphasis added.)
106. Id. at 1612. (Emphasis added.)
In essence, with these limits as a guide, the issue must be resolved on particular facts and circumstances first put to the trial judge, and ultimately determined by a jury. But noteworthy, is the Court's reference after the above quote, that, "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused."\(^{107}\)

**C. The "New" Exclusionary Rule**

The third area of anticipated conflict arises from the following statement by the Court:

> But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.\(^ {108}\)

The problem then, centers on the full meaning of the Court's language, which is couched in very absolute terms.\(^ {109}\) If, in fact, all evidence is to be excluded \emph{per se}, then the Court will have created a new rule of admission and exclusion in the field of constitutional law which reaches beyond comparable rulings. Even on the basis of the vitality of the right involved such an all-inclusive rule would be difficult to explain.\(^ {110}\)

Under due process standards an involuntary confession could not constitutionally support a conviction, even in part, and regardless that the record revealed sufficient additional evidence to support it.\(^ {111}\) Most likely, then, the new exclusionary rule will be applied analogously to the Fourth Amendment exclusionary rule,\(^ {112}\) which is sometimes referred to as the "fruits of the poisonous tree"\(^ {113}\) doctrine, and which excludes any evidence uncovered as the result of an illegal search or seizure. This position seems tenable because of the similarity of the terms used to designate the two rules, and further because of the often recognized compatibility of the Fourth and Fifth Amendments.\(^ {114}\)

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107. \emph{Id.} at 1612 n.4.
108. \emph{Id.} at 1630. (Emphasis added.)
109. It is worth noting that in many states an accused's silence after a direct accusation has been admissible into evidence. See 4 \emph{Wigmore, Evidence} §§ 1071-1072 (3d ed. 1940). In \emph{Miranda} the Court made it clear that such attempts violated the defendant's constitutional rights.
110. In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. \emph{Id.} at 1625, n.37.
111. It is interesting to note that such an operation of the rule is the primary fear of the dissenting Justices. See supra note 89, and accompanying text.
115. See, \emph{e.g.}, Schmerber v. California, -- U.S. --, 86 S.Ct. 1826 (1966).
Although the Fourth Amendment exclusionary rule is almost uniformly applied to exclude evidence from the trial of the accused which was uncovered as a result of a violation by the police of his constitutional rights, at least two exceptions are applied whenever justified by the circumstances. The evidence may be held admissible when its discovery is so unrelated to the illegal search "as to dissipate the taint," or if the prosecution can demonstrate that it would have been uncovered anyway.

However, because these exceptions are vague, to say the least, a better rule has been suggested: a "but for" test which would exclude any evidence which the police would not have obtained but for their constitutional violation. This test would effectively safeguard the defendant's constitutional rights, but would practically permit the introduction of evidence which could be used without the danger of infringing his rights.

The new exclusionary rule will not entirely protect those individuals who are subjected to police harassment, or those "picked-up" as mere suspects for the purpose of determining whether there is sufficient evidence for a charge. Such arrests have also been utilized to provide an opportunity for the prosecutor to extract evidence from an accused in order to perfect his case, or to elicit a confession and could conceivably continue as long as the proper warnings and safeguards are employed. Similarly, one case in recent years declared that a voluntary confession following an illegal arrest was not invalid per se, and presumably Miranda will not change that rule, providing, however, that adequate warnings are given and that a valid waiver can be demonstrated. Because of the decision, state legislatures will probably establish directives that should make such police practices too burdensome for the most part.

It is clear that henceforth the police must necessarily be more sophisticated in the exercise of their duties. They must be cautious, lest their field investigation so center on a person as to amount to a restraint of his freedom, at which time he would become entitled to proper warnings should the officer wish to constitutionally assure the admissibility of his information. And because the new requirements for constitutional safeguards could materially affect undercover work, whenever the investiga-

tion begins to focus on the accused, investigating officers must exercise judgment in their manner and methods to prevent encroachment of the suspect's constitutional rights, and thereby render useless the fruits of their efforts. Admittedly, a value judgment at best, might raise the issue whether a person's freedom had been restrained.

We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high.\(^2\)

At the same time, police investigation to secure extrinsic evidence will now become more vital to successful prosecution. In view of the warning and waiver requirements, prosecuting attorneys will seek to avoid, wherever possible, the heavier burden of demonstrating a "knowing and intelligent" waiver. Police departments, as well, are very concerned with the arrest-conviction rate which is often used to gauge their efficiency. But, ineffective law enforcement cannot be tolerated, whatever the reason.

All this points to the greater financial expense involved—the dollar and cents increase which society will have to bear for modern effective law enforcement. Our policemen will have to be more capable and competent, more highly trained, and consequently better paid.\(^1\) Additional technological devices for better crime detection will be needed to fill in the gap caused by the loss of the confession as a device. More detailed police procedures will require expanded administration facilities. A larger and more effective public defender agency is inevitable. Finally, a new form of "deposition" recording of interrogation sessions will most certainly be required.

**D. Bugging Devices or "Here We Go Again"**

Before leaving this area, the question may be posed how one's constitutional right to counsel and privilege against self-incrimination will be affected by police undercover work through the use of wire-tapping or other secret "bugging" devices used to secure information from a suspect by *listening* to his private conversations. It could be argued that by analogy to *Massiah*, *Brock v. United States*,\(^1\) and other search and

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121. Several states have already enacted minimum law enforcement training standards for policemen in recognition of the need for more qualified officers. Furthermore, academic training in police science and administration is presently being offered by some forty institutions of higher learning, e.g., Washington State University, UCLA, and Michigan State University. The problems and suggestions are commendably approached by *Leonard, Police Organization & Management* (2d ed. 1964), and *Wilson, Police Administration* (2d ed. 1963).
122. 223 F.2d 681 (5th Cir. 1955).
123 F.2d 681 (5th Cir. 1955).

After arresting three men at a moonshine still, federal agents then proceeded to a nearby house to find a fourth man, Brock. Through an open window in the house in which Brock was sleeping, the agents propounded suggestive questions to him after they noticed
seizure cases which have discussed the Fifth Amendment influence, any evidence obtained from such secret investigations was obtained illegally, in violation of the suspect's constitutional rights. If the privilege, and therefore, the right to counsel, attaches whenever the investigation centers on the accused, or whenever the authorities actively place him in a position whereby incriminating statements could be elicited from him, then that point should be reached whenever the police utilize their secret listening devices to uncover incriminating evidence from the suspect's communications.

It has been the law for some time that exploratory and general searches to find incriminating evidence are unconstitutional, and that private papers introduced to demonstrate evidence of a crime violate the Fifth Amendment. The force of *Miranda* should also exclude any evidence uncovered as a result of the Government's use of the accused's private statements which were elicited through means which deprived him of an opportunity to exercise his privilege. The burden would fall upon the prosecution to establish either that the defendant waived his privilege knowingly and intelligently, or that the evidence would have been revealed anyway. Obviously, the former is insurmountable; one who is without knowledge of the investigation has no more opportunity to exercise his rights than one who has no knowledge of their existence. Proof that the evidence would have been uncovered regardless should be the only choice open to the prosecution, and that will require some real maneuvering in many cases.

Evidence obtained at the end of a whip is no less voluntary than that derived by insidious and subtle means where the opportunity 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. Where that fair chance is not afforded him, evidence obtained in violation of his right is not only inadmissible against him, but it is incapable of becoming the formulation for the violation of his rights under the Fourth Amendment. Freedom from unreasonable search would be a delusion indeed, if evidence obtained through compulsory self-incrimination may be used as a basis for violating that right.

he was talking in his sleep. Based on his self-incriminating answers the agents, without a search warrant, entered the house and arrested him. The statements, together with private papers found on Brock's person and in a dresser drawer, were admitted into evidence at the trial which resulted in his conviction for violation of the Internal Revenue laws relating to moonshine liquor. The Fifth Circuit Court of Appeals reversed the conviction, holding that the statements and papers were constitutionally inadmissible because they were secured in violation of the Fourth and Fifth Amendments.

The essence of the issue is also a well known axiom: substance over form. The State should not be permitted to do indirectly that which the Constitution prevents it from doing directly. The meaning of the privilege implores the opportunity to exercise it, and the purpose of constitutional safeguards is to assure that the Government cannot constructively defeat that opportunity.

V. LEGISLATIVE SUBSTITUTES

Throughout the opinion in *Miranda* the Court declared that the required warnings were “the procedural safeguards to be employed, unless other fully effective means are devised.” Indeed, the Court encouraged Congress and the states to adopt “a fully effective equivalent.”

Notably, the opinion applauded the FBI for its adherence to the required warnings system *without any decay in effective law enforcement.* Furthermore, it seems that the requirements under the Federal Rules of Criminal Procedure, imposed on federal agents if the evidence is to be admissible, adequately provide for most of the warnings to be given. But to the extent that the Rules do not provide for the “procedural safeguards” now required, Congress should revise them accordingly regardless of the FBI procedure now being employed. Particularly, amendments may be necessary to encompass the “new” right that an accused be continuously afforded an opportunity to exercise his rights, *i.e.*, to discontinue the interrogation whenever he chooses, or to have an attorney present in the alternative. This appears to be essential because of the strong presumption against waiver which the Government will be forced to rebut. Such proof will invariably require a revision of the Rules to provide for recording and transcribing the interrogation proceedings, unless formally waived by counsel for the accused, for although other forms of corroboration might be suggested, recording seems most appropriate. Otherwise, the burden of proof proving waiver may result in blocking effective prosecution.

Most of the states will be forced to respond to the Court’s ruling with more detailed legislative enactments. It might be wise for state legislatures

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Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the individual while promoting efficient enforcement of our criminal laws. *Id.* at 1624.

We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. *Id.* at 4537.

126. *Id.* at 1624, 1629.

127. *Id.* at 1632. See note 102 *supra.*
to adopt the Model Code of Pre-Arraignment Procedure, prepared by the
American Law Institute, when it is released in final form. Although it is
yet incomplete, the Code should soon be available in adoptable form,
especially in view of the *Miranda* decision which defines the required
procedures, some of which were missing in the original draft. Neverthe-
less, state legislatures should begin considering the Code or a suitable
substitute, to effectuate the required constitutional protections if depen-
dence upon vague court-made rules is to be avoided.

As last presented, the Code had provisions for most of the safeguards
required by the *Miranda* decision: the accused must be warned of his
right to silence promptly after arrest; he must be advised that he has a
right to call his attorney or family, and that they shall be permitted to see
him; he cannot be questioned for more than four hours at a time; and
notably, all interrogation must be recorded. This last provision assures
that any knowing and intelligent waiver will be able to be established
easily by the prosecution at trial, and conversely, will show an invalid
waiver. It also insures against secret interrogation. Furthermore, the Code
provides its own exclusionary rules for any testimony or evidence secured
in violation of its provisions, or resulting from procedures contrary to the
principles behind those provisions.

The Code should be modified to include required advice to the
accused that he has the right to have an attorney present during interroga-
tion. Also, as mentioned earlier, there should be provision that recording
of the interrogation period may be waived by an attorney representing
the accused. Moreover, some procedure for screening persons suspected
of crimes should be included, either in the Code or by specific state
legislation, in order to prevent unnecessary custodial time of innocent
persons who can be cleared without difficulty.\(^\text{128}\) Such legislation, together
with more skilled and competent policemen governed by minimum law
enforcement training standards, also to be legislated,\(^\text{129}\) should more
adequately safeguard our constitutional rights and simultaneously per-
form the essential task of upgrading esteem and respect for local police
departments.

**VI. Conclusion**

Explication of the right to counsel in the American system of criminal
prosecution has matured. Clearly, the moving force behind its develop-
ment has been the assertion that the purpose of the right is to assure a
meaningful trial to one charged with a criminal offense. Too often the
purpose of the trial, *i.e.*, the determination by a jury of one’s innocence
or guilt with the burden of proof on the State, was reduced to a formal
hearing from which an accused could appeal his “admitted” guilt. Indeed,

\(^\text{128}\) See Bator & Vorenberg, *supra* note 118, at 69.
\(^\text{129}\) See note 121 *supra*. 
the Fifth Amendment privilege against self-incrimination has little protective value when there has been only a qualified opportunity to exercise it.

*Miranda* begins with the basic premise that the privilege is an individual's absolute right. Free choice contemplates that first one must be given the opportunity to exercise it, and then he must be permitted its intelligent exercise. The only effective assurance of such a choice to an accused is his lawyer. Any activity on the part of the authorities which impedes the operation of those rights is inherently coercive.

The major inquiry today, then, is to what limits can the privilege be extended? In a single week the United States Supreme Court has told us that it does extend to "communicative" police interrogation and investigation for the purpose of securing evidence in order to prosecute, but not to compelled blood tests which are "non-communicative." Is that distinction now to be our guide? Conceivably, counsel is required whenever the privilege can constitutionally be exercised; does the right to counsel attach automatically at the same instant?

The answers lie somewhere within the traditional conflict between practical considerations for effective law enforcement and the personal freedoms under which we live. Under the American system the *methods* employed to establish his guilt are no less important than removing the criminal from society. Nevertheless, superior law enforcement remains as the strongest deterrent to crime. But there is a mature and effective compromise.

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.131