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MASSIAH, ESCOBEDO, AND RATIONALES FOR THE EXCLUSION OF CONFESSIONS

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The article explores the now famous cases of *Massiah v. United States* and *Escobedo v. Illinois* and their relation to the trend and rationales of the confession doctrines that have been developed by the Supreme Court of the United States during the last few decades. From his unique vantage point as a prosecutor turned academician, Professor Robinson critically examines the validity of the Court's assumptions and holding in *Escobedo* and projects the future impact of that opinion upon the administration of criminal justice in the United States.—EDITOR.

INTRODUCTION

Last year the Supreme Court of the United States decided two already famous cases which seem likely to have revolutionary impact on American criminal procedure.

Massiah v. United States[1] reversed the conviction of a merchant seaman who had been charged with violating the federal narcotics laws. Because of the quantity of drugs involved, federal narcotics officers suspected that the defendant was a part of a substantial criminal organization. The officers sought to continue their investigation into this enterprise and to obtain further incriminating information as to Massiah himself, although the latter had been indicted and released on bail. The cooperation of a co-defendant, one Colson, was obtained. Colson agreed that the government might install a radio transmitter under the seat of his car. A receiver permitted a government agent to overhear what was said. Massiah made incriminating statements to Colson in this car, and the agent divulged the conversation at the trial.[2] The defendant argued before the Supreme Court that the use of the radio transmitter constituted not only a violation of his fourth amendment right to be free from unreasonable search but a violation of the fifth and sixth amendments as well, since incriminating statements had been elicited from him in the absence of counsel. The Court put aside the fourth amendment argument.[3] The majority, speaking through Justice Stewart, held that the sixth amendment right to counsel had been violated by the introduction into evidence of the fruits of the interrogation. Relying on language contained in concurring opinions in *Spano v. New York*,[4] the Court stated:

> "... [*U*]nder our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." ***It was said that a Constitution which guarantees a defendant the aid of counsel at such a 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, might deny

[1] 377 U.S. 201 (1964).

[2] The government apparently decided not to attempt to use Colson as a witness to this conversation because he had previously informed the court that he and his family had been threatened with death if he testified. See Record, vol. 2, p. 16.

[3] In On Lee v. United States, 343 U.S. 747 (1951), another federal narcotics case, the accused while free on bail was visited on his own premises by a federal undercover agent with a radio transmitter concealed on his person. Testimony as to admissions made by the defendant was presented by a second federal agent who had received the radio transmissions. The Court sustained the conviction on the basis that there had been no unlawful invasion of the defendant's premises and hence no fourth amendment violation.

[4] 360 U.S. 315 (1959).

a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' "[5]

Escobedo v. Illinois[6] reversed a murder conviction of a defendant also on the basis that he had been denied the assistance of counsel. The defendant had been taken into custody for interrogation shortly after his brother-in-law had been fatally shot. After a number of hours of unsuccessful effort by the Chicago police to obtain incriminatory admissions from him, the defendant was released pursuant to a writ of habeas corpus. Ten days later, one DiGerlando, later a co-defendant, told the police that Escobedo had fired the fatal shots. The latter was then rearrested. Escobedo's lawyer, who had been in daily consultation with him since his prior arrest, reached the police station shortly after his client, but was not permitted to see him. The defendant's requests to consult the lawyer were likewise denied by the police. After confronting DiGerlando (who was also in custody), the defendant confessed, stating that he had hired DiGerlando to kill his brother-in-law and had driven him to the scene of the homicide because the deceased had been abusing Escobedo's sister. After a number of general criticisms of the utilization of private police interrogation to obtain confessions, the Court concluded:

"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 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 to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, 83 S. Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."[7]

The purpose of this article is to review and evaluate some of the rationales for the now broadening doctrines tending toward the exclusions of confessions[8] in trials of criminal cases.

I. Protecting the Trustworthiness of the Truth-Seeking Process

Empirical and Common Law Bases

The classic rationale for the exclusion of confessions, both as a matter of constitutional law and of the law of evidence, is that some confessions are believed to be untrustworthy.[9] The orthodox principle excludes confessions when the circumstances under which they were obtained are such as to indicate a substantial danger of inducement to make a false statement. Conversely, it assumes that confessions made in the absence of such inducement have probative value. This inference rests largely on the common sense notion that an innocent person will not ordinarily wish to imperil his freedom by making a false admission of criminal guilt. In the past this assumption has almost invariably been unquestioned.

The first Mr. Justice Harlan observed:

"... A confession, if freely and voluntarily made, is evidence of the most satisfactory character....

Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."[10]

Professor Wigmore expressed a similar view:

"In the first place, the only real danger and weakness in a confession—the danger of a false statement—is of a slender character, and the cases of that sort are of the rarest occurrence. No trustworthy figures of authenticated instances exist; but they are concededly few.

[5] 377 U.S. at 204.
[6] 378 U.S. 478 (1964).
[7] *Id.* at 490-491.

[8] For purposes of this article the term "confessions" is used unusually broadly, in the interest of brevity. It therefore includes not only admission of all of the elements of a crime, but also of individual elements, of subordinate facts relevant to culpability, and of exculpatory statements relevant to a showing of guilty knowledge or to self-contradiction.

[9] 3 Wigmore On Evidence §822 (3d ed. 1940). The common wording of this test in terms of volition is preferably avoided because of its inescapable ambiguity. See 3 Wigmore on Evidence §824 (3d ed. 1940); Kamisar, *What is an Involuntary Confession?* 17 Rutgers L. Rev. 728 (1963).

[10] Hopt v. Utah, 110 U.S. 574, 584 (1883).

> Now if it were a question of receiving the confession as conclusive, *i.e.* as equivalent to a plea of guilty, we might well prefer to be extremely cautious (as under the early traditional practice already described), and let the trial take its ordinary course. But as it is a mere matter of giving or not giving one more piece of evidence to the jury, as it is impossible to determine beforehand the real weight of any confession, and as the accused has ample opportunity of offering any facts affecting the weight of the confession, it is entirely unnecessary to bar out all confessions whatever by broad and artificial tests, merely on account of this slender and rare risk of falsity. To employ an anomalous occurrence as the basis of indiscriminate exclusion is not reasonable. It is simply, in the language of Chief Justice Paxson already quoted, an exhibition of sentimentalism toward the guilty."[11]

A probable exception to the general consensus of writers and courts as to the reliability of confession evidence in American trials is contained in the *Escobedo* assertion:

> "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. . . ."[12]

However, the authorities cited by the Court in support of the quoted statement[13] on the reliability of such a system are generally inapposite to the American system of criminal justice.[14]

The argument of those inclined to the view that "voluntary" confessions constitute evidence sufficiently credible to survive an exclusionary principle based on nontrustworthiness is not that the innocent never confess. It is not that given the full resources, unlimited time, and insensitivity to personal suffering of modern totalitarian states, systematic false confessions cannot be obtained. It is simply that the truth-seeking process is far more reliable when confession evidence is added to such other evidence as may be available than when it is excluded. At best the facilities which we have to assist a tribunal in determining disputed matters of historical fact fall short of the ideal. But other likely sources of information, such as reports of eyewitnesses, frequently relating to events imperfectly perceived and remembered and testimony accomplices, for example, do not, in the absence of

[11] 3 WIGMORE ON EVIDENCE §867 (3d ed. 1940). Professor McCormick came to a similar conclusion. McCormick, *Some Problems and Developments in the Admissability of Confessions*, 24 TEX. L. REV. 239, 246 (1946); MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §109 (1954). Compare the statement of Justice Jackson: "... [O]nce a confession is obtained it supplies ways of verifying its trustworthiness.... Such corroboration consists in one case of finding a weapon where the accused has said he hid it, and in others that conditions which could only have been known to one who was implicated correspond with his story. It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity." Watts v. Indiana, 338 U.S. 49, 60 (1949) (concurring opinion).

[12] 378 U.S. 478, 488 (1964).

[13] "See Committee Print, Subcommittee to Investigate Administration of the Internal Security Act, Senate Committee on the Judiciary, 85th Cong., 1st Sess., reporting and analyzing the proceedings at the XXth Congress of the Communist Party of the Soviet Union, February 25, 1956, exposing the false confession obtained during the Stalin purges of the 1930's. See also Miller v. United States, 320 F.2d 767, 772–773 (2d Cir. 1963); Reform and the Psychology of Totalism (1963); Rogge, Why Men Confess (1959); Schein, Coercive Persuasion (1961)." *Id.* at 489, n. 11.

[14] The printed title of the referenced Senate Judiciary material is "Speech of Nikita Khruschev Before a Closed Session of the XXth Congress of the Communist Party of the Soviet Union on February 25, 1956." The "analysis" is a brief summary and commentary on the speech by the Free Trade Union Committee (AFL-CIO). The confessions during the Stalin purges were obtained by long periods of physical torture and threats of death, according to the speech. See *id.* at 34–43, 53–56. For example, Stalin's personal instructions in the case of the so-called doctor's plot were quoted as "beat, beat and, once again, beat." *Id.* at 53–54. The *Miller* case involved the relevance of evidence of flight after the commission of a crime to establish guilt. It was apparently cited because of Judge Bazelon's footnoted reference to a bibliography of literary, psychoanalytic, and general sociological material. The Lifton and Schein books are studies of brainwashing in Communist China in which prisoners were subjected to torture, continuous confinement, and semicontinuous interrogation, often for periods of years. The Rogge book is also primarily a discussion of communist confession producing techniques, although it attempts to illustrate confession situations through the ages and to give a psychoanalytically-oriented interpretation.

The Court in *Escobedo* proceeded on to cite 8 Wigmore On Evidence 309 (3d ed. 1940) as to the author's argument against the abolition of the privilege against self-incrimination in judicial proceedings. While Wigmore did defend the privilege against advocates of compulsory disclosure in judicial proceedings his views on confessions were strongly to the contrary, as has been indicated above. Nevertheless, in view of the substantial overlap in policies between the confession rule and the privilege against self-incrimination, it is difficult to reconcile Wigmore's disparate treatment of them.

The applicability of the privilege against self-incrimination to the confession situation is discussed *infra* pp. 416–418.

(opinion of Chief Judge Bazelon); Lifton, Thought empirical data which we lack, appear to offer more reliable sources of information.

In both the Borchard and Frank studies[15] of convictions in which strong subsequent evidence later appeared that the defendant was innocent, confessions were not commonly blamed, although almost all of the cases arose at a time when control of police practices was less careful than today.

Both the Borchard and Frank[12] studies indicated the most common source of error to be reliance on eyewitnesses. If unreliability of confessions requires their exclusion, a fortiori, it would appear that eyewitness testimony should also be excluded.

Yet it cannot be doubted that the circumstances of in-custody interrogation present real problems for a trier of fact in determining the conditions under which a confession was made. The defendant characteristically must rely upon his own testimony, which is likely to be discounted because of self interest and because of contradictory testimony given by the police. *Escobedo* is itself an interesting example of this. The defendant alleged that he had confessed to hiring DiGerlando to carry out the murder on the promise by the police that if he (Escobedo) made a statement implicating DiGerlando, there would be no prosecution of himself. The Illinois Supreme Court initially reversed the conviction on the assumption that the confession was induced by this promise. On petition for rehearing the state pointed out that this assertion of the defendant was contradicted by the testimony of the police, and the Illinois court thereupon unanimously affirmed the conviction.[16] The Supreme Court noted the conflict in testimony, stated that it was authorized to resolve it itself, but found it unnecessary to do so in view of the new constitutional basis assigned by it for its decision.[17]

Constitutional Applications

The first reversal of a state case because of admission of a coerced confession occurred in 1936.[18] At least as early as 1941 it became evident that the Court was not exclusively concerned with trustworthiness in imposing a constitutional standard. *Lisenba v. California*[19] sustained a California conviction for murder. The Court, through Justice Roberts, stated:

> "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. The criteria for decision of that question may differ from those appertaining to a State's rule as to the admissibility of a confession."[20]

In *Ashcraft v. Tennessee*[21] the *Lisenba* dictum that the constitutional test was not one merely of trustworthiness was applied to reverse a conviction in which a confession obtained after 36 hours of semi-continuous questioning had been received in evidence. The Court held that the police conduct had been "inherently coercive" without explaining the principle applied. Justice Jackson in dissent protested that the Court had failed to determine whether the confession was *in fact* coerced and had ignored evidence indicating that the confession had been given under circumstances indicating that Ashcraft was in full control of his faculties at the time of the confession.[22]

In spite of decisions such as *Lisenba* and *Ashcraft*, which appeared to announce a broader exclusionary rule, as recently as *Stein v. New York*[23] the Court, through Mr. Justice Jackson, spoke as though the principle to be applied was still one based upon the desire to prevent conviction upon unreliable evidence:

> "Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. . . . [R]eliance on a coerced confession vitiates a conviction because such

[15] BORCHARD, CONVICTING THE INNOCENT (1932); FRANK & FRANK, NOT GUILTY (1957). Borchard's study of 65 erroneous convictions indicated that in 29 cases, the identification of the accused by the victim of a crime of violence was practically alone responsible for the error. In 15 additional cases mistaken identification was supplemented by circumstantial evidence. Perjury by hostile witnesses accounted for an additional fourteen cases. Of the seven cases involving confessions, one occurred after conviction. Two of the confessions were attributed by Borchard to improper questioning by police. In 20 of the cases the errors were uncovered by substantiated confessions of others. *Id.* at xiii–xix.

Of the 18 cases of erroneous conviction briefly described by Frank and Frank, Ch. 7, none involved confessions, but in 12, the solution was aided by confession of others.

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

[17] 378 U.S. 478, 484, n.4. The possibility of attempting to deal with improper inducement of confessions by law enforcement officers by preserving *more* evidence relating to the circumstances under which they were obtained is briefly discussed *infra*, pp. 430-431.

[18] Brown v. Mississippi, 297 U.S. 278 (1936).

[19] 314 U.S. 219 (1941).

[20] *Id.* at 236.

[21] 322 U.S. 143 (1944).

[22] *Id.* at 156–174.

[23] 346 U.S. 156 (1953).

> a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."[24]

Stein sustained the practice followed in New York and a number of other jurisdictions under which a trial judge left to the jury the decision of whether a confession was "voluntary," the Court merely making a preliminary finding that a jury could properly so determine. The jury was instructed not to consider the confession in the event they deemed it coerced. The rule in *Stein* thus presented no difficulty so long as the rationale of exclusion was lack of trustworthiness; it did, however, create dangers that a jury might give weight to a confession (that is, believe it to be truthful) even though they believed it to have been obtained by coercive means.

Stein was followed by widespread changes in the personnel of the Court. A few months after the decision Chief Justice Warren replaced Chief Justice Vinson, and the following year Justice Jackson, the leader of the group of justices who subscribed to something close to a trustworthiness test died, being succeeded by Justice Harlan. In 1956 Justice Brennan replaced Justice Minton, and two years later Justice Stewart followed Justice Burton. While the most decisive abandonment of previous criteria applied to confession cases was to await the later retirement of Justice Frankfurter—who had himself played a leading role in the attack on in-custody interrogation methods, particularly in federal courts—the alteration in attitude was soon visible.[25]

Rogers v. Richmond[26] applied the *coup de grace* to the orthodox principle of exclusion. After the defendant had been arrested and questioned for several hours without success, the police stated that they were going to have his wife taken into custody for questioning. The defendant then confessed. The Connecticut courts admitted the confession on the theory that the confession was voluntary in that the circumstances were not such as to make likely an untruthful admission of guilt. The Supreme Court unanimously was of the view that this standard was constitutionally impermissible.

The final blow to the trustworthiness standard was the formal repudiation of the *Stein* rule. This was accomplished in *Jackson v. Denno*,[27] the Court stating that *Stein* had been based on a reliability test, which had been rejected in *Rogers*.[28]

Thus it has become fully apparent that the Court in excluding confessions has not been solely —or perhaps even primarily—concerned with safeguarding the truth-seeking process. Other values are involved. An attempt must be made to consider them.

II. Requirements of the Constitution Itself

This article will not attempt a detailed reexamination of the origins of the fifth and sixth amendments or of their interpretation. The proposition submitted is a modest one: neither the words of the Constitution, its background, nor its essential policies requires wholesale rejection of confessions.

The language of the fifth, sixth, and fourteenth amendments to the Constitution does not compel general exclusion of confessions. Neither do their histories.

The privilege against self-incrimination at common law did not apply to situations where there was no official right to compel answers and hence did not apply to police questioning.[29] The confession rule came into existence a century after the origins of the privilege against self-incrimination.[30] While the Supreme Court in 1897 stated by way of dictum that the prohibition against coerced confessions was controlled by the fifth amendment,[31] the decision resulted in much criticism and was not followed in succeeding cases.[32]

[24] *Id.* at 192. Professor Paulsen has argued that the Court went beyond the trustworthiness rationale even in *Stein*, which indicated that the admission of a confession coerced by physical violence or threat of it would vitiate a conviction as being too untrustworthy. Paulsen pointed out that even such a confession may be corroborated and found to be reliable. Thus, he contended, the opinion is not fully supportable on the trustworthiness principle. See Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan L. Rev. 441, 428 (1954), See also Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 12 (1956); *cf.* Wigmore On Evidence §§856–859 (3d ed. 1940).

[25] *E.g.*, see Spano v. New York, 360 U.S. 315 (1959); Blackburn v. Alabama, 361 U.S. 199 (1960).

[26] 365 U.S. 534 (1961).

[27] 378 U.S. 368 (1964).

[28] *Id.* at 383–4.

[29] 8 Wigmore on Evidence §2252; (McNaugh. Rev. 1961); Morgan, *The Privilege against Self-Incrimination*, 34 Minn. L. Rev. 1, 18 (1949); *cf.* Comment, *The Privilege against Self-Incrimination: Does it Exist in the Police Station?* 5 Stan L. Rev. 459 (1953).

[30] 8 Wigmore on Evidence §2266 (McNaugh. Rev. 1961).

[31] Bram v. United States, 168 U.S. 533, 542.

[32] 3 Wigmore on Evidence §822, n.2, §823, n.5 3d ed. 1940); Beisel, Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 86–90 (1955).

The distinction between the privilege and the coerced confession rule was carefully noted in the first case constitutionally imposing the latter upon the states as a matter of due process of law.[33] Due process was held to proscribe the admission into evidence of a coerced confession, although at the time, the privilege against self-incrimination was not itself included within the fourteenth amendment protections.[34] Nevertheless more recent decisions broadening the scope of the involuntary confession rule to cover admissions which would not be barred on a lack of trustworthiness basis adopt policies also served by the privilege against self-incrimination. Furthermore, dicta in contemporary opinions of the Court indicate an inclination to rescue the notion that the privilege extends to police investigations.

In *Malloy v. Hogan*[35] the Court reversed a contempt conviction of a witness before a state judicial proceeding who declined to testify on grounds of self-incrimination. The Court based its argument in part on the state coerced confession cases which had been reversed under the fourteenth amendment, stating that those decisions, in ruling out statements secured with mild inducements, a fortiori would not permit a state to obtain incriminating admissions under threat of imprisonment.[36] The confession rule is applicable to situations where the process of questioning itself is subject to greater danger of abuse of the suspect, since the proceedings are usually secret, the personnel frequently more poorly trained, the suspect is not represented by counsel, and there is no impartial arbiter of the proceeding. In these respects, if there is an a fortiori argument, it must be made the other way, as indeed, it frequently has.[37]

In view of the broad coverage of the existing confession doctrine the matter might seem to be largely academic. However it is not at all academic if, by extending the privilege against compulsory self-incrimination to confessions situations, the Court will now require a showing of informed and purposeful waiver of the privilege. There is a hint in *Escobedo* that it may have this in mind: "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination. . . ."[38] Under such an approach, confessions traditionally deemed to have been voluntarily made to police or even to private persons may hereafter be excludable. The fifth amendment requirement of no compulsion, would, in effect, be replaced by a requirement of a showing of "intelligent and knowing" waiver. Such a result could not be attributed to the Constitution itself.

From the time of the adoption of the sixth amendment to 1932 there were almost no cases, either federal or state, on the right to counsel. The English background is uncertain, although it appears that the right to be assisted even by retained counsel in felony cases (other than treason) was not fully recognized until 1836.[39] The modern federal constitutional law of right to counsel was inaugurated with *Powell v. Alabama*,[40] holding that in capital cases the states were required to provide counsel for assistance at trial, with sufficient advance notice for preparation for trial. The right to other than retained counsel at trial in non-capital felony cases was not established in the federal courts until 1938,[41] or in the state courts until 1963.[42] The question of whether it was constitutionally permissible for a state to admit a confession obtained after refusal to permit a defendant to consult with his lawyer came before the Supreme Court in two cases in 1958. It was answered in the negative.[43] While these cases were probably overruled by *Escobedo*,[44] the reach of the right to counsel in investigative situations remains to be clarified by further decisions.

It is sometimes urged that the right of a suspect to remain quiet during police questioning being conceded, the encouragement of his exercise of that right by means of a vigorous privilege against self-incrimination and an extended right to counsel should not be protested.[45] However, it is one thing for society to establish a policy of not applying coercive sanctions against behavior and quite another for society to urge it. For example, one may grant a "right" to kill to prevent the escape of a felon without promoting its exercise whenever possible. If indeed there is a social interest in trying criminal cases on their facts, although an interest

[33] Brown v. Mississippi, 297 U.S. 278, 285 (1936).
[34] Twining v. New Jersey, 211 U.S. 78 (1908).
[35] 378 U.S. 1 (1964).
[36] *Id.* at 7.
[37] See *infra*, pp. 421–424.
[38] 378 U.S. 478, 490 n.14.
[39] See Powell v. Alabama, 287 U.S. 45, 60 (1932); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 Yale L.J. 1000, 1018–1034 (1964).
[40] 287 U.S. 45 (1932).
[41] Johnson v. Zerbst, 304 U.S. 458.
[42] Gideon v. Wainwright, 372 U.S. 335.
[43] Crooker v. California, 357 U.S. 433; Cicenia v. LaGay, 357 U.S. 504.
[44] See 378 U.S. 478, 491 (1964).
[45] See Note, *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 221 (1964).

which we have decided to be outweighed by an interest in avoiding coercive treatment of suspects, it does not follow that the former interest is to be disregarded in the absence of actual coercion.[46] It is obvious that the privilege against self-incrimination and the right to counsel can be applied so as to have a highly restrictive effect upon the obtaining of confession evidence. Whether they should be cannot be resolved in their own terms, but require independent assessments.

III. Deterrence of Illegal or Undesirable Police Conduct

It has sometimes been thought that the principle to be served by exclusion of confessions is the deterrence of the third degree[47] and other unlawful or undesired police conduct. The situation thus would be analogous to the common justification of the exclusion of evidence obtained as a result of an illegal search and seizure under the rule of *Mapp v. Ohio*.[48]

While there is undoubtedly an element of deterrent thinking in many of the confession cases, the principle is intelligible only if we understand what we are trying to deter.

[46] Compare Devlin, The Criminal Prosecution in England 48–50 (1960):

I have said that the accused's statement to the police often plays a great part in the prosecution's case....

How do I reconcile what I have said with the accused's right to silence? Does not the English system pride itself on having nothing to do with those inquisitorial methods which are said to be practised on the Continent and are designed to get the accused to convict himself out of his own mouth? ...

The answer to these questions is that while the English System undoubtedly does give the accused man the right to say nothing, it does nothing to urge him to take advantage of his right or even to make that course invariably the attractive one....

[47] According to Wigmore, the "third degree" originally meant the use of violence. It has been frequently extended to include non-violent interrogation, particularly by continuous questioning over an extended period of time. 3 Wigmore on Evidence §851 (3d ed. 1940). The Wickersham Commission defined it as the "employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime." National Comm. on Law Observance and Enforcement, Report No. 11, Lawlessness in Law Enforcement 19 (1931).

[48] 367 U.S. 643 (1961). "... [T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it'...." *Id.* at 656. See Linkletter v. Walker, 381 U.S. 618 (1965). Professor Paulsen, writing over a decade ago, seems to have taken this position with respect to the exclusion of confessions, to the extent the principle went beyond the requirements of reliability. See Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan L. Rev. 411 (1954).

There is surely a consensus that the Court should act to prevent the utilization of physical torture, as was involved in the 1936 case of *Brown v. Mississippi*;[49] yet there have been no state cases before the Supreme Court in which a finding of violence was made since that time.[50] There is also probably a consensus with respect to outrageous physical indignity such as that occurring in *Malinsky v. New York*.[51] One would expect that there is also a consensus on cases of very prolonged incommunicado interrogation.[52] The same may be said for threats of harm or promises of benefit which present any substantial likelihood of producing false statements,[53] although such exclusions are also fully justifiable on the trustworthiness of evidence rationale. The deterrence argument is relevant when the confession at issue was obtained as a result of an illegal search and/or an illegal arrest, although it is not yet clear whether a majority of the Court is willing to apply an exclusionary sanction in the case of confessions obtained after any illegal arrest irrespective of the circumstances.[54]

The problem of defining what we are trying to deter becomes an extremely difficult one, however, when the standard applied is whether the practices of the police "offend what may fairly be deemed the civilized standards of the Anglo-American world,"[55] or where the conduct of the police indicates "disregard of the standards of decency."[56] While Justice Frankfurter defended similar due process standards against the objection that they are predicated on concepts of natural law and in fact provide no standard for judgment,[57] Justices Black and Douglas have, on occasion, respectively found them "evanescent"[58] and "dependent upon the idiosyncrasies of judges."[59]

Recent decisions indicate that whatever the nature of the uncivilized standards, it is not now

[49] 297 U.S. 278.

[50] See Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems*, 19 Wash. & Lee L. Rev., 202 (1962).

[51] 324 U.S. 401 (1945) (defendant required to remain without clothing for extended period of time); see also, Bram v. United States, 168 U.S. 533 (1897).

[52] *E.g.*, Chambers v. Florida, 309 U.S. 227 (1940).

[53] *E.g.*, Lynum v. Illinois, 372 U.S. 528 (1963).

[54] See Wong Sun v. United States, 371 U.S. 471 (1962). (Statement made after illegal search followed by illegal arrest inadmissable.)

[55] Fikes v. Alabama 352 U.S. 191 (1957) (concurring opinion of Frankfurter, J.).

[56] Haley v. Ohio, 332 U.S. 596, 600 (1948) (opinion of Douglas, J.

[57] Rochin v. California, 342 U.S. 165 (1951).

[58] *Id.* at 177.

[59] *Id.* at 179.

required that they be such as to "shock the conscience."[60] For example, in *Haynes v. Washington*[61] the defendant having already orally confessed to a robbery, was told that he could telephone his wife only after he "cooperated" in reducing the statement to writing. This he did, and the statement was admitted at the trial. The Court held the confession involuntary and reversed the conviction.

However, the case most dramatically inconsistent with a deterrent rationale is *Massiah v. United States*.[62] In replying to the Solicitor General's argument that the Narcotics Bureau was justified in continuing its investigation into the criminal activities of the group of which defendant was a member, even after the defendant's indictment, the Court stated:

> "We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial."[63]

It seems clear that the Court's decision, in which six members joined, cannot be supported on a deterrent theory. To be sure, deception at the instigation of the government was involved, but this is a necessary concomitant of all undercover operations. More fundamentally, the Court did not predicate its decision on such deception in immunizing the defendant from its effects. The Court appears to accept the propriety of the further investigation itself.

To the extent that deterrence of the third degree or other undesired conduct by the police does play a role in exclusionary principles, an evaluation would have to seek to determine its efficacy. Unfortunately, here as elsewhere opinions are more easily discovered than fact. A pessimistic indication is a study of cases in a branch of the Chicago Municipal Court during the year 1950. In 4,673 out of 6,649 cases the defendant challenged the legality of the method of obtaining evidence. In 4,593 of these cases the Court suppressed the evidence. It should be noted that the cases heard by the Chicago Municipal Court involved the misdemeanor of gambling. The degree of deterrence may be greater in felony cases, as the police interest in successful prosecution rather than harassment may be increased.[64] The Chicago experience may also be atypical.[65]

In the area of confessions the exclusionary rules are utilized, not by all persons subjected to police interrogation, but only by those who are charged and who decide to contest their cases. In a study of arrests for investigation made by the police of the District of Columbia in the years 1960 and 1961 only about 6% of the persons thus arrested were actually charged.[66]

Even if all confessions were inadmissible, police would have motives for interrogating suspects in order to get leads to extrinsic evidence, to gain intelligence about crimes, as well as a sanction in itself.[67]

On the other hand, it seems reasonable to assume that a desire of criminal investigators to see their work bear fruition in convictions would lead to some negation of interrogation practices which are held to be illegal. Assuming this to be the case, some unmeasured and probably unmeasurable deterrent effect may be obtained.

IV. Equalitarianism Among Potential Defendants

It cannot be denied that confession is almost invariably inconsistent with the interest of a suspect

[60] The phrase is from *id.* at 172.

[61] 373 U.S. 503 (1963).

[62] 377 U.S. 201 (1964). The decision is summarized *supra* p. 1.

[63] *Id.* at 206-207 (Emphasis in original.)

[64] Note, *Searches and Seizures in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 Nw. U.L. Rev. 493, 497-499 (1952).

[65] See Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. L. Rev. 1083, 1157, n.250 (1959).

[66] District of Columbia Committee on Police Arrests for Investigation, Report and Recommendations (1962); See Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. Pa. L. Rev. 1182 (1952).

[67] See Maguire, Evidence of Guilt §4.002 (1959); Lafave, Arrest, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States 438-489 (1965). "This Court may, by the adoption of such a rule, outlaw confessions. But the police will not abandon their practice of questioning suspects after arrest and before arraignment. And not because of any disrespect for this Court and its teachings, but simply because society will not let them, because society cannot let them. The 'deeply rooted feelings of the community' will demand that those who murder and rape and would escape unknown—but for the confession following arrest—be at least unmasked though they may go unwhipped of justice." Brief for Respondent, p. 43, Escobedo v. Illinois, 378 U.S. 478(1964).

seeking to avoid criminal prosecution and conviction. While the factors that lead persons to confess are undoubtedly extremely complex and imperfectly understood, it is an easy inference that persons guilty of such a tactical blunder must be intellectually, emotionally, ethnically, or culturally disadvantaged. In a famous early confession case involving protracted interrogation, Justice Black mildly wrote for the Court:

> "The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless."[68]

Professor Beisel adds:

> "Seldom indeed do we hear of professionally trained men or experienced business men making confessions as to crimes of which they might be accused. Instead, under the present constitutional law of 'coerced' confessions, it is the frightened, the insecure, the weak, the untrained, the bewildered, the stupid, the naive, the credulous that are caught in the web. These are the ones who will talk to an experienced, well-trained police interrogator. Once they start talking, they talk themselves into jail. . . . No matter how fine we may think the present constitutional law of confessions to be, it does permit many of the discriminatory features of characteristics dividing and separating men into various social classes today to play an important, perhaps decisive, yet unarticulated, role in determining who shall or shall not be punished by the use of confessions. All the inequalities of native intelligence, environment, schooling, economic opportunity, racial origin, to name only a few, bear upon and are allowed to play an important part in securing confessions of guilt at the police station under the present constitutional law of 'coerced' confessions."[69]

The argument surely has emotional appeal. It would be incautious to assert that it may not have legal consequence as well in an age of advancing constitutional equalitarianism.[70] Relying primarily upon the equal protection clause, the Supreme Court has held that the states must take affirmative action to remedy inequality resulting from poverty during litigation itself, *e.g.*, as in providing appellate transcripts[71] and counsel.[72] *Gideon v. Wainwright*[73] while decided in terms of due process, has strong equalitarian motifs.[74] If the dull witted, the ignorant, the impulsive, the guilt-ridden are disadvantaged in the criminal process by improvident confession should not the legal system also attempt to provide a remedy? Is it not unfair to take advantage of such weakness?

In *Escobedo* the Court came close to indicating an affirmative answer to these questions: ". . . 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.[75] Taking this language for all it may be worth, it

[68] Chambers v. Florida, 309 U.S. 227 at 237–238 (1940).

[69] BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: Role of the Supreme Court 105–106 (1955). Note, *An Historical Argument for the Right to Counsel during Police Interrogation*, 73 Yale L. J. 1000, 1044 (1964) appears to make the same assumption. Empirical data is not cited for the notion that the economically or intellectually fortunate do not confess as readily when questioned as those less favored in these qualities, and the writer knows of none. To the extent the former may confess less frequently because of a lower incidence of criminality the argument seems to prove too much, assuming we are unwilling, for example, to abolish the law of theft because its impact is primarily on the poor. A conclusion that experienced criminals rarely confess seems to have a common sense plausibility, and is probably borne out in the case of professionals engaged in enterprises such as gambling and vice. It is doubtfully valid as to habitual sociopathic offenders. See generally, CLECKLEY, THE MASK OF SANITY (2d ed. 1950).

[70] See Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 Harv. L. Rev. 143, 143–149 (1964).

[71] Griffin v. Illinois, 351 U.S. 12 (1956).

[72] Douglas v. California, 372 U.S. 353 (1963).

[73] 372 U.S. 335 (1963) (requiring that states provide trial counsel for the indigent in felony cases).

[74] *Id.* at 344.

[75] 378 U.S. 478 at 490 (1964).

could be inferred that no confession would be admissible unless the suspect were advised not only of his right to remain silent, but also of the practical and tactical consequences of any statement. This interpretation is supported by the fact that Escobedo himself had extensively consulted counsel prior to confession. The Court emphasized that there was no evidence in the record that they specifically discussed what Escobedo should do in the event that his codefendant made a false accusation that he had fired the fatal bullets.[76] This, too, may be interpreted as requiring the tactical assistance of counsel. Yet in view of the careful stating of the holding, and in view of the more limited nature of the factual context of the case, the matter must be regarded as still undecided.

The basic inadequacy of the equalitarian argument, it is submitted, is that it misconceives the nature of the problem. Surely it does not follow that because skilled burglars carefully wipe their fingerprints off safe dials, that society must outlaw the use of all fingerprint evidence lest there be discriminatory utilization of such evidence against the "poor, the ignorant, the numerically weak, the friendless, and the powerless." It surely will not do to argue that because some clever or wealthy criminals avoid conviction that all should do so.[77] The lack of professionalism of many of those engaged in criminal conduct is a resource which society should be able to utilize. There seems to be no justifiable end in equal acquittal of the guilty.[78]

V. The Adversary System—Equalitarianism Between Prosecution and Defense

The analogy of the adversary system as it exists in the courtroom has been referred to in a number of decisions reaching conclusions that interrogation procedures in those cases fell below due process standards. In *Ashcraft v. Tennessee*[79] the Court stated:

> "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room."[80]

Justice Stewart, concurring in *Spano v. New York*,[81] put the matter dramatically:

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. 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."[82]

Justice Douglas, in a concurring opinion joined by Justices Black and Brennan, wrote in similar vein.[83] Justice Stewart had an opportunity to incorporate this view into the majority opinion in *Massiah v. United States*.[84] He took advantage of it.[85]

Similarly, in 1962 Justice Douglas wrote the opinion of the Court in *Gallegos v. Colorado*,[86] a case presenting a strikingly equalitarian rationale. The defendant was a fourteen year old boy who had been convicted of murder. He had confessed while in juvenile custody prior to the death of the victim. In holding that the admission of the confession violated due process the Court stated: " . . . A lawyer or an adult relative or friend

[76] *Id.* at 485.

[77] See Enker and Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 Minn. L. Rev. 47, 65 (1964).

[78] It is perhaps significant that the opinions of the Court in Griffin v. Illinois, 351 U.S. 12, 17 (1956), and Douglas v. California, 372 U.S. 353, 356–358 (1963) are couched in due process as well as equal protection terms, although the latter is given primary emphasis. The Hon. Nicholas deB. Katzenbach, Attorney General of the United States, has said recently, "But I never understood why the gangster should be made the model and all others raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap. I see no reason to distort the whole of the criminal process in this fashion. Because we cannot solve all crimes and convict all criminals is no reason to release those guilty whom we can convict." *The Bazelon-Katzenbach Letters*, 56 J. Crim. L., C. & P. S. 498 (1965).

[79] 322 U.S. 143 (1944).

[80] *Id.* at 154 (footnotes omitted).

[81] 360 U.S. 315 (1959).

[82] *Id.* at 327.

[83] *Id.* at 424–426.

[84] 377 U.S. 201 (1964).

[85] *Id.* at 204.

[86] 370 U.S. 49.

could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. . . ."[87]

A closely related view is contained in frequent assertion that American criminal justice is accusatorial rather than inquisitorial in nature. This language may be traced to *Watts v. Indiana*,[88] a case involving extensive detention and interrogation of the accused, in which Justice Frankfurter wrote for the Court:

> "To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.
>
> This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. . . ."[89]

Of course the statement that the adversary system characterized investigatory stages of the criminal case simply was not true.[90] Justice Frankfurter himself recognized this in his opinion in *Culombe v. Connecticut*.[91]

> "Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.
>
> . . . In any event, whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths."[92]

Whether the typical use of questioning of suspects in the investigative stage of a case is characterized as "inquisitorial" seems to depend on whether the writer disapproves of the practice and desires to argue his position with emotive language.[93]

The question of importance is not whether there is a difference between the trial process and the investigative process, but whether the difference is justified. It is submitted that it is. The adversary system at the time of preparation for trial and trial, including making available assistance of counsel, serves to collect and present evidence and law relevant to the resolution of the dispute. The decision in *Gideon v. Wainwright*,[94] was without dissent. It required substantial change in practice in only four of the states.[95] The adversary system, however, functions differently during the investigation of a case, particularly during the questioning of suspects. The adversary system during the questioning of suspects functions to suppress evidence in the case of the guilty, rather than to present it. Counsel at such a proceeding serves not only to prevent abusive questioning techniques, but to prevent all questioning.

This is not a matter of a suspect being advised of his constitutional rights. Counsel's primary function is surely not to advise the client that he is under no obligation to speak. Counsel's job is to give him tactical advice not to speak.[96]

[87] *Id.* at 54.
[88] 338 U.S. 49 (1949).
[89] *Id.* at 54.
[90] See 3 WIGMORE ON EVIDENCE §§817–820 (3d ed. 1940); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CAL. L. REV. 11, 16–18 (1962).
[91] 367 U.S. 568 (1961).
[92] *Id.* at 571. (Emphasis supplied.)
[93] See Watts v. Indiana, 338 U.S. 49, 60 (1948). (Concurring opinion of Jackson, J.)
[94] 372 U.S. 335 (1963) (holding that due process required the availability of defense counsel at the trial of felony cases).
[95] See Note, 73 YALE L.J. 1000, 1015 (1964).
[96] ". . . no competent counsel will allow his client to confess (especially would this be true in the case of appointed counsel whose failings are laid to the state), if only to avoid the ever increasing risk of having his competency attacked on another day and in another forum. . . ." Brief for Respondent, pp. 40–41, Escobedo v. Illinois, 378 U.S. 478(1964). See also Enker & Elsen,

It is true that since the large scale abandonment of the common law principle that evidence was not to be excluded, if relevant, on the basis that it was obtained by illegal means, defense counsel has a significant role to play in seeking to suppress evidence at the trial. Whether this role should be expanded to prevent the collection of evidence prior to trial—or more precisely, how far it should be expanded—remains open however.

It should be noted that immediately after the commission of the crime the perpetrator normally is in possession of extensive information concerning it. Frequently there are no innocent witnesses. Even when this is not the case, the witnesses may have imperfectly perceived the event, particularly when the offense was a violent one, or be unable to accurately recall it. Many will be unwilling to come forward to testify. Fingerprints are rarely recoverable.

Furthermore, it is almost invariably insufficient to show merely that a person accused of a serious crime committed the criminal act. There must be proof of criminal intent. Did the accused kill the deceased out of malice or in self defense? Did the accused take the vehicle with the intent to deprive the owner of its possession permanently or did he take it merely for a ride? Or did he believe that the owner consented to his use of it? Was the accused's presence in the building accompanied by burglarous intent, or was he engaged in a mere trespass? The answers to such questions are frequently known only to the perpetrators of the crimes. It surely is not obvious that the adversary system and notions of equalitarianism should be extended to secure the continuation of this situation in status quo. Justification for such an extension must be found in terms other than the adversary system itself.

VI. Privacy and the Dignity of the Individual

While the interest in individual privacy is primarily protected by the fourth amendment prohibition against unreasonable search and seizures, a close relationship to a broadly conceived privilege against self-incrimination has been frequently noted.[97] Perhaps the gravest interference with this interest in privacy occurs when an arrest is made for purposes of interrogation in the absence of probable cause.[98] An intermediate situation is frequently presented when the police have sufficient evidence to constitute probable cause for an arrest but insufficient basis to justify the filing of a formal charge.[99] Assuming a case in which there is sufficient reason to justify an arrest, or assuming questioning in the absence of an arrest, do interests in privacy and individual dignity preclude questioning?

At the outset it must be observed that such concepts are not unlike notions of "civilized conduct" in that they tend to depend on individual attitudes and values. Yet conventionally we have not thought that such interests prevent the putting of questions to witnesses and even suspects, in the absence of very prolonged interrogation or other abusive practices. We have, for example, even permitted grand jury subpoenas for witnesses and suspects.

Furthermore, there is evidence which suggests that the amount of time ordinarily required to interrogate a suspect is surprisingly short. A study in the District of Columbia[100] indicated that in 1960, of 172 persons arrested for investigation and subsequently charged 87 were charged after one hour or less and all except 7 were charged in under 12 hours. In 1961 of 138 persons arrested for investigation and subsequently charged the charge was filed in all but 10 cases within 8 hours or less.

A study of arrest and interrogation practices in California in two unidentified medium sized cities showed a range of interrogation times which varied between no interrogation and eight hours. The median in each case was between one and two hours.[101]

Bentham long ago observed in the context of the

Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev., 47, 66(1964); Cf. Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio St. L. J. 449, 498(1964).

[97] See, *e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886); Mapp v. Ohio, 367 U.S. 643, 646 (opinion of the Court) and 661–666 (concurring opinion of Justice Black) (1961).

[98] *Cf.* Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16 (1958); District of Columbia Committee on Arrests for Investigation, Report and Recommendations (1962); La Fave, Arrest (1965) Ch. 16; compare Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Cal. L. Rev. 47–50 (1962), (indicating situations where it is argued that detention in the absence of probable cause *to charge* is justified).

[99] See La Fave, Arrest (1965) Chs. 15, 17; Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 49 (1963) (indicating this situation to be quite common).

[100] District of Columbia Committee on Police Arrests for Investigation, Report and Recommendations (1962). See Barrett, *op. cit. infra.* n. 134 at 35–45.

[101] Escobedo confessed after approximately 1½ hours of interrogation. Brief for Respondent, p. 1.

privilege against self-incrimination that the hardship involved in obtaining evidence of guilt from the suspect himself was essentially the hardship of the eventual punishment rather than the interrogation.

> "What, then, is the hardship of a man's being thus made to criminate himself? The same as that of his being punished: the same in kind, but inferior in degree: inferior, in as far as, in the chance of an evil, there is less hardship than in the certainty of it. Suppose, in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's?"[102]

Those familiar with background investigations involving detailed probing of the subject's prior activities, friendships, and associations may realize that alternative means of investigation can impinge more harshly on notions of dignity of the individual and privacy than direct questioning of suspects. Questioning also appears to be more protective of individual privacy than is infiltration of groups suspected of criminality by persons acting in cooperation with police.

It must be remembered that interests in individual dignity and privacy are threatened not only by police interrogation but by the incidence of crime in our society as well. A country in which the city of Baltimore is said to have a higher homicide rate than the entire United Kingdom,[103] cannot consider these values to be jeopardized by the possibility of police intrusion alone. Unless notions of the absolute importance of freedom from official inquiry are felt to be so supremely important as to preclude limitation in terms of competing needs of a highly interdependent society, the necessity for attempting to strike a balance and to decide how much privacy is to be sought to be protected by the law of confessions remains.

VII. The Interest of Defendants In Avoiding Conviction

It is a thesis of this article that the reach of current confession exclusion doctrines can be justified only in terms of protecting the interests of guilty defendants desiring to avoid conviction. Such a rationale has a long history. It will be recalled that the privilege against self-incrimination itself arose in England at a time when compulsory answers to judicial inquiries were required to enforce substantive law proscribing political and religious nonconformity.[104] It should not be surprising that a nation reacting to evidence of gross abuses of police powers by contemporary totalitarian states, and which is developing greater sensitivity to racial, economic, and other group tensions at home, would be inclined to adopt procedures tending to grant freedom to the suspect.

Nor is it unlikely that the frequent gulf between substantive criminal law and common behavior was without effect. Professor Louis B. Schwartz has observed:

> "Kinsey has tabulated our extensive sexual misdeeds. The Bureau of Internal Revenue is the great archive of our false swearing and cheating. The highway death statistics inadequately record our predilection for manslaughter. 100% law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside. . . ."[105]

While the argument seems inapposite to many types of offenses, particularly assaultive ones, with a little bit of sentiment it may appear to some to cover the field.

Although again the empirical evidence is not fully satisfying, the Supreme Court, prior to the decisions in *Massiah* and *Escobedo*, had reason to believe that substantial restrictions on the utilization of evidence obtained from the questioning of suspects would have an important effect upon the ability of the states to successfully prosecute criminal cases. The fact that the Supreme Court's own experiment with the far less restrictive *McNabb-Mallory* rule has not been followed by the states was itself suggestive.[106] The failure of the courts of 49 states to utilize right to counsel rationales to exclude confessions was also illuminating.[107]

[102] Rationale of Judicial Evidence, 230–231 (1827).

[103] Meyer, *Farewell to Washington*, New Statesman, April 2, 1965, p. 564, col. 3.

[104] See 8 Wigmore on Evidence, §2250 (McNaugh. Rev. 1961); Maguire, Evidence of Guilt 12, n.3 (1959).

[105] Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U.Pa. L. Rev. 157 (1954).

[106] *Cf.* Allen, *Due Process and State Criminal Procedures*, 48 Nw. U.L. Rev. 16–30 (1953).

[107] Apparently the sole exception was the State of New York, which understandably had been led to expect new constitutional doctrine by concurring opinions relying on right to counsel in a case specifically addressed to itself: Spano v. New York, 360 U.S. 315 (1959). See People v. Donovan, 13 N.Y. 2d, 148, 15 N.E.2d 628 (1963); but see People v. Gunner 193 N.Y.2d 226, 205 N.E.2d 852 (1965).

True, it has sometimes been asserted that the Federal Bureau of Investigation functions successfully without reliance on confessions comparable to that of the states, but the radically different nature of the types of crimes which are the subject of federal prosecution outside the District of Columbia has also been noted.[108] There is reason to believe that restrictions on the use of confessions has its heaviest impact in cases involving crimes of violence.[109] Such offenses are probably foremost in their disturbance to the community and foremost in the concern of local law enforcement. Yet here extrinsic evidence sufficient to convict is often unavailable. On the other hand, crimes of fraud, whether state or federal, seem much less dependent on confessions for their solution. Common examples are provided by crimes involving the forgery or uttering of false bank checks, tax frauds, and mail frauds.

In this connection it may also be observed that prior to 1964 the Supreme Court wrote opinions in 33 cases in which questions of the admission of confessions were decided. These cases included 25 of murder, 4 of rape, 2 of robbery, 1 of manslaughter, and 1 of narcotics.[110] The significance of these figures is subject to strong reservation, of course, because of selective application for and allowance of Supreme Court review.

The record before the Court has frequently indicated that a case depended for its solution upon obtaining a confession. Three famous examples were decided on the same day: *Watts v. Indiana*,[111] *Turner v. Pennsylvania*,[112] and *Harris v. South Carolina*.[113] Mr. Justice Jackson, concurring in the first and dissenting in the latter two, observed:

> "These three cases, from widely separated states, present essentially the same problem. Its recurrence suggests that it has roots in some condition fundamental and general to our criminal system.
>
> In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him. This extended over varying periods. In each, confessions were made and received in evidence at the trial. Checked with external evidence, they are inherently believable, and were not shaken as to truth by anything that occurred at the trial. Each confessor was convicted by a jury and state courts affirmed. This Court sets all three convictions aside.
>
> The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble."[114]

Some notion of the significance of confessions in cases which have been taken before the Supreme Court is given in a review of their subsequent histories. In a study of 22 cases reversed because of

[108] See, *e.g.*, District of Columbia Committee on Police Arrests for Investigation, Report and Recommendations 50–51 (1962).

[109] See *Confessions and Police Detention, Hearings Pursuant to S. Res. 234 [Mallory Rule] Before the Subcommittee on Constitutional Rights of the Committee on Judiciary*, 85th Cong., 2d Sess. 107–116 (1958). But see Packer, *Policing the Police*, The New Republic 17, 20 (Sept. 4, 1965).

[110] See Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 327 (1964).

[111] 338 U.S. 49 (1949).

[112] 338 U.S. 62 (1949).

[113] 338 U.S. 68 (1949).

[114] *Id.* at 57–58. See also opinion of Justice Frankfurter in Culombe v. Connecticut, 367 U.S. 568, 578–580 (1961):

"The critical elements of the problem may be quickly isolated in light of what has already been said. Its first pole is the recognition that 'Questioning suspects is indispensable in law enforcement'.... But if it is once admitted that questioning of suspects is permissible, whatever reasonable means are needed to make the questioning effective must also be conceded to the police. Often prolongation of the interrogation period will be essential, so that a suspect's story can be checked and, if it proves untrue, he can be confronted with the lie; if true, released without charge. Often the place of questioning will have to be a police interrogation room, both because it is important to assure the proper atmosphere of privacy and nondistraction if questioning is to be made productive and because, where a suspect is questioned but not taken into custody, he—and in some cases his associates—may take prompt warning and flee the premises. Legal counsel for the suspect will generally prove a thorough obstruction to the investigation. Indeed, even to inform the suspect of his legal right to keep silent will prove an obstruction. Whatever fortifies the suspect or seconds him in his capacity to keep his mouth closed is a potential obstacle to the solution of crime."

coerced confessions and remanded to state courts, it was reported that 11 of the defendants were convicted of the same or of a lesser offense, 10 were released, and one was murdered by the husband of the victim of the offense during the third re-trial of the case.[115] In a number of these 11 cases the subsequent convictions were based on pleas of guilty. Furthermore, the study does not indicate in how many, if any, of the cases which were retried, confessions, admissions, or the fruits thereof, were received in evidence.[116]

In *Escobedo* itself the defendant's confession was the evidence connecting him to the crime.[117] It seems fair to conclude that the Court assumed that Escobedo's confessed instigation of the homicide could not be proven without his confession.[118]

Indeed a consciousness that the court was furthering the interest of guilty defendants in avoiding conviction in deciding *Escobedo* is suggested by the statement toward the end of the majority opinion:

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' *Spano v. New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 1209 (Stewart, J., concurring), by gathering information from *witnesses* and by other 'proper investigative efforts,' *Haynes v. Washington*, 373 U.S. 503, 519, 83 S.Ct. 1336, 1346. . . ."[119]

The Court in *Haynes*—again recalling that it was the same majority speaking through the same justice—had written:

> ". . . And, certainly, we do not mean to suggest that all interrogation of *witnesses and suspects* is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. . . ."[120]

For a number of years prior to *Massiah* and *Escobedo* the focus of Supreme Court controversy had been shifting from the question of what constituted a voluntary confession to the question of whether confessions of any sort should be allowed in evidence against a defendant. When the balance struck in earlier cases was before the Court for reconsideration in *Escobedo* it had before it a brief for petitioner which put the argument of the need of defendants to avoid confessions with unusual candor:

> "The right to counsel, if it is to have any efficacy at all, must obtain when the need for the advice of counsel is crucial. . . . Especially is this so in the case at bar where the advice of counsel would have precluded the eliciting of the statement of petitioner upon which his conviction was solely based. . . ."[121]

In a brief amicus curiae the American Civil Liberties Union argued that the position taken in *Crooker* and *Cicenia* (that counsel at the police station will unduly interfere with criminal investigation and successful prosecution) should be disregarded, because "the variables which can determine the efficiency of criminal investigation and successful prosecution are so complex that no one really knows the *extent* to which seemingly more restrictive rules in this area actually do or will hamper the police. . . ."[122]

Perhaps more rationally, the A. C. L. U. pointed out a possible intermediate basis for decision, noting that a denial of a specific request for counsel may be deemed more coercive than failure to make counsel available without such a request.[123] In general, however, the amicus brief urged broader grounds for decision: an end to private police questioning of arrested persons.[124]

The brief for the State of Illinois recalled that the

[115] Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 208–9 (1962).

[116] Presumably the confessions ordered excluded were not received on re-trial. However, it has not been uncommon for defendants to have made confessions or admissions other than the ones ruled incompetent by the Supreme Court. See, *e.g.*, Malinsky v. New York 324 U.S. 401 (1945); Haynes v. Washington, 373 U.S. 503 (1963).

[117] See People v. Escobedo, 28 Ill. 2d 41, 42, 190 N.E.2d 825, 826 (1963).

[118] After remand the case against *Escobedo* was dismissed. Time, April 23, 1965, p. 46, col. 1. (The inference is further supported by the absence of any observation comparable to the one by the same majority of the Court speaking through the same Justice in Haynes v. Washington, 373 U.S. 503, 519 (1963), that in that case the argument that interrogation was needed to solve the case was inapplicable, because of other evidence there available.)

[119] 378 U.S. at 492 (Emphasis added.)

[120] 373 U.S. 503, 515 (Emphasis added.)

[121] Brief for Petitioner, pp. 8–9.

[122] Brief for ACLU as Amicus Curiae, p. 15 (Emphasis added.) Even if the Court were to ignore the interests of Illinois under the record before it and even if it were to decide that its own experience and the other materials available to it were too limited for confident prediction of the *extent* of impairment of police functions, one would hope that this would be a reason for experimenting under the supervisory power exercised by the Court over the federal system, rather than a matter for constitutional imposition on the nation as a whole.

[123] *Id.* at 9.

[124] *E.g.*, *id.* at 11.

majority of five justices which had reversed the conviction in *Haynes* had conceded that the questioning of *suspects* was essential to law enforcement. It then argued that allowance of requests for counsel could hardly be confined to those who have attorneys, in view of cases such as *Gideon* and *Griffin v. Illinois*.[125] In addition, the brief for Illinois argued, if criminal defendants are entitled to counsel from the moment of arrest, such right does not depend upon a request, in view of the doctrine of *Carnley v. Cochran*.[126] The conclusion would be the ending of police questioning of suspects even though conceding its indispensibility to law enforcement.[127]

In the majority opinion in *Escobedo* the dilemma was noted and resolved as follows:

> "It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' *Watts v. Indiana*, 338 U.S. 49, 59, 69 S.Ct. 1347, 1357, 93 L.Ed. 1801 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. . . . [Citations omitted.] The right to Counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. 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. See note, 73 Yale L.J. 1000, 1048–1051 (1964)."[128]

Thus the crucial issue[129] of adjusting the competing interests of society and the individual suspected of crime was resolved by claiming, in effect, that the judgment had been made by the Constitution, since defendants have a critical need to avoid making confessions.[130]

Of course it is not here contended that the interest of a guilty accused in avoiding conviction has now been recognized by a majority of the Court as sufficient, standing alone, to reverse a conviction. Each case must still present a constitutional question which is capable of being phrased in conventional terminology. Cases such as *Massiah*, however, indicate that the Court approaches the task of posing such issues with considerable flexibility and ingenuity. Once that is done, the interest of the state in enforcing its criminal law appears to be largely discounted and the interest of the defendant to the contrary preferred.

In his *Escobedo* dissenting opinion, Mr. Justice White noted that the Court in *Massiah* had held that as of the date of the indictment the prosecution was disentitled to secure admissions from the accused and that in *Escobedo* the time was moved back to when suspicion begins to "focus on the accused."[131] There is an important respect, however, in which *Massiah* reaches beyond *Escobedo*. Massiah did not confess under the psychological stimuli of in-custody interrogation. Although confident prediction must await further clarification by the Court, it may be suggested that while *Escobedo* might be thought to push the *Massiah* immunity back from the time of indictment to the time that suspicion is focused on the defendant at least when he is in custody, *Massiah* may push the *Escobedo* immunity back through the pre-arrest situation. Furthermore, there is no more logical basis to restrict *Escobedo* to situations where it

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[125] 351 U.S. 12 (1956).

[126] 369 U.S. 506, 513 (1962) (Counsel at trial not waived by failure to make request, in absence of facts indicating purposeful and informed waiver.)

[127] Brief for the Respondent, 39–41.

[128] 378 U.S. at 488.

[129] Professors Kamisar and Choper have referred to the question of when the right to counsel begins as "the most pervasive question in the field of constitutional-criminal procedure today." See Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 33 (1963). In view of the sweeping announced bases for decision in *Escobedo* and the narrow statement of what was held, it is difficult to conclude to what extent the question has been answered.

[130] Compare the similar effort to disclaim judgment of competing interests in two recent opinions written in cases concerning the reach of the double jeopardy prohibiting of the Fifth Amendment: Douglas, J., in Downum v. United States, 372 U.S. 734, 738 (1963): "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion.'" (citing United States v. Watson, 28 Fed. Cas. 499, 501 (1868)). Compare Goldberg, J., dissenting in United States v. Tateo, 377 U.S. 463, 475: "With all deference I suggest the Constitution has resolved this question of competing interests of the government and the individual in favor of protecting the individual. . . ."

[131] 378 U.S. at 495.

may be said that suspicion has focused on the suspect, than there is to support a rule limiting immunity from interrogation to the time following indictment. The net result would be the exclusion of admissions whenever obtained.

Alternatively—or perhaps supplementarily—admissions made prior to focus of suspicion may be excludable on fourth as well as fifth and sixth amendments rationales. If the admission is made while a defendant is deemed to be under arrest—and with a functional test rather little may be required to permit the conclusion of an arrest—the doctrine of *Wong Sun v. United States*[132] may exclude a confession obtained after an arrest without probable cause, although the reach of *Wong Sun*, like that of *Massiah* and *Escobedo*, is still largely unclarified.[133]

At least this is clear: If the sole consideration controlling the resolution of these questions continues to be the needs of suspects, no stopping point is apparent.

VIII. Further Observation and Conclusions

(1) The problem of attempting to achieve a satisfactory level of law enforcement while providing humane treatment of suspected offenders is misconceived if it is put solely in terms of a conflict between security and liberty.[134] It is astonishing to note the degree of restriction in liberty of movement about our cities because of the anticipated dangers of becoming the victim of crime. This fear must be added to loss of liberty resulting from actual subjection to criminality. To say this is not to minimize the extent to which freedom may be lost through activity of police; it is merely to emphasize that both must be considered. The maximization of total liberty is unlikely to be achieved by solely concerning ourselves with the liberty of persons suspected of crime.

It is also unlikely to be achieved on the assumption that the hard questions of constitutional-criminal procedure may be answered by merely examining the text of the Constitution, its historical origins, by making facile generalizations about the lessons of history or the nature of the Anglo-American system of criminal justice, by inflating individual value-preferences into constitutional commands, or even by examining previous decisions of the Supreme Court.

(2) The problem is also misconceived if the battle is deemed one between cops and robbers. Except to the extent that they may be particularly vulnerable to criminal attack, a special police need does not appear to be involved. Indeed one might accurately suppose that the higher the level of criminality and the less efficient the approved techniques of enforcement, the greater will be the resources which must be allocated to police. The interest in maintaining an adequate level of law enforcement is truly a societal one, as is the interest in maintaining an adequate level of individual freedom from personal interference and inhumane treatment in the course of law enforcement.

(3) Although the accuracy of statistics indicating the incidence of crime in the United States is limited by different classifications of offenses by different states, and by differences in reporting and recording practices, the available evidence indicates that the level of crime is rising and that it is doing so at a rapid and accelerating rate.[135]

(4) While empirical studies are largely nonexistent, there is reason to fear loss of respect for law and consequent loss of self-enforcement of law if the legal system is believed to be unable to enforce the law,[136] and also if the police techniques so alienate substantial segments of our population as to result in loss of respect for and cooperation with law enforcement efforts.[137] It is suggested that progress here can best be accomplished by avoiding "sentimentalism about combatting crime too energetically,"[138] while preserving a sensitivity both to the needs of effective administration of the criminal law and for maintenance of humane treatment of suspected offenders.

[132] 371 U.S. 471 (1962), probably already extended to the states in the *per curiam* vacation of judgment and remand of Traub v. Connecticut, 374 U.S. 493 (1963).

[133] See Herman, *The Supreme Court and Restrictions upon Police Interrogations*, 25 Ohio St. L.J. 449 (1964); Kamisar, *Equal Justice in the Gatehouse and Mansions of Criminal Procedure*, reproduced in Howard, Criminal Justice in Our Time (1965).

[134] See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Cal. L. Rev. 11, 14–16 (1962).

[135] See Uniform Crime Reports—1964, pp. 2–22, 50–53 (1965). With respect to the statistics, see, *e.g.*, Beattie, *Criminal Statistics in the United States—1960*, 51 J. Crim. L., C. & P.S., 49 (1960). For views critical to the crime statistics, see, *e.g.*, Foote, *Safeguards in the Law of Arrest*, 52 Nw. U. L. Rev. 16 (1958); New York Times, March 22, 1965, p. 1, col. 4.

[136] See Barrett, *op. cit. supra*, n. 134, at 11.

[137] See Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L. Q. 436, 454 (1964).

[138] Rochin v. California, 342 U.S. 165, 172 (1951).

Furthermore, the objectives of administration of the criminal law cannot be accurately conceived solely, or perhaps even primarily, in terms of general deterrence.[139] The social need for incapacitation and treatment of dangerous offenders must also be considered.

(5) It is perhaps easier to form opinions on what we would prefer our police not to do than to form opinions on what we would prefer our police to do. We must recognize that much of the relevant evidence of crime theoretically available is subject to reservation, not only by the squeamish and the hypersensitive. Physical evidence presents fourth and fifth amendment problems. The questioning of suspects and witnesses presents fourth, fifth and sixth amendment issues. The use of undercover agents now presents sixth amendment problems. The list could be expanded to include other constitutional problems, wiretap objections, privileged communications, and on.

(6) The wholesale exclusion of credible evidence itself poses grave dangers to the truth-seeking process, even if that process is considered solely in terms of acquitting the innocent. As has been previously noted, the deterrent efficacy of exclusionary rules is difficult to predict. But assuming that their broadening will have significant though incomplete effect in deterring proscribed police activity, a number of dangers to the reliability of the acquittal of the innocent may be foreseen. The explanations of the innocent, unless verified as soon as possible, may be beyond corroboration.[140] It may be too late after defense counsel arrives. In addition, a witness erroneously suspected of a crime may be charged and convicted because the actual perpetrator was not questioned.[141]

Non-interrogation of suspects may result in the filing of formal charges in situations where explanations obtained in the course of questioning would result in release. Once such charges have been filed there is a tendency on the part of police and prosecution to assume that they have been properly brought and to press for conviction. While explanations can be made subsequent to charge, they may be less believed because of the time available for fabricating a story and because the opportunities for corroboration may be reduced. The reputation of many members of the criminal defense bar is such that explanations made after consultation with them may be significantly discounted. Furthermore, even reputable defense counsel may determine that it is tactically advisable to save the defense case until the time of trial, rather than take a chance that it may be weakened if disclosed to the prosecution in advance of trial. By the time the trial begins the prosecution is likely to be highly motivated to attempt to win its case. Then all of the multitude of factors, many of which—such as respective ability of counsel, the nature of the crime, the attractiveness of defendant and complainant, the nature of the jury—are largely irrelevant to the merits of the case, may result in an unjust conviction. It surely seems desirable that the prosecution process typically, at least, be begun only when the prosecutor believes he has a very strong case, if the incidence of conviction of the innocent is not to significantly rise. One can imagine some conscientious investigators attempting to continue regular interrogation practices for the assistance which it would provide in further investigative and prosecutive decisions, even though it is believed that admissions thus obtained could not be introduced into evidence.

A wide gap between the constitutional standards for admissibility of evidence and of common sense notions of its reliability also creates danger that law enforcement agents will be encouraged to give false testimony. A practice of what may seem to the officer to be a necessary telling of "white lies" on what he believes to be legalistic issues can easily reduce the trustworthiness of the guilt-determining process. Increased pressure to obtain accomplice and informer testimony and to coach other witnesses involve further perils to the innocent.

What has been said is directed solely to the reliability of the release of the innocent; it seems apparent that severe restriction or elimination of confession evidence will greatly reduce the ability to convict those who otherwise would confess, an indeterminate, though I suspect a very small percentage of whom are innocent.

(7) Humility and realism suggest that there are serious limits as to what can be effected through admissibility of evidence doctrines in eliminating practices of law enforcement which are concededly abusive. Many of the inadequacies of local law enforcement are probably beyond the reach of constitutional corrective efforts, which in any event can not eliminate lack of resources, political pres-

[139] They appear to be so interpreted in Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L.R. 157 (1954); note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1047–1948 (1964).

[140] See 3 Wigmore, *Evidence*, §867 (3d ed. 1940).

[141] See footnote 15, *supra*.

sures, and structural inflexibility in the thousands of state and local governmental units having primary responsibility for law enforcement.[142] There is the possibility of calling for the assistance of the federal government with greater frequency in areas of law enforcement traditionally left to local control. That, too, has its perils.[143]

(8) It is unnecessary to eliminate or severely restrict the use of confession evidence in order to stimulate investigation of other sources of evidence. The nortorious preference of prosecutors for overwhelming cases includes a desire for as much evidence as can be secured. Thus there is strong incentive to obtain independent evidence, if possible, in any event.[144] To the extent that achieving this objective is made difficult by the limited investigative resources which may be available, there seems to be no basis for expending these resources at less efficient means of acquiring evidence, in the absence of a showing—which has not been made—that confession evidence is less reliable than its replacement. There seems to be no rational basis for preference of less efficient means of investigation as such.

(9) While considerations of cost are not often deemed controlling, the expense of a system of administration of criminal justice cannot be completely disregarded. In the past the great majority of criminal cases have been decided by pleas of guilty. There is reason to believe that restrictions on the admissibility of confessions will greatly reduce such pleas, and place an enormously greater burden upon the courts and upon the legal profession.[145] Furthermore, less direct and efficient means of law enforcement may require very large expansion in the numbers of police personnel.[146] And if large numbers of cases are to be presented to the courts without screening by questioning of the defendants, a very considerable increase in judicial and legal facilities will have to be provided as well.[147] While in the abstract one may be willing to pay an unlimited price for justice, it must be borne in mind that the funds thus poured into the administration of the criminal law could alternatively be utilized in other needed social services.

(10) The fact remains that secret interrogation is obviously subject to possibilities of abuse. The accused ordinarily will only have his own testimony to demonstrate such abuse when it occurs. The circumstances of the obtaining of the confession are highly relevant to its trustworthiness, even where they do not result in its exclusion under evidentiary or constitutional standards. In addition, accurate disclosure of the events surounding a confession is likely to have a deterrent effect upon abusive practive.

A number of thoughtful commentators have proposed that questioning be conducted under judicial control.[148] It is difficult to believe, however, that judicially supervised questioning would today be a viable alternative to present police practices. In *White v. Maryland*,[149] the Supreme Court reviewed the conviction of a defendant who had stated that he pleaded guilty at a preliminary hearing. No plea at this stage of the proceeding was required. Evidence of this admission had been received at the trial. The conviction was reversed for denial of right to counsel. Assuming defense counsel's presence at a judicially supervised inquiry, one could not expect to obtain confessions.

A more hopeful approach to reform would be more accurate record keeping at police interrogations, perhaps utilizing recording devices or independent observers. It would seem that tape-recorders, for example, could easily be installed in police interrogation rooms. They could also be routinely supplied to police vehicles. Absence of such a record in spite of feasibility in a particular case in which the circumstances of a confession are disputed could well be made an important factor in due process evaluation. The use of such devices would itself tend to curb abuse and enable the courts and juries to penetrate to a substantial extent the otherwise frequently opaque conflict in testimony between police and defendants.[150]

[142] See Wigmore, *Evidence* §851 (3d ed. 1940); Inbau, *Restrictions on the Law of Interrogations and Confessions*, 52 NW. U. L. REV. 77 (1957).

[143] See Malloy v. Hogan, 378 U.S. 1, 28 (1964) (opinion of Harlan, J., dissenting).

[144] See 8 Wigmore, *Evidence* §2251 (McNaugh. Rev. 1961).

[145] See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CAL. L. REV. 11, 45 (1962).

[146] This expansion, while helpful in dealing with crime on the streets, would seem to promise less assistance in solving crimes occurring elsewhere, as was the case in *Massiah* and *Escobedo*.

[147] See Barrett, *op. cit. supra*, n.134, at 45.

[148] See Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIM. 1014, 1017 (1934); 3 Wigmore, *Evidence* §851 (3d ed. 1940).

[149] 373 U.S. 59 (1963).

[150] See 3 Wigmore, *Evidence* §§798a, 851 (3d ed. 1940) (suggesting sound motion pictures); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 45–46 (1962);

The discussion of possible ways to minimize abuses in police questioning while preserving its social and individual advantages is of little moment, of course, if the reach of the fourth, fifth, sixth and fourteenth amendments is extended so as to eliminate the questioning of suspects entirely.

An Epilogue

The views which have been expressed in this article are concededly inconsistent with the trend of recent decisions. The writer believes that these cases do not point the way to a desirable or even viable system of law enforcement. But it must be admitted that we are now embarked on a new adventure, and past experience does not foreclose the possibility that the constitutional experiments will be satisfactory ones. Much still undoubtedly depends upon details of procedural requirements which are yet to be worked out.

If pessimism turns out to be justified, in the long run events may be expected to generate pressures which must be recognized even by a legal system which has been placed as far from popular control as ours. The skeptical may perhaps take some comfort from the realization that constitutional decisions in matters of criminal procedure are particularly subject to reexamination.

Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 Minn. L. Rev. 47, 84–91 (1964).