1966

Proof by Confession

O. John Rogge

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I. ACCUSATORIAL VERSUS INQUISITIONAL

IN THE WRITER'S VIEW any confession which a defendant repudiates in court should for that reason alone be inadmissible in evidence. Then we shall fulfill the spirit of our accusatorial method as well as its implicit promise. Moreover, such a course will make for stronger, not weaker, law enforcement. The United States Supreme Court has been approaching this position, but has not yet quite reached it, in its extensions of the right to counsel and of the privilege against self-incrimination, or right of silence as the bench and bar are increasingly calling it,\(^1\) and its exclusions of confessions in state as well as federal cases. \(\text{Miranda v. Arizona}\)\(^2\) gives further substance to the critical yet prophetic comment of Justice White in his dissenting opinion in \(\text{Escobedo v. Illinois}\):

"The decision is thus another major step in the direction of the goal which the Court seemingly has in mind — to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not."

\(^1\) Member of the New York Bar. A.B., University of Illinois, 1922; LL.B., Harvard University, 1925, S.J.D., 1931.


\(^3\) 378 U.S. 478, 495 (1964).
as he put it in his dissenting opinion in *Miranda*, in which Justices Harlan and Stewart joined, the Court's result in that case "adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not." This is as it should be.

If a defendant wants to stand up, with his lawyer beside him, and plead guilty, well and good. That is one thing. A large majority of deviants do just this anyway. That is how prosecutors rack up such high percentages of convictions year after year. But if a defendant pleads not guilty, the prosecutor ought to be bound to prove his case from sources other than the defendant's own mouth, or the defendant goes free. Then we shall truly have an accusatorial system.

Prosecutors and those of like mind have assailed the Supreme Court's exclusionary rulings. Often they have quoted the statement of Justice Jackson, concurring in *Watts v. Indiana*, that counsel for the suspect would mean "a real peril" to law enforcement. Justice Harlan in his dissenting opinion in *Miranda*, in which Justices Stewart and White joined, relied on Justice Jackson's concurring opinion, and expressed a similar fear: "[F]or if counsel arrives, there is rarely going to be a police station confession." Justice Clark in his dissenting opinion in *Miranda* was even more gloomy as to the Court's extension of the right of silence to police interrogation: "Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient."

In the writer's opinion, those who insist on empowering the police to question suspects in the absence of counsel, thus importing another bit of the inquisitional system, are mistaken when they assert that such a measure is essential to law enforcement. On the contrary, counsel for suspects will be a help rather than a hindrance in handling deviants. Indeed, such counsel will prove to be a boon to law enforcement, for they will find out from suspects what their stories are. True, if a suspect is guilty, counsel will then try to negotiate a solution with the prosecutor; but this usually happens after indictment or other comparable charge anyway. Therefore, let us put counsel for the suspect in as good a bargaining position as the prosecutor. Let us give the suspect the right to counsel during the interrogation stage. And let us exclude confessions, except in the form of a guilty plea with a defendant's lawyer by his side.

4. 384 U.S. at 538.
6. 384 U.S. at 516 n.12.
7. Id. at 500.
The right to counsel and that of silence are two of the mainstays of our accusatorial method. Moreover, they are part of a legal system which has had a continuous development of more than eight centuries, from the time of Henry II, who was king of England from 1154 to 1189. Before the end of the 1200's the English had not only a court and jury system for the administration of justice but also an established judiciary, a legal profession divided into the two branches which still exist there, and a legal literature as well. The right of silence has origins which go back at least to 1246, more than 700 years ago, when the English people first resisted a general inquisition into heresy.

But there is another approach to the treatment of deviants which is fundamentally distinct from our accusatorial method. Communist regimes, as well as the rest of the governments on the mainland of Europe, use the inquisitorial technique. Under the accusatorial method there is an insistence that the investigating authorities get their case from sources other than the mouth of the accused. Under the inquisitional system the investigators try to get their case from this very source. When the United States Supreme Court in June 1949 invalidated confessions in three different cases from three different states, South Carolina, Pennsylvania and Indiana, Justice Felix Frankfurter, in announcing the judgment of the Court in one of them, Watts v. Indiana (in which Justice Jackson wrote his concurring opinion), commented:

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American 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.

This comment represents some 800, and in one sense more than 1500, years of history; our accusatorial method owes its survival and growth to our grand and petit jury system, and this system, in a sense, takes us back to tribal justice. Henry II, a wise administrator and one of the greatest English kings, laid the basis for our jury system. In so doing he developed an institution which he inherited from his Norman ancestors and which they in turn borrowed from the Frankish kings. Heinrich Brunner sought to demonstrate that our jury system

9. 338 U.S. at 54.
was neither English nor popular, but rather Frankish and royal.\textsuperscript{10} He was right and he was wrong. One will find the jury of neighbors among the Anglo-Saxons as well as among the Franks. It was both popular and royal.

As early as the Wantage Code (c. 997) of Ethelred and his councillors, there is provision for a jury of presentment, the ancestor of our grand jury:

3.1. And that a meeting is to be held in each Wapentake, and the twelve leading thegns, and with them the reeve, are to come forward and swear on the relics which are put into their hands that they will accuse no innocent man nor conceal any guilty one.\textsuperscript{11}

If it be suggested that this is a piece of Danish rather than English law, there is a double answer: for one thing, the Wantage Code was issued on English soil; for another, the northern tribes of Europe made use of the accusing jury. While the use of the deciding jury by the Anglo-Saxons may have been sporadic, it was there.\textsuperscript{12} What Henry II did was to take the royal Frankish inquisition and fashion it into our grand and petit jury system among a people to whom this kind of inquisition was familiar as well as congenial. In basing the administration of justice of this institution, he had the support of the body of the population; the great losers were the feudal courts.

In the 800's, the Frankish kings broke through the bounds of the old tribal customs and, where their finances were concerned, abandoned the older modes of proof. There were the customary moot hill courts with their magical, superstitious procedures — the ordeal, oaths of one's self and one's kindred (called wager of law, and compurgation), and trial by battle. Such procedures were no longer good enough for the Frankish kings when it came to their revenues. They established a procedure which had the name of \textit{inquisitio patriae}, more generally known as the \textit{enquete du pays}, the inquiry of the country or the countryside, the inquiry of neighbors. In 829 an ordinance of Louis I, le Debonnaire, or the Pious (814-840), the third and surviving son of Charlemagne, provided that every inquiry with reference to the royal revenue was to be by the \textit{inquisitio}, the inquiry of neighbors.\textsuperscript{13} This kind of \textit{inquisitio} is to be distinguished from the later \textit{inquisitio} of the church, the inquiry by officials.

\textsuperscript{10} BRUNNER, DIE ENTSTEHUNG DER SCHWURGERICHT (1872).
\textsuperscript{11} \textit{I ENGLISH HISTORICAL DOCUMENTS} 403 (Douglas gen. ed., D. Whitelock ed. 1955).
\textsuperscript{12} See Van Caenegem, \textit{Royal Writs in England From the Conquest to Glanvill} in \textit{77 SELDEN SOCIETY PUBLICATIONS} 51-81 (1959).
\textsuperscript{13} See THAYER, \textit{PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW} 48 (1898).
In the next century the Danes and Norwegians (Northmen), under a leader named Rollo, invaded the West Frankish kingdom; and by a treaty in 911 acquired the territory which became known as Normandy. Rollo's successors as dukes of Normandy adopted and developed the Frankish *inquisitio*. One of them, William the Conqueror, with his barons invaded England, defeated Harold and the English at the battle of Hastings (1066), and on Christmas day of that year had himself crowned at Westminster. Had it not been for the Normans and their conquest of England, the inquiry of neighbors might long ago have become a matter of interest only to antiquaries, who might have regarded it as no more than an instrument of Frankish fiscal tyranny. Instead it developed into the jury system, and was to be regarded as an agency for the protection of the weak against the strong and of the individual against the state.

Looked at one way, the accusatorial method is centuries older even than Henry II, Ethelred, and the sons of Charlemagne, for it may be said that tribal justice already had this characteristic. It was accusatorial in the sense that the public did not prosecute, and hence officials did not question, deviants. The ones who prosecuted offenses were private persons, the parties injured or their kindred, and the modes of proof were not inquisitional but magical. In England the administration of justice remained accusatorial concomitant with the development of the grand and petit jury system. This does not mean that the accusatorial method has to develop in connection with the jury system, but only that historically it did. Nor does it mean that our shrinking jury system should be extended. However, it does mean that the growing regard for the individual which we showed under our accusatorial method should be extended to inquisitions by officials, including police officials.

In the 800's and the following centuries in western Europe, two changes slowly occurred in the treatment of deviants: the state gradually took over the prosecution of offenses and, in the course of time, the accusatorial and inquisitional systems supplanted the older modes of proof. With the Vikings attacking from the north and the Saracens from the south, tribal society in Western Europe started to become feudal: kinship ties gave way to the lord-man relationship. The authority of the state waxed; that of the kindred waned. After the Norman conquest of England, feudalism there became an elaborately organized and symmetrical system due to William the Conqueror's wholesale enfeoffment of his captains. As the state's power grew, so too did its jurisdiction over offenses. One of the ways in which the state increased its jurisdiction in this area was by an extension of
the king's peace. William the Conqueror announced that his peace included all men, English as well as Norman. His greatest Norman successor was Henry II, the first of the Plantagenet line, who became duke of Normandy in 1150 and king of England and Normandy four years later.

Henry II's Norman predecessors had already made considerable use of the inquiry of neighbors of the Frankish kings. On two occasions — the conquest of Normandy, and again at the conquest of England — they had found this institution helpful in discovering the extent of the rights they took over. The Domesday Book, a great fiscal record which William the Conqueror ordered prepared, was compiled in 1085-1086 out of just such inquiries. This work contains all manner of details with reference to local customs and the possession, tenure and taxable capacity of the landowners. The Anglo-Saxon Chronicle said of William's inventory of every local holding: "So very narrowly did he have it investigated, that there was no single hide nor a yard of land, nor indeed (it is a shame to relate but it seemed no shame to him to do) one ox nor one cow nor one pig was there left out and not put down in his record..."14 Such information was obtained by a commission which traveled throughout England and made inquiry of sworn groups of responsible neighbors in each district concerning the facts which they wished to elicit.

Just as the Frankish kings became dissatisfied with the old procedures and modes of proof, so too did the church. Almost 400 years after the Frankish kings began to develop the inquiry of neighbors, Innocent III, a great papal legislator and one of the ablest of popes (1198-1216), began to devise the inquisitional technique. It would be interesting to speculate what would have been the course of history had Innocent III preceded Henry II.

Innocent devised the inquisitional technique in a series of decretals beginning in 1198 or 1199, and perfected it in one which he issued through the biggest of all of the Lateran Councils — the Fourth. This Council was held, as were the others, at Rome in the Lateran basilica. Innocent called it to assemble in November 1215, and began sending out invitations more than two years in advance. The assembly included clerical leaders from almost every country in Christendom and representatives of many temporal rulers. There were 412 bishops, including the Latin patriarchs of Constantinople and Jerusalem, 800 abbots and priors, the heads of various religious orders, Cistercian, Premonstratensian, and Knights Templar and Hospitaller, proctors

chosen by cathedral chapters, collegiate churches and bishops unable to attend, representatives of Otto IV, Frederick II, Phillip Augustus and John, Ambassadors from the kings of Hungary, Aragon and Cyprus and the Latin emperor of Constantinople, and delegates from the republican states of Milan and Genoa and from other free cities of Italy. The canons and decretals which this Council issued totaled seventy in number. One of these perfected the inquisitional system; others abolished ordeals and instituted the practice which came to be known as auricular confession.

Under the inquisitional technique an official by virtue of his office (ex officio) had power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all things he would be questioned about. In setting up this procedure, Innocent, following some traces of the Roman law, provided for three forms of action: accusatio, denunciatio, and inquisitio. In accusatio an accuser formally brought suit and was subject to the talio in case of failure, that is, he would be obliged to suffer the punishment which he had demanded for the accused. In denunciatio a person gave information about an offense to the appropriate official but did not himself become a formal accuser or party to the suit. In inquisitio the inquisitor without any denunciation cited a suspect, having him imprisoned if necessary. However, under Innocent’s decretals the inquisitor was not supposed to proceed by this third method without some basis in either common report (“per famam”) or notorious suspicion (“per clamosam insinuationem”). In practice, the third form, the inquisitio, became the invariable rule. But at the same time, the safeguards which Innocent III provided were ignored. This system spread throughout Christendom and to the organs of the state of the mainland of Europe, beginning in France.

Originally, France was on another path. It was the Frankish kings who developed the inquiry of neighbors. But in the 1200’s, after King John lost his southern territories to the French, the inquiry of neighbors, while it was carrying all before it in England, was slowly

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15. For a full description of the inquisitional procedure of the church, both in theory and practice, see 1 Lea, A History of the Inquisition of the Middle Ages 310-440 (1888), reprinted under the title of The Inquisition of the Middle Ages 1-133 (1954). Hinschius also related that in the inquisitio procedure the safeguards came to be disregarded. Hinschius, 6 System des Katholischen Kirchenrechts Mit Rücksicht Auf Deutschland 68-71 (1897).

Esmein found the earliest instance of the inquisitio procedure of the church in a decretal of 1198. Histoire de la Procédure Criminelle en France, translated in 5 Continental Legal History Series 60 (1913). But Wigmore, Pollock, Maitland, Tannen, and Hinschius were of the opinion that the first reference to the inquisitio procedure as a generic method was in a decretal of 1199. 8 Wigmore, Evidence § 2250 n.28 (3d ed. 1940); 2 Pollock & Maitland, History of English Law 657 n.4 (2d ed. 1909).
dying out in France. There it gave way to the inquisitional system of
the church. The point of departure was the Ordinance of 1260, issued
by St. Louis, the king who led the Seventh and Eighth Crusades. By
this Ordinance, St. Louis forbade trial by battle in the king's courts,
and substituted for this mode of proof a procedure which he borrowed
from the practice of the ecclesiastical courts — witnesses were to appear
before certain delegates of the judge and be questioned. The judge's
deleates were called inquirers (enquesteurs) or auditors. They were
to question the witnesses separately and "artfully" ("subtilement").

The Ordinance of 1260 did not apply to the barons' courts. In
1306 Philip the Good readmitted trial by battle, except in cases of
theft, for all accusations which involved capital punishment where the
offense had been committed so secretly and quietly (en repos) that
it would have been impossible to convict the perpetrator by witnesses.
But as an institution, trial by battle was on its way out and the
inquisitional system was on its way in.

The difference between the inquisitio of the Frankish and English
kings and the inquisitio of the Church, between the inquiry of neigh-
bors and inquiry by officials, is subtle yet fundamental. Under the
inquiry of neighbors, it was the neighbors who accused and sat in
judgment; under the inquiry by officials, it was some official. The
inquiry of neighbors was to aid in the development of a fairly in-
dependent and relatively mature citizenry and a more or less repre-
sentative form of government; inquiry by officials was not. Of course,
both forms of inquiry were more rational than the old modes of proof.
Also, the fact that officials questioned persons in secret need not
necessarily have been an evil. After all, our grand jury proceedings
are secret too. The vice lay in the use of secret questions, not by a
grand jury, but by a professional class, at a time when safeguards for
persons who stood accused had not yet been developed. In England
those safeguards did develop, and today constitute part of what we
describe as the accusatorial method.

It was the French inquisitional system of criminal justice that
Czar Alexander II adapted to Russia in the Judicial Laws of 1864.
Although inquisitional torture was in general use prior to 1864 —
Peter the Great, for instance, used it on his son Alexis to such an
extent that Alexis died — it was in 1864 that the inquisitional tech-
nique was formally introduced in Russia as a regular part of the
procedure for the investigation of offenses. The Communists, after a
burst of nihilism in which they sought to destroy all the institutions
of the old government, found that this technique suited their purposes.
They not only went back to it, but in the 1930's under Stalin and
Vyshinsky, especially during the purge years of 1936-1938 and the two or three years just preceding them, they greatly intensified it. They then exported this totalitarian form of the inquisitional technique to other countries where the Communists came to power.

Although we managed to keep our accusatorial method, the inquisitional technique made inroads upon it from time to time. We are currently in an inquisitional trend which began a century ago. If one wanted a specific starting point, one could take an act of June 30, 1864, which gave inquisitional subpoena powers to federal tax assessors. There were a half dozen sporadic grants by the turn of the century, including this one, two to federal tax assessors, and one each to the predecessors of the coast guard, the Commissioner of Pensions, the Interstate Commerce Commission, and the Pacific Railway Commission.

The story on a state level, with a time lag of a few years, is similar. Delaware gave its attorney general inquisitional subpoena powers in 1873. Connecticut gave its insurance commissioner such powers in 1877, and its justices of the peace in 1895. California in article 12, section 22 of its Constitution of 1879, still in force, with amendments, empowered its railroad commissioners “to issue subpoenas . . . to administer oaths, take testimony, and punish for contempt of their orders and processes, in the same manner and to the same extent as courts of record.” Kansas passed the first of its four acts giving inquisitional subpoena powers to judicial inquirers in 1885, and the second of these acts in 1897. Kentucky gave such powers to a magistrate in 1884, and Michigan to certain police justices in 1885. There were yet other instances in the past century.

Then in the past three decades, both on a federal and a state level, we have deluged ourselves with such statutes. Almost every year we have passed more of them. We have given inquisitional subpoena powers not only to a multitude of officials but also to various agencies and commissions. Recent grants of such powers on a federal level were to the Civil Rights Commission and the Warren Commission.

Because we are currently in an inquisitional trend, it becomes all the more important that we protect, indeed extend, the individual rights which we developed under our accusatorial method. Foremost among these rights in our treatment of deviants are the right to counsel and that of silence, the one extended in Escobedo and the other in Miranda.

II. GUILTY PLEAS

Even with our accusatorial method, the large majority of deviants plead guilty because human beings, whether guilty or innocent of the offense charged, feel a compulsion to confess to something. It has even been adumbrated that some individuals commit offenses in order to make confessions.

It may come as a surprise to many, but in the eighty-six United States District Courts having purely federal jurisdiction, the number of defendants in such cases during the seven-year period ending June 30, 1954 who pleaded either guilty or nolo contendere amounted to the surprising figure of 224,920 out of a total of 268,620. Of the remainder, 23,274 were dismissed, 6,988 were acquitted, and 13,438 were convicted. Reduced to percentages this means, if one excludes the defendants who were dismissed, the astounding figure of 91.67% for those who pleaded either guilty or nolo contendere. If one includes the defendants who were dismissed the figure becomes 83.70%. These figures exclude those charged as juvenile delinquents but include immigration cases. The immigration cases were almost entirely confined to the five federal districts touching the Mexican border and the pleas of guilty of defendants in these cases amounted to almost 98%. If immigration cases are omitted the figure becomes 87.67%, if one excludes the defendants who were dismissed, and 77.16% if one includes them.17

Comparable figures for the decade from June 30, 1954 follow.18

| Fiscal Year | Total Defendants Terminated | Total Convicted | Convicted by Plea of Guilty or Nolo Contendere | Percent Convicted by Plea of Guilty or Nolo Contendere of Total Terminated | Percent Convicted of Total
<table>
<thead>
<tr>
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<th></th>
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</thead>
<tbody>
<tr>
<td>1955</td>
<td>38,990</td>
<td>33,855</td>
<td>31,148</td>
<td>79.9</td>
<td>92.0</td>
</tr>
<tr>
<td>1956</td>
<td>31,811</td>
<td>27,567</td>
<td>25,029</td>
<td>78.7</td>
<td>90.8</td>
</tr>
<tr>
<td>1957</td>
<td>29,725</td>
<td>26,254</td>
<td>23,867</td>
<td>80.3</td>
<td>90.9</td>
</tr>
<tr>
<td>1958</td>
<td>30,469</td>
<td>26,808</td>
<td>24,256</td>
<td>79.6</td>
<td>90.5</td>
</tr>
<tr>
<td>1959</td>
<td>30,729</td>
<td>27,033</td>
<td>24,793</td>
<td>80.7</td>
<td>91.7</td>
</tr>
<tr>
<td>1960</td>
<td>30,512</td>
<td>26,728</td>
<td>24,245</td>
<td>79.5</td>
<td>90.7</td>
</tr>
<tr>
<td>1961</td>
<td>31,226</td>
<td>28,625</td>
<td>24,830</td>
<td>79.5</td>
<td>86.7</td>
</tr>
<tr>
<td>1962</td>
<td>33,110</td>
<td>28,511</td>
<td>25,639</td>
<td>77.4</td>
<td>89.9</td>
</tr>
<tr>
<td>1963</td>
<td>34,845</td>
<td>29,803</td>
<td>27,024</td>
<td>77.6</td>
<td>90.7</td>
</tr>
<tr>
<td>1964</td>
<td>33,381</td>
<td>29,170</td>
<td>26,273</td>
<td>78.7</td>
<td>90.1</td>
</tr>
</tbody>
</table>

18. See [1955-1964] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table D4. For the years 1955-1961, juvenile delinquents are excluded; for the years 1962-1964 there are no exclusions.
The story in our state courts is not far different, although here one is handicapped by a lack of statistics. Some of the best state court statistics come from the Bureau of Criminal Statistics of the California Department of Justice, and the Administrative Office of the Courts of New Jersey. In California for the 13-year period from 1952 through 1964, of the total number of dispositions, less those certified to the juvenile courts, the percentage of those who pleaded guilty was rather consistently in the neighborhood of 65%. According to the New Jersey statistics, the number of defendants who pleaded either guilty or non vult exceeded by more than two and a half times the number who went to trial.

A recently published report of the American Bar Foundation states that the proportion of defendants who elected to plead guilty rather than stand trial ranged from 33% to 93% in the various states, with a median figure of 66%.

As Dean Edward L. Barrett, Jr., of the new law school of the University of California at Davis pointed out in his background material for the twenty-seventh American Assembly, held in 1965 at Arden House on the Harriman (New York) campus of Columbia University, "the overwhelming majority (at least three-quarters over-all) of all persons brought to the courts will plead guilty and not involve courts, prosecutors, and defenders in the time and expense of contested cases."

III. ROLE OF COUNSEL

What then is the role of defense counsel? Is it to see to it that the guilty are deemed innocent? The writer denies this.

Has defense counsel, because of what we call our adversary system (and again in the words of Justice Jackson in his concurring opinion in \textit{Watts v.Indiana}), "no duty whatever to help society solve its crime problem"? The writer refuses to think so.

True, a defendant in a criminal case has a right to remain silent, and if the prosecution does not prove him guilty beyond a reasonable doubt, to go free. Moreover, his counsel is under the duty to help him obtain this result. But most cases do not permit of such a simple, theoretical resolution.

19. California Bureau of Criminal Statistics, Crime in California 118 (1964); Id. at 51 (1959); Id. at 57 (1956); Id. at 17 (1952). This series of reports began in 1952.
21. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 92-93 (1965). The 66% figure includes 6% of the defendants who pleaded guilty to lesser offenses.
Let us take a situation, such as that in Escobedo v. Illinois, where police officers feel that an individual in their custody is guilty of the offense they are investigating. Do they really lose anything by telling such an individual that they think he is the guilty one, but that he has a right to remain silent and that he should get counsel? And, if such an individual is indigent, do we lose anything by having the state provide him with counsel?

Let us seek at least a partial answer in the most recent case in which the writer was appointed as counsel to represent an indigent accused in custody on the complaint of a patrolman of possessing heroin. The patrolman observed my client and another exchange paper bags, and placed them both under arrest. One bag contained money; the other, the heroin. The writer went to confer with his client in the Tombs, and listened to his account. My client insisted that the patrolman had framed him. However, he also wanted to plead guilty if he could get a sentence of six month and protect the seller. The writer explained to his client that a guilty plea on his part would not be of any help to the seller. Toward the close of the conference the writer also asked his client if he were a user of heroin. He responded that he was. At the preliminary examination the writer cross-examined the patrolman as vigorously and extensively as the court would permit. Thereafter his client wanted to plead guilty, and did. On the writer's plea for leniency, the judge imposed a sentence of 90 days, with credit for the time already spent in custody.

Now the sentence will in no way cure the writer's client of the drug habit, but the bench and bar disposed of the criminal case involving him with expedition, and in a manner acceptable to both sides.

Justice White in his dissenting opinion in Miranda, in which Justices Harlan and Stewart joined, charged that "the Court all but admonishes the lawyer to advise the accused to remain silent... But the Court did not do this. What the Court said, somewhat enigmatically, was:

An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath — to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

25. 384 U.S. at 537-38.
26. Id. at 480-81.
The writer suggests that the manner in which he represented his drug addict client gives content to the Court's statement. Defense counsel, whether appointed by the court, or selected by those who are accused, help their clients decide on the steps they are to take. For the guilty, this will usually be a guilty plea to some charge. However, the course of giving deviants some choice in the matter is more equalitarian, and thus more salutary and mature, than the course of making them submissive to the authorities. Under our system, under *Miranda* and *Escobedo*, an accused person always has a friend, his lawyer, who is on his side, who stands between him and the state, and who helps him determine what to do.

We often speak of our system as being adversary in character, and on the surface it would appear to be so. But on a deeper level, and in the long perspective of time, the bench and bar are peacemakers; for they help society resolve its disputes without a resort to violence. Members of the bar cast in the role of adversaries may act vehemently, may even shout, but the disputes involved will come to a peaceful end, and counsel will conduct themselves as officers of the court. By way of a long-range contrast, one of the early predecessors of the bench and bar was the blood-feud. Under it, members of tribal groups did settle their differences with bloodshed. The role of the bench and bar as peacemakers will be an expanding one as we continue our course as "a maturing society." More and more disputes will be resolved by counsel for the various parties before the litigants reach the courtroom. This will hold true for criminal cases as well, and will make for an increasingly effective system of criminal justice.

IV. Right to Counsel

On the Court's extensions of the right of counsel under the fourteenth amendment's due process clause, our account can begin with the leading case of *Powell v. Alabama*, which arose out of the Scottsboro prosecution. There Justice Sutherland wrote for the Court:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

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29. *Id.* at 69.
Since then, a long line of decisions makes plain that every defendant in every state criminal case, whether capital or noncapital, is entitled to be represented by counsel of his own choosing. A recent case, *Chandler v. Fretag*, is illustrative. The defendant had pleaded guilty to a house breaking and larceny charge, but when he found that this also involved him in a mandatory sentence of life imprisonment under the Tennessee Habitual Criminal Act, he asked for a continuance to enable him to get counsel on the habitual criminal accusation. The state court denied his request. The Supreme Court reversed. The Court through Chief Justice Warren unanimously ruled: "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."  

Courts may in no way impair this right to independent counsel of one's own choice. For example, in *Glasser v. United States*, a federal prosecution involving several defendants, the Court held that the trial judge's assignment of counsel selected by one defendant to represent also another of the defendants was a violation of the sixth amendment's guarantee of the assistance of counsel. The Court speaking through Justice Murphy reasoned:

Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of the accused should be respected. . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Another illustrative case is *Releford v. United States*. There the attorney retained by the defendant became ill and could not attend the trial. The district judge, instead of granting the defendant a con-


31. Id. at 9. In Reickauer v. Cunningham, 299 F.2d 170, 172 (4th Cir. 1962), the court, referring to counsel of one's choice, wrote: "This right is absolute and no showing of special circumstances is necessary. Holly v. Smyth, 280 F.2d 536 (4th Cir. 1960) . . . ." In Andrews v. Robertson, 145 F.2d 101, 102 (5th Cir. 1944), cert. denied, 324 U.S. 874 (1945), the court observed: "The State Court has no right under the Constitution, to deny a defendant the right to counsel of his own choosing."


33. 315 U.S. at 75-76.

34. 288 F.2d 298 (9th Cir. 1961).
tinuance to secure substitute counsel, insisted, contrary to the defend-
ant's wishes, that the attorney who shared offices with the attorney
retained by the defendant serve as his counsel. After conviction, the
defendant on appeal asserted that "this is reversible error regardless
of whether prejudice is shown." The Court of Appeals for the
Ninth Circuit held: "We agree. . . . Where such a person is able to
obtain counsel for himself and does not ask the court to appoint
counsel, he must be given a reasonable time and a fair opportunity to
secure counsel of his own choice." 58

Moreover, as the last case indicates, a defendant is entitled to a
reasonable amount of time to obtain counsel and to consult with him.
In Powell v. Alabama, 37 the Supreme Court stated: "It is hardly neces-
sary to say that, the right to counsel being conceded, a defendant should
be afforded a fair opportunity to secure counsel of his own choice." 38
The Court added: "The prompt disposition of criminal cases is to be
commended and encouraged. But in reaching that result a defendant,
charged with a serious crime, must not be stripped of his right to have
sufficient time to advise with counsel and prepare his defense." 39 In
Chandler v. Fretag 40 the Court, after quoting with emphasis from
Powell on an individual's unqualified right to counsel of his own choice,
reasoned: "A necessary corollary is that a defendant must be given a
reasonable opportunity to employ and consult with counsel; otherwise,
the right to be heard by counsel would be of little worth." 41 In addition,
counsel must have adequate time and opportunity to prepare his client's
defense. As the Court stated in Hawk v. Olson, 42 speaking through
Justice Reed: "The defendant needs counsel and counsel needs time." 43

35. Id. at 301.
36. Ibid.
37. 287 U.S. 45 (1932).
38. Id. at 53.
39. Id. at 59.
41. Id. at 10; accord, House v. Mayo, 324 U.S. 42 (1945); United States v.
Mitchell, 354 F.2d 767 (2d Cir. 1966); Tinkle v. United States, 254 F.2d 23 (8th Cir.
1958). In United States v. Mitchell, supra at 769, the Second Circuit held and said:
So, the question for decision by us is, under the circumstances did the trial judge
abuse his discretion by granting appellant only the period between Wednesday,
September 8, and Monday, September 13, to obtain the effective assistance of
counsel, and thus, in effect, deprive him of such assistance? We think he
did....
42. 326 U.S. 271 (1945).
43. Id. at 278; accord, White v. Ragen, 324 U.S. 760 (1945); Davis v. Johnson,
354 F.2d 689 (6th Cir. 1966); Tinkle v. United States, 254 F.2d 23 (8th Cir.
1958); United States v. Helwig, 159 F.2d 616 (3d Cir. 1947); United States v. Bergamo,
154 F.2d 31 (3d Cir. 1946); Walleck v. Hudspeth, 128 F.2d 343 (10th Cir. 1942);
Jones v. Commonwealth of Kentucky, 97 F.2d 335 (6th Cir. 1938); United States
Supp. 299 (M.D. Ala.), aff'd, 308 F.2d 674 (5th Cir.), cert. denied, 371 U.S. 933
(1962); Wright v. Johnston, 77 F. Supp. 687 (N.D. Cal. 1948); Shapiro v. United
States, 69 F. Supp. 205 (Ct. Cl. 1947); Merritt v. State, 219 A.2d 258 (Del. 1966);
Furthermore, one who stands accused is entitled to private consultations with his counsel free from the presence of others. In Coplon v. United States the Court of Appeals for the District of Columbia Circuit reversed Judith Coplon's conviction because the Government wiretapped the communications between her and her lawyer. The court ruled that this deprived her of the effective and substantial aid of counsel, in violation of the fifth amendment's guarantee of due process and the sixth amendment's guarantee of the right of counsel in all criminal prosecutions, saying: "The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel."

Nor, in the federal courts, is a defendant in a criminal case, in his untrammeled right to counsel of his own choice, limited in his selection to members of the local bar. He can select counsel from some other jurisdiction so long as that counsel is a duly qualified member of some accredited bar. For example, in United States v. Bergamo, where Pennsylvania defendants selected New Jersey counsel, the court ruled: "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." State courts as matter of practice often reach the same result on a pro hac vice basis.

Also, in a criminal case, a defendant is entitled to the assistance of counsel throughout the proceedings. As the Court stated in Powell v. Alabama: "He requires the guiding hand of counsel at every step in the proceedings against him." When a federal district court "advisedly accepted for itself the duty of representing the defendant upon


45. 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1940).
46. Id. at 759.
47. 154 F.2d 31 (3d Cir. 1946).
48. Id. at 35.
49. In Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), the court held, with reference to members of the New York bar admitted pro hac vice in a state criminal prosecution in New Jersey, that "their standing with respect to this case was no different from that of any other regularly admitted local lawyer." Id. at 123. In the preceding paragraph of its opinion the court observed:

And they were admitted pro hac vice in accordance with a custom that was apparently recognized as early as 1629 by English judges of Common Pleas. This custom of permitting the appearance of out-of-state lawyers had become "general" and "uniform" in the United States as early as 1876. Id. at 122.
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50. 287 U.S. 45, 69 (1932).
the return of the verdict, and fully discharged that responsibility," the Court of Appeals for the Tenth Circuit disagreed and reversed, saying:

Assuming that a court can adequately represent the defendant at any step of a contested criminal trial, that is not a substitute for, nor can it be taken in satisfaction of, the constitutional requirement that one charged with crime is entitled to the benefit of counsel who will devote his undivided energies solely and exclusively to the performance of these functions. 51

Not only does every person in every proceeding, civil as well as criminal, state as well as federal, have the absolute and unqualified right to independent counsel of his own choice, but also every defendant in every criminal prosecution, state as well as federal, is entitled to the effective assistance of counsel whether he requests it or not. For the federal courts, rule 44 of the Federal Rules of Criminal Procedure covers the assignment of counsel: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

At one time the right to the assignment of counsel was not as extensive in state as in federal criminal prosecutions. Although every accused in every state capital case as well as every accused in every state noncapital case "where the circumstances show that his rights could not have been fairly protected without counsel" 52 was entitled to have counsel assigned to him whether he asked for it or not, there was an exception in state noncapital cases where the refusal or failure to appoint counsel did not result in fundamental unfairness. This was Betts v. Brady. 53 But in Gideon v. Wainwright 54 the Court overruled Betts v. Brady, and did so unceremoniously. Today all defendants in all criminal prosecutions, in state as well as federal courts, in capital as well as noncapital cases, have the right to counsel — in the federal courts, under the specific provision for "the Assistance of Counsel" of the sixth amendment as well as the due process clause of the fifth; and in the state courts, under the due process clause of the fourteenth amendment.

Justice Black in Gideon wrote for the Court: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 55

53. 316 U.S. 455 (1942).
55. Id. at 344.
Court was unanimous although there were several concurring opinions. Justice Harlan in his concurrence felt that *Betts v. Brady* was “entitled to a more respectful burial” than it had been accorded.

Moreover, nothing better illustrates the powerful impact of the Court’s rulings under the fourteenth amendment’s due process clause on our national life than the fact that twenty-three states and commonwealths by their attorneys general filed a brief amici curiae on behalf of the petitioner Gideon asking the Court to overrule *Betts v. Brady*. The attorneys general in the conclusion of their brief amici declared:

"*Betts v. Brady*, already an anachronism when handed down, has spawned twenty years of bad law. That in the world today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that *Betts v. Brady* be reconsidered, and that this Court require that all persons tried for a felony in a state shall have the right to counsel as a matter of due process of law and of equal protection of the laws."

The Court agreed.

On the same day that the Court decided *Gideon*, it also held in *Douglas v. California* that the two defendants there were entitled to counsel on an appeal which they had as of right, even though the California District Court of Appeals stated that it had “gone through” the record and had come to the conclusion that “no good whatever could be served by the appointment of counsel.”

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56. *Id.* at 349.

Gideon on a retrial, with the benefit of counsel, was acquitted. N.Y. Times, Aug. 6, 1963, p. 2, cols. 2-4. For a full account see Lewis, GIDEON’S TRUMPET (1964).

On where to draw the line between crimes and petty offenses, see Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 62-88 (1963). The Fifth Circuit applied *Gideon* to guilty pleas to illicit liquor misdemeanor charges. *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965).

The New York Appellate Term, Second Department, decided that even traffic violators were entitled to be informed of their right to counsel, and reversed the conviction of a speeder who had not been so advised. The New York Court of Appeals in turn reversed the New York Appellate Term. People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965), reversing *sub nom.* People v. Kohler, 45 Misc. 2d 692, 258 N.Y.S.2d 279 (App. T.).

The North Carolina Supreme Court in *State v. Bennett*, 266 N.C. 755, 757, 147 S.E.2d 237, 238 (1966), ruled: “We do not conceive it to be the absolute right of a defendant charged with a misdemeanor, petty or otherwise, to have court-appointed and-paid counsel.”

59. 372 U.S. at 354-55. In *Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966), the court, in denying a motion of court-appointed counsel to withdraw from representing the defendant on appeal on the ground that the appeal was frivolous, pointed out that such a motion had to be supported by a memorandum analyzing the
The Court’s insistence on the right to counsel has been such that at each of many of its recent terms the Court has set aside a number of convictions because defendants had been denied the effective assistance of counsel. At the 1960-1961 term, which was the first term after the writer’s book *The First and the Fifth* appeared, where the cases on the assistance of counsel are collected,⁶⁰ there were: *Ferguson v. Georgia*,⁶¹ *Reynolds v. Cochran*,⁶² and *McNeal v. Culver*.⁶³

In *Ferguson v. Georgia* the Court held that a Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of counsel’s questioning while making it, unconstitutionally deprived him of the effective assistance of counsel. This case arose out of the fact that Georgia retained the old common law rule that a defendant in a criminal case could not be sworn on his own behalf. Georgia was the only state to keep this old rule. Justices Frankfurter and Clark would have gone further than the rest of the Court; they would have held that this old rule itself violated the fourteenth amendment’s due process clause. Justice Clark characterized it “as an unsatisfactory remnant of an age gone by.”⁶⁴

*Reynolds v. Cochran* involved a second-offender statute, and the defendant, who had his own lawyer, asked for a continuance in order for his lawyer to be available. The Criminal Court of Polk County, Florida, denied his request. The Supreme Court reversed, and in the process overruled the state’s contention that the denial of the defendant’s motion for a continuance was harmless error. The Court in a unanimous opinion by Justice Black held and said:

> The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding — that he had been convicted of a previous felony in 1934 as charged in the information — a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in Chandler. Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been previously employed could ever be termed “harmless error,” it is clear that such deprivation was not harmless under the facts as presented in this case.⁶⁵

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⁶⁴ 365 U.S. at 602 (concurring opinion).
⁶⁵ 365 U.S. at 531.
In a footnote Justice Black added: "It is significant that in Chandler we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel."\(^6\)

The cases at the 1961-1962 term were: Carnley v. Cochran,\(^6\) Chewning v. Cunningham,\(^6\) and Hamilton v. Alabama.\(^6\) In Carnley v. Cochran the Court held that a waiver of the right to counsel would not be presumed from a silent record: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Any-thing less is not waiver."\(^7\)

In Chewning v. Cunningham the Court concluded that an accused under a recidivist statute was entitled to the appointment of counsel.

In Hamilton v. Alabama the Court reversed an Alabama murder conviction because the petitioner did not have counsel at his arraignment, quoting the language from Powell v. Alabama to the effect that such an accused needed the guiding hand of counsel at every step in the proceedings against him.\(^7\)

At the 1962-1963 term there was, in addition to Gideon v. Wainwright,\(^7\) and Douglas v. California:\(^7\) White v. Maryland.\(^7\) In White the Court, following Hamilton v. Alabama, upset a Maryland murder conviction because the accused did not have counsel at his preliminary hearing.

At the 1963-1964 term there were as many as 19 comparable rulings. In thirteen cases the Court vacated judgments of conviction with the indication that it might apply Gideon retrospectively.\(^7\)

\(^6\) Id. at 532 n.12.
\(^7\) 369 U.S. 506 (1962).
\(^6\) 368 U.S. 443 (1962).

\(^7\) 369 U.S. at 516. In United States ex rel. Higgins v. Fay, 252 F. Supp. 568 (S.D.N.Y. 1966), the court held that a difficult defendant in a state court case who refused to choose between continuing with assigned counsel or proceeding pro se had not waived his right to counsel.

\(^7\) 368 U.S. at 54.
\(^7\) 372 U.S. 335 (1963).
\(^7\) 372 U.S. 353 (1963), vacating judgment in 187 Cal. App. 2d 802, 10 Cal. Rptr. 188 (1960).

\(^7\) 373 U.S. 59 (1963). In Dancy v. United States, 361 F.2d 75 (D.C. Cir. 1966), the court held that the failure to advise an indigent at a preliminary hearing of his right to counsel not only required the reversal of his resulting narcotics conviction, but also of his conviction for assaulting the policeman who was testifying at that hearing, even though the full sentence on the assault conviction had been served. The court further ordered the dismissal of the assault indictment. But cf. Blue v. United States, 342 F.2d 894 (D.C. Cir. 1965), cert. denied, 380 U.S. 944 (1965), where the defendant waived a preliminary hearing, and the court could find no prejudice.

cases it indicated similarly with reference to its holding in Douglas v. California, and in a third case did apply that holding retrospectively. In Doughty v. Maxwell the Court extended Gideon not only retrospectively but also to defendants who had pleaded guilty.

After Doughty came Massiah v. United States and Escobedo v. Illinois. Massiah and Escobedo represented high points in the Court's development of the right to counsel.

Massiah involved an indictment with two defendants. The government with the aid of one of the defendants, who became cooperative, recorded a conversation between the two of them. The Court held that the other defendant was denied his sixth amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." In Escobedo the Court invalidated a conviction on the ground that one who had become a suspect was entitled to counsel even before indictment, and during police interrogation. The Court reasoned:

The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. Powell v. Alabama, 287 U.S. 45, 69. This was the "stage when legal aid and advice" were most critical to petitioner. Massiah v. United States, 377 U.S. at 204. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama, 368 U.S. 52, and the preliminary hearing in White v. Maryland, 373 U.S. 59. What happened at this interrogation could certainly "affect the whole trial," Hamilton v.

78. 376 U.S. 202 (1964), reversing 175 Ohio St. 46, 191 N.E.2d 727 (1963); accord, Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); United States ex rel. Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964), cert. denied, 377 U.S. 998 (1964); United States ex rel. Craig v. Myers, 329 F.2d 856 (3d Cir. 1964). In Durocher the court pointed out:

Simply stated, we are convinced that Gideon's requirement of court-appointed counsel cannot be limited to cases in which a "not guilty" plea has been entered - the context in which Gideon itself was decided. Indeed, we would be less than candid were we even to consider the question as an original matter; even if Gideon may be said to have left the issue open, our conclusion seems plainly required by the Supreme Court's recent disposition of Doughty v. Maxwell... 330 F.2d at 307.

In Manny v. State, 237 Md. 349, 206 A.2d 563 (1965), and Subilosky v. Commonwealth, 209 N.E.2d 316 (Mass. 1965), the courts held that Gideon was to be applied retrospectively.
81. 377 U.S. at 206; accord, McLeod v. Ohio, 381 U.S. 356 (1965); People v. Halstrom, 34 Ill. 2d 20, 213 N.E.2d 498 (1966); State v. Green, 46 N.J. 192, 215 A.2d 546 (1965). In Lee v. United States, 322 F.2d 770 (5th Cir. 1963), decided before Massiah, the Fifth Circuit held inadmissible testimony of a federal agent as to oral admissions he obtained from an indicted prisoner who did not yet have counsel.
Alabama, 368 U.S. at 54, since rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." Ibid. It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.82 [Citations modified.]

Escobedo resulted in a development across the country of the right to counsel for suspects. Although one can limit Escobedo to cases where the police deny a suspect's request to see his lawyer or a lawyer's request to see his incarcerated client, the courts divided on the necessity of a request for counsel by a suspect in custody in order for the right to counsel to become determinative.83 The leading cases which


held that such a request was not necessary were probably United States ex rel. Russo v. New Jersey\(^{84}\) in the Third Circuit, and People v. Dorado\(^{85}\) in California. The principal cases to the contrary were probably State v. Johnson\(^{86}\) and State v. Ordog,\(^{87}\) both in New Jersey. This made for an interesting juxtaposition of the two contrasting points of view, for New Jersey is in the Third Circuit. Chief Justice Joseph Weintraub of the New Jersey Supreme Court also sent a pastoral letter to all state judges and prosecutors directing them to ignore the ruling of the Third Circuit and to follow New Jersey law.\(^{88}\)

In Russo the Third Circuit threw out confessions obtained from two New Jersey suspects during police interrogation, although neither had requested counsel. Chief Judge Biggs in the court’s opinion stated:


In Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), cert. denied, 384 U.S. 1011 (1966), the court held that Internal Revenue agents did not have to inform a taxpayer of his right to counsel even though their investigation of his returns and records had reached the point where they suspected him of fraud. Cf. Smith v. United States, 250 F. Supp. 803 (D.N.J. 1966).

So great has been our insistence on the right to counsel and so various have been our applications of it, that one can argue for its extension to accused persons in the grand jury room. One can suggest that if in France an accused person has the right to counsel whenever the judge d’instruction questions him, then by a parity of reasoning an accused person before a grand jury should have a like right. Our courts have refused to go this far. United States v. Rosen, 353 F.2d 523 (2d Cir. 1965), cert. denied, 383 U.S. 908 (1966); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955), cert. denied, 350 U.S. 897 (1955); United States v. Kane, 243 F. Supp. 746 (S.D.N.Y. 1965); cf. United States v. Winter, 348 F.2d 204 (2d Cir. 1965).

However, four of the eleven judges of the District of Columbia Circuit sitting en banc in Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) (Senior Circuit Judge Edgerton, Chief Judge Bazelon, and Circuit Judges Fahy and Wright), would have ordered the dismissal of an indictment based on an accused person’s answers to questions before the grand jury which returned it. Contra, United States v. Cleary, 265 F.2d 459 (2d Cir. 1959), cert. denied, 360 U.S. 936 (1959). In support of the exclusion of defense counsel from the grand jury room, one can point to the fact that the grand jury traditionally is a group of neighbors selected from the body of the people, and nearly the antithesis of inquisitional officials.

But cf. People v. Ianiello, 35 U.S.L. Week 2003 (Sup. Ct., N.Y. County, June 24, 1966), where the court held that the sixth amendment barred a New York criminal contempt indictment based on testimony a grand jury witness was compelled to give after he had been denied access to his counsel who was outside the grand jury room.

"No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver."

At its 1964 term the Court denied certiorari in cases going both ways on the extension of Escobedo to all suspects, but at its 1965 term it granted review in five such cases. As Justice Samuel J. Roberts noted (before the Court began granting review in these cases) in the concluding paragraph of his concurring opinion in Commonwealth ex rel. Linde v. Maroney, where the court, although reversing a conviction, held a request by the suspect for counsel to be necessary:

No doubt, we shall have further guidance from the Supreme Court of the United States on this subject. In any event, if the law enforcement officers of this Commonwealth unfailingly advise one upon whom the spotlight of accusation has swung that he has a right to counsel, then the stress in this area will be substantially lessened.

The Court's further guidance did come. Four of the five cases in which it granted review were decided in Miranda. In three of these, two state cases and one federal case, the Court reversed convictions. The fourth of the four cases decided in Miranda was California v. Stewart. Here the Supreme Court of California, following its ruling in People v. Dorado, itself had reversed a conviction. In this instance the United States Supreme Court affirmed.

The Court reached its Miranda result by adding to Escobedo an extension of an individual's right of silence to police questioning. The ground of the Court's ruling came as a surprise, but a historical study of the right of silence will show how apt the Court's ground was.

The fifth of the five cases in which it granted review at its 1965 term was Johnson v. New Jersey. Here the Court affirmed the New

89. 351 F.2d at 438.
92. Id. at 338-39, 206 A.2d at 292 (concurring opinion).
Jersey Supreme Court's affirmance of a conviction, but it did so on the ground that it would not give retroactive effect to its *Miranda* ruling.

Of course, even if neither *Miranda* nor *Escobedo* is applicable, a confession can still be attacked. It can be attacked in a federal case as violating the *McNabb-Mallory* rule, after two cases: *McNabb v. United States*[^95] and *Mallory v. United States*[^96]. It can be attacked in a state case as violating the due process clause of the fourteenth amendment.

The Court's rulings in *Miranda* and *Johnson v. New Jersey* thus present these three topics, among others: the right of silence, the retroactivity of the Court's rulings, and the use of confessions. All three topics will be treated in subsequent sections of this article.

As for the right to counsel itself, the Court at the same term as its *Miranda* ruling gave this right a further extension: it held in *Kent v. United States*[^97] that in a determination by a juvenile court under a provision of the District of Columbia Juvenile Court Act to waive its jurisdiction, a juvenile was entitled to the effective assistance of counsel. The Court ruled:

> [W]e conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision[^98].

The Court also noted probable jurisdiction in *In re Gault*[^99] in order to consider the practices of Arizona's juvenile courts. One of the questions involved is whether the juvenile as well as his parents were deprived of their right to counsel.

With the United States Supreme Court's insistence over the years on the right to counsel, state courts as well as lower federal

[^95]: 318 U.S. 332 (1943).
[^97]: 383 U.S. 541 (1966), reversing 343 F.2d 247 (D.C. Cir. 1965). In *Black v. United States*, 355 F.2d 104 (D.C. Cir. 1965), the District of Columbia Circuit held that the absence of counsel from waiver proceedings for a 16-year-old charged with a felony vitiated the District of Columbia Juvenile Court's waiver of its jurisdiction. Cf. *Harrison v. United States*, 359 F.2d 214 (D.C. Cir. 1965), where this court en banc held that an 18-year-old's confession to murder committed while he was 17, elicited by District of Columbia police while they held him for an unrelated offense, was inadmissible in evidence against him because he was still subject to the exclusive jurisdiction of the Juvenile Court as to the earlier offense; and *Watkins v. United States*, 343 F.2d 278 (D.C. Cir. 1964), where this court remanded a case to the district court for supplemental proceedings to determine the extent to which the social records of the juvenile court were to be disclosed to the appellant's attorney.

The Vermont Supreme Court held that the commitment of a juvenile to a training school was not vitiated by the juvenile court's failure to advise him of his right to counsel. *In re Rich*, 216 A.2d 266 (Vt. 1966).

[^98]: 383 U.S. at 557.
courts have made innumerable comparable rulings. The New York Court of Appeals in People v. Witenski\(^{100}\) ruled that all criminal defendants in all state courts had to be told in plain language not only of their right to counsel, but also that a lawyer would be assigned to them if they could not afford to hire one themselves. The defendants were three youths, all less than twenty-one years old, who were surprised in an orchard in the act of stealing a half bushel of apples of the value, according to the information filed by the owner of the orchard, of about two dollars. A justice of the peace advised each of them:

>'You are entitled to the aid of counsel in every stage of these proceedings, and before any further proceedings are had. You are entitled to an adjournment for that purpose and upon your request I will send a message to any counsel you name within this jurisdiction. Do you desire counsel?'\(^{101}\)

Each defendant answered in the negative. The court ruled that the justice of the peace had not done enough. It was not enough to make a formulistic recital of law language about the right to counsel. In addition, the justice had to bring home to these defendants that, if they did not have the money to hire counsel, they had the right to have the court assign counsel to them. Without this much enlightenment, they could not be held to have waived their right to counsel:

>The bare statement to an ignorant teenager that he is "entitled to the aid of counsel in every stage" plus an offer to send a message to a lawyer to be named by the defendant, followed by the defendant's negative answer to a question as to whether he desired counsel, did not show an effective waiver by the defendant of his right to counsel. . . . "It is also well established that waiver of such statutory and constitutional rights is occasioned only when the accused acts understandingly, competently and intelligently."\(^{102}\)


\(^{101}\) 15 N.Y.2d at 394, 207 N.E.2d at 359, 259 N.Y.S.2d at 414.

\(^{102}\) Id. at 395, 207 N.E.2d at 360, 259 N.Y.S.2d at 414-15. In People v. Burton, 47 Misc. 2d 1077, 264 N.Y.S.2d 89 (Port Jervis City Ct. 1965), the court, apparently irritated by this holding, reached the conclusion that a defendant who was advised of his right to retain counsel of his own choosing, and who, after stating that he did not wish to obtain counsel, was asked if he wished the assistance of counsel and answered in the negative, was not sufficiently advised of his right to assigned counsel. Under Witenski, it was mandatory upon courts to advise a defendant in this language: "If you do not have sufficient funds with which to retain counsel of your own choosing, or for any other reason you are unable to obtain counsel of your own choosing, and if you so request same, this court will assign counsel to you, which counsel shall act as your attorney without fee." 47 Misc. 2d at 1079, 264 N.Y.S.2d at 91. But Chief Justice Warren in the Court's opinion in Miranda v. Arizona, 384 U.S. 436, 473 n.42 (1966), referred with approval to Witenski, as well as to United States ex rel. Brown v. Fay, 243 F. Supp. 273, 277 (S.D.N.Y. 1965).
The New York Court of Appeals ruled in *People v. Monahan*103 that an indigent defendant, upon request, was entitled to have counsel assigned to represent him at a coram nobis post conviction hearing in a court of special sessions, in *People ex rel. Rogers v. Stanley*104 that an indigent mental patient, who was committed to an institution, was entitled, in a habeas corpus proceeding (brought to establish his sanity), to the assignment of counsel as a matter of constitutional right, and in *People v. Hughes*105 that an indigent was entitled, upon request, to have assigned counsel upon a coram nobis or a habeas corpus appeal.

The New York Appellate Division, Third Department, in *People ex rel. Rodriguez v. La Vallee*106 held that an indigent prisoner was entitled, upon request, to the assignment of counsel to represent him upon a habeas corpus hearing.

The New York Appellate Division, Fourth Department, decided in *People v. Hamilton*107 that a defendant was entitled to counsel upon a hearing for violation of probation, and that a failure to advise him of this right vitiated this hearing.

The California Supreme Court ruled that a trial judge had to appoint counsel in a coram nobis proceedings for an indigent prisoner who showed that his claim of unlawful imprisonment was not frivolous.108

The Supreme Court of Alaska read into an Alaska statute which accorded to deviants on probation the right to counsel at probation revocation proceedings, a requirement that indigent probationers be furnished with court-appointed counsel at such proceedings.109

The Supreme Court of West Virginia held that the escape from custody by a West Virginia prisoner who had been denied the assistance

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106. 26 App. Div. 2d 8, 270 N.Y.S.2d 340 (1966). *Contra*, Flowers v. Oklahoma, 356 F.2d 916 (10th Cir. 1966); Little v. Rhay, 413 P.2d 15 (Wash. 1966). The contra cases went on the ground that habeas corpus was a civil proceeding, a distinction which the Fourth Department regarded as no longer determinative so far as the right to counsel was concerned.

of counsel at his trial did not constitute an offense, for his escape was from imprisonment under a void judgment.\textsuperscript{110}

The Washington Supreme Court in \textit{City of Tacoma v. Heater}\textsuperscript{111} held that the refusal to permit a Washington motorist to contact his counsel until four hours after his arrest for drunken driving violated his sixth amendment right to counsel, resulted in irreparable damage to his defense, and required dismissal of the prosecution. The regulations of the Tacoma police department permitted officers to deny to a person charged with an offense involving intoxication the right to make a telephone call until the expiration of four hours following his arrest.

Pennsylvania’s Superior Court held that the trial judge’s direction to a defendant not to discuss his testimony during a 17-hour recess in the course of the defendant’s cross-examination was a deprivation of his right to counsel “even if no actual prejudice was proved.”\textsuperscript{112}

The Kentucky Court of Appeals held that an indigent defendant who was subject to imprisonment under a civil judgment had the same rights as an indigent defendant in a criminal case. This included assigned counsel for an appeal as well as a free copy of the transcript.\textsuperscript{113}

In \textit{Application of Stapley}\textsuperscript{114} the Federal District Court for the District of Utah held that a serviceman who was represented before a special court-martial by officers with substantially no knowledge, experience or training in the law was denied his sixth amendment right to counsel so as to render the court-martial without jurisdiction and entitle him to discharge from detention on a writ of habeas corpus.

The United States Supreme Court’s emphasis on the right to counsel helped to bring about the passage of the Criminal Justice Act of 1964.\textsuperscript{115} This act provides for the representation of indigent defendants in federal criminal cases; and the appointment and payment of counsel for them. The number of counsel appointed between the effective date of the act, August 20, 1965, and April 1966, reached 12,383.\textsuperscript{116}

\textsuperscript{111} 409 P.2d 867 (Wash. 1966).
\textsuperscript{113} Wright v. Crawford, 401 S.W.2d 47 (Ky. 1966).
\textsuperscript{114} 246 F. Supp. 316 (D. Utah 1965) ; cf. Application of Palacio, 48 Cal. Rptr. 50 (Dist. Ct. App. 1965). The Fifth Circuit in Davis v. Holman, 354 F.2d 773 (5th Cir. 1965), held that a conviction of a defendant who had originally waived counsel and pleaded not guilty was vitiated because the trial judge did not again offer him counsel when he withdrew his plea of not guilty and pleaded guilty; and in Bland v. Alabama, 356 F.2d 8 (5th Cir. 1965), \textit{cert. denied}, 383 U.S. 947 (1966), that the trial court’s failure to provide counsel for an indigent defendant who, before applying for a new trial, asked that he “be accorded the same rights as one who was financially able to pay all the legal fees,” vitiated the denial of the motion for a new trial.
In 1965 the state of New York enacted two statutes to make legal counsel available to every indigent defendant in state courts: one allowing senior-year law students to act as attorneys for indigent clients, and the other requiring each county to set up a program of free legal services for all needy defendants. Governor Rockefeller in a message approving this legislation wrote: "In our society, the right to counsel is as indispensable as the right to a fair trial, and both must be protected if our system of justice under law is to continue and flourish."

In 1966, as a result of New York appellate court decisions expanding the right to counsel to include habeas corpus proceedings and coram nobis applications, New York state passed an act providing for the assignment of counsel for indigents in such proceedings and applications as well as counsel for indigents detained in any state institution.

The New Jersey Supreme Court announced in an opinion by Chief Justice Weintraub in State v. Rush that after January 1, 1967 the county would compensate attorneys whom New Jersey courts appointed to represent indigent defendants in all criminal cases, non-murder as well as murder. The court reasoned: "Thus the 'necessary expenses' of the prosecution are the burden of the county. Within that category must fall the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under Gideon v. Wainwright..."

The changes are breathtaking. No matter who the defendant, or what the type of criminal proceeding, our courts will see to it that the defendant has the effective assistance of counsel.


120. 46 N.J. 399, 217 A.2d 441 (1966).

121. Id. at 414-15, 217 A.2d at 449.

122. On September 7, 1966, at the Nassau Inn, Princeton, New Jersey, Chief Justice Weintraub and his six colleagues on the New Jersey Supreme Court sought the opinions of more than 300 jurists, prosecutors, defense lawyers, and educators who assembled for an annual seminar on New Jersey legal techniques with regard to whether the court should order the police to make evidence uncovered for the prosecution in criminal cases available to the defense as well. See N.Y. Times, Sept. 8, 1966, p. 33, col. 1.
V. Right of Silence

A. Early Inquisitional Attempts

The right of silence, which the Supreme Court extended in *Miranda*, has origins which go back more than seven centuries, to the first general pursuit of heresy in England.

Into the English accusatorial framework, with one group of neighbors presenting formal and specific charges against deviants and another group judging the facts, the Church introduced the inquisitional technique, and soon ran into stiff opposition, which in the long run proved to be insurmountable. The one who introduced the inquisitional procedure in England, or as it came to be designated, the oath ex officio, was Cardinal Otto, a papal legate. He came there in 1237, the year after Henry III married his French wife, Eleanor of Provence. Less than a decade later when Robert Grosseteste, the crusading Bishop of Lincoln, used it in a general inquisition throughout his extensive diocese, the people showed resistance. They complained, and Henry III, although regarded as a king who was favorable to the claims of the Church, nevertheless with the advice of his Council wrote the sheriff commanding him not to let any laymen of his bailiwick appear before the bishop or his officials to make answer under oath except in causes matrimonial or testamentary ("nisi in causis matrimonialibus vel testamentariis"). The bishop questioned the king's motives, which William Prynne described as "an insolent undutiful answer of a furious turbulent willful Prelate," and continued with his visitations. Then the king, the next year, cited the bishop to appear before him and his justices to show cause why he had compelled persons "to appear and take his new devised Oathes." In 1251 the king cited the bishop of Worcester, who had followed Grosseteste's example. The following year he ordered Grosseteste to desist from his inquisitional practices. In his order he recited that the bishop and his officials were still compelling people to testify under oath as to the private sins of other persons with the result that many were defamed, and might easily incur the danger of perjury. There was no contention in all this that the bishops were exceeding their powers. Rather the objection was to the inquisitional method. Near the end of the same century the *Mirror of Justices* (c. 1290) also contained a criti-

123. Matthias Paris Monachi Albanensis Angli, Historia Major 716 (1640 ed.).
125. Id. at 705.
cism of this technique: "It is an abuse that a man is accused of matters touching life or limb quasi ex officio, without suit and without indictment."126

A legal scholar, Professor John Henry Wigmore, was of the view that the first four hundred years of the opposition of the English people to the inquisitional technique represented a jurisdictional struggle between the state and the church and between the common law courts and the ecclesiastical courts.127 But it is to be doubted whether it was this at all, at least prior to 1606, when Coke went on the bench. Certainly it was not fundamentally this. Fundamentally what was involved was an opposition to the inquisitional procedure itself. To the people of England, who themselves had a hand in the job of governing and where an individual was not questioned until after he had been formally and specifically charged, there was something improper about putting a person on oath and just generally questioning him. They raised various objections to this procedure: a person was entitled to be presented formally with the charges against him, to be tried in his own vicinity, to know his accusers, and to not be questioned about the secret thoughts of his heart. Often implicit even in the early objections was a reluctance to inform on others.

Two legal historians, Pollack and Maitland, expressed the opinion that because Henry II preceded Innocent III and extended the inquiry of neighbors, England escaped the inquisitional system.128 This would seem to be what happened. The grand jury system provided a continuity for the accusatorial characteristic of tribal justice—a person was not to be proceeded against without being first formally charged. No official took a person into custody and questioned him generally. One first had to be presented with specific charges by a jury of his neighbors. The English people, always having been accustomed to formal and specific charges before being questioned, insisted on them.


127. 8 Wigmore, Evidence § 2250 (3d ed. 1940). Wigmore first published his study of the growth of the privilege against self-incrimination, or right of silence as it is more appropriately called, over sixty years ago. Wigmore, Nemo Tenetur Seips in Prodere, 5 Harv. L. Rev. 71 (1891). He later enlarged upon it. Wigmore, The Privilege Against Self-Incrimination: Its History, 15 Harv. L. Rev. 610 (1902). Later researches showed that more was involved, even in the early history of the growth of a right of silence, than simply disputes over the scope of the authority of various officials. Maguire, M.H., Attack of the Common Lawyers on the Oath Ex Officio in the Ecclesiastical Courts in England, in Essays in History and Political Theory in Honor of Charles Howard McIlwain 199 (1936); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949). But Professor Morgan's study came too late for him to consider, and that of Mrs. Maguire he refused to take seriously. See 8 Wigmore, supra § 2250 n.1.

It was in this way that they began their successful struggle against the inquisitional system. However, their escape from this system, as Pollock and Maitland admitted, was a narrow one.

B. Insistence on Formal Charges

In England as in France the inquisitional method spread to the organs of the state. It crept into use in the courts of common pleas and king's bench and before the king in Council. There was opposition on all fronts. With respect to the Church, the *Prohibitio formata de Statuto Articuli Cleri* again prohibited the use of the inquisitional oath except in causes matrimonial and testamentary. As for the use of this oath by the king in Council the Commons protested, and the king promised that it would not be used without reason. A few years later, in 1351-1352, a statute, after a reference to the Great Charter, provided: "from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighborhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law. . . ." This was the same act which provided that no member of a grand jury which had indicted a suspect was to sit on the petit jury which tried him if the defendant objected. In 1368 another statute, in order "to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers" causing them to be brought before the king's Council, enacted that "no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land." In this century, as in the preceding one, the objections were based on opposition to the inquisitional oath itself. The church clearly had jurisdiction over heresy as well as other offenses. The king's Council, too, had jurisdiction over the matters it investigated. Yet in all these instances there was opposition, and it was to the inquisitional oath.

The rise of the Lollards caused the prelates to renew their pressure for the use of the oath ex officio against heretics. In 1382 they persuaded Richard II to give them the power they wanted. However,

129. 35 Selden Society Publications, Select Cases Before the King's Council (1243-1482), at xlii (Leadam & Baldwin ed. 1918).
131. 2 Rotuli Parliamentorum 168, item 28 (1347).
133. 1369, 42 Edw. 3, c. 3.
the Commons, at their next session, asserted that they had never agreed
to this enactment and asked that it be declared void. The king con-
sented.\textsuperscript{135}\ But in 1401, under Henry IV, the Church obtained a
statute which gave the diocesan power to arrest and imprison heretics
and to “determine that same Business according to the Canonical
Decrees.”\textsuperscript{136} So long as this statute remained on the books the church
could use the oath ex officio against heretics. A statute of 1414 en-
larged the church’s power still further by providing that indicted
heretics were to be turned over to the ordinary for trial by the Church’s
procedure.\textsuperscript{137} However, in an earlier statute in the same year, Parlia-
ment provided that if a person were brought into the spiritual court
he was to have a copy of the things complained about, in order to know
whether and how to answer them. If the copy were not forthcoming
he was entitled to have a writ of prohibition.\textsuperscript{138}

\textbf{C. Coroner}

There was one official who acquired and retained inquisitional sub-
poena powers, the coroner; but he functioned in connection with a
body which was like the grand jury. This did not have to be so, but
historically it was.

The first distinct reference to coroners dates from 1194, in one
of the articles for the eyre of that year.\textsuperscript{139} Bracton in his \textit{Tractatus de
legibus} describes their duties.\textsuperscript{140} Then in 1276 the Statute de Officio
Coronatoris, almost a transcript of Bracton, provided:

\begin{quote}
A Coroner of our Lord the King ought to inquire of these Things,
[if he be certified by the King’s Bailiffs, or other honest Men
of the Country: First, he shall go] . . . to the Places where any be
slain, or suddenly dead, or wounded, or where Houses are broken,
or where Treasure is said to be found . . . , and shall forthwith
command four of the next Towns, or five or six, to appear before
[him] . . . in such a place: and when they are come thither the
Coroner upon the Oath of them shall inquire. . . .\textsuperscript{141}
\end{quote}

This statute provided for an inquiry of neighbors, and not an inquisi-
tion by an official.

\textsuperscript{135} 3 \textit{Rotuli Parliamentorum} 141, item 53.
\textsuperscript{136} 1401, 2 Hen. 4, c. 15.
\textsuperscript{137} Stat. 1, 1414, 2 Hen. 5, c. 7.
\textsuperscript{138} Stat. 1, 1414, 2 Hen. 5, c. 3.
\textsuperscript{139} See \textit{Stubb’s, Constitutional History of England} 544 (4th ed. 1883).
\textsuperscript{140} F. 121–21b.
\textsuperscript{141} Stat. 2, 4 Edw. 1.
D. Inquisitional Inroads in the 1400's and 1500's

The struggle of the English people against the inquisitional system, however, was by no means at an end. One group of officials who obtained a certain amount of inquisitional powers over suspects were the justices of the peace. Between 1414 and 1503 a series of twenty-five different statutes empowered these officials as well as others to question defendants and suspects about various specified offenses relating to: masters and servants, trade, nuisances on the Thames, giving liveries and keeping retainers, assaults on privileged persons, wax-chandlers, corruption in sheriffs, desertion in the king's service, contentious attorneys, apparel, and the destruction of deer. The first and last in this series of twenty-five statutes provided for examination on oath. The first, which was Henry V's Statute of Labourers, provided: "And also that the Justices of Peace from henceforth have Power to examine as well all Manner of Labourers, Servants, and their Masters, as Artificers, by their Oaths, of all Things by them done." The last, which was Henry VII's Statute of Retaining, enacted that "the Justices of the Peace at their opyn Sessyons shall have full Power and auctorite to cause all such persons, as they shall thinke to be suspect" to come before them or two of them and "theym to examen of all such reteynours contrary to this acte, or otherwyse name themself to be servaunt to any person or of others mysbehaving contrary to this acte by the discrescion of seid Justices." Furthermore, the act provided for an informer's suit before "the Chancellor of England or the keper of the Kyng's gret seale in the Sterre Chamber, or before the Kyng in his Benche, or before the Kyng and his Counseill attending" and gave these officials "power to examen all persons defendauntes and every of theym, as well by oth as oderwyse." Even without suit the "Chauncellor or keper of the gret Seale Justices or Counsell" were empowered to bring persons before them and "the same person or persons to examen by oth or otherwyse by their disgressions." The act was to last during the king, Henry VII's, lifetime.

142. Stat. 1, 1414, 2 Hen. 5, c. 4; 1423, 2 Hen. 6, c. 7; 1423, 2 Hen. 6, c. 12; 1423, 2 Hen. 6, c. 18; 1427, 6 Hen. 6, c. 3; 1429, 8 Hen. 6, c. 4; 1429, 8 Hen. 6, c. 5; 1433, 11 Hen. 6, c. 8; 1433, 11 Hen. 6, c. 11; 1433, 11 Hen. 6, c. 12; 1439, 18 Hen. 6, c. 4; 1439, 18 Hen. 6, c. 14; 1439, 18 Hen. 6, c. 19; 1444-45, 23 Hen. 6, c. 12; 1455, 33 Hen. 6, c. 7; 1463, 3 Edw. 4, c. 1; 1463, 3 Edw. 4, c. 5; 1464-65, 4 Edw. 4, c. 1; 1468, 8 Edw. 4, c. 17; 1477-78, 17 Edw. 4, c. 4; 1482-83, 22 Edw. 4, c. 1; 1485, 1 Hen. 7, c. 7; 1495, 11 Hen. 7, c. 3; 1503, 19 Hen. 7, c. 11; 1503, 19 Hen. 7, c. 14.

143. Stat. 1, 1414, 2 Hen. 5, c. 4.

144. 1503, 19 Hen. 7, c. 14, § 5.


In the next reign opposition to the inquisitional oath renewed itself. Heresy and anticlerical feeling were spreading at this time in England. This caused another bishop of Lincoln, one of Grosseteste's successors, to start after heresy with a plentiful use of the oath ex officio. The people resisted. Their spokesman was Christopher Saint-German, a leading lawyer, and author of *Doctor and Student*. His antagonist was Sir Thomas More. Their controversy took place in 1532-1533. In opposing the oath ex officio Saint-German argued: “the partyes haue not known who hath accused them, and thereupon they have sometyme bene caused to abiure in causes of heresies... for they have knowne none other accusers and that hath caused moche people in diuers partyes of this realme to thynke great malyce and parcyalyte in the spirituel iudges.” Then referring to the fact that those who named others as well as themselves gained redemption in the eyes of the Church, he continued, “This is a daungerous lawe and more lyke to cause untrewe and unlawfylle men to condemne innocentes than to condemne offenders.”

More answered that if the church could not use the inquisitional procedure “the streythes were lykely to swarme full of heretykes before that ryght fewe were accused, or peradventure any one eyther.” Saint-German responded: “But to put the partie that is complayned on, to answere, and to condempe, if he say contrary to that the witness have seyd, not knowing who be the witnes, ne who be his accusers: it semeth not reasonable to be accepted for a lawe.”

The next year Parliament entered the controversy and passed “An Acte for Punyshement of Heresye,” which repealed the statute of 1401 and outlawed the *inquisitio* procedure of the Church in heresy cases. The preamble, referring to the act of 1401, recited:

And also by cause those wordes canoycall sanctions and suche other lyke conteyned in the seid acte are so generall, that unneth the most expert and best lerned men of this your Realme diligently lying in wayte uppon himselff can eschewe and avoyd the penaltie and daunger of the same acte and canoycall sanctions yf he shulde be examyned upon suche capcious interrogatoryes as is and hathbyn accustomed to be mynystered by the Ordynaries of this Realme in cases where they wyll suspecte any person or persons of heresye.

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147. *A Treatise concerning the division betwene the spiritualtie and temporalitie* in *The Apologie of Syr Thomas More, Knyght* 203, 220–21 (Early English Text Society, original ser. no. 180, Taft ed. 1930).

148. *Id.* at 147.

149. *Salem and Bizance*, f. 49b, 50a (London 1533).

150. 1533, 25 Hen. 8, c. 14; 3 Statutes of the Realm 454.

Section 6 provided that before persons could be proceeded against for heresy they had to be "presented or indicted of hersye or duly accused or detected thereof by two lawfull wytnesses at the leest."\(^{152}\) Moreover, after they were apprehended, they were to answer "in open Courte and in an open place to their such accusation and present-ments."\(^{153}\)

The same year More was to some extent hoist on his own petard. Henry VIII had him called before some of his councilors to take the oath of supremacy or give his reasons for not doing so. More steadily declined to do either. After all he had committed no overt act: "I nothinge doinge nor nothing sayenge against the statute it were a very harde thinge to compell me to saye either precisely with it againste my conscience to the losse of my soule, or precisely againste it to the destruction of my bodye."\(^{154}\)

Under the brief reign of Mary the inquisitional technique again made great gains, and it made them with both the lay and clerical authorities. Mary restored the Church's jurisdiction as well as its inquisitio procedure in heresy cases. Hardly had she concluded her Spanish marriage with Philip than Parliament, in 1554, revived the legislation of 1401 together with that of 1382, and 1414.\(^{155}\) In the same year justices of the peace, who in 1503 were given inquisitional duties with respect to the offenses of giving liveries and keeping retainers, received an express enlargement of such duties. A statute provided that when any person arrested for manslaughter or felony, or suspicion of manslaughter or felony, who was bailable by law, was brought before two justices, they were to "take thexaminacon of the said Prysoner, and informacon of them that bringes him, of the facte and circumstances Thereof, and the same, or asmuche Thereof as shalbee materiall to prove the felonye shall put in writing before they make the same bailem."\(^{156}\) The next year another statute extended this procedure to accused persons who were not bailable.\(^{157}\) It may be that these two statutes did no more than give legal sanction to a practice which had grown up without express statutory authority, especially in the fifty years since the act of 1503.\(^{158}\) At any rate they now

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152. 3 Statutes of the Realm 455.
153. Ibid.
154. From a letter to his daughter written in June, 1535 in the Tower of London. The Correspondence of Sir Thomas More 557 (Rogers ed. 1947).
155. 1 & 2 Phil. & M., c. 6 (1554-55); 4 Statutes of the Realm 244. The repudiated statute of 1382, which had remained on the books, and the act of 1414, had been repealed in the reign of Edward VI. 1547, 1 Edw. 6, c. 12, § 2. 4 Statutes of the Realm 19.
156. 1 & 2 Phil. & M., c. 13 (1554-55).
157. 2 & 3 Phil. & M., c. 10 (1555).
had such power by express grant. However, one must remember that in proceedings before justices of the peace one had the benefit not only of specific charges but also of accusers.

In 1557 Mary took a further inquisitional step in ecclesiastical matters. In order to provide “for a severer way of proceeding against heretics” she appointed a commission of twenty-two persons, and directed them to use the oath ex officio. They were to question persons and in the process compel them “to answer, and swear, upon the holy evangelists, to declare the truth in all such things whereof they or any of them shall be examined.”159 This was one of the successive series of bodies which under Elizabeth I were to be called the court of high commission.

The first piece of legislation under Elizabeth I was the Act of Supremacy (1558). It repealed the legislation of Philip and Mary which authorized the church to use its inquisitio procedure, and provided:

[T]hat no person or persons shall be hereafter indicted or arraigned for any of the offenses made, ordained revived or adjudged by this act, unless there be two sufficient witnesses or more to testify and declare the said offences whereof he shall be indicted or arraigned: (2) and that the said witnesses or so many of them as shall be living and within the realm at the time of the arraignment of such person so indicted, shall be brought forth in person, face to face before the party so arraigned, and there shall testify and declare what they can say against the party so arraigned, if he require the same.160

Thus for the offenses covered by that act there had to be both formal charges and confrontation.

E. Star Chamber

Two tribunals which evolved during the reigns of the Tudors now enter our account: the court of star chamber, and the court of high commission. These two tribunals were separate bodies but they came to work closely together, especially during the seven-year period before the Long Parliament met (1640). This was in the time of the Stuart king, Charles I (1625-1649) and William Laud, his archbishop of Canterbury (1633-1645). Laud was the head of the high commission as well as a member of the star chamber, and thus used both bodies to carry out the oppressive program of the king and himself. The fact that Laud was a member of both tribunals and used them in a coor-

160. 1 Eliz. 1, c. 1, § 37 (1558).
ominated fashion may have tended to obscure in the minds of some their separate identities.

The star chamber gradually emerged from the king's council in the process of the separation of judicial from executive functions. It was not at first a distinct body. As one writer observed: "while it is necessary to point out that under the Lancastrians the council was also the star chamber, there is equal need to remember that under Henry VII the star chamber was also the council."161 As two other writers put it: "[I]n Henry VII's reign the Council as an executive board was indistinguishable from the Council as a court of law."162

But by the time the new council register was opened in August 1540, late in the reign of Henry VIII, there was a differentiation between the two bodies, and suitors were not allowed to overlook the fact that the star chamber and the council were distinct. Of this body, Sir Thomas Smith wrote in 1565:

In the Terme time . . . everie weeke once at the least . . . the Lord Chauncellor, and the Lordes, and other of the privie Counsell, so manie as will, and other Lords and Barons which be not of the privie Counsell, and be in the towne, and the Judges of England, speciallie the two chiefe Judges, from ix. of the clocke till it be xi. doe sit in a place which is called the Starre chamber, either because it is full of windowes, or because at the first all the roffe thereof was decked with images of starres gilted. There is plaints heard of riots.163

Its procedure was largely written and began with an information against the defendant, often by the attorney general, which was drawn up like an old bill in equity. The defendant put in a written answer. Witnesses gave sworn statements. When all was in readiness the case came on for oral argument. The parties appeared by counsel, the information, answer and depositions were read and commented upon, and finally each member of the court pronounced his opinion and gave his judgment separately.

If one refers to this body as it was after it became distinct from the king's council, in other words the body which the Puritans attacked and before which John Lilburne appeared, one cannot say that it exercised the royal prerogative to inflict torture for the purpose of extracting a confession. Indeed for its *ore tenus* examination, used

163. The *Common-wealth of England* 118-19 (1594 ed.).
when a person accused admitted the charge, it had three rules which excluded the use of compulsion:

1. That the private examination should not be on oath.
2. That the confession should not be obtained by compulsion.
3. That when brought into Court, Deft. should openly acknowledge his confession, but if he then denied it, he was to be remanded and proceeded against in a formal manner by witnesses.\(^\text{164}\)

Coke explained that in an *ore tenus* proceeding the person involved “again must freely confess in open court,” and if he did not do so “then they cannot proceed against him but by bill or information, which is the fairest way.”\(^\text{165}\)

Both Smith and Coke as well as the antiquary, William Lambarde, in their time had a high opinion of this tribunal. Smith stated that the effect of this court was “to bridle such stout noblemen, or Gentlemen which would offer wrong by force to anie manner men, and cannot be content to demaund or defend the right by order of law.”\(^\text{166}\) Coke declared: “It is the most honourable court (our parliament excepted) that is in the Christian world. . . .”\(^\text{167}\) Lambarde extolled it as “this most noble and praiseworthy court, the beams of whose bright justice do blaze and spread themselves as far as the realm is long or wide.”\(^\text{168}\)

Moreover, the star chamber at least purported to respect one’s right of silence with reference to acts involving the loss of life or limb. In a star chamber trial in 1581 the judges stated:

Sir Roger Manwhode, the lord chief baron. . . . He alleged that though the lawe dyd forbydd a man to accuse hymselfe where he was to loose lyfe or lymme, yet in this case yt was not so. Sir James Dier, lord chief justice of the common pleas. He beganne with the reason that the chief baron first alleged, saing, that in case where a man might leese lyfe or lymme, that the lawe compelled not the partie to sweare, and avouched this placenemo tenetur seipsum prodere, [no one is bound to accuse himself] which I take to be Bracton’s principall. Sir Christopher Wraye, lord chief justice of England. He also beganne with the chief baron’s originall; that no man by lawe ought to sweare to accuse hym self where he might loose lyfe or lymme.\(^\text{169}\)

\(^{164}\) See Burn, *The Star Chamber* 50 (1870).
\(^{165}\) 4 Inst. *63*.
\(^{166}\) The *Common-wealth of England* 120 (1594 ed.).
\(^{167}\) 4 Inst. *65*.
\(^{168}\) Lambarde, *Archetom: or, a Commentary Upon the High Courts of Justice in England* 215 (1635).
F. High Commission

The high commission began to evolve in the reign of Henry VIII as a sort of ecclesiastical privy council. Under Elizabeth I its members held office for sufficiently long periods and developed a sufficiently set procedure to become known as the court of high commission. Actually it was a successive series of bodies, each one created by a separate royal letters patent. Its proceedings like those of the star chamber, were largely written. Prior to 1600 most of its hearings were probably private, but there is little reason to believe that any attempt was made to conceal the fact that a session was in progress. On the contrary, when important Puritans were involved an interested audience was often if not regularly permitted to attend. Moreover, in proceedings involving Puritans the high commission often came out second best, if the Puritan versions of these proceedings are correct. The first trial of which we have any detailed account is a good example. It involved some "conventiclers" caught in 1567, and was before the Lord Mayor of London, the Bishop of London, the Dean of Westminster and others. The defendants were brought in by the wardens of the jail and answered to their names. Then the bishop turned to the mayor and asked him to begin. The mayor declined, whereupon the bishop began. During the course of the proceedings, this occurred:

_Bishop._ What: you mean of our cappes and typettes, which you say come from Rome.

_Irelande._ It belongeth to the Papistes, therefore throwe it to them.

_Bishop._ I have saide Masse. I am sorie for it.

_Irelande._ But you goe like one of the Masse-priests still.

_Bishop._ You see mee weare a coape or a surplesse in Pawles. I had rather minister without these things, but for orders sake and obedience to the Prince.

_Roper._ Maister Crowley sayeth, he could not be perswaded to minister in those conjuring garments of poperie.

_Nixon._ Your garmentes are accursed as they are used.

_Bishop._ Where do you find them forbidden in the scriptures?

_Nixon._ Where is the Masse forbidden in the scriptures?^{170}

G. Puritan Opposition to the Oath Ex Officio

The Act of Supremacy under Elizabeth I made the crown the head of the Church in England, and empowered the queen by letters

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^{170} Quoted in _Usher, The Rise and Fall of the High Commission_ 58 (1913).
patent to delegate her authority to commissioners. This she did beginning in 1559. In her first five letters patent, issued before 1583, Elizabeth I said nothing about the oath ex officio. However, her commissioners resorted to it to some extent — after all Mary in 1557 had authorized her commissioners to use it — but the pursuit of heresy was not intensive enough to cause any general resistance. Then in 1583 things changed. Elizabeth I created a new high commission, her sixth, with Archbishop Whitgift at its head, and this time she specifically authorized her commissioners to call suspects before them and “to examine them on their corporeal oaths, for the better trial and opening of the truth.” To this end Whitgift drew up a list of twenty-four points, or articles, running the gamut of doctrine, dress and ritual, upon which suspects were to be questioned. The ones who bore the brunt of his attack were the Puritans.

Once again, as on the two previous occasions when there were general investigations into heresy in England — in the time of Grosseteste, shortly after the introduction there of the oath ex officio, and under the reign of Henry VIII — the people strongly opposed the inquisitional oath. This time the Puritans spearheaded the opposition. They and others then out of sympathy with the governing authorities made it plainer than had their predecessors that the objections to the oath ex officio were based not only on the fact that it enabled inquiry into the secret thoughts and knowledge of a person’s heart, but also made him into an informer on his family, neighbors and friends. One of the Puritan leaders, James Morice, a lawyer and a member of Parliament, wrote a tract against the oath which was published in 1590, shortly after the last and final struggle against the inquisitional oath had begun. In it he explained that by the use of this oath the ecclesiastical judge could require a person:

[T]o accuse himselfe even of the most secret and inward thoughtes, or contrarie to christian charitie, yea humanitie it selfe, constrayning him to enforme against his naturall parentes, dearest friends, nearest neighbors, or to bewray with griefe of heart such manners of secrecie, as otherwise were inconvenient peradventure not honest to be revealed.

He went on to tell how in the reign of Henry VIII the “bloudie Bishop” of Lincoln by the oath ex officio “constrayned the children to

171. 1 Eliz. 1, c. 1, §§ 17 and 18 (1558).
172. 1 Neal, The History of the Puritans 161 (1843).
accuse their parents, the parentes their naturall children, the wife her husbande, the husbande his wife, one brother and sister another."  

In July 1590, when the Puritan minister, John Udall, refused to tell the high commission whether he was the author of a certain book he frankly explained: "My lord, I think the author, for any thing I know, did well, and I know that he is enquired after to be punished; and therefore I think it my duty to hinder the finding of him out, which I cannot do better than . . . thus." When then asked why so, he answered: "Because if every one that is suspected do deny it, the author at length must needs be found out." Later when the oath was urged upon him he offered to take an oath of allegiance to the queen but refused to take the inquisitional oath, saying: " . . . but to swear to accuse myself or others, I think you have no law for it."  

Yet another Puritan leader, the preacher, Thomas Cartwright, who was before the high commission in September 1590, was reluctant to take the oath "lest by his answer upon oath in this case others might be prejudiced, who would refuse to answer upon theirs."  

Daniel Neal in his History of the Puritans, in discussing the course of Cartwright and of fifteen more who followed his example, stated: "The rest of Cartwright's brethren refusing the oath for the same reasons, viz., because they would not accuse themselves, nor bring their friends into trouble . . . ." There were of course those who confessed and disclosed who attended their meetings. As to them Neal commented: "[B]ut the worst part of their confession was their discovering the names of the brethren that were present, which brought them into trouble."  

Earlier in his work he related: "When the prisoners were brought to the bar, the court immediately tendered them the oath to answer all questions to the best of their knowledge, by which they were obliged not only to accuse themselves, but frequently to bring their friends and relations into trouble." One will note that in all this nothing was said of the use of any torture.

At the time Whitgift and his fellow commissioners started on their crusade this much was fairly well established: one was entitled to be accused formally and to know the charges, and one did not have to submit to inquiry about his secret thoughts and deeds. Also, as a matter of practice one usually knew who his accusers were and, in a nonpolitical criminal case, was confronted with them. Of course, once he had been formally charged, he could be and was questioned. This

174. A BRIEFE TREATISE OF OATHES 11.
175. Trial of John Udall, 1 How. St. Tr. 1271, 1274-75 (1590).
176. 1 STRYPE, THE LIFE AND ACTS OF JOHN WHITGIFT *26 (1822).
177. 1 NEAL, HISTORY OF THE PURITANS 194 (1843).
178. Id. at 196.
179. Id. at 162-63.
was true in lay as well as ecclesiastical proceedings. So far as questioning an accused was concerned, one of the main differences between a lay criminal trial and a case before the high commission was that in a lay criminal trial a defendant was not put under oath. But from a rational point of view, this difference is not a substantial one: questioning is questioning whether one is put under oath or not.

Indeed, in a lay criminal trial by the latter part of the 1500's the judge not only questioned a defendant but even badgered him. An illustration is John Udall's case, the Puritan minister who was before the high commission. Within the same month as his appearance before that body he was indicted for libelling the queen, and the court not only questioned him but also took the then unusual step of offering him an oath: "What say you? Did you make the Book, Udall, yea or no? What say you to it, will you be sworn? Will you take your oath that you made it not? We will offer you that favour which never any indicted of Felony had before; take your oath, and swear you did it not, and it shall suffice." Udall refused. The judge offered to take his unsworn answer: "I will go further with you; Will you but say upon your honesty that you made it not, and you shall see what shall be said unto you?" Udall again refused. Then the judge urged him, "Do not stand in it, but confess it. . . ."180

But if one had the right to be formally and openly charged and could not be questioned on his secret thoughts and deeds, and if he as a matter of practice usually knew his accusers and was confronted with them, the next step followed naturally: one could not be made to accuse one's self. This was the step the English people took to resist the pursuit of heresy which Whitgift and his successors carried on.

In composing their argument against the oath ex officio the Puritans and their lawyers made use of a phrase which they borrowed from an opinion of nine English canonists, one of whom was Richard Cosin, a leading civil lawyer. These canonists about the middle of Elizabeth I's reign prepared a short treatment of the practice in ecclesiastical courts in England and the use of the oath ex officio. They conceded that "no one may be urged to bewray himself in hidden and secret crimes; or simply therein to accuse himself."181 Then they discussed the inquisitio procedure of the church, in the course of which they stated the safeguards which theoretically accompanied it: "Licet nemo tenetur seipsum prodere; tamen profitus per famam, tenetur seipsum ostendere, utrum possit suam innocentiam ostendere, et

180. 1 How. St. Tr. 1271, 1282 (1590).
181. 3 STRYPE, THE LIFE AND ACTS OF JOHN WHITGIFT, app. at *233.
seipsum purgare [Though no one is bound to accuse himself, yet when once a man has been accused by general report, he is bound to show whether he can prove his innocence and to vindicate himself by an oath of purgation].”182 The Puritans and their counsel took the *nemo tenetur seipsum prodere* and in the course of the next century made it into a household phrase, in the colonies as well as in the mother country. At first they tied it to the *nisi in causis matrimonialibus vel testamentariis* of the order of 1246 of Henry III to Grosseteste and the *Prohibitio formata de Statuto Articuli Cleri* of Edward II, but after 1640, the year the Long Parliament convened, a turning point year in an eventful century for the English people, the phrase was used by itself. On every hand and in every court people simply claimed that no one was bound to be his own accuser.

Even before 1583 there were instances in Elizabeth I’s reign in which common law courts on habeas corpus released persons who were in custody for refusal to take the high commission’s oath ex officio, but the precise grounds of these decisions are not clear. The three cases most frequently cited later were those of *Skrogges*,183 involving title to an office, *Hynde*,184 accused of usuary, and *Leigh*,185 charged with hearing mass at the Spanish ambassador’s house. Coke after he got on the bench, cited all three cases for the proposition that no person was bound to accuse himself except in matters matrimonial and testamentary.186 However, Dyer’s report did not support Coke in the cases of *Skrogges* and *Hynde*, and *Leigh’s* case is not in any published report. One must further bear in mind that during Elizabeth I’s reign the common law courts were not unfavorable to the high commission; they even held it to be a prerogative rather than a statutory court.187 It was not until after Coke got on the bench in the reign of James I that there were many writs of prohibition against the high commission. Nevertheless, this much may be said: persons were relieved from taking the oath, and, whatever may have been the reasons, the law was also pretty clear that one was entitled to be formally charged and to know what the charges were.

Then came Whitgift and his twenty-four articles. Protest began almost from the start. In 1584 certain ministers who were under

182. Id. at *234.
185. Unreported (18 Eliz. 1, 1568).
186. Burrowes v. High Commission, 3 Bulst. 48, 49-50, 81 Eng. Rep. 42, 43 (1615-16). Concerning Hynde, Coke is reported as saying parenthetically “some love money, and he loved usury well,” and about Leigh, “he loved mass as well as he loved his life.”
attack by Whitgift applied to Lord Burleigh for help. He wrote
Whitgift:

[B]ut I conclude, according to my simple judgment, this kind of
proceeding is too much savouring of the Romish inquisition: and
is rather a device to seek for offenders, than to reform any. This
is not a charitable way to send them to answer to your common
Register upon so many articles at one instant, without any com-
modity of instruction by your Register, whose office is only to
receive their answers. By which the parties are first subject to
condemnation, before they be taught their error. . . . I pray your
Grace, bear that one (per chance a) fault, that I have willed
them not to answer these articles, except their conscience may
suffer them. . . .

Whitgift justified his procedure on the ground that it was “the ordi-
nary course in other courts likewise; as in the Star Chamber, the
Court of Marches, and other places.”188 Burleigh replied that “he
was not satisfied in the point of seeking by examination to have
ministers accuse themselves, and then publish them for their own
confession. . . .”189

In 1589 Coke stepped into the picture. He represented one
Collier, who was involved before the high commission on a charge of
incontinency. Coke sought a writ of prohibition in the common pleas,
and argued that no one was bound to accuse himself except in causes
matrimonial or testamentary.190 Wigmore suggested that Coke’s argu-
ment was newly devised as well as specious.191 He is wrong on both
scores. The use of the phrase nemo tenetur seipsum prodere apart
from its full context antedated Coke’s argument in this case by a
number of years.192 Also, if one will take into account the fact that
there was opposition to the inquisitional oath in England in the
century and a half after its introduction, and under Henry VIII, based
on the ground that one was entitled to be formally and openly accused,
one will regard a refusal to be one’s own accuser as a logical next step
rather than a specious one.

What the outcome was in the Collier case is uncertain. According
to two reports Coke won, but a third stated that “the Court would

188. 3 STROPE, THE LIFE AND ACTS OF JOHN WHITGIFT, app. at *64, *65.
190. Collier v. Collier, Cro. Eliz. 201, 78 Eng. Rep. 457 (Spelled Cullier) (1589);
191. 8 WIGMORE, EVIDENCE § 2250, 295–96 (3d ed. 1940).
192. Maguire, Attack of the Common Lawyers on the Oath Ex Officio in the
Ecclesiastical Courts in England, in ESSAYS IN HISTORY AND POLITICAL THEORY IN
Honor of Charles Howard McIlwain 223–24 (1936). Morice in his tract against
the oath used the phrase separately and also in its full context. A BRIEFE TREATISE
OF OATHES 17, 21–22. He could not understand why even under the inquisitio
procedure a person should not be advised in advance of the charges against him.
advise of it." Subsequently, Udall, when he was before the high commission, stressed the older ground: "I pray your lordship, doth not the law say generally, no man shall be put to answer without presentment before justices, or things of record, or by due process, or writ original?" To support his question he cited the statute of 1368. Just before this, when he explained that by law he need not answer, the court responded, "That is true, if it concerned the loss of your life."

In 1591 in the case of Dr. Jeremiah Hunt the King's Bench held that the high commission could compel him to answer under oath concerning incontinency "where the offence is presented first by two men." The same year the same court gave another favorable decision to the high commission: it held it to be prerogative court.

As for inquisitions by justices of the peace, Richard Crompton in his edition, published in 1584, of Anthony Fitzherbert's *L'Officio et Auctoritie de Justices de Peace* explains that a man should not be examined on oath on matters sounding to his reproach, such as whether he committed such and such a felony, or such and such a perjury, for the law assumes that a man is unwilling to accuse himself in such circumstances. A generation later Michael Dalton in his *Countrey Justice*, first published in 1618, drew a distinction between accused persons and witnesses. Accused persons were not to be examined on oath because of the maxim *nemo tenetur seipsum prodere*:

The Offender himself shall not be examined upon Oath: For by the Common Law *Nullus tenetur seipsum prodere*. Neither was a Man's Fault to be wrung out of himself, (nay not by Examination only) but to be proved by others, until the Stat. 2 & 3 P. & M. cap. 10 gave Authority to the Justices of the Peace to examine the Felon himself.

H. On the Threshold of the 1600's

Thus matters stood as the English people entered upon one of their greatest centuries, the 1600's, a century that witnessed the contest between Edward Coke and James Stuart, the refusal of Edmund Hampden and four others in 1627 to make a forced loan to Charles I, the Petition of Right (1628), the resistance of Edmund Hampden's more famous kinsman John in 1635 and the following years to

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194. Trial of John Udall, 1 How. St. Tr. 1271, 1274 (1590).
197. Id. at 128.
198. DALTON, COUNTREY JUSTICE 380 (1742 ed.).
Charles I's attempts to collect ship money from him, John Lilburne's case before the star chamber, which began in 1637, the Long Parliament, which convened in 1640, the abolition of the star chamber and the high commission (1641), and the Bill of Rights (1689). Much had already been gained as the century opened; much remained yet to be won.

I. Coke Versus Stuart

Appropriately enough the first major episode in the struggle of the English people against the Stuarts was the contest between Edward Coke and James Stuart. Just as with Henry II and Innocent III we have here two more individuals who helped shape the course of the treatment to be accorded deviants. It was this James who became James VI of Scotland (1567) and James I of Great Britian and Ireland (1603). In 1606 James elevated Coke to the bench, making him Chief Justice of the Court of Common Pleas. It was in this position that there developed, because of his insistence on the supremacy of the common law, his fundamental conflict with James. In 1613, at the suggestion of Francis Bacon and in order to get him out of the way, James promoted him to be Chief Justice of the Court of King's Bench, a position of more dignity but less labor and desirability. However, Coke's conflict with James continued, and in 1616 he was dismissed.

With James I's accession to the throne the position of the Church was probably further strengthened. One of his early acts as king of Great Britain and Ireland was to cause the leading ecclesiastics in England to be called to a conference at Hampton Court in January 1604 for a three-day discussion of theology. At the conference a lord objected to the inquisitional procedure of the high commission. "The proceedings in that Court are like the Spanish Inquisition, wherein men are urged to subscribe more than law requireth, and by the oath ex officio forced to accuse themselves. . . ." Whitgift answered, not in the positive way in which he had taken care of Lord Burleigh in 1584, but as if the opposition he had encountered had not been without its effect on him, too: "Your lordship is deceived in the manner of proceeding; for, if the Article touch the party for life, liberty, or scandal, he may refuse to answer. . . ." James gave an exposition in support of the oath ex officio, "the ground thereof, the wisdom of the law therein, the manner of proceeding thereby, and profitable effect from the same."199

199. Proceedings in a Conference at Hampton Court Respecting Reformation of the Church, 2 How. St. Tr. 69, 86 (1604).
Later the same year Richard Bancroft succeeded Whitgift as Archbishop of Canterbury. He was equally zealous. In the name of the whole clergy he objected to the grant of a writ of prohibition in a case where the high commission sought to question someone before giving him a specification of the charges. The judges answered that parties ought “to have the cause made knowne unto them for which they are called ex officio, before they be examined, to the end it may appeare unto them before their examination, whether the cause be of ecclesiastical cognizance, otherwise they ought not to examine them upon oath.”

In 1606 Henry Garnet, superior of the Jesuits in England, on trial for high treason as a conspirator in the gunpowder plot, used the phrase about not accusing one’s self to describe proceedings before a magistrate: “when one is asked a question before a magistrate, he was not bound to answer before some witnesses be produced against him, ‘Quia nemo tenetur prodere seipsum’.” This illustrates how easy it was to proceed from the requirement of a formal accusation to the acknowledgment of a right to remain silent.

It was in that year, also, that James made Coke Chief Justice of the Court of Common Pleas. Soon thereafter, according to Coke in his Oath Ex Officio, the king’s council on the motion of the House of Commons asked Popham and him “in what cases the Ordinary may examine any person ex officio upon oath.” After a study of the law they answered:

1. That the Ordinary cannot constrain any man, ecclesiastical or temporal, to swear generally to answer to such interrogatories as shall be administered unto him; but ought to deliver to him the articles upon which he is to be examined, to the intent that he may know whether he ought by the law to answer them: and so is the course of the Star-Chamber and Chancery; the defendant hath the copy of the bill delivered unto him, or otherwise he need not to answer it.

2. No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion: but something ought to be objected against him what he hath spoken or done. No lay-man may be examined ex officio, except in two causes, and that was grounded upon great reason; for lay-men for the most part are not lettered, wherefore they may easily be inveigled and entrapped, and principally in heresay and errors of faith...

200. Articuli Cleri, id. 131, 155 (1605).
201. The Trial of Henry Garnet, id. 217, 244 (1606).
203. Ibid.
Coke made so bold as to tell James that the King was under the law. The occasion was a Sunday morning conference in 1608 which arose out of the complaint of Richard Bancroft, Archbishop of Canterbury, about the number of writs of prohibition which the court of common pleas under Coke as chief justice issued against the court of high commission. Coke’s court issued these writs in order to confine the jurisdiction of the high commission and thus limit the use of its inquisitional procedure. On this complaint the king assembled the judges before him. He took the position that he in his own person could decide any cause and therefore he could delegate it to the high commission. Then according to Coke in his Prohibitions del Roy, this occurred:

To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case... but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England... then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial [i.e. studied] reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege.

Coke’s account contains his own heavy gloss. James would never have permitted without interruption the long speeches which Coke attributed to himself. From Sir Julius Caesar and various contemporary newsletters it appears that at some point James broke in and told Coke he “spoke foolishly.” James himself was the supreme judge and all the courts were under him. There was nothing to prevent him from

205. Id. at 65, 77 Eng. Rep. at 1343 (1608). Bracton in 1 TRACTATUS DE LEGIBUS 39 (1878), wrote: “Ipse autem rex, non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. [But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king]."
sitting on the bench and deciding cases himself if he chose, but nevertheless he would protect the common law.

"The common law protecteth the King," countered Coke. "A traitorous speech!" erupted James. "The King protecteth the law and not the law the King. The King maketh judges and bishops. If the judges interpret the law themselves and suffer none else to interpret they may easily make, of the laws, shipmen's hose." Then rising in his chair and shaking his fist in Coke's face he tongue-lashed him so heatedly that Coke "fell flat on all fower" before the king and begged his pardon. Robert Cecil interceded for Coke and the king was finally mollified.

But if Coke grovelled before James, what is even more important than his grovelling is the fact that he insisted that the king was under the law.

After Coke, the idea that the king was under the law spread in England. When Charles I was attempting to collect his ship money in 1638 a constable, "prating and grumbling much, uttered these speeches" against it, as reported to the principal lieutenant of Archbishop Laud: "4. Said the king was under a law as much as any subject, and that he could do nothing of himself without his subjects. 5. He confessed that some of the judges determined it to be law, but the best and most honest had not." The constable belonged to the growing middle class in England, whose members dared to oppose the king.

After Coke went on the King's Bench, a major piece of litigation involving the high commission's use of the oath ex officio arose in Burrowes case on applications for, and returns to, writs of habeas

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Coke in granting a writ of prohibition said:

the Ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart. . . . And in cases where a man is to be examined upon his oath, he ought to be examined upon acts and words, and not of the intention or thought of his heart; and if every man should be examined upon his oath, what opinion he holdest concerning any point of religion, he is not bound to answer the same. . . . And so long as a man does not offend neither in act nor in word any law established, there is no reason that he should be examined of his thought or cogitation: for as it hath been said in the proverb, thought is free. . . .

In his Second Institute he wrote: "No person ecclesiastical or temporall ought in any ecclesiastical court to be examined upon the cogitation of his heartt or what hee thinkeith." At *658.

He ruled in Huntley v. Cage, 2 Brownl. 14, 15, 123 Eng. Rep. 787, 788, noted sub nom. Clifford v. Huntley, Roll. Abr. Prohibition (T) 6 (1611) that the high commission in an ex officio proceeding "ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporal." The
corpus on behalf of a group of non-conformists who had been committed by the high commission. Coke proceeded slowly. The court heard argument four separate times in a period of more than a year (1615-1616), bailed them after the third argument, but finally remanded them. At the third session Coke, after explaining that he did not like sectaries any better than anybody else but that he had to do justice, gave three reasons why the returns to the writs were bad:

I will not by any ways maintain sectaries. But the subject ought to have justice from us in a Court of Justice. For three causes, my conscience and judgment do lead me in this case, that this return here is not good.

First, the statute of 1 Eliz. is a penal law, and so they are not to examine one upon oath upon this law; thereby to make him accuse himself . . .

A second cause which doth satisfie my conscience, when they demanded the articles, they ought to have had of them a copy . . .

A third reason may be drawn from the liberty of the subject, the which is very great as to the imprisonment of his body, and therefore before commitment, the party ought to be called to make his answer, and if he be committed, yet this ought not be perpetually. . . .209

To this Justice Dodderidge added: “[I]f they think they may examine them upon oath, and not to deliver them a copy of the articles, yet shall they still be suffered to lie in prison perpetually; we will not suffer this so to be, but we will bail them until the next term, and in the mean time to conform themselves.”210

During the pendency of this litigation the King’s Bench and Common Pleas in separate cases, involving proceedings between private parties before the high commission, both squarely held that a person was not bound to accuse himself where to do so might subject him to punishment or penalty. In Spendlow v. Smith,211 involving a suit before the high commission for dilapidations, the Court of Common Pleas granted a writ prohibiting the high commission from examining the defendant in the suit before it about covin, “for though the original cause belong to their cognizance, yet the covin and fraud is criminal; and the avowing of it to be bona fide is punishable, both in the Star-Chamber, and by the penal law of fraudulent gifts, and

ex officio proceeding there involved was an aftermath of private litigation before the high commission. It was instituted by the king’s proctor, and was for the forfeiture of a bond.

210. Id. at 54, 81 Eng. Rep. at 46.
211. Hob. 84, 80 Eng. Rep. 234 (c. 1615).
therefore not to be extorted out of himself by his oath." 212 The King's Bench in Latters v. Sussex, 213 a comparable case in which there was an allegation of simony, ruled similarly: "[N]one shall be compelled to accuse himself upon his oath; where he is to incur a temporal punishment, at the common law, or a temporal loss. . . . And a prohibition was granted: for by that he is to lose 100£ by the statute." 214

Not long after these decisions Coke was dismissed, but the principle that one was not bound to accuse one's self in matters involving punishment or penalty had made headway. That it was to be applied to litigation between private parties before the high commission and to proceedings resulting from such litigation was pretty well established. It had been extended even farther: in Burrowes Case, 215 it had been one of the grounds for granting bail to a group of non-conformists under attack by the high commission. These circumstances plus the succession of Bancroft, in 1610, by George Abbot, a man of more moderate temperament, led to a lessening for a time of the controversy over the inquisitional oath. But the struggle between the people and the crown continued, and took on greater intensity again under Charles I and Laud, who succeeded Abbot in 1633. Under them the controversy over the oath ex officio resumed in full force with Lilburne's Case 216 before the star chamber.

J. John Lilburne

Lilburne, in the course of his controversy with the star chamber, arrived at the position that no free-born Englishman should take the oath ex officio. This is how he came to be known as "Free-born John." A judge said of him that if the world were emptied of all but him, Lilburne would quarrel with John and John with Lilburne. 217

In December 1637, while John Hampden's Case 218 was being argued before the Court of Exchequer, the star chamber had Lilburne taken into custody on a charge of importing certain seditious books. It is to be noted that without objection he at first answered many questions relating to the charge against him. It was only when the questioning went beyond the charge, specifically when he was asked about other individuals, that he began to object, and started the last

212. Ibid.
214. Id. at 152, 74 Eng. Rep. at 1113.
216. 3 How. St. Tr. 1315 (1637).
218. The King Against John Hampden, 3 How. St. Tr. 825 (1637).
phase of the final struggle for the establishment of the right to remain silent. He was in the attorney general's office being questioned by the latter's chief clerk. At first he even answered some questions about other individuals, but as this questioning went afield he refused to continue.

[W]hy do you ask me all these questions? these are nothing pertinent to my imprisonment, for I am not imprisoned for knowing and talking with such and such men, but for sending over Books; and therefore I am not willing to answer you to any more of these questions . . . therefore if you will not ask me about the thing laid to my charge, I shall answer no more: but if you will ask of that, I shall then answer you, and do answer that for the thing for which I am imprisoned, which is for sending over books, I am clear, for I sent none; and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence, and not answer to your interrogatories; and that my accusers ought to be brought face to face, to justify what they accuse me of. 219

Then began a long effort to get him to be sworn and answer such questions as would be put to him. He was taken to the attorney general, Sir John Bankes, himself, and ten or twelve days later, to the offices of the court of star chamber. He persisted in his refusal to be sworn. The account of what happened, which is by Lilburne, goes on to relate: “So some of the clerks began to reason with me, and told me every one took that oath: and would I be wiser than all other men? I told them, it made no matter to me what other men do. . . .” 220

In February 1638 he was taken before the star chamber itself. When the lord keeper asked him why he refused to take the oath he answered: “My honourable Lord, I have answered fully before sir John Banks to all things that belong to me to answer unto: and for other things, which concern other men, I have nothing to do with them.” The lord keeper persisted: “But why do you refuse to take the Star-Chamber oath?” Lilburne responded:

[T]hough I had fully answered all things that belonged to me to answer unto . . . yet that would not satisfy and give content, but other things were put unto me, concerning other men, to insnare me, and get further matter against me. . . . And withal I perceived the oath to be an oath of inquiry; and for the lawfulness of which oath, I have no warrant; and upon these grounds I did and do still refuse the oath. 221

219. 3 How. St. Tr. 1315, 1318 (1637).
220. Lilburne's Case, 3 How. St. Tr. 1315, 1320 (1637).
221. Ibid.
The star chamber ordered that he was to be held a close prisoner until Tuesday of the following week, and if in the meantime he did not take the oath he was to be censured and made an example. The following Monday he was again offered the oath, and again he refused, saying, "I am of the same mind I was; and withal I understand, that this Oath is one of the same with the High Commission Oath, which Oath I know to be both against the law of God, and the law of the land. . . ." On Tuesday he was again before the star chamber, was once more offered the oath and once more refused to take it. For his continued refusal he was this time fined 500 pounds and sentenced to be whipped and pilloried, a sentence which was executed in April. While he was in the pillory he made a speech against the oath. According to his own account he stated:

Now this oath I refused as a sinful and unlawful oath: it being the High-commission oath. . . . It is an oath against the law of the land. . . . Again, it is absolutely against the law of God; for that law requires no man to accuse himself; but if any thing be laid to his charge, there must be two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, "Why ask you me? Go to them that heard me."

Withal, this Oath is against the very law of nature; for nature is always a preserver of itself and not a destroyer: But if a man takes this wicked oath, he destroys and undoes himself, as daily experience doth witness, Nay, it is worse than the law of the heathen Romans, as we may read, Acts XXV. 16. For when Paul stood before the pagan governors, and the Jews required judgment against him, the governor replied, "It is not the manner of the Romans to condemn any man, before he and his accusers be brought face to face, to justify their accusation." But for my own part, if I had been proceeded against by a Bill, I would have answered and justified all that they could have proved against me. . . .

He not only made a speech against the oath while at the pillory, but also with acrobatic ingenuity distributed three copies of the offending book, which he had secreted about his person. Finally the star chamber, which was in session, had him gagged.

K. Long Parliament

On November 3, 1640 the Long Parliament met, and the turning point in the successful struggle of the people against the crown had
arrived. Oliver Cromwell on the opening day presented a petition on behalf of Lilburne, who was still in prison. He was ordered to be released, "being, as I remember, the first prisoner in England set at liberty by them." In May 1641 the House of Commons voted that his sentence was illegal and that he should have reparation. Two months later in two separate acts Parliament abolished both the star chamber and the high commission. The latter act forbade any person exercising ecclesiastical authority to administer "ex officio, or at the instance or promotion of any other person whatsoever . . . any corporal Oath" where the answers might subject one "to any censure, pain, penalty or punishment whatsoever. . . ." The act which abolished the star chamber also extended the writ of habeas corpus to cover any person restrained of his liberty:

[B]y the order or decree of any such court of star-chamber, or other court aforesaid, now or at any time hereafter, having or pretending to have the same or like jurisdiction, power or authority to commit or imprison as aforesaid, (2) or by the command or warrant of the King's majesty, his heirs or successors, in their own person, or by the command or warrant of the council-board, or of any of the lords or others of his Majesty's privy council.

The Commons had voted that Lilburne was entitled to reparation, but the Lords had not yet acted. His counsel, in arguing before them on his behalf in February 1645, asserted that it was "contrary to the laws of God, nature, and kingdom, for any man to be his own accuser." The Lords agreed, and ordered that his sentence be forever totally vacated "as illegal, and most unjust, against the liberty of the subject, and law of the land, and Magna Charta, and unfit to continue upon record." Finally, in December 1648, Parliament awarded Lilburne 3000 pounds as reparation.

It could be argued that the act which abolished the high commission did not forbid all oaths in criminal matters in ecclesiastical courts but only those in cases in which persons had not been first duly charged. A statute of 1661, passed after the restoration of the Stuarts, disposed of any such argument. This statute made it unlawful for any person exercising ecclesiastical authority "to tender or administer unto any person whatsoever, the Oath usually called the Oath ex officio, or any

224. Id. at 1342.
225. 1640, 16 Car. 1, c. 10.
226. 1640, 16 Car. 1, c. 11, § 2.
227. 1640, 16 Car. 1, c. 11, § 6.
228. 3 How. St. Tr. 1315, 1349.
229. Id. at 1358.
other Oath whereby such person to whom the same is tendred or administered may be charged or compelled to confess or accuse or to purge him or her selfe of any criminall matter or thing whereby he or she may be lyable to any censure or punishment. . . ."231

In this and many other ways the reforms wrought by the Long Parliament endured. Thereafter various rights of the individual, some of which had been growing, established themselves. In addition to the right to bail, habeas corpus, and a public trial, there was the right to remain silent, the right to be confronted with the witnesses against one, to produce witnesses in one’s favor, to have unhampered juries, to be represented by independent counsel of one’s own choosing, and to be free from unreasonable searches and seizures. As David Jardine, a legal scholar, put it:

The law then for the first time became a protection to the subject against the power of the Crown; and so well considered and substantial were the improvements then introduced, that they continued after the Restoration, and through the tumultuous and sanguinary reign which succeeded it. Though the barriers were still insufficient entirely to stop the encroachments of bad princes, encouraged and promoted by unprincipled judges, the administration of the Criminal law, even in the evil days of Charles II, was always better than it had been before the Commonwealth; for the tide of improvement, having once set it, steadily continued to flow, until at length the increase of knowledge, and the power and proper direction of public opinion, led to the final subjection of prerogative to law at the Revolution of 1688.232

L. From Lilburne to Lord Holt

After Lilburne's Case in the star chamber and the various steps which the Long Parliament took in 1640-1641, ordering his release, abolishing the star chamber and high commission, forbidding the use of the oath ex officio by ecclesiastical officials and extending the writ of habeas corpus, people on every hand, no matter what the charge or the proceeding or the court, claimed a right to remain silent, and the courts soon recognized this right. In 1641 in the case of the Twelve Bishops, who were charged with high treason before the House of Lords, when they were asked whether a certain document was subscribed by them and in their handwriting, refused to answer because "it was not charged in the impeachment; neither were they bound to accuse themselves."233 In 1649 in Charles I's Trial, when one Holder

231. 1661, 13 Car. 2, c. 12, § 4.
233. 4 How. St. Tr. 63, 76 (1641).
on being asked to be sworn expressed a desire to be spared from giving evidence against the king, "the Commissioners finding him already a Prisoner, and perceiving that the Questions intended to be asked him, tended to accuse himself, thought fit to waive his Examination."\textsuperscript{234}

In the same year, Lilburne, this time on trial for high treason, insisted on a right of silence. He at first even refused to plead, saying, "Then, Sir, thus, by the Laws of England, I am not to answer to questions against or concerning myself." Lord Keble responded, "You shall not be compelled."\textsuperscript{235} In 1660 in the trial of Adrian Scroop, one of the regicides, Lord Chief Baron Bridgeman said to him: "Did you sit upon the Sentence-day, that is the evidence, which was the 27th of January? You are not bound to answer me, but if you will not, we must prove it."\textsuperscript{236}

A striking claim of privilege occurred in 1670 in the Trial of William Penn and William Mead, who were indicted for preaching to a tumultuous assembly and disturbing the peace. Mead in refusing to answer the recorder's question whether he was present at the meeting, stated vividly: "It is a maxim of your own law, 'Nemo tenetur accusare seipsum,' which if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why dost thou offer to insnare me with such a question?" The recorder answered, "Sir, hold your tongue, I did not go about to insnare you."\textsuperscript{237} The jurors returned a verdict in which they stated that Penn and Mead were guilty of speaking but refused to find them guilty of what they were charged. The court tried to browbeat the jurors into a verdict of guilty, with the result that they ended up finding both Penn and Mead not guilty.

Another interesting claim of a right of silence took place in 1676 before Charles II and his council. Francis Jenkes was hailed before them for presuming to criticize royal policies at a public meeting. He admitted his speech. The king asked: "Who advised you?" Jenkes replied:

\begin{quote}
Since I see your majesty and the Lords are angry, though I am sensible I have not given you any just cause for it; I must not say I did it without advice, lest you should be more angry; and to name any particular person (if there were such) would be a mean and unworthy thing, therefore I desire to be excused all farther answer to such questions; since the law doth provide, that no man to be put to answer to his own prejudice.\textsuperscript{238}
\end{quote}

\begin{footnotes}
\item 234. 4 How. St. Tr. 989, 1101 (1649).
\item 235. 4 How. St. Tr. 1269, 1292-93, 1342 (1649).
\item 236. Trial of Adrian Scroop, 5 How. St. Tr. 1034, 1039 (1660).
\item 237. 6 How. St. Tr. 951, 957-58 (1670).
\item 238. Proceedings Against Mr. Francis Jenkes, 6 How. St. Tr. 1189, 1194 (1676).
\end{footnotes}
Prosecutors as well as judges for a time continued to question defendants, and even urge them to confess. For example, when Lilburne was on trial in 1649, this occurred:

Mr. Attorney. . . . But why will you put us to all this trouble to prove your Books, seeing your hand is to them? My Lord, I had thought that the great champion of England would not be ashamed to own his own hand.

Lilburne. I have answered once for all: I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, "Thou sayest it." So say I, Thou Mr. Prideaux sayest it, they are my Books: But prove it; and when that is done, I have a life to lay down to justify whatever can be proved mine.

Judge Jermin. But Christ said afterwards, "I am the Son of God." Confess, Mr. Lilburne, and give glory to God.

Lilburne. I thank you, Sir, for your good law, but I can teach myself better. 239

But this practice, too, came to an end. The last judge to use it was Lord Chief Justice Holt, who died in 1710. "To the end of his life," according to Lord Campbell, a later Lord Chief Justice as well as lord chancellor, "he perservered in what we call 'the French system' of interrogating the prisoner. . . ." 240 However, during the latter half of the 1600's the right to remain silent firmly established itself, and it extended not only to defendants, but also to witnesses. 241

M. In the Colonies

The experience in the Colonies was not far different from that in the mother country. The Colonists insisted on formal charges, on knowing their accusers, on being tried in their own communities, and on a right of silence. When John Wheelwright was summoned before the authorities of Massachusetts Bay Colony in 1637, a half year before Lilburne was taken into custody in England, he demanded to know whether he was sent for as an innocent or a guilty person. He was told as neither, but as a suspect. Then he demanded to know

239. 4 How. St. Tr. 1269, 1342 (1649).
240. 3 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 9 (3d ed. 1874).
241. Rex v. Reading, 7 How. St. Tr. 259, 296 (1679); Rex v. Whitebread, 7 How. St. Tr. 311, 361 (1679); Rex v. Langhorn, 7 How. St. Tr. 417, 435 (1679); Rex v. Castlemaine, 7 How. St. Tr. 1067, 1096 (1680); Rex v. Stafford, 7 How. St. Tr. 1293, 1314 (1680); Rex v. Plunket, 8 How. St. Tr. 447, 480-81 (1681); Rex v. Rosewell, 10 How. St. Tr. 147, 169 (1684); Rex v. Oates, 10 How. St. Tr. 1079, 1098-1100, 1123 (1685).
his accusers. It was explained to him that his accuser was one of his sermons and that since he acknowledged it, "they might thereupon proceed, ex officio." But "at this word great exception was taken, as if the Court intended the course of the High Commission, &. It was answered that the word ex officio was very safe and proper . . . seeing the Court did not examine him by any compulsory means, as by oath, imprisonment, or the like. . . ." At length, on the persuasion of some of his friends, he agreed to answer questions, but as soon as he was asked something which did not relate directly to the sermon, he refused to answer, and "hereupon some cried out, that the Court went about to ensnare him, and to make him to accuse himself. . . ."\(^{242}\)

In November, a month before Lilburne's incarceration in England, Anne Hutchinson, whose views Wheelwright shared, was summoned before Governor Winthrop and the elders. The governor in an opening explanation told her that she was called before them as a disturber of the peace of the commonwealth and the churches. She responded: "I am called here to answer before you, but I hear no things laid to my charge."\(^{243}\)

In 1642, shortly after Lilburne's victory over the court of star chamber, Deputy Governor Richard Bellingham of Massachusetts Bay Colony wrote to Governor William Bradford of Plymouth Plantation and propounded the following question, among others: "How farr may a magistrate extracte a confession from a delinquente, to acuse him selfe of a capitall crime, seeing Nemo tenetur prodere seipsum." Bradford referred the questions to some of his elders, three of whom replied.\(^{244}\) All three were opposed to the use of an inquisitional oath. The first said: "That an oath (ex officio) for such a purpose is no due means, hath been abundantly proved by ye godly learned, & is well known." The second answered: "... he may not extracte a confession of a capitall crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishemente inflicted or threatened to be inflicted, for so he may draw forth an acknowledgemente of a crime from a fearfull innocente; if guilty, he shall be compell'd to be his owne accuser, when no other can, which is against ye rule of justice." The third responded: "The words of ye question may be understood of extracting a confession from a delin- quente either by oath or bodily tormente. If it be mente of extracting by requiring an oath, (ex officio, as some call it,) that in capitall crimes, & fear it is not safe, nor warented by God's word, to extract

\(^{242}\) **Antinomianism in the Colony of Massachusetts Bay** 194, 195 (Chas. F. Adams ed. 1894).

\(^{243}\) I Chandler, American Criminal Trials 1, 11-12 (1841).

\(^{244}\) Bradford, History "of Plimoth Plantation" 465-73 (1928).
a confession from a delinquent by an oath in matters of life and death.” To the Puritan mind, as the answers of these elders show, requiring a suspect to take an inquisitional oath was a form of torture and an even worse one than physical compulsion — the third elder would not have permitted an inquisitional oath although he would have allowed a certain amount of physical compulsion in exceptional circumstances to obtain a confession.

In Virginia, after Bacon’s Rebellion in 1677, the House of Burgesses in the same year announced:

Upon a motion from Accomack county, sent by their burgesses, It is answered and declared, that the law has provided that a person summoned as a witness against another, ought to answer upon oath, but noe law can compell a man to sweare against himself in any matter wherein he is lyable to corporall punishment.245

That the motion which led to this announcement came from Accomack County was no accident, for it was there that Governor Berkeley was at his harshest, both during and after suppression of the rebellion.

Royal governors in the colonies, patterned after the king in England, exercised what they regarded as their prerogative. They summoned suspects before them and their council and tried to induce confessions. If they were successful such confessions were then used at subsequent trials. The colonists resisted this practice and protested vigorously. In 1689 in Pennsylvania the governor summoned the printer, William Bradford, before him and his council. Bradford had printed the charter of that colony in order to inform the people of their rights. Although the publication was anonymous, he was the only printer there.

Governour: . . . I desire to know from you, whether you did print the Charter or not, and who set you to work?

Bradford: Governour, it is an impracticable thing for any man to accuse himself; thou knows it very well.

Governour: Well, I shall not press you to it, but if you were so ingenious as to confess, it should go the better with you.

Bradford: Governour, I desire to know my accusers; I think it very hard to be put upon accusing myself.

Governour: Can you deny that you printed it? I do know you did print it and by whose directions, and will prove it, and make you smart for it, too, since you are so stubborn.

245. 2 LAWS OF VIRGINIA 422 (Hening 1823).
Bradford: . . . if any thing be laid to my charge, let me know my accusers. I am not bound to accuse myself. 246

One of the charges against Governor Andros of New England and New York in the New England revolution of 1689, following the flight of James II from England, was that he would too frequently fetch up persons from very remote Counties before the Governor and Council at Boston (who were the highest, and a constant Court of Record and Judicature) not to receive their tryal but only to be examined there, and so remitted to an Inferior Court to be farther proceeded against. The Grievance of which Court was exceeding great. . . . But these Examinations themselves were unreasonably strict, and rigorous and very unduely ensnaring to plain unexperienced men. 247

When some years later, in 1696, the governor of Massachusetts summoned Thomas Maule before him and his council to question him about a book in which Maule criticized both clerical and lay officials and their conduct in the witchcraft prosecutions, he refused to answer any questions and successfully demanded to be tried by a jury of his peers in his own county. 248

A few years before the revolution Governor Dunmore of Virginia called before him and his council persons accused of forging paper money. The House of Burgesses as a body advised the governor that his mode of proceeding was “different from the usual Mode, it being regular that an examining Court on Criminals should be held, either in the County where the Fact was committed, or the Arrest made.” Then followed this explanation: “The duty we owe our Constituents obliges us, My Lord, to be as attentive to the safety of the innocent as we are desirous of punishing the Guilty; and we apprehend, that a doubtful construction and various execution of Criminal Law does greatly endanger the safety of innocent men.” 249

N. Constitutions and Bills of Rights

It was this history and this approach to deviants which we incorporated in our constitutions and bills of rights. Seven states, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia, put a guarantee of the right of silence

248. 1 Chandler, American Criminal Trials 144–49 (1841).
in their constitutions or bills of rights before the adoption of the fifth amendment. Today, in addition to the fifth amendment's protection of this right, all but two states, Iowa and New Jersey, have similar constitutional provisions, and in these two states this right also obtains — in Iowa by judicial decision, and in New Jersey by statute as well as judicial decision. Many states have statutory as well as constitutional provisions. 260

Moreover, the federal courts have given to the right of silence of the fifth amendment an even more liberal application than they have to the guarantees of the first amendment. In 1807 in the Burr281 case Chief Justice Marshall sitting as a circuit justice in the federal court for Virginia stated that this right covered not only answers that would in themselves support a conviction, but also those which would furnish a link in the chain of evidence needed to prosecute. In Counselman v. Hitchcock282 the Supreme Court extended this right to a grand jury proceeding, although the fifth amendment's guarantee by its terms relates only to a criminal case. The Court, through Justice Blatchford, pointed out that this provision "must have a broad construction in favor of the right which it was intended to secure." 253

Recent cases, including two in the Supreme Court, Emspak v. United States284 and Quinn v. United States,285 further extended it to proceedings before congressional committees.

In the 1950s alone, the federal courts sustained claims to a right of silence in some sixty reported cases, and many more unreported ones.256 In more than a score of cases they sustained such claims in proceedings before congressional committees.257 We had generally


252. 142 U.S. 547 (1892).

253. Id. at 562.


256. The cases are collected in Rogge, The First and the Fifth 332-33 (1960).

assumed that the right of silence extended to such proceedings, but the federal courts had not passed on the question. Now they repeatedly so held. The two cases in the Supreme Court involved Thomas Quinn and Julius Emsepk, members of the United Electrical Workers. In both cases the Court not only sustained claims of the privilege before a congressional committee, but did so even though they were based only secondarily on the fifth amendment. Emsepk in refusing to answer certain questions explained: "Because of the hysteria, I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the First Amendment, supplemented by the Fifth. This Committee will corrupt those rights." Quinn adopted the statement of another, Thomas J. Fitzpatrick, a member of his union. Fitzpatrick commented at one point: "This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment." Another time he said: "I stand on the protection of the Constitution, the First and Fifth Amendments." Chief Justice Warren delivered the opinions in both cases. In the Quinn case, after pointing out that the guarantees in the Constitution were to be accorded a liberal construction he continued:

Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly — to treat it as an historical relic, at most merely to be tolerated — is to ignore its development and purpose.

Most of those under attack were persons whom the authorities believed or felt to be Communists. A number were persons whom the Special Committee to Investigate Organized Crime in Interstate Commerce, frequently known as the Kefauver Committee, after its chairman, Senator Estes Kefauver of Tennessee, sought to interrogate and


258. See Note, Applicability of Privilege Against Self-Incrimination to Legislative Investigations, 49 Colum. L. Rev. 87 (1949); cf. Emery's Case, 107 Mass. 172, 9 Am. Rep. 22 (1871); Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931); Ex parte Johnson, 187 S.C. 1, 196 S.E. 164 (1938).

259. 349 U.S. at 193 n.3.

260. 349 U.S. at 158 n.8.


262. 349 U.S. at 162.
whom many regarded as racketeers. In a case involving suspected Communists, Judge Delbert E. Metzger in Hawaii declared:

And I can’t see any actual difference, whether the proceeding was before a grand jury or committee of the House of Representatives, and any other inquisitive body. . . . The Constitution stands there like the rock of Gibraltar. It has the same force and effect, to my mind, whether a proceeding is before a grand jury or any other body.263

In a case involving a suspected racketeer, Judge Herbert F. Goodrich, in writing the opinion for the Court of Appeals for the Third Circuit in Philadelphia, commented: ‘‘If our conclusion permits, in the individual case, a rascal to go unwhipped or a villain unhung, it is because Americans have thought it better public policy to lose a conviction now and then than to force a conviction from the defendant’s own mouth.’’264

When Harry Slochower, an associate professor of German at Brooklyn College, was dismissed under a section of New York City’s charter which made a claim of one’s right of silence an automatic basis for the termination of one’s employment, the Supreme Court in an opinion by Justice Clark held the section invalid:

The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . There has not been the ‘‘protection of the individual against arbitrary action’’ which Mr. Justice Cardozo characterized as the very essence of due process.265

One recent case involved Henry W. (the Dutchman) Grunewald, Max Halperin and Daniel A. Bolich,266 alleged to be members of a tax-fixing ring. The Supreme Court ruled that a trial judge's allowance of the government’s cross-examination of a defendant to bring out his prior reliance on his right of silence under the fifth amendment when subpoenaed by a grand jury constituted reversible error. The Court in an opinion by Justice Harlan reasoned:

We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt could be drawn

263. United States v. Yukio Abe, 19 U.S.L.W. 2321, 2322 (D. Hawaii, Jan. 16, 1951); (a later opinion reported only in this source).


265. Slochower v. Board of Higher Educ., 350 U.S. 551, 557, 559 (1956); accord, In re Gardner, 46 Misc. 2d 728, 250 N.Y.S.2d 739 (Sup. Ct. 1965), where the court held that the summary dismissal of New York policemen for invoking their fifth amendment privilege when called to testify before a grand jury investigating their official conduct, violated the fourteenth amendment’s due process clause.

from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men. Griswold, The Fifth Amendment Today, 9-30, 53-82. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." Ullmann v. United States 350 U.S. 422, 426. See also Slochower v. Board of Higher Education, 350 U.S. 551 when, at the same Term, this Court said at pp. 557-558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

When we pass to the issue of credibility, we deem it evident that Halperin's claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence. Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless would have provided the Government with incriminating evidence from his own mouth. For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach.267

Justice Black in a concurring opinion, in which Chief Justice Warren and Justices Douglas and Brennan joined, added:

I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.

It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the constitution.268

A second trial ended with a hung jury. Thereafter Grunewald died. Halperin and Bolich were tried a third time, and this time acquitted.

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267. 353 U.S. at 421-22.
268. Id. at 425-26.
In another late case, *Stewart v. United States*, the Court reversed a conviction (after two previous reversals by the Court of Appeals for the District of Columbia Circuit) because the prosecutor asked the defendant whether he had been tried twice before and whether this was the first time he had taken the stand. Justice Black in the last paragraph of the Court's opinion commented:

We thus conclude that this conviction and sentence against petitioner cannot stand. In doing so, we agree with the point made by the government in its brief — that it is regrettable when the concurrent findings of 36 jurors are not sufficient finally to terminate a case. But under our system, a man is entitled to the findings of 12 jurors on evidence fairly and properly presented to them.  

A recent Federal Court of Appeals case involved the secretary-treasurer of one of John Dioguardi (Johnny Dio's) paper locals in the Teamsters Union. The Second Circuit in ruling in his favor reasoned through Circuit Judge Jerome N. Frank: "The purpose of the Bill of Rights was, as Madison declared, 'to oblige the government to control itself.' " Judge Frank further observed:

At any such right of privacy [as the right of silence], be it noted, the despotic rulers of totalitarian regimes sneer. They denounce all privacy, since it blocks efficient enforcement of criminal laws. Their position, which logically renders asinine any privilege not to testify, necessarily justifies them logically in subjecting their subjects to constant spying and snooping, for such despotic surveillance plainly aids in the detection of those who violate the laws. Our democratic concern with privacy, they call characteristic of our decadent culture. Before we accept their criticism, and sacrifice all our other values to effective law enforcement, we should reflect on the brutal consequences of the totalitarians' alleged efficiency in pursuing suspected criminals. Such reflection should teach us this: An overzealous prosecutor's heaven may be everyone else's hell.

A dramatic recent case was against two of those who participated in the acid blinding of Victor Riesel. They were Gondolfo (Shiekie) Miranti and Domenico (Nick) Bando. They had told their part in the conspiracy to do this to the FBI, and had been indicted and convicted of conspiring to remove the one who allegedly had thrown the acid on Riesel, Abe Telvi, from the state of New York to avoid

270. Id. at 10.
271. United States v. Gordon, 236 F.2d 916, 920 (2d Cir. 1956).
prosecution for the maiming. At the time of their trial the Government announced that it would not proceed against them for conspiring to obstruct justice. Subsequently, they were scheduled to be Government witnesses in the trial of Johnny Dio, who was charged with masterminding the attack on Riesel. But now they refused to talk, and United States Attorney Paul W. Williams said that their refusal had sabotaged the trial.

It was then that they were taken before the grand jury which had returned the original indictments and which was reconvened to investigate the alleged intimidation of witnesses. (Telvi was killed, probably murdered.) They were asked to acknowledge their previous statements to the FBI, but they still refused to talk, relying instead on the fifth amendment’s provision for a right of silence. Federal District Judge William B. Herlands held them guilty of contempt, declaring: “The Court’s conclusion, therefore, is that this is not a case of constitutional silence. It is a case of underworld lockjaw.” But the Court of Appeals for the Second Circuit reversed, saying through Chief Judge Charles E. Clark:

We are thus faced with the novel question whether or not a witness can invoke his privilege against self-incrimination where practically there is only a slight possibility of prosecution. . . . We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute.

We appreciate the Government’s frustration in this case and we honor the trial court’s justifiable anger over the defendants’ recalcitrance. But the Constitution is for the despicable as well as for the admirable.

Two recent decisions, both by Federal Courts of Appeals, dealt with federal registration legislation requiring the filing of certain information. In the one, Russell v. United States, the Ninth Circuit held unconstitutional a registration provision of the National Firearms Act because the information it required violated the individual’s right of silence under the fifth amendment; in the other, Communist Party

276. 306 F.2d 402 (9th Cir. 1962); cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 166 (1963), where the Court ruled that provisions of acts of Congress which divested an American of his citizenship for leaving or remaining outside of the United States in time of war or national emergency for the purpose of evading military service, were unconstitutional because they did not afford “the procedural safeguards guaranteed by the Fifth and Sixth Amendments.”
the District of Columbia Circuit all but rendered nugatory so far as the Communist party was concerned the registration provision of the Subversive Activities Control Act of 1950 for the same reason. It did so by imposing on the Government the "burden of proving that a volunteer was available" to sign the registration forms. The opinion was by Chief Judge David L. Bazelon. The Supreme Court denied review.

In earlier litigation, Communist Party v. Subversive Activities Control Bd., the District of Columbia Circuit sustained the act's validity. This time Judge Bazelon was the dissenter. He had the better of the argument:

Suppose an Act of Congress required bands of bank robbers to file with the Attorney General statements of their membership and activities, and imposed criminal penalties upon their leaders and members for failure to do so. Such an Act would compel individuals to disclose their connection with a criminal conspiracy. No argument could reconcile such an Act with the Fifth Amendment's command.

The Supreme Court granted review but did not reach the constitutional issue. Rather it sent the case back to the Subversive Activities Control Board for reconsideration because of the alleged false testimony of three Government witnesses: Harvey Matusow, Paul Crouch, and Manning Johnson.

The Subversive Activities Control Board reconsidered, and again ordered the Communist party to register. Again there was a remand, this time by the District of Columbia Circuit. For the third time the Board ordered the Communist party to register. This time its order was affirmed both by the District of Columbia Circuit as well as the Supreme Court. But the Communist party did not register, and was indicted for not doing so. This resulted in the decision requiring the Government to prove the existence of an available volunteer. After more than a dozen years of protracted litigation, the right of silence, in effect, had the last word.

Then in Malloy v. Hogan the Court held that the fifth amendment's right of silence was itself applicable to the states by virtue of

278. 223 F.2d 531 (D.C. Cir. 1954).
279. Id. at 576.
283. 378 U.S. 1 (1964). In another case decided the same day, Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964), the Court, with reference to testimony which an individual is compelled to give under a state compulsory testimony (immunity) act, ruled that "the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution
the due process clause of the fourteenth amendment. In extending
the fifth amendment's right of silence to the states, the Court applied
the right to the facts in Malloy in its usual broad manner. The right
covered even answers which would furnish only a link in the chain of
evidence. Furthermore, it applied whenever a witness felt that his
answer might tend to incriminate him, unless the judge could see with
perfect clearness that the answer could not possibly have such a
tendency. This left the witness pretty much in the driver's seat. Quot-
ing from an earlier case, the Court explained:

The privilege afforded not only extends to answers that
would in themselves support a conviction . . . but likewise em-
brates those which would furnish a link in the chain of evidence
needed to prosecute. . . . [I]f the witness, upon interposing his
claim, were required to prove the hazard . . . he would be com-
pelled to surrender the very protection which the privilege is
designed to guarantee. To sustain the privilege, it need only be
evident from the implications of the question, in the setting in
which it is asked, that a responsive answer to the question or an
explanation of why it cannot be answered might be dangerous
because injurious disclosure could result.284

Malloy v. Hogan overruled not one but two earlier leading cases:
Adamson v. California,285 as well as Twining v. New Jersey.286
At the next term, in Griffin v. California,287 the Court held that
its ruling in Malloy that the fifth amendment's right of silence was to
be applied to the states in the same way as against the federal govern-
ment, was to be taken literally; accordingly, the federal rule against
comment on a defendant's failure to take the stand governed in the
states as well. This decision affected the law in six states: California,
Connecticut, Iowa, New Jersey, New Mexico, and Ohio.288

O. Boyd and Bram

Although in the area of the first, fourth, fifth, sixth, eighth and
fourteenth amendments, the field is filled with overruled cases, there
are others that grow with age. Two of these are Boyd v. United

against him." This case not only overruled Feldman v. United States, 322 U.S. 487
(1944), but also corrected the reasoning in United States v. Murdock, 284 U.S. 141
(1931), as well as Mills v. Louisiana, 360 U.S. 230 (1959), and Knapp v. Schweitzer,

284. 378 U.S. at 11-12.
286. 211 U.S. 78 (1908).
288. See Tehan v. United States ex rel. Shott, 382 U.S. 406, 407 n.2, 417 n.15-16,
vacating and remanding 337 F.2d 990 (6th Cir. 1964).
States\textsuperscript{289} and Bram v. United States.\textsuperscript{290} Boyd in recent decades has been increasingly quoted, and Bram, increasingly cited.

It was in Boyd that Justice Bradley in the Court's opinion in discussing Entinck v. Carrington\textsuperscript{291} (holding general search warrants illegal) commented that Lord Camden's "great judgment on that occasion is considered as one of the landmarks of English liberty."\textsuperscript{292} What the Court held was that a provision of an act of Congress which required, in the words of the Court, "a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws"\textsuperscript{298} violated the fourth amendment's prohibition of unreasonable searches and seizures.

Three statements in particular in Boyd have been quoted. One, beginning at the end of the discussion of Entinck, refers to the support which the fourth and fifth amendments give each other:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.\textsuperscript{294}

Justice Black, for instance, who concurred in Wolf v. Colorado\textsuperscript{295} (where the Court refused to apply the federal exclusionary rule of illegally seized evidence to the states), also concurred in Mapp v. Ohio\textsuperscript{296} (where the Court overruled Wolf), and on the quoted ground.

Another quoted statement from Boyd makes the point that compulsory discovery does not go with being a free people:

> And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.\textsuperscript{297}

\textsuperscript{289} 116 U.S. 616 (1886).
\textsuperscript{290} 168 U.S. 532 (1897).
\textsuperscript{292} Id. at 626.
\textsuperscript{293} Id. at 622.
\textsuperscript{294} Id. at 630, 633.
\textsuperscript{295} 338 U.S. 25 (1949).
\textsuperscript{296} 367 U.S. 643 (1961).
\textsuperscript{297} 116 U.S. at 631–32.
The third, in answer to the argument that the proceedings in Boyd did not involve any actual search and seizure, pointed to the insidious nature of small encroachments:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

In Bram, Justice, later Chief Justice, White in the Court’s opinion tied the inadmissibility of a challenged confession to the fifth amendment’s right of silence:

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

The challenged material consisted of certain answers which a triple-murder suspect gave to an interrogator.

Professor Wigmore was harshly critical of Justice White’s opinion. At one point he stated that Bram “reached the height of absurdity in misapplication of the law,” and at another, called the identification of the exclusion of coerced confessions and the fifth amendment’s right of silence as “erroneous, both in history, principle, and practice.” One can suggest, on the contrary, that, just as the fourth and fifth amendments support each other, so the exclusion of challenged confessions and the fifth amendment’s right of silence are but two sides of the same coin.

P. Miranda v. Arizona

In any event, Bram finally came fully into its own in Miranda. The Court in extending the fifth amendment’s right of silence to police questioning, commented through Chief Justice Warren that “this ques-

298. Id. at 635.
299. 168 U.S. at 542.
300. 3 Wigmore, Evidence § 821 n.2 (3d ed. 1940).
301. 8 Wigmore, Evidence § 2266 (3d ed. 1940).
tion, in fact, could have been taken as settled in federal courts almost
70 years ago" ... with Bram, and quoted from it.

With Miranda, those in custody must be advised of their right to
remain silent and to counsel, either retained or appointed. If they
are not so advised, any statements which they give during such
detention will not be admissible in evidence. Chief Justice Warren in
the Court's opinion twice detailed what Miranda requires. Near the
beginning he wrote:

Our holding will be spelled out with some specificity in the
pages which follow but briefly stated it is this: the prosecution
may not use statements, whether exculpatory or inculpatory,
stemming from custodial interrogation of the defendant unless it
demonstrates the use of procedural safeguards effective to secure
the privilege against self-incrimination. By custodial interroga-
tion, we mean questioning initiated by law enforcement officers
after a person has been taken into custody or otherwise deprived
of his freedom of action in any significant way. As for the
procedural safeguards to be employed, unless other fully effective
means are devised to inform accused persons of their right of
silence and to assure a continuous opportunity to exercise it, the
following measures are required. Prior to any questioning, the
person must be warned that he has a right to remain silent, that
any statement he does make may be used as evidence against
him, and that he has a right to the presence of an attorney, either
retained or appointed. The defendant may waive effectuation of
these rights, provided the waiver is made voluntarily, knowingly
and intelligently. If, however, he indicates in any manner and
at any stage of the process that he wishes to consult with an
attorney before speaking there can be no questioning; Likewise,
if the individual is alone and indicates in any manner that he
does not wish to be interrogated, the police may not question
him. The mere fact that he may have answered some questions
or volunteered some statements on his own does not deprive him
of the right to refrain from answering any further inquiries until
he has consulted with an attorney and thereafter consents to be
questioned.

To make doubly sure, he went over the same ground again before taking
up the facts of the four cases involved in that decision:

To summarize, we hold that when an individual is taken into
custody or otherwise deprived of his freedom by the authorities
and is subjected to questioning, the privilege against self-
incrimination is jeopardized. Procedural safeguards must be em-
ployed to protect the privilege, and unless other fully effective
means are adopted to notify the person of his right of silence and

303. Id. at 461.
304. Id. at 444-45.
to assure that the exercise of the right will be scrupulously
honored, the following measures are required. He must be
warned prior to any questioning that he has the right to remain
silent, that anything he says can be used against him in a court
of law, that he has the right to the presence of an attorney, and
that if he cannot afford an attorney one will be appointed for him
prior to any questioning if he so desires. Opportunity to exer-
cise these rights must be afforded to him throughout the interro-
gation. After such warnings have been given, and such opportu-
nity afforded him, the individual may knowingly and intelligently
waive these rights and agree to answer questions or make a state-
ment. But unless and until such warnings and waiver are demon-
strated by the prosecution at trial, no evidence obtained as a
result of interrogation can be used against him. 305

To many police officers and prosecutors the Court's requirements
in Escobedo and Miranda seem revolutionary. But to those familiar
with our legal history, the Court's extensions in Escobedo of the right
to counsel and in Miranda of the right of silence to police question-
ning seem as natural developments of our accusatorial method, developments
which will not reach their full fruition until any confession which a
defendant repudiates in court will for that reason alone be inadmissible
in evidence.

Indeed, some trial judges have already given a sympathetic appli-
cation to the Miranda ruling. For example, in People v. Allen, 306
New York State Supreme Court Justice Nathan R. Sobel ruled that
a statement elicited from a rape suspect in his home by the arresting
officer without first warning him of his right to remain silent and
to counsel as required by Miranda was inadmissible in evidence. The
complainant was the suspect's mother-in-law. She, her paramour, and
police officers went to her son-in-law's home. The officers asked him
if he had raped his mother-in-law. He replied that he had not, but
that he had had intercourse with her consent. He was then placed
under arrest. In ruling his statement inadmissible, Justice Sobel
reasoned:

"Compulsion" under the Fifth Amendment and its State
counterpart does not have its precise dictionary meaning. It has
no relationship to "coercion" and is applicable in many settings
not related to any "critical stage." Compulsion is simply ques-
tioning in any setting (civil proceeding, administrative or depart-
mental hearing, grand jury and all court proceedings) where a
criminal fact may be elicited. . . .

305. Id. at 478-79.
I read *Miranda* to hold that the mere "fact of custody" is inherently "compulsive" in its Fifth Amendment sense; that as soon as a person is deprived of "his freedom of action" adversary proceedings commence and the privilege protects him from questioning, routine or otherwise, which seeks to elicit a criminal or clue fact. . . .

To summarize, what the Court has done is to move the commencement of "adversary proceedings" to the point of "custody" — backwards from "focus" in point of time. This the Court deemed essential when "compulsion" rather than "critical stage" become the new test.

Presumably when a police officer is merely investigating there will be no custody if the questioning takes place outside the police station. Since the burden of proof is on the People, the police officer's testimony of his subjective intention not to "arrest" should not suffice. An objective test is required — one which encompasses in scope primarily the prior existence of probable cause to arrest — but also the place, nature, the duration of the questioning and all other relevant circumstances. Whether the interrogation was in fact custodial should not turn on the actual or professed intent of the police officer but rather on all the objective evidence.

Since *Miranda*, police have presumably been alerted to the circumstances under which such warnings must be given. . . . The fourfold warning should be given before engaging in any "first" custody questioning at the scene, upon "arrest" and in the police car.307

One can repeat, the changes are breathtaking.

VI. **NON-TESTIMONIAL INCrimINATION**

In addition to confessions and admissions, there are a number of forms of non-testimonial incrimination, such as: stomach contents, blood samples, handwriting exemplars, identification in a police lineup, voice identification, and confrontation at the scene of the crime. Here the courts have ruled variously. In *Rochin v. California*308 the United States Supreme Court held that a conviction based on evidence obtained by pumping a defendant's stomach against his will violated the fourteenth amendment's due process clause. But in *Breithaupt v. Abram*309 the Court held that a conviction based on evidence of intoxi-

307. *Id.* at 255-57.
308. 342 U.S. 165 (1952).
cation obtained from a blood sample of a defendant while he was unconscious, and in *Schmerber v. California*,\(^\text{310}\) of a defendant who was not only conscious but who also protested, did not violate due process.

In an earlier case, *Holt v. United States*,\(^\text{311}\) the Court in a unanimous opinion by Justice Holmes stated that it did not violate a prisoner's right of silence to force him to put on a blouse to see if it fitted him.

In *Williams v. United States*,\(^\text{312}\) the District of Columbia Circuit refused to extend *Escobedo* to identification in a police lineup; and in *Rigney v. Hendricks*,\(^\text{313}\) the Third Circuit held that neither the equal protection nor the due process clause prevented state police from making an indigent accused, who was in custody due to his inability to raise bail, appear in a police lineup before the victims of crimes with which he was not yet charged.

In *Kennedy v. United States*,\(^\text{314}\) the District of Columbia Circuit refused to extend *Escobedo* to identification at or near the scene of the crime, saying: "The absence of counsel at the time of the confrontation at the scene of the crime did not deprive Appellant of a right to silence, a right to withhold evidence or any other right which could have been effectively asserted had counsel been present."\(^\text{315}\)

The California Supreme Court in two cases, *People v. Graves*,\(^\text{316}\) and *People v. Gilbert*,\(^\text{317}\) and the Oregon Supreme Court in *State v. Fisher*,\(^\text{318}\) refused to extend *Escobedo* to handwriting samples. In *Graves* the California police took handwriting samples from a forgery suspect before as well as after arrest.

In *Gilbert* the United States Supreme Court granted certiorari. This case also involves identification at a police lineup as well as leads from alleged illegal procedures — eyewitness identification of the defendant was based, in whole or in part, on witnesses' viewing of four photographs obtained as a result of an alleged illegal search and seizure. Thereafter, the eyewitnesses viewed the defendant at a police lineup where he was compelled to appear without counsel.

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311. 218 U.S. 245 (1910).
312. 345 F.2d 733 (D.C. Cir. 1965).
314. 353 F.2d 462 (D.C. Cir. 1965).
315. Id. at 466; cf. State v. Myers, 140 N.W.2d 891 (Iowa 1966).
318. 410 P.2d 216 (Ore. 1966).
Several recent cases involved voice identification: United States ex rel. Stovall v. Denno, Palmer v. Peyton, and Wade v. United States. In Stovall the Second Circuit sitting en banc denied relief; in Palmer the Fourth Circuit sitting en banc granted it. In Wade the Fifth Circuit also granted relief.

In Stovall Dr. Paul Behrendt was stabbed to death, and his wife Dr. Frances Behrendt, was seriously wounded. The defendant was taken to Mrs. Behrendt's hospital room, where she identified him. During the course of it one of the officers asked Stovall to say a few words for voice identification, and he did — just what he said does not appear.

In Palmer and Wade the circumstances of the voice identification contained elements of suggestibility not present in Stovall. In Palmer a rape suspect and the rape victim were placed in adjoining rooms at the police station, with the door between the rooms a little ajar, and, without the suspect and victim seeing each other, the suspect was asked to say the words which the victim had attributed to her attacker, and he obeyed. The Fourth Circuit in an opinion by Circuit Judge Simon E. Sobeloff felt that "the highly suggestive atmosphere that had been generated could not have failed to affect her judgment."

In Wade a suspected bank robber was required to repeat words allegedly similar to the words used by the robber. Also, the president and the cashier of the robbed bank viewed the suspect separately. In addition, the suspect had court-appointed counsel who was not advised of the lineup in which the voice identification occurred. The vote to reverse the conviction was two to one. Voting with Chief Judge Elbert P. Tuttle was Circuit Judge Sterry R. Waterman of the Second Circuit, sitting by designation. Judge Waterman was one of the three dissenters in Stovall.

In an interesting recent case, State v. Miller, involving a charge of unlawfully monitoring a sheriff's frequency, officers came upon the suspect driving his automobile, stopped him, and, upon finding his automobile radio not in working order, directed him to connect several wires. He did so, and his radio received the sheriff's frequency. But a Louisiana Court of Appeals reversed his conviction on the ground that such forced monitoring could not provide a legal basis for conviction.

Because of the Supreme Court's grants of certiorari in Gilbert from the California Supreme Court and in Stovall from the Second

320. 359 F.2d 199, 201 (4th Cir. 1966).
321. 358 F.2d 557 (5th Cir. 1966).
322. 187 So. 2d 461 (La. 1966).
Circuit, we shall have further word from the Court at its 1966 term in these cases on non-testimonial incrimination, and in *Gilbert*, on the use of evidence obtained as a result of leads from illegal procedures.

VII. LEADS FROM ILLEGAL PROCEDURES

One sentence in *Miranda* indicates that the Court will not permit the use of evidence which results from the questioning of a suspect in violation of *Miranda*, for the Court stated: "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." A line of Supreme Court cases beginning with *Silverthorne Lumber Co. v. United States* supports the conclusion that such evidence will not be admissible. There the Court held that the government could not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed. Justice Holmes wrote for the Court: "If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In the second *Nardone* case the Court held that evidence obtained as a result of leads from an illegal wiretap was not admissible. Similarly in *Wong Sun v. United States*, the Court held that declarations which government agents heard a suspect make during the course of an unlawful entry on their part were "'fruits' of the agents unlawful action."

In one of the voice identification cases, *Wade v. United States*, the court ruled that in the event of a retrial the voice identification testimony of the two bank witnesses would have to be omitted.

Relevant also is *Murphy v. Waterfront Comm'n of New York Harbor*, where the Court, with reference to testimony which an individual is compelled to give under a state compulsory testimony (immunity) act, ruled that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."
VIII. RETROACTIVITY

The great number of the Supreme Court's new rulings under the due process clause of the fourteenth amendment has raised the question of the extent to which these rulings are to be applied retrospectively. The right to counsel is of such importance that the Court at first indicated in a dozen cases331 that it would apply its ruling in Gideon v. Wainwright332 retrospectively, and then not only did so in Doughty v. Maxwell338 but also included defendants who had pleaded guilty. The Court likewise indicated in two cases334 that it would apply Douglas v. California338 retrospectively, and then in a third case did so.336 The Court ruled similarly in reversing convictions based on coerced confessions.337 The Court also applied Griffin v. Illinois338 retrospectively, giving indigents a right to a free copy of trial transcripts, in Eskridge v. Washington Prison Bd.339

But in two cases, Linkletter v. Walker340 and Angelet v. Fay,341 the Court refused to apply Mapp v. Ohio342 (holding material illegally seized by state officers inadmissible even in a state court proceeding) retrospectively to situations where all direct appeals had been concluded before Mapp was decided. The Court similarly restricted Griffin v. California343 (which made applicable to the states under the fifth amendment's right of silence the federal rule prohibiting comment on

333. 376 U.S. 202 (1964), reversing 175 Ohio St. 46, 191 N.E.2d 727 (1963); accord, Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); United States ex rel. La Valle v. Durocher, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1964); United States ex rel. Craig v. Myers, 329 F.2d 856 (3d Cir. 1964). In Manning v. State, 237 Md. 349, 206 A.2d 563 (1965), and Subilosky v. Commonwealth, 209 N.E.2d 316 (Mass. 1965), the courts held that Gideon was to be applied retrospectively.
a defendant's failure to take the stand) in Tehan v. United States ex rel. Shott.\textsuperscript{344}

It was in this state of the law that Johnson v. New Jersey,\textsuperscript{345} the remaining case of the five cases in the Escobedo area in which the Court granted review at its 1964 term, came before the Court. In Johnson the convictions of the defendants became final in 1960, when the New Jersey Supreme Court affirmed them upon direct appeal\textsuperscript{346} and the time expired for them to apply for certiorari. This was long before either Miranda or Escobedo. The Court refused to apply either Escobedo or Miranda retroactively. Moreover, the Court was very specific in its rulings. Escobedo is to be applied prospectively and thus "this holding is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided." Miranda is to be applied prospectively, and thus its "guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966."\textsuperscript{347}

On the same day that the Court announced its opinion in Johnson v. New Jersey, it also disposed of 129 other applications on its docket asking for Escobedo relief,\textsuperscript{348} including two petitions for writs of habeas corpus\textsuperscript{349} as well as a petition for rehearing.\textsuperscript{350} The habeas corpus petitions, the Court denied, and then treating the papers as petitions for writs of certiorari, denied certiorari. Justice Douglas was of the opinion that certiorari should be granted, the judgments vacated, and the causes remanded for reconsideration in the light of Miranda, it being impossible to say on the records whether the principles announced in that case had been violated.

The petition for a rehearing, the Court likewise denied. Here Justice Douglas would have granted the rehearing, vacated the order denying certiorari, granted the petition, vacated the judgment below, and remanded the case for reconsideration in the light of Miranda, it being impossible to say whether the principles in that case had been violated.

Five of the 129 applications were petitions by the state of California in cases where its reviewing courts had reversed convictions.

\begin{itemize}
  \item \textsuperscript{344} 382 U.S. 406 (1966), vacating judgment in 337 F.2d 990 (6th Cir. 1964); accord, In re Gaines, 63 Cal. 2d 234, 404 P.2d 473, 45 Cal. Rptr. 865 (1965); Pinch v. Maxwell, 3 Ohio St. 2d 212, 210 N.E.2d 883 (1965).
  \item \textsuperscript{345} 384 U.S. 719 (1966), affirming 43 N.J. 372, 206 A.2d 737 (1965); accord, United States ex rel. Romano v. Fay, 360 F.2d 389 (2d Cir. 1966), decided before the principal case.
  \item \textsuperscript{346} 31 N.J. 489, 158 A.2d 11 (1960).
  \item \textsuperscript{347} 384 U.S. at 734.
  \item \textsuperscript{348} 384 U.S. 996-97, 1010-28 (1966).
  \item \textsuperscript{349} Mann v. Wainwright, 384 U.S. 996 (1966); McLain v. Florida, 384 U.S. 997 (1966).
  \item \textsuperscript{350} Alford v. Arizona, 384 U.S. 1028 (1966).
\end{itemize}
The Court denied certiorari.\(^\text{351}\) Justice Douglas agreed with the Court's denial of certiorari because he felt that California's reviewing courts had correctly applied the rule announced in \textit{Miranda}. Justices Clark, Harlan and Stewart agreed with the denial on the ground that the judgments below were not final. Justice White was of the opinion that certiorari should be granted and the judgments below reversed for the reasons stated in his dissenting opinion in \textit{Miranda}. After the denials of certiorari in these five cases, California's attorney general asked the California Supreme Court to modify its \textit{Escobedo} stand and reinstate the voided convictions in these cases.

In \textit{New Jersey v. Russo}\(^\text{352}\) the Court, Justice Douglas dissenting, vacated the judgment and remanded the case to the federal district court for further proceedings in the light of \textit{Johnson v. New Jersey}. Russo's petition for certiorari the Court denied; Justice Douglas was of the opinion that certiorari should be granted, the judgment vacated, and the case remanded for reconsideration in the light of \textit{Miranda}, it being impossible to say on the record whether the principles announced in that case had been violated.\(^\text{353}\)

In the remaining 119 applications, the Court denied review. In 3 of these, Justice Douglas, finding no violation of the principles of \textit{Miranda}, was of the opinion that certiorari should be granted and the judgments below affirmed.\(^\text{354}\) In 76 more, he was of the opinion that certiorari should be granted, but the judgments below vacated and the cases remanded for reconsideration in the light of \textit{Miranda}, it being impossible to say on the records whether the principles in that case had been violated.\(^\text{355}\) In the other 40, Justice Douglas thought that certiorari should be granted, the judgment below reversed, and the cases remanded for a new trial, it being clear from the records that the principles announced in \textit{Miranda} were not applied.\(^\text{356}\) He saw no reason to discriminate against these petitioners, all of whose cases were there on direct review and of the same vintage as \textit{Miranda}. The grand total, including the 4 involved in \textit{Miranda} and the one in \textit{Johnson v. New Jersey}, is 134 applications for \textit{Escobedo} relief which the Court disposed of in the manner indicated.

Of course, the Court's refusal to give retroactive effect to \textit{Miranda} and \textit{Escobedo} is not as drastic as it at first sounds; defendants in

\[^{352}\text{384 U.S. 889 (1966), vacating judgment in 351 F.2d 429 (3d Cir. 1965).}\]
\[^{353}\text{Russo v. New Jersey, 384 U.S. 1012 (1966).}\]
\[^{354}\text{384 U.S. 1011 (1966).}\]
\[^{355}\text{384 U.S. at 1012–20.}\]
\[^{356}\text{384 U.S. at 1020–25.}\]
federal cases can still contend that their confessions violate the 
McNabb-Mallory rule, and defendants in state cases can still contend 
that their confessions violate the due process clause of the fourteenth 
amendment. As Chief Justice Warren pointed out in Johnson v. 
New Jersey, a claim that a confession was coerced "presents no prob-
lem of retroactivity." Indeed, at the very term at which the Court 
in Miranda extended the right of silence to police questioning, and in 
Kent v. United States extended the right to counsel to those af-
ected by waiver proceedings in juvenile courts, it also in Davis v. 
North Carolina threw out a confession in a state case because it 
violated the due process clause of the fourteenth amendment. The pre-
Miranda confession cases will continue to be applied retroactively, even 
to cases tried decades and more ago. Similarly, the pre-Miranda 
cases on the right to counsel, like Gideon v. Wainwright, will continue 
to be applied retroactively. Also, if a defendant obtains a reversal of 
his conviction and the grant of a new trial on other -than Escobedo or 
Miranda grounds, his new trial will be governed by the rulings in those 
cases. The Fifth Circuit so held in Gibson v. United States. In the 
third place, state courts may give greater retroactive effect to the 
Escobedo and Miranda rulings than the Supreme Court itself gave 
them. The California Supreme Court and New York Court of Appeals 
currently have before them questions as to the amount of retroactivity 
to give to these rulings.

IX. USE OF CONFESSIONS

Even before either Miranda or Escobedo, the United States 
Supreme Court had been invalidating many confessions which de-
endants repudiated in court. It did this in two lines of cases: one for 
the federal courts, and the other in state cases.

In federal trials the McNabb-Mallory rule governed. McNabb 
involved three members of a clan of Tennessee mountaineers by that 
name who were charged with the murder of an officer of the Federal 
Alcohol Tax Unit. Two of them were questioned for a number of 
hours over a period of two days. During this period all three gave 
confessions. The other case involved a nineteen year old youth named 
Mallory who was charged with rape in the District of Columbia. He 
was taken into custody between two and two-thirty in the afternoon, 
subjected to a polygraph (lie-detector) test beginning a little after

357. 384 U.S. at 735.
359. 384 U.S. 737 (1966), reversing 339 F.2d 770 (4th Cir. 1964), affirming 221 
360. 363 F.2d 146 (5th Cir. 1966).
eight in the evening, and alleged to have confessed by nine-thirty. In both cases the defendants objected to their confessions. The Supreme Court held the confessions to be invalid because they were obtained as a result of persistent questioning plus a failure to take the prisoners before a United States Commissioner or other committing authority without unnecessary delay. In between the two decisions came the Federal Rules of Criminal Procedure, promulgated in 1946, which in rule 5(a) requires that an arrested person be taken before the nearest available committing authority "without unnecessary delay."

In Mallory the Court drew a distinction between time taken to verify a claim by an arrested person that he was innocent and time used to obtain a confession: "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

In state cases the Court threw out confessions which it found to be involuntary on the ground that they violated the due process clause of the fourteenth amendment. However, by involuntary the Court meant almost any confession which it regarded as unfairly obtained. As Chief Justice Warren explained Blackburn v. Alabama: "Thus a complex of values underlies the stricture against use by the state of confessions which, by way of a convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."

The line of state cases in which the Court invalidated convictions based on confessions began with Brown v. Mississippi in 1936. Then came Chambers v. Florida, where Justice Black wrote eloquently for a unanimous court on the dangers of a secret inquisitional method:

The determination to preserve an accused's right to procedural due process sprang in large part from the 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,

362. Id. at 449.
363. Id. at 199.
364. 297 U.S. 278 (1936).
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.\textsuperscript{366}

A high point in the exclusion of confessions came in June 1949, the last month that Justices Murphy and Rutledge sat, when the Court invalidated convictions in three different cases from three different states.\textsuperscript{367} It was in one of these that Justice Frankfurter stated: “Ours is the accusatorial as opposed to the inquisitorial system.”\textsuperscript{368}

In the first part of the 1950’s, during the time of the Vinson Court with Justices Murphy and Rutledge gone, and in the midst of the cold war, there was somewhat of a retreat in the exclusion of confessions.\textsuperscript{369} But under Chief Justice Warren the Court returned to its course. At each of many of its recent terms, just as it has set aside a number of convictions because defendants have been denied the effective assistance of counsel, so it has invalidated a number of convictions because they were based on confessions. As Justice Frankfurter commented in another connection:

It would be comfortable if, by a comprehensive formula, we could decide when a confession is coerced so as to vitiate a state conviction. There is no such talismanic formula. Every Term we have to examine the particular circumstances of a particular case in order to apply generalities which no one disputes.\textsuperscript{369}

Many of the recent rulings produced leading cases. Often there were leading cases in every year and in 1961, as in 1949, there were three: \textit{Fikes v. Alabama} (1957),\textsuperscript{371} \textit{Payne v. Arkansas} (1958),\textsuperscript{372} \textit{Spano v. New York} (1959),\textsuperscript{373} \textit{Blackburn v. Alabama} (1960),\textsuperscript{374} \textit{Rogers v. Richmond} (1961),\textsuperscript{375} \textit{Reck v. Pate} (1961),\textsuperscript{376} and \textit{Culombe v. Connecticut} (1961).\textsuperscript{377}

\begin{itemize}
\item \textsuperscript{369} 338 U.S. at 54.
\item \textsuperscript{369} See, e.g., Stein v. New York, 346 U.S. 156 (1953) (known as the “Reader's Digest case,” because the murder there involved was committed in the course of a robbery of some \textit{Reader's Digest} mail); Burns v. Wilson, 346 U.S. 137 (1953); DeVita v. New Jersey, and Grillo v. New Jersey, 345 U.S. 976 (1953), denying cert. to 11 N.J. 173, 93 A.2d 328 (1952).
\item \textsuperscript{370} Kingsley Int'l Pictures Corp. v. Bd. of Regents, 360 U.S. 684, 696 (1959) (concurring opinion).
\item \textsuperscript{371} 352 U.S. 191 (1957).
\item \textsuperscript{372} 356 U.S. 560 (1958).
\item \textsuperscript{373} 360 U.S. 315 (1959).
\item \textsuperscript{374} 361 U.S. 199 (1960).
\item \textsuperscript{375} 365 U.S. 534 (1961).
\item \textsuperscript{376} 367 U.S. 433 (1961).
\item \textsuperscript{377} 367 U.S. 566 (1961).
\end{itemize}
In Spano as well as Blackburn Chief Justice Warren wrote the opinion. In both cases the Court was unanimous for reversal, although in Spano there were concurring opinions, and in Blackburn, Justice Clark concurred in the result. Spano confessed after eight hours of questioning, Blackburn, after eight or nine hours. Also, in Spano, a fledgling police officer who was one of Spano's buddies told him that if he did not confess, the officer would be in trouble with his superiors. In the Court's opinion excluding Spano's confession, Chief Justice Warren explained:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.378

In Blackburn, Chief Justice Warren on behalf of himself and seven of his brethren reasoned:

Since Chambers v. State of Florida ... this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion." A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. . . .

[A]s important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar.379

In 1961, in Reck v. Pate, the Court reached back a quarter of a century to upset an Illinois conviction in 1936. In another leading case decided in that year, Rogers v. Richmond, a police chief in Connecticut had obtained a confession from a suspect after he pretended that he

378. 360 U.S. at 320-21.
379. 361 U.S. at 206-07.
was about to have the suspect's wife brought in for questioning. The state courts accepted the confession, and in doing so were influenced by the consideration that the probable reliability of the confession was a circumstance of weight in determining its voluntariness. But the United States Supreme Court reversed, reasoning that the probable truth or falsity of a confession had nothing to do with its voluntariness or admissibility. If it was not voluntary in the broad sense in which the Court uses the word, it was not admissible. Justice Frankfurter, author of the Court's opinion, spoke unequivocally:

Our decisions under that Amendment [Fourteenth] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. [Footnotes omitted.] To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant has been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.\(^{880}\)

At the same term and in the same year as *Gideon v. Wainwright*,\(^{881}\) where the Court extended the right to counsel to all defendants in all state criminal cases, the Court also reversed convictions based on confessions, again in three different cases from three different states: *Fay v. Noia*\(^ {882}\) (New York); *Lynumn v. Illinois*\(^ {883}\) and *Haynes v. Washington*.\(^ {884}\) In *Fay v. Noia* the Court reversed such

\(^{880}\) 365 U.S. at 540-41.
\(^{882}\) 372 U.S. 391 (1963), affirming 300 F.2d 345 (2d Cir. 1962).
\(^{884}\) 373 U.S. 503 (1963).
a conviction even though the defendant Noia had allowed the time for a direct appeal in the state courts to lapse. Noia had two co-defendants, who were convicted with him, Bonino and Caminito. Both took direct appeals but lost in the state reviewing courts. Ultimately, however, Caminito succeeded in having the Court of Appeals for the Second Circuit throw out his confession. Judge Jerome N. Frank wrote for the court:

It has no significance that in this case we must assume there was no physical brutality. For psychological torture may be far more cruel, far more symptomatic of sadism. Many a man who can endure beatings will yield to fatigue. To keep a man awake beyond the point of exhaustion, while constantly pummelling him with questions, is to degrade him, to strip him of human dignity, to deprive him of the will to resist, to make him a pitiable creature mastered by the single desire — at all costs to be free of torment. Any member of this or any other court, to escape such anguish, would admit to almost any crime. Indeed, the infliction of such psychological punishment is more reprehensible than a physical attack: It leaves no discernible marks on the victim. Because it is thus concealed, it has, under the brutalist regimes, become the favorite weapon of the secret police, bent on procuring confessions as a means of convicting the innocent.

Then Bonino got the New York Court of Appeals to reverse his conviction. The Supreme Court, affirming the Second Circuit, freed Noia.

In Malloy v. Hogan, Justice Brennan noted that the Court, in Haynes v. Washington, had "held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed." After a reference to the "marked shift to the federal standard in state cases," Justice Brennan then made this significant comment: "The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."

The next term marked another high in the protection of an individual's right of silence. There were no less than half a dozen decisions enforcing it in one way or another. In the order of their rendition they were: Doughty v. Maxwell (February 24, 1964),

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387. Id. at 701.
391. 378 U.S. at 7.
392. Id. at 7.
extending *Gideon* not only retrospectively but also to defendants who had pleaded guilty; *Massiah v. United States* (May 18, 1964), reversing a federal conviction because of the introduction into evidence of the defendant's incriminatory statements made after indictment to federal agents in the absence of his counsel; *Malloy v. Hogan* (June 15, 1964), making the fifth amendment's right of silence applicable to the states; *Murphy v. Waterfront Comm'n of New York Harbor* (June 15, 1964), holding state-compelled testimony and its fruits inadmissible in a federal criminal prosecution; *Jackson v. Denno* (June 22, 1964), reversing a state conviction based on a confession because the trial judge left the question of the confession's voluntariness to the jury without passing on this question independently first himself; and *Escobedo v. Illinois* (June 22, 1964), excluding a suspect's confession given in the absence of his counsel.

*Jackson v. Denno* arose in New York. After its rendition, the New York Court of Appeals in *People v. Huntley* announced that in cases involving contested confessions, whether the cases were concluded or not, there would be a hearing on voluntariness before the trial judge. As to future trials the court further stated: "The Judge must find voluntariness beyond a reasonable doubt before the confession

396. Id. at 52.
399. 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). At the time of *Jackson v. Denno* there were three different rules for determining the voluntariness of confessions: the New York rule, the orthodox rule, and the Massachusetts rule. Under the New York rule, if there was a factual conflict in the evidence as to the voluntariness of a confession over which reasonable men could differ, the judge left the question of voluntariness to the jury. This rule was followed in some 15 states, the District of Columbia, Puerto Rico, and six federal circuits. Under the orthodox rule, the judge heard all the evidence and ruled on voluntariness for the purpose of the admissibility of the confession; and the jury considered voluntariness as affecting the weight or credibility of the confession. This rule was followed in some 20 states and three federal circuits. Under the Massachusetts rule the judge heard all the evidence and ruled on voluntariness before allowing a confession into evidence; if he found the confession voluntary the jury was then instructed that it must also find the confession voluntary before it could consider it. This rule was followed in 14 states and two federal circuits. The law in Nevada on the point apparently had not been settled. See 378 U.S. at 410-23.

In *People v. Huntley*, the New York Court of Appeals, adopted the Massachusetts rule. The Wisconsin Supreme Court adopted the orthodox rule. State v. Burke, 133 N.W.2d 753 (Wis. 1965).

*Jackson v. Denno* was applied retrospectively in Rudolph v. Holman, 236 F. Supp. 62 (M.D. Ala. 1964). The petitioner in this case was also the petitioner in Rudolph v. Alabama, 375 U.S. 889 (1963).
can be submitted to the trial jury. The burden of proof as to voluntariness is on the People." In concluded cases, such hearings became known as "Huntley hearings." Huntley himself had such a hearing, but lost before the trial judge.

Then at the same term as its Miranda ruling, the Court in Davis v. North Carolina not only threw out a confession in a state case without the help of Miranda, but also, by its reliance in reaching its results on the fifth amendment's right of silence (made applicable to the states by the due process clause of the fourteenth amendment), blended the two lines of cases for the federal and state courts on the exclusion of confessions. Davis was an escaped convict who was captured, and interrogated about a rape-murder. Miranda was not applicable under Johnson v. New Jersey. Nevertheless, Chief Justice Warren in the Court's opinion reasoned:

The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions — a standard grounded in the policies of the privilege against self-incrimination. Malloy v. Hogan, 378 U.S. 1, 6-8 (1964).

The review of voluntariness in cases in which the trial was held prior to our decisions in Escobedo and Miranda is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by Miranda, is a significant factor in considering the voluntariness of statements later made.

Justice Clark in a dissenting opinion, in which Justice Harlan joined, complained about the Court's new emphasis in confession cases on an individual's fifth amendment right of silence:

This case goes against the grain of our prior decisions. The Court first confesses that the rule adopted under the Fifth Amendment in Miranda v. Arizona, . . . i.e., that an accused must be effectively advised of his right to counsel before custodial interrogation, is not retroactive and therefore does not apply to this case. See Johnson v. New Jersey. . . . However, it obtains the same result by reading the Due Process Clause as requiring that heavy weight must be given the failure of the State to afford counsel during interrogation as "a significant factor in considering the voluntariness of statements."

400. 15 N.Y.2d at 78, 204 N.E.2d at 183, 255 N.Y.S.2d at 843-44.
404. 384 U.S. at 740.
405. Id. at 753-54.
Even before this case and *Miranda*, it had been argued that the recent decisions of the Supreme Court in effect if not in form had applied the *McNabb-Mallory* rule to the states. Now there is no longer any doubt that the rules excluding confessions are the same for the state as for the federal courts.

Before *Miranda*, as one puts together the results of the various decisions of the United States Supreme Court voiding confessions—particularly the results in three cases: *Mallory v. United States*, where the Court excluded a confession obtained after less than two hours of questioning; *Massiah v. United States*, where the Court held inadmissible an incriminating statement made by an indicted defendant in the absence of his counsel; and *Escobedo v. Illinois*, where the Court ruled out a suspect’s confession given in the absence of his counsel—and the decisions of the lower courts extending *Escobedo*—for instance, the Court of Appeals for the Third Circuit in *United States ex rel Russo v. New Jersey*, and the California Supreme Court in *People v. Dorado*—to suspects who either do not have or do not request counsel, one could see that the courts were approaching the writer’s position of excluding from evidence any confession which a defendant repudiates in court. *Miranda* took this process one step further. And this, the writer repeats, is as it should be.

Indeed, the District of Columbia Circuit in the application of the *Malloy* rule in a recent case, *Alston v. United States*, reversed a conviction based on a confession obtained in only about five minutes of questioning. Chief Judge David L. Bazelon based his opinion on the ground that the arresting officers had not taken the defendant before a committing magistrate as quickly as possible. He relied heavily on two other recent District of Columbia Circuit cases. In one, *Greenwell v. United States*, the court excluded an oral confession made after arrest and while the police vehicle was parked for the purpose of obtaining the confession before proceeding to the committing authority.

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408. 377 U.S. 201 (1964).
412. 348 F.2d 72 (D.C. Cir. 1965).
According to the police, the defendant confessed within a few minutes. In ruling against the confession, Circuit Judge J. Skelly Wright wrote for the court: "One purpose of the *Mallory* doctrine was to eliminate swearing contests between police and defendants as to what each said and did, by commanding that the defendant be promptly presented."\footnote{336 F.2d at 968.}

In the other, *Spriggs v. United States*,\footnote{335 F.2d 283 (D.C. Cir. 1964).} the court excluded a confession which a police officer obtained during a form-filling process. Circuit Judge Charles Fahy in the court's opinion distinguished not only between the time taken to verify an arrested person's claim of innocence and time used to obtain a confession, but also between questions which the police ask to make sure they are not charging the wrong person and questions which they ask to elicit a confession. With reference to the case at hand he wrote:

> The *McNabb-Mallory* exclusionary rule does not permit the use at trial of evidence of a repudiated confession obtained by secret interrogation during a form-filling process such as here occurred after arrest on probable cause and prior to arraignment. It is of little consequence that the officer says he advised Spriggs he need make no statement and if he did it would be used against him. Under the law Spriggs was entitled to be taken to a magistrate for public advice by the magistrate as to his rights, including his right to counsel with an opportunity to obtain counsel.\footnote{Id. at 285. But in Pyles v. United States, 34 U.S.L. Week 2680 (D.C. Cir. June 2, 1966), the court held that a suspect's inculpating answer to a question asked by a policeman who had apprehended him fleeing a robbery scene, had disarmed him, and was holding him at gunpoint, was not as a matter of law inadmissible. In State v. Randolph, 406 P.2d 791 (Ore. 1965), the court held that an unlicensed Oregon motorist's admission to an officer that he was driving the car which hit a parked car was admissible at his trial on a charge of driving without a license, even though the officer did not advise him of his fifth and sixth amendment rights.}

Some other recent pre-*Miranda* confession cases deserve mention. The Tenth Circuit reversed the conviction for spying of George J. Gessner because it was based on a confession which the court held inadmissible in evidence.\footnote{Gessner v. United States, 354 F.2d 726 (10th Cir. 1965).} Gessner was an Army nuclear weapons specialist who deserted, went to Mexico City, contacted the Soviet Embassy, and passed atomic secrets to the Russians. For this he got a life sentence. The court was "in complete accord with the government's contention that the military interviewers treated Gessner with admirable decency."\footnote{Id. at 729.}

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\footnote{414. 336 F.2d at 968.}
\footnote{415. 335 F.2d 283 (D.C. Cir. 1964).}
\footnote{416. *Id.* at 285. But in Pyles v. United States, 34 U.S.L. Week 2680 (D.C. Cir. June 2, 1966), the court held that a suspect's inculpating answer to a question asked by a policeman who had apprehended him fleeing a robbery scene, had disarmed him, and was holding him at gunpoint, was not as a matter of law inadmissible. In State v. Randolph, 406 P.2d 791 (Ore. 1965), the court held that an unlicensed Oregon motorist's admission to an officer that he was driving the car which hit a parked car was admissible at his trial on a charge of driving without a license, even though the officer did not advise him of his fifth and sixth amendment rights.}
\footnote{417. Gessner v. United States, 354 F.2d 726 (10th Cir. 1965).}
\footnote{418. *Id.* at 729.}
physically abused. . . .”

Nevertheless, he was mentally sick and his confession was obtained from him by considerable questioning without the presence of counsel. Despite the fact that it might not be possible to try him again, the court reversed, saying at the close of its opinion:

In remanding this case we are not unmindful that further prosecution under the Atomic Energy Act may not be possible although Gessner’s betrayal of the United States is despicable, sorely testing the administration of justice as an individual case. Further, his statement to the trial court, when given the right of allocution at sentencing, is nauseating. This record reflects no travesty on justice. It does reflect complete fairness of prosecution and appeal upon the part of the government, careful and competent adjudication, and complete dedication of appointed defense counsel to a cause which, to them, as to us, is distasteful but reflects the legal profession at its best.

Subsequently the government dropped the case because it lacked sufficient evidence without Gessner’s confession to try him again. Gessner, who has a high I.Q., on his part had referred to President Johnson as “the Mr. Pecksniff we have in the White House — a horse poverty warrior, full of promise but of no performance.”

The Second Circuit set aside the conviction of Samuel Tito Williams, who was convicted of the murder of 15-year-old Selma Graff in the course of a burglary of the Graff apartment, because the conviction was based on coerced confessions. The court realized: “As there was no evidence against Williams at the trial, other than the confessions which we now hold to have been inadmissible, a retrial may be unlikely.”

The New York Court of Appeals in People v. Waterman, as well as in other cases (a number of which were cited with approval by the Supreme Court in Massiah v. United States) ruled inadmissible confessions or other statements of an indicted defendant obtained by the authorities in the absence of his counsel. In Waterman the court held:

Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

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419. Ibid.
420. 354 F.2d at 731.
425. 9 N.Y.2d at 565, 175 N.E.2d at 448, 216 N.Y.S.2d at 75.
This holding was quoted by the Supreme Court in Massiah. People v. Meyer extended Waterman to a pre-indictment but post-arraignment statement: "We thus conclude that any statement made by an accused after arraignment not in the presence of counsel as in Spano, Di Biasi and Waterman is inadmissible." In People v. Friedlander the New York Court of Appeals threw out a confession made before arraignment, but after the defendant had consulted with a lawyer who told the officer in charge "to arrest and arraign" the defendant. The court reasoned:

The right to counsel is fundamental . . . and statements obtained after arraignment not in the presence of counsel are inadmissible . . . as are statements obtained where access has been denied . . . and this is so even when counsel cannot obtain access, due to physical circumstances . . . So it is here.

In People v. Donovan, this court invalidated a confession taken by police from a suspect after counsel had been denied access to him; and in People v. Faila, it reached the same result as to a confession in the prospect of being taken from a suspect when an attorney sent by the suspect's father asked to see the suspect.

The New York Appellate Division, First Department, in reversing a first-degree murder conviction in People v. Taylor, held that where a suspect "has asked to see his family or his family have asked to see him, and such request is denied, any confession thereafter obtained by the police will be inadmissible against him upon his trial." However, in this instance the Court of Appeals modified the order of the Appellate Division by requiring a Huntley-type hearing to determine the voluntariness of the confession, which the First Department thereafter directed to be held.

New York State Supreme Court Justice J. Irwin Shapiro dismissed indictments against three anti-Castro Cubans because the indictments were based on confessions taken from the defendants out of...
of the presence of their lawyer, who was in the station house. The three allegedly confessed to firing a bazooka shell from Queens into the East River near the United Nations on December 11, 1964 in order to divert attention from a speech that Major Ernesto Che

437. People v. Novo, Sup. Ct., June 9, 1965. For further recent pre-Miranda cases where the courts voided confessions or other incriminating statements, see United States v. Middleton, 344 F.2d 78, 81-82 (2d Cir. 1965) (two-hour delay) ("Any period of delay becomes unreasonable if used, as here, 'to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements' to support the arrest and ultimately the defendant's guilt"); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964) (arrested on a warrant issued in another state, and not taken before the nearest available committing authority) (arresting officer testified that the defendant confessed within two or three minutes after the questioning began); Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963), cert. denied, 376 U.S. 964 (1964) (three-hour delay); United States ex rel. Kemp v. Pate, 240 F. Supp. 696, 707 (N.D. Ill. 1965) ("Courts in the District of Columbia have held that a reaffirming confession which, though it followed a hearing, was a result of that illegality and must be excluded.")

In Killough v. United States, 315 F.2d 241, 245 (D.C. Cir. 1962), the court held "that a reaffirming confession which, though it followed a hearing, was made soon after an earlier confession obtained during unlawful detention which preceded the hearing, was a result of that illegality and must be excluded." In Johnson v. United States, 344 F.2d 163, 166 (D.C. Cir. 1964), the court concluded that a defendant's inadmissible confession could not be used to cross-examine him if he took the stand at his trial and "merely offered his own version of the events charged in the indictment." But in United States v. Curry, 358 F.2d 904, 910 (2d Cir. 1966), the Second Circuit, with reference to a suppressed confession, said: ". . . if the defendant offers testimony contrary to the facts disclosed by evidence which has been suppressed, the government may in the interest of truth use this illegally obtained evidence to establish facts collateral to the ultimate issue of guilt."

Also, in Fredricksen v. United States, 266 F.2d 463, 464 (D.C. Cir. 1959), the court held that "a spontaneous and voluntary exclamation" of an accused person in a police line-up was admissible over a Mallory objection. Thereafter a practice seemed to develop in the District of Columbia of offering in evidence apologies by accused persons to complaining witnesses. See, e.g., Veney v. United States, 344 F.2d 542, 543 (D.C. Cir. 1965); Copeland v. United States, 343 F.2d 287 (D.C. Cir. 1964). This led Circuit Judge J. Skelly Wright in his concurring opinion in Veney to comment: "For some time now I have been curious and concerned about evidence offered by the Government, appearing again and again in criminal case records, showing that the defendant, at the lineup or other confrontation with the complaining witness, had, while in the presence and custody of the police, "spontaneously and voluntarily" apologized for his misdeed.

[I]t appears to me that the time is ripe for some soul searching in the prosecutor's office before it offers any more "spontaneous" apologies in evidence.

In United States ex rel. Martin v. Fay, 352 F.2d 418 (2d Cir. 1965), where the defendant claimed that he pleaded guilty because of a coerced confession obtained from him in the absence of counsel, the Second Circuit held, in the words of another of its recent decisions: "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings. . . ." Id. at 419. But in United States ex rel. Kuhn v. Russell, 252 F. Supp. 70 (M.D. Pa. 1966), the court gave habeas corpus relief because the state court trial judge at the time of sentence under a guilty plea considered the defendant's pretrial statement taken while he was without the benefit of counsel.

The Delaware Supreme Court adopted "the federal McNabb-Mallory rule within the framework of the facts in the case before us," where a delay of 36 hours in bringing the defendant before a committing magistrate was in violation of a Delaware statute. Vorhauer v. State, 212 A.2d 886 (Del. 1965). The Michigan Supreme Court took a similar step in People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

In Evalt v. United States, 359 F.2d 534 (9th Cir. 1966), the court, partly because of Estes v. Texas, 381 U.S. 532 (1965), held that newspaper reporters who, with the sheriff's permission, interviewed a federal criminal defendant and obtained his confession, could not be used as witnesses against him.
Guevara, a chief aide of Premier Fidel Castro, was making to the United Nations General Assembly.

Another recent confession case tried before *Miranda* involved six defendants and the confession of one of them.438 Although all the names in the confession were blanked out, save that of the confessing party, the Second Circuit, Circuit Judge Leonard P. Moore dissenting, nevertheless reversed as to the five on the ground that the confession of the one might have rubbed off on them. Ironically enough, there was a good case against the defendants without the confession. As the court noted:

To be sure the evidence apart from Jones' confession was ample for convictions on all counts if the jurors believed Kuhle, as we have relatively little doubt it would have even without the impressive corroboration which the confession furnished.439

The trial, which lasted a month in the federal district court in Brooklyn, produced sensational accusations of murder threats, Cosa Nostra activity, and the attempted intimidation of the assistant United States attorney who tried the case. Judge Moore wrote in his dissent: "For all practical purposes, the decision must of necessity seriously affect all future multi-defendant trials. . . . For all practical purposes any confession in any multi-defendant trial becomes unusable or inadmissible."440 But the difficulty to which Judge Moore addressed himself becomes nonexistent if prosecutors will just give up their reliance on confessions.

X. MODERN POLICE SYSTEMS

The Court's extensions of the right to counsel in *Escobedo* and that of silence in *Miranda* come at an opportune time, for not only are we currently in an inquisitional trend, but also in the course of the past century and a quarter we have witnessed the growth of modern police forces. It was in 1828 that Sir Robert Peel, then Secretary of State for Home Affairs, secured the passage of a statute which abolished the old system of watch and ward, and substituted in its place a professional police force, uniformed, disciplined and under the direct control of a commissioner responsible to the national government. This force was in charge of a new metropolitan police district comprising the area surrounding the old city of London. Soon there were

439. 365 F.2d at 218.
440. Id. at 228.
police organizations throughout England, but under local instead of national supervision.

This country experienced a similar development. In 1844 the New York legislature abolished the night watch in New York City and provided for the organization of a day and night police. This measure went into effect in 1845. In the course of time the rest of the country followed suit.

The most effective agency for the investigation of deviant behavior, the FBI, is not a police system, and it dates from this century. The beginnings of the FBI date from July 26, 1908, when Attorney General Charles J. Bonaparte issued an order creating an investigative agency within the Department of Justice. Most of the FBI's development came under J. Edgar Hoover, whom Attorney General, later Chief Justice, Harlan F. Stone, in 1924 appointed first as acting Director and seven months later as Director.441

Although police forces, as well as the FBI, do not have inquisitional subpoena powers, they nevertheless do question many people, including suspects. Indeed, Lord Shawcross, who was Attorney General for Great Britain from 1945 to 1951, and who argued for the importation into England of "something from . . . the juge d'instruction of continental systems," thought it anomalous that many officials should have inquisitional subpoena powers, but not the police:

Although the police may not enter our houses or question us, the gas inspector can. And not only the gas inspector. You would be surprised at the long list of statutes and regulations under which some official or other person dressed in a little brief authority is entitled to enter private premises and private homes without any question of a warrant being issued by a magistrate. Similarly, there is a long list of cases under which private citizens can be interrogated or compelled to produce documents which may incriminate them.

I am not saying for a moment that these powers are not justified. On the contrary, they are essential for the proper enforcement and administration of the great network of social, economic, fiscal and industrial legislation on which our organized society depends. . . .442

But Lord Shawcross overlooks a vital distinguishing fact: the police have power to take persons into custody; inquisitional officials, such as the gas inspector to whom he refers, ordinarily do not.

441. See Whitehead, The FBI Story (1956).
XI. MODERN ENGLISH PRACTICE

Our treatment of confessions paralleled a similar treatment in England. And, just as Justice, later Chief Justice, White in *Bram v. United States* \(^{443}\) identified the exclusion of confessions and the privilege against self-incrimination, so, three decades earlier, did Chief Baron Kelly in *Regina v. Jarvis*: \(^{444}\)

I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced either by a threat or a promise to say anything of a criminally character against himself.

Professor Wigmore condemned Chief Baron Kelly's identification along with that of Chief Justice White as a monstrous confusion. \(^{445}\)

In 1848 Parliament passed a statute that specifically required a justice of the peace to advise an accused person of his right to remain silent in a preliminary examination. The act provided that he "shall say to him these Words, or Words to the like Effect: 'Having heard the Evidence, do you wish to say anything in answer to the Charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial. . . ." \(^{446}\)

In 1912 the judges at the request of the Home Secretary drew up some rules as guides for police officers as well. These rules provided in part:

2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

\(^{443}\) 168 U.S. 532 (1897).
\(^{444}\) 10 Cox Cr. Cas. 576 (1867).
\(^{445}\) 3 Wigmore, Evidence § 2266 (3d ed. 1940).
\(^{446}\) 11 & 12 Vict., c. 42, § 18 (1848). In 1793, over a half century before this statute, the court in *Rex v. Bennet*, cited in *Rex v. Lambe*, 2 Leach 553 n.(a), 168 Eng. Rep. 379 n.(a) (Assizes 1793), excluded an examination before a magistrate where the accused had refused to sign it. The judge reasoned that the accused had a right "to retract what he had said, and to say that it was false. . . ." In 1817, still more than three decades before this statute, Chief Baron Richards in *Rex v. Wilson*, Holt 597, 171 Eng. Rep. 353 (Assizes 1817), excluded an examination before a magistrate where the accused had not been cautioned, saying: "An examination of itself imposes an obligation to speak the truth. If a prisoner will confess, let him do so voluntarily." In a similar ruling in 1850, after this statute, but without a reference to it, Chief Justice Wilde in *Regina v. Pettit*, 4 Cox Cr. Cas. 164 (1850), in rejecting such an examination, declared:

I reject it upon the general ground that magistrates have no right to put questions to a prisoner with reference to any matters having a bearing upon the charge upon which he is brought before them. The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry.

Id. at 165.
4. If the prisoner wishes to volunteer any statement the usual caution should be administered.\textsuperscript{447}

These rules were known as the "Judges' Rules," and while not absolute requirements, they did form the standard for evaluating police practices. Subsequently others were issued. The first sentence of rule 7 specified: "A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said."\textsuperscript{448}

In 1929 a Royal Commission on Police Powers and Procedures, which had been appointed the preceding year, made a report in which, among other things, it recommended:

A rigid instruction should be issued to the Police that no questioning of a prisoner, or a "person in custody," about any crime or offense with which he is, or may be, charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements, under No. (7) of the Judges' Rules, but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial.\textsuperscript{449}

A case and an anecdote will illustrate the English approach. In the case, a woman was on trial with another for the murder of her husband. At the time of her arrest she admitted her guilt and that the murder weapon had been a mallet. The arresting officer did not follow up these statements with any question, and when defense counsel asked him why not, this colloquy took place:

Mr. Justice Humphreys: Do you really suggest, Mr. O'Connor, if after a woman 'has said - believe it or not - that she was a party to a crime like this, the police would be justified in cross-examining her at all?

Mr. O'Connor: I accept your lordship's suggestion at once, and apologise for the question.\textsuperscript{450}

The anecdote is about a British constable on the witness stand who was asked whether it was not true that the accused had made a statement. He answered: "No: he was beginning to do so; but I knew my duty better, and I prevented him."\textsuperscript{451}

\\textsuperscript{447.} They are set out in The King v. Voisin, (1918) 1 K.B. 531, 539 n.3.
\textsuperscript{448.} These rules are quoted in Justice Frankfurter's opinion, in which Justice Stewart joined, in Culombe v. Connecticut, 367 U.S. 568, 596 n.41 (1961).
\textsuperscript{449.} Royal Commission on Police Powers and Procedure, Report, CMD. No. 3297, at 118 (1929).
\textsuperscript{450.} Trial of Alma Victoria Rattenbury and George Percy Stoner 126-27 (Notable British Trials Series, Jesse ed. 1935).
But, just as the police in this country have not accepted the McNabb-Mallory rule, so the police in Great Britain have not always guided themselves by the Judges' Rules. As Justice Frankfurter observed in his opinion in Culombe v. Connecticut: 452 "Although the third degree is, in England, spoken of as the American practice, England herself is not free of police interrogation and cross-questioning." 453

A recent article in The Economist about the Judges' Rules, Change in the Rules?, began with this paragraph:

Lord Shawcross this week in Leeds condemned the "kid glove methods" supposed to be used against criminals by the English police and judiciary. The following day, a monstrous tale of police brutality emerged from nearby Sheffield. A Home Office tribunal of inquiry, set up to hear the appeals of two detective constables against their dismissal from the Sheffield police force for using (among other things) a rhinoceros-hide whip on suspects, not only found their dismissal fully confirmed, but implicated more senior officers as well. 454

Also, and again just as in this country, at the height of the cold war, confessions had a readier admissibility into evidence. 455 Indeed, in 1960 it seemed to Dr. Glanville Williams "from reported cases that the judges have given up enforcing their own rules." He further noted that "between the wars the general practice was to exclude the confession; but since 1950 they have almost uniformly been admitted." 456

However, in 1964 the authorities issued a new set of Judges' Rules. The second of these provides:

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." 457

453. Id. at 572 n.3.
Thereafter one lawyer expressed the view that the judges would return to their earlier exclusionary course: "Recent cases suggest that perhaps the judges have been tightening up again. Almost inevitably, the effect of the new Rules will be to stimulate this tendency." But, once again as in this country, there were those who denounced the exclusionary course. Lord Shawcross would even borrow "from the juge d'instruction of continental systems." He contended: "It is notorious that under our existing procedures the police have, in general, no power to compel anyone — be he suspect or merely witness — to disclose anything or to answer any question. Why on earth not?"

XII. Modern French Practice

France kept on its customary inquisitional path, but continued abuses finally resulted in a law of December 8, 1897, which gave an accused person the right to be represented by counsel whenever the juge d'instruction questioned him. M. Constans, one of the sponsors of the law in the French Senate, said: "The juge d'instruction is like other functionaries. He must be controlled. . . . The presence of the lawyer will of itself . . . prevent him from doing anything but his duty."

The juge d'instruction was required to inform an accused, not that he had a right to remain silent, but that he had a right to be defended by counsel and that he need not answer questions until counsel was present. However, counsel, even when present, had only limited rights. He was entitled to speak only when the juge d'instruction authorized him to do so, although a refusal was to be noted in the minutes. The juge d'instruction was still free to try to get a confession.

Today in France, under articles 114 and 118 of the Code of Penal Procedure, which went into effect on March 2, 1959, an accused before a juge d'instruction not only has a right to counsel but also is excused from taking an oath to tell the truth. In the words of Professor Robert Vouin of the University of Paris:

In France, the suspected person enjoys an effective protection as soon as he is brought before the examining magistrate as an
accused. From that time, actually, he is not only excused from taking an oath to tell the truth, but also he may require the help of a barrister. The latter must be convoked by the judge to every interrogatory, permitted to study the briefing, and allowed to communicate freely with his client any time he desires.\footnote{1. Vouin, Police Interrogation Privileges and Limitations: An International Symposium, 52 J. Crim. L., Cr. & P.S. 1, 57 (1961). Professor Vouin continued with the comment: As these protections do not facilitate their task, the examining magistrate and the police might be tempted to put off their application, delaying as long as possible the time where the suspected person is the object of a formal inculpation. But the jurisprudence has reacted against this trend by formulating a rule that the Penal Procedure Code has just adopted. According to article 105 of this Code: [T]he examining magistrate in charge of a preliminary investigation, as well as the magistrate and the judicial police officers acting upon a rogatory commission, cannot (otherwise it would not be valid) hear as witnesses persons against whom serious and concordant incriminating evidences exist, when this hearing would result in eluding the defense guarantees. Under article 70, the Procureur de la République may subpoena any person suspected of having participated in a flagrant crime; but this person, "if he reports himself, accompanied by a defense counsel . . . may be interrogated only in the presence of the latter." As quoted in id. at 58.}

However, in the preliminary investigation of a crime or a flagrant delict, a person may be interrogated by the judicial police officer during two periods of 24 hours each, even if serious and concordant incriminating indicia exist against him.\footnote{2. 318 U.S. 332 (1943).}

XIII. Effect of Exclusionary Rulings


In July and August 1965 Deputy United States Attorney General Ramsay Clark and David C. Acheson, the United States Attorney for the District of Columbia, flouting the \textit{Mallory} rule, issued administrative instructions to the District's Police Chief John B. Layton authorizing arresting officers there to question suspects for up to three hours before arraignment. The United States Senate passed a bill to the same effect.\footnote{7. Id. at 58.} Three Senators, Democratic Senator John J. McClellan of Arkansas, and Republican Senators Roman L. Hruska of Nebraska and Hugh Scott of Pennsylvania, questioned the new appointee to the Supreme Court, Justice Abe Fortas, on the point. He hedged by going in opposite directions at the same time: "I believe
that adequate opportunity by police to interrogate persons who are suspected or accused is absolutely essential to law enforcement. But such a person should be brought before a magistrate as soon as possible to determine probable cause. 468

Statistics on the effect of exclusionary rulings on law enforcement are scarce, but they have been accumulating. Professor Yale Kamisar gathered some on two rulings: Mallory v. United States, 409 which came up from the District of Columbia, and People v. Cahan, 470 a search and seizure case, in which the Supreme Court of California, in the words of Justice Stewart in the Court's opinion in Elkins v. United States, "resolutely turned its back on many years of precedent and adopted the exclusionary rule." 471 Professor Kamisar's findings, contrary to what prosecutors and those in accord with them contend, indicate that these exclusionary rulings resulted in somewhat more effective law enforcement rather than less. 472

After Mallory, both Chief Robert Murray and Deputy Chief Executive Officer Howard Covell of the District of Columbia Police Department testified that the percentage of solutions of major crimes had increased through the years. Covell testified in 1959 and Murray the following year. Here is part of Covell's testimony:

Mr. Santangelo. As a matter of fact, it appears to me that the percentage of solutions of the major crimes has increased down through the years?

Chief Covell. I would say yes.

Mr. Santangelo. For the last 3 years let us say, the homicides, rapes, and aggravated assaults, your percentage of solutions has increased, has it not?

Chief Covell. I would say yes, but that also comes from, and I say this with modesty, from an increased efficiency of the Police Department and better coordination of the law enforcement agencies throughout the entire metropolitan area. I think that the cooperation of all departments in this area reflects in each other's department to some extent. . . . During the fiscal year 1958 there was a total of 51 per cent of all part 1 crimes [major offenses] solved as compared with 49.5 during 1957 [the Mallory year]. The rate of clearance in 1958 is second to the highest; that was 55.6 attained by the Department since the installation of the present system of reporting, which was made in 1948. 473

The next year Chief Murray continued the account:

Mr. Santangelo. . . . Can you tell us what your experience in 1959 was with respect to the solution of crimes of criminal homicide and the other major crimes?

Chief Murray. . . . The average is 52.5 . . .

Mr. Santangelo. Last year, in 1958, the percentage of solution of crimes was 51 per cent, and in the year 1959 it was 52.5 per cent. So your percentage of efficiency has increased to that extent. Is that a correct statement?

Chief Murray. Yes, sir; plus the fact that we have had a few more men to help us clear it . . .

Mr. Santangelo. Your percentage of solutions has increased in the cases of robbery.

Chief Murray. Yes, sir; we have, I think, a very good record in the clearance of robberies, 65 per cent.

Mr. Santangelo. That rose from 61.3.

Chief Murray. Yes, sir.

Mr. Santangelo. In aggravated assault, you also have gone up from 84.3 to 88 per cent. In housebreaking, which is another difficult thing to solve, you have gone up from 50.5 to 54 per cent. Is that correct?

Chief Murray. Yes, sir. 474

In the third year after Mallory, the United States Attorney for the District of Columbia, Oliver Gasch, in a speech in Washington, D.C., to the Twelfth Annual Conference, National Civil Liberties Clearing House, made some statements about law enforcement which must seem incredible to many prosecutors:

In fact, Mallory questions, that is to say, confessions or admissions, are of controlling importance in probably less than 5% of our criminal prosecutions. At the present time, due largely to the conscientious cooperation of our Chief of Police and in accordance with the teaching of the decisions and our lectures on it, the police are making better cases from the evidentiary standpoint. Extensive investigation prior to arrest of suspects has resulted. The accumulation of other evidentiary material has become standard operating procedure. 475


The *Cahan* statistics are equally arresting. In the 13-year period from 1952 through 1964, including three pre-*Cahan* years, the *Cahan* years, and six post-*Cahan* years, not only did the number of felony defendants (less juvenile) in California superior courts almost double, but also the percentage of convictions stayed fairly steady, and even increased a little:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Defendants</th>
<th>Number of Convictions</th>
<th>Percentage of Convictions</th>
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<td>1952</td>
<td>17,006</td>
<td>14,238</td>
<td>83.7</td>
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<td>1953</td>
<td>18,372</td>
<td>15,864</td>
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<td>1954</td>
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<td>1955</td>
<td>17,850</td>
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<td>1964</td>
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Less than two years after *Cahan*, Attorney General, later Governor, Edmund G. Brown wrote:

The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been

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476. *California Bureau of Criminal Statistics — Crime in California* 118 (1964); *Id.* at 51 (1959); *Id.* at 57 (1956); *Id.* at 17 (1952). This series of reports began in 1952.
excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.\textsuperscript{477}

Dramatic support for the writer's thesis that confessions are not the key to law enforcement came from a study by New York State Supreme Court Justice Sobel. His study showed that of the first 1,000 indictments since the New York Court of Appeals decided \textit{People v. Huntley}\textsuperscript{478} on January 7, 1965, fewer than 10 per cent involved confessions:

Based on the Huntley statistics, as fortified by the individual experiences of the trial judges consulted, it is safe to estimate that "confessions" constitute part of the evidence in less than 10 per cent of all indictments. This would include admissions and exculpatory statements. An examination of the trial minutes of several judges indicates that confession doctrine is charged in one out of twenty cases tried. . . .\textsuperscript{479}

Justice Sobel further wrote:

Indeed little or no harm to successful law enforcement would result if the courts were to outlaw all but "volunteered" confessions — i.e., outlaw any confessions "elicited" by \textit{interrogation} . . . .

The "historical" fact is that law enforcement has always depended more on \textit{ judicial} confessions than on police station confessions. At the appropriate time, with the aid of counsel, those who do not volunteer confessions to the police will make a judicial confession to the court — i.e., plead guilty. This had been the "experience in all jurisdictions at all times whether there has been a confession to the police or not; whether there is much or little evidence and often when there is insufficient evidence. This is a commonplace of 'adjudication'. . . ."\textsuperscript{480}

According to press accounts, Justice Sobel, in discussing his study before the New Jersey Bar Association, derided the usual police contention that confessions are the backbone of law enforcement as "carefully nurtured nonsense." In a telephone interview he added: "Confessions do not affect the crime rate by more than one-hundredth


\textsuperscript{478} 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).


\textsuperscript{480} \textit{Id.} at 5.
of 1 per cent, and they do not effect the clearance of crime by more than 1 per cent."  

The next month the Chief of Detectives of the City of Detroit, Vincent W. Piersante, in a letter to Professor Jerold Israel of the Michigan Law School, disclosed that in the nine months from January 20, 1965 (the date his department decided to notify suspects of their right to counsel and that of silence) and October 31, 1965, confessions were obtained in 56.1 per cent of the homicide cases (as against 53.0 per cent in 1961), and were essential in only 9.3 per cent of the cases (as against 20.9 per cent in 1961).  

The most recent survey was the *Dorado-Miranda Survey* by District Attorney Evelle J. Younger of Los Angeles County, conducted to test the effect of *People v. Dorado* and *Miranda* upon the prosecution of felony cases. The *Dorado* part covered 1,297 cases, and was for the week December 13-17, 1965. The *Miranda* part covered 2,780 cases and was for the three-week period that ended July 15, 1966. The survey demonstrated two things: that confessions were relatively unimportant, and that suspects talked despite advice by the police that they had a right to remain silent and to counsel, and, if they were indigent, to free legal counsel. At the complaint stage, *Dorado* and *Miranda* caused difficulty in only 1 per cent of the cases. At the trial stage, confessions were important in but 10 per cent of cases in the *Miranda* part, and less than that in the *Dorado* part. Mr. Younger wrote:

The results appear to justify the following conclusions:

2. Confessions are essential to a successful prosecution in only a small percentage of criminal cases.

3. The percentage of cases in which confessions or admissions were made has not decreased, as might have been anticipated, because of the increased scope of the admonitions required by *Miranda*.

5. If an individual wants to confess, a warning from a police officer, acting as required by recent decisions, is not likely to discourage him. Those who hope (or fear) these decisions will eliminate confessions as a law enforcement tool will be disappointed (or relieved).  

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In a telephone interview, Mr. Younger admitted: "I'm amazed by our findings. Like most prosecutors I had assumed that confessions were of the utmost necessity in the majority of cases." He further explained: "The most significant things about our findings are that suspects will talk regardless of the warnings and that furthermore it isn't so all-fired important whether they talk or not."

A few other law enforcement officials have expressed comparable views. Two of these, Brendan T. Byrne, the prosecutor in Essex County, New Jersey, and Richard Sprague, chief trial lawyer in the Philadelphia District Attorney's office, spoke of their experiences as a result of orders after Escobedo to the police in their jurisdictions to warn suspects of their rights and to provide them with lawyers in case of indigency where requested after the warning. Both stated that no confessions have been lost as a result of the warnings and the offer of counsel. Mr. Sprague, who had opposed the warning system, said: "I hate to admit it, but on the basis of our early reports we haven't lost a single confession, except to racket men and hardened criminals who never talk anyway."

Sixth Circuit Judge George Edwards, who was Police Commissioner in Detroit during 1962 and 1963, told the Midwestern Conference of Attorneys General in December 1965, before Miranda, that he ran the Detroit Police Department under the same rules as those announced in recent decisions of the Supreme Court, and that as a result law enforcement in Detroit became more effective. Judge Edwards and his assistants convinced most people that they were moving toward making law enforcement "more nearly equal in its application to all people, regardless of race or color."

At the sixtieth annual meeting of the National Association of Attorneys General, held in May 1966, after Escobedo but before Miranda, the clear consensus was that Escobedo had had little effect on the rate of confessions. Furthermore, confession rates remained stable even in those states where Escobedo had been extended to require the police to warn suspects of their rights. In addition, Jack P. F. Gremillion, Attorney General of Louisiana and president of the association, stated that even the presence of lawyers during interrogation had not "hurt the confession rate a bit." He further contended that ever since Escobedo, lawyers had been present in the back rooms of police stations: "If the suspects haven't got the money we appoint

lawyers for them, and it hasn’t made a bit of difference as far as confessions go.”

The Brooklyn District Attorney, Aaron E. Koota, took the position, in 1965, that a person should have access to a lawyer “at the moment he comes into contact with the law.” But the next year, an election year, he told 52 graduating Housing Authority policemen that the Court’s *Miranda* ruling “shackled” law-enforcement agencies, making it possible for vicious criminals to escape punishment.

As for the effect on the crime rate of the Court’s exclusionary rulings, even the former United States Attorney for the District of Columbia conceded: “Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain.”

There are those who have suggested that the solution for misconduct of the police in the procurement of coerced confessions and in illegal searches and seizures simply is “to see to it that our police are selected and promoted on a merit basis, that they are properly trained and adequately compensated, and that they are permitted to remain substantially free from politically inspired interference.” The California Supreme Court answered that suggestion when it explained in *Cahan* why it decided to adopt the exclusionary rule:

We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.

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Chief Justice Weintraub of the New Jersey Supreme Court, who told New Jersey judges and prosecutors to ignore the Third Circuit’s ruling in United States ex rel. Russo v. New Jersey, nevertheless expressed the thought that the courts “are drifting toward the abolition of all confessions,” and that intellectually he “could not resist such a course.” In time the majority of us will agree. Judges, in their exclusionary rulings and extensions of the right to counsel and that of silence, will prove to have been wiser than lawyers and legal writers and even wiser than they themselves have realized.

496. See N.Y. Times, Dec. 11, 1965, p. 1, col. 1; p. 42, cols. 2, 3. New York State Supreme Court Justice Samuel H. Hofstadter and Shirley R. Levitan proposed “enactments by statute, when possible, and by constitutional amendment, when necessary,” which would provide, with reference to police questioning in the station house:
As soon as the inquiry ceases to be general in nature, and a mere search for information, and the police focus their attention in suspicion of a particular person — to the extent that they wish to constrain him to further interrogation — they must take him before a judicial officer. There in a court house — not a police station — his questioning may be continued by the police in the presence of the magistrate.

Hofstadter & Levitan, Let the Constable Blunder: A Remedial Proposal, 20 Record or N.Y.C.B.A. 629, 630 (1965). The danger with this proposal is that our magistrate will become like the French juge d'instruction.