Brigham Young University Journal of Public Law

Volume 19 | Issue 1 Article 4

3-1-2004

A Custodial Suspect's Right to the Assistance of Counsel – The Ambivalence of Israeli Law Against the Background of American Law

Rinat Kitai

A Custodial Suspect's Right to the Assistance of Counsel – The Ambivalence of Israeli Law Against the Background of American Law

Rinat Kitai[*]

TABLE OF CONTENTS

[*] LL.B. (1992), Ph.D. (2001), the Hebrew University of Jerusalem. Lecturer in Law, the Academic College of Law (Ramat Gan). The author would like to thank Boaz Sangero, Michael Prawer, Risa Zoll and the editorial staff of the Brigham Young University Journal of Public Law for their insightful comments.

I. INTRODUCTION

This article addresses Israeli law's ambivalence toward the custodial suspect's right to meet with an attorney. This ambivalence may indicate a deeper conflict regarding the role of defense counsel in pre-indictment proceedings. The conflict heightens when the proceedings concern suspects of terrorist offenses who present challenges to law enforcement authorities, both in terms of the danger they pose to public safety and in terms of their unwillingness to cooperate in the investigation of the terror offenses ascribed to them. The United States has entered a new era of interrogation of suspects of terrorist offenses following the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. The United States may now address the question of whether suspects of terror offenses should be automatically included within the public safety exception rule announced in *New York v. Quarles.*[1] The *Quarles* ruling permits the interrogation of suspects without their having been apprised of their right to remain silent and their right to the presence of counsel according to the *Miranda* decision.[2]

Part II of this article will analyze the defense counsel's role in the investigation proceedings prior to indictment in light of *Escobedo v. Illinois*[3] and *Miranda v. Arizona*.[4] Part III will survey the reasons militating against permitting a meeting between a suspect and his attorney at the investigation stage. Part IV will address the attitude of Israeli law toward the suspect's right to meet with defense counsel. This part will present the general endorsement of a right of consultation together with an interest balancing approach according to which, under certain circumstances, the public interest in law enforcement and prevention of offenses overrides the suspect's interest in meeting his defense counsel. According to the interest balancing approach, Israeli law permits the delaying of detainee-attorney meetings, particularly in cases of detainees suspected of security offenses. Israeli law specifies the reasons justifying a delay of the meeting between a custodial suspect and his counsel.[5] It will become clear that the underlying intention of these reasons is to isolate the detainee and pressure him into making a statement to his interrogators. Part V will distinguish between the power to delay the detainee-attorney meeting in order to permit an investigation

1. 467 U.S. 649 (1984).

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. 378 U.S. 478 (1964).

4. *Miranda*, 384 U.S. 436 at.

5. The Criminal Law Procedure (Powers of Enforcement–Detention) Law 1996, S.H. 1592, page 338 § 35 (L.S.I.) [hereinafter Detention Law].

intended to prevent the execution of a future offense and in order to permit an investigation in connection with an offense committed in the past.

There is no real controversy regarding the necessity of defense counsel to protect both innocent and guilty defendants at trial.[6] The average defendant lacks the legal knowledge and expertise required to deal with legal issues, to effectively cross-examine the prosecution's witnesses, and to develop a defense strategy.[7] After the indictment stage, the defense attorney plays an important role in preparing the defense's case for trial.[8] Even before the indictment, there are interrogatory proceedings having an adversary character. Thus, the United States Supreme Court ruled that the right to counsel arises at the critical stages of pretrial proceedings.[9] The leading decision in this matter is *United States v. Wade*,[10] which promulgated the suspect's right to counsel during the conduct of a lineup.[11] The "critical stages" are those particular stages where defense counsel's presence is essential for securing a fair

6. Donald A. Dripps, *Criminal Law: Effective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 261 (1997).

7. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

8. Ralph Ruebener, *Police Interrogation: The Privilege Against Self-Incrimination, the Right to Counsel, and the Incomplete Metamorphosis of Justice White*, 48 U. MIAMI L. REV. 511, 559 (1994). In the United States, the right to counsel arises with the filing of the formal charge, even if the investigation has not yet terminated. *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964). The filing of the formal charge triggers the adversary process, bringing a change in the status of the individual's rights. Hence, from the point charges are filed onward, the police are no longer permitted to interrogate the accused regarding matters included in the indictment or to attempt to elicit incriminating statements in the absence of his defense counsel. Counsel's duty is to protect the accused person at the time of filing to the same extent he is supposed to protect him during trial. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the United States Supreme Court held that the adversary process between the State and the individual begins the moment police focus on a suspect and attempt to illicit an admission of guilt. *Id.* at 492. *Escobedo* was overruled by the *Miranda* decision, 384 U.S. 436 at 444, 465-66, which clarified that when using the phrase "focusing of investigation" the *Escobedo* Court was referring to the investigation of a suspect under custodial conditions.

9. For example, the arraignment is a critical stage where the accused can be required to plead a particular defense, which, if not asserted, waives the defense which may result in the conviction of an innocent person. *See, e.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961). Another critical stage is the preliminary proceeding, in which a decision is made as to whether there is probable cause that the accused has committed the offense. At this stage, the defense attorney can attempt to prevent the filing of an indictment by indicating the weakness in the prosecution's case while gaining knowledge of the prosecution's case against the suspect. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970).

10. 388 U.S. 218, 223-24 (1967).

11. The scope of the duty was restricted in *Kirby v. Illinois*, 406 U.S. 682 (1972). The United States Supreme Court held that only after the filing of the formal charge, when the adversary proceeding begins and an individual is confronted with the organized prosecutorial powers of the State, does the right to counsel arise. This limitation has been harshly criticized because the same rationale for the presence of an attorney also exists before the filing of the formal charge. *See, e.g.*, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 210-14 (1984).

trial for the accused.[12] At these critical stages, unfair processes may be utilized which may subsequently damage the accused person's defense in court. Some of these procedural defects, such as conducting a lineup that may produce an unreliable identification, can be rectified at the pretrial stage. Consequently, as the Court recognized in *Wade*, defense counsel needs to be present in order to effectively discern manipulations and weed out procedural defects.[13] A suspect is not able to give an accurate account of the procedure adopted in the lineup, nor is he able to observe defects in the lineup process.[14] Tactical considerations may also lead a suspect to remain silent.[15] In *Kariv*, the Israeli Supreme Court reached a similar conclusion regarding a suspect's right to have his counsel present during lineups.[16] Furthermore, the Israeli Supreme Court, unlike the United States Supreme Court,[17] requires the presence of counsel during a photographic display in which the witness has to identify the photograph of the offender amid a group of random photos.[18]

The role of defense counsel in Israeli law is less definitive, and even disputed, when it concerns consultation with the suspect at the pre-trial stage, in contrast with his role during investigative proceedings which carry an adversarial character. In investigative proceedings, the defense counsel does not fulfill the classical adversarial role of submitting evidence and cross-examining witnesses. A police investigation is essentially an inquisitorial process.[19] The suspect is not allowed to oversee the work of the police officers and respond to its development.[20] It may indeed be claimed that the interrogation is a "critical stage" of the criminal proceedings since the earlier a defense attorney is retained during an investigation the easier it is to discover exculpatory evidence.[21] Thus, the defense attorney can demand that the police collect specific items of evidence or question certain witnesses[22] Under Israeli law however, the suspect is entitled to full access to the evidentiary material

12. *See Wade*, 388 U.S. at 224-27.

13. *Id.* at 235-36.

14. *Id.* at 230-31.

15. *Id.* at 231.

16. Cr.A. 648/77, Karib v. Israel, 32(2) P.D. 729, 743.

17. United States v. Ash, 413 U.S. 300 (1973).

18. Cr.A. 429/71, Awad v. Israel, 26(1) P.D. 775, 780.

19. Arnold N. Enker & Sheldon H. Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 48 (1964).

20. H.C. 185/64, Annon v. The Minister of Health, 19(1) P.D. 122, 127-28.

21. Marea L. Beeman, *Fulfilling the Promise of the Right to Counsel: How to Ensure that Counsel is Available to Indigent Defendants 1) Upon Questioning Following Arrest and 2) Following Probable Cause Determination and Awaiting Indictment*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 39 (2001).

22. DAVID LIBAI, THE LAW OF DETENTION AND RELEASE 182 (1978) (Hebrew).

in the prosecution's file after the indictment,[23] while the prosecution is not entitled to advance knowledge of the accused's evidence.[24] Attorneys accordingly usually only prepare for trial after the indictment has been filed against their client.

II. THE ROLE OF COUNSEL DURING THE INTERROGATION OF A CUSTODIAL SUSPECT

The *Escobedo*[25] holding exemplifies the defense counsel's role in advising the suspect during the investigation stages. It also provides a good example of how the right to counsel creates the potential for obstructing a police investigation and frustrating the discovery of an offender.

In *Escobedo*, the police prevented a meeting between Escobedo, a suspect accused of murdering his brother-in-law, and his defense counsel despite the suspect's and defense counsel's repeated requests to meet.[26] Escobedo, nonetheless, discussed the suspicions against him with his counsel at an earlier stage.[27] Escobedo's defense counsel furthermore motioned to him in the interrogation room and made a gesture that Escobedo understood as a warning not to say anything to his interrogators.[28] The interrogators failed to inform Escobedo of his right to remain silent and that anything he said could be used against him in a court of law.[29] After Escobedo had been informed that his accomplice claimed that it was Escobedo who had fired the fatal shots, Escobedo acceded to his interrogators' suggestion that he confront his accomplice.[30] Escobedo then accused his accomplice of being the one who pulled the trigger.[31] Thus, having admitted knowledge of the circumstances surrounding the offense, it became easy to elicit information from Escobedo that implicated him in the commission of the murder[32] and led to his conviction of murder.[33]

In a majority opinion, the United States Supreme Court ruled that Escobedo's confession was inadmissible due to a violation of his right to

23. Criminal Procedure Law, 1982, S.H. 1043 page 43 § 74 (L.S.I.).

24. This entitlement is subject to an exception that permits the court to obligate the defendant to disclose an expert opinion that he intends to introduce as evidence at trial. *Id.* at § 83.

25. 378 U.S. 478 (1964).

26. *Id.* at 480-81.

27. *Id.* at 479.

28. *Id.* at 480-81 n.1.

29. *Id.* at 483.

30. *Id.* at 482.

31. *Id.* at 482-83.

32. *Id.* at 483.

33. *Id.*

counsel.[34] The Court stressed Escobedo's ignorance of the fact that under Illinois law an accomplice to a murder bears full liability for the murder.[35] If Escobedo had access to defense counsel, he could have been informed of this legal position and avoided making incriminating remarks.[36] Because a suspect's remarks during an interrogation can have a potential harm on the defendant's case, the right to counsel during an investigation is intimately connected to the right to counsel during the trial.[37]

In the event of a confession, the trial becomes "an appeal from the interrogation," and the right to counsel during trial becomes a formality.[38] A cynical prosecutor might quip that once a confession is obtained, it does not matter who the defendant retains as defense counsel, it will be near impossible to overcome this confession at trial.[39] The *Escobedo* Court criticized both the exploitation of a detainee's ignorance of his constitutional rights and the fear of the police that a defense counsel's presence would induce the suspect to invoke his right against self-incrimination.[40] Utilizing the interests balancing approach, the United States Supreme Court decided in favor of the suspect's need to be aware of his right against self-incrimination.[41] Requiring a suspect to confront a grave accusation, while denying him access to the rights to deal with that confrontation, offends the notions of fairness and equality.[42] The Court did not regard Escobedo's confession as being obtained under duress as his confession had not been obtained by force, threats, or unfair temptations.[43] Nonetheless, the Court excluded the confession on the basis of a violation of the right to defense counsel who could have informed him of his rights and of the legal consequences of his actions.[44]

The seminal *Miranda* ruling stressed that the right to counsel before the indictment and prior to the onset of adversary proceedings accrues in

34. *Id.* at 486, 491. The United States Supreme Court held that the suspect's right to representation by counsel was infringed. This right is fully entrenched in the Sixth Amendment. *See also* Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* Court held that the constitutional right violated by a breach of a custodial suspect's right to assistance of counsel is the right against self-incrimination, not the right to representation by defense counsel. This right is fully entrenched in the Fifth Amendment.

35. *Escobedo*, 378 U.S. at 486.

36. *Id.*

37. *Id.*

38. *Id.* at 487.

39. *Id.* at 488.

40. *Id.*

41. *Id.*

42. *Id*. at 490.

43. *Id*. at 484.

44. *Id.* at 486, 490-91.

custodial interrogations where the right of the suspect against coerced self-incrimination is in jeopardy.[45] As such, the *Miranda* decision clarified *Escobedo*, which also dealt with custodial interrogations.[46] The police are only obliged to inform a suspect of his rights to silence and counsel during custodial interrogations.[47] These two elements—interrogation and the suspect's detention—constitute the threshold situation for triggering the *Miranda* ruling.[48] Custody must be formal or a functionally equivalent deprivation of freedom of movement to a degree associated with formal arrest.[49] Interrogation is explicit questioning, or its functional equivalent in terms of words or police conduct, that the police officer should reasonably expect to elicit an incriminating admission from the suspect.[50] The interrogation must reflect an element of coercion beyond the extent inherent in the custody itself.[51]

How can defense counsel aid a suspect undergoing a custodial interrogation? In a number of decisions the Israeli Supreme Court has pointed out that the suspect's right to counsel prior to an indictment is "no more than another aspect of the right to remain silent."[52] This is in

45. 384 U.S. 436, 465-66 (1966).

46. In *Miranda*, the Court referred to the right to defense counsel due to the focusing of the investigation on the suspect, which in essence commences an adversarial proceeding. *See* Moran v. Burbine, 475 U.S. 412, 429-30 (1986); *Miranda*, 384 U.S. at 445 n.4 (stating that "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused").

47. *Miranda*, 384 U.S. at 444-45.

48. *Id.*

49. Minnesota v. Murphy, 465 U.S. 420, 430 (1984); California v. Beheler, 463 U.S. 1121, 1125 (1983); Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 44 (1986).

50. Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980). *Innis* is the leading case addressing the meaning of interrogation under *Miranda*. Innis, a murder suspect, was traveling in a police wagon with three police officers. *Id.* at 294. Two of the officers did not address him directly, but rather were talking between themselves. *Id.* at 294-95. One officer mentioned that there was a whole bunch of handicapped children running around the murder site and that only God knows what might happen if one of them was to find the weapon. *Id.* at 295. Hearing this conversation, Innis said to the officers "stop, turn around, I'll show you where it is" and directed them to the location of the murder weapon. *Id.* The police officers notified Innis of his rights prior to reaching the scene of the offense. *Id.* Innis's incriminating confessions as well as the weapon were introduced as evidence in his trial and led to his conviction of murder and kidnapping. *Id.* at 295-96. The *Innis* Court ruled that there had been no interrogation since he had not been exposed to a direct questioning or its functional equivalent. *Id.* at 302. The conversation between the police officers was short. *Id.* at 303. They had no cause to expect, and in fact there was no indication that they expected, the suspect would show any particular sensitivity for the fate of handicapped children and that he would reveal incriminatory details after hearing their conversation. *Id.* at 302. Nor was there anything to show that the suspect had been in a mental state of depression or over sensitivity. *Id.* at 302-03.

51. *Id.* at 300.

52. Cr.A. 96/66, Tau v. Attorney General, 20(2) P.D. 539, 545-46; Cr.A. 115, 168/82, Mooadi v. Israel, 38(1) P.D. 197, 231; H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843, 847.

fact the essence of *Miranda*.[53] In *Miranda*, the custodial suspect's right to counsel was not predicated on the adversarial right to a counsel, but based on the suspect's right against self-incrimination.[54] In-custody questioning is intrinsically coercive and as such places heavy pressure on the suspect to speak.[55] The custodial suspect has been removed from his natural surroundings and placed into an isolated, unfamiliar and hostile environment.[56] He is surrounded by police officers who are indifferent to his welfare and who are trained in coercive methods of persuasion.[57] The entire atmosphere of the custodial interrogation is structured to subjugate the free will of the person under investigation.[58] As such, it may diminish the willpower of the suspect, creating a situation in which the suspect involuntarily speaks and confesses his guilt.[59] Statements made under such conditions cannot seriously be regarded as the product of a defendant's free choice.[60] The United States Supreme Court specified a number of concrete procedural prophylactic measures to overcome this coercive situation and ensure the "voluntariness" of the confession.[61] The investigating authorities must apprise the suspect of his right to silence, right to communicate with a private or public defense counsel, right to have that counsel present during an interrogation, and that his comments may be used to implicate him.[62] Investigating authorities must also allow a suspect to effectuate those rights.[63] If the investigating authorities fail to apprise the interrogatee of these rights, there is an irrefutable presumption that any admission was obtained under conditions of coercion and duress, and is therefore involuntary and inadmissible at trial.[64] The psychological pressures inflicted on a suspect during an interrogation can easily overcome him.[65] A detainee being interrogated in isolation is far more vulnerable to coercion than a suspect permitted to meet with his counsel.[66] The presence of defense counsel is essential to counteract the compulsion and pressure inherent in custodial detention.

53. *Miranda*, 384 U.S. 436.
54. *Id.* at 466.
55. *Id.* at 458, 467.
56. *Id.* at 461.
57. *Id.*
58. *Id.* at 457.
59. *Id.* at 461.
60. *Id.* at 458.
61. *Id.* at 467.
62. *Id.* at 467-68.
63. *Id.* at 444, 479.
64. *Id.* at 468-69.
65. *Id.* at 447-55.
66. Leonard H. Leigh, *The Protections of the Rights of the Accused in Pre-Trial Procedure: England and Wales*, *in* HUMAN RIGHTS IN CRIMINAL PROCEDURE 41 (John A. Andrews ed., 1982).

The right to counsel is therefore necessary to protect the custodial suspect's right against self-incrimination.[67]

Escobedo and *Miranda* indicate that defense counsel's role is to explain to the detainee his rights, primarily his right against self-incrimination.[68] During an interrogation, defense counsel must assist the suspect in deciding on whether to remain silent or to give a statement.[69] Defense counsel must ensure that any admission is made voluntarily and reflects the true will of the suspect. In addition, defense counsel should explain the substantive law to the detainee, instruct the detainee regarding the kinds of searches to which he is obliged to consent, and make the client aware of the statutory duration of the detention.[70] Furthermore, defense counsel can strengthen the morale of the detainee.

During interrogation proceedings, counsel can reassure the suspect that he does not stand alone, demand that the interrogators provide his client with proper conditions of confinement, and generally redress the imbalance of power between his client and the State. Allowing a suspect the assistance of counsel will force interrogators to be wary of employing illegal methods of persuasion or of making unreasonable demands of a suspect.[71] The *Miranda* decision, as affirmed in *Dickerson*,[72] elucidates the unique and irreplaceable role of defense counsel in protecting the custodial suspect against coerced self-incrimination.[73] However, it should be noted that even when a suspect desires to voluntarily cooperate with law enforcement authorities, defense counsel should be able to advise the suspect of his legal rights, to ensure a suspect will not give even a voluntary statement clearly against his interests.

III. THE REASONS FOR OPPOSITION TO PERMITTING MEETING OF CUSTODIAL SUSPECT AND COUNSEL

Defense counsel is charged with assisting the detainee in avoiding statements that are not the product of his sincere informed desire to

67. Miranda, 384 U.S. at 466, 469.

68. *See also* Regina v. Hebert, [1990] 2 S.C.R. 151, 176 (holding that "the most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence"); Regina v. Brydges [1990] 1 S.C.R. 190, 206.

69. *Hebert*, 2 S.C.R. at 177; George C. Thomas III, *The End of the Road of* Miranda v. Arizona*? On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 22 (2000).

70. Enker & Elsen, *supra* note 19, at 85.

71. *Miranda*, 384 U.S. at 470; Robert K. Calhoun, *Confessions and the Right to Counsel: Reflections on Recent Changes in Turkish Criminal Procedure*, 6 ANN. SURV. INT'L & COMP. L. 61, 63 (2000).

72. Dickerson v. United States, 530 U.S. 428 (2000).

73. Fare v. Michael C., 442 U.S. 707, 719 (1979).

cooperate with interrogators or even in avoiding statements that are inimical to his interests. Therefore, it is easy to understand why the presence of counsel during the investigative stages is criticized. The conflict between the need of police to gather evidence and the need of the suspect to have access to legal consultation at the investigative stage may militate against the suspect's right to consult with defense counsel. Confessions are an important tool in the investigation of the truth and the enforcement of the law.[74] Historically, an admission of guilt has been considered the "Queen of Evidence."[75] The United States Supreme Court recognized that an admission of guilt is more than just "desirable."[76] Confessions, in general, are actually "essential to society's compelling interest in finding, convicting, and punishing those who violate the law,"[77] and can be crucial to determining the guilt of the defendant. Supporters of the "Crime Control" model emphasize the need for effective enforcement of the criminal law and the desirability of admissions.[78] Accordingly, they oppose any meeting between the suspect and counsel.[79] The suspect is often the best source of information.[80] Without the cooperation of suspects, many crimes would remain unsolved.[81] Perpetrators of offenses do not usually surrender themselves to the police.[82] Obtaining a confession usually entails pressure by the police through detention and interrogation.[83] The suspect's detention is necessary to give the police a reasonable opportunity to investigate the suspect in solitary conditions before the suspect has an opportunity to fabricate a story or decide not to cooperate with the interrogators.[84] Isolating a suspect from his family and defense counsel limits external interference that can reduce the chances of the suspect cooperating during an interrogation.[85] Defense counsel constitutes an obstacle to law

74. Anthony X. McDermott & H. Mitchell Caldwell, *Did He or Didn't He? The Effect of* Dickerson *on the Post-Waiver Invocation Equation*, 69 U. CIN. L. REV. 863, 871 (2001).

75. Stephen C. Thaman, Miranda *in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 581 (2001) (stating that "[h]istorically, confessions of guilt have been the 'best evidence in the whole world'").

76. Moran v. Burbine, 475 U.S. 412, 426 (1986).

77. *Id.*

78. The "Crime Control Model" is one of two models that describes, according to Professor Herbert Packer, the nature of criminal proceedings and the way the proceedings strike the balance between law enforcement needs and human rights. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968). The Crime Control Model, as opposed to the Due Process Model, gives clear priority to the demands of law enforcement. *Id.* at 158.

79. *Id.* at 188.

80. *See id.* at 187; *see also* McDermott & Caldwell, *supra* note 74, at 870-71; Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU L. REV. 185, 188.

81. PACKER, *supra* note 78, at 187.

82. Van Kessel, *supra* note 49, at 144.

83. Van Kessel, *supra* note 49, at 144.

84. PACKER, *supra* note 78, at 187.

85. *Id.* at 188.

enforcement by advising a suspect of his right to remain silent, assisting the suspect to resist interrogatory pressures, and by helping the suspect avoid entrapment efforts. Defense attorneys place the interests of their clients above that of law enforcement authorities' duty to seek the truth. Law enforcement authorities should be equipped with the tools necessary to fulfill their duties. Consequently, investigating authorities should be allowed a reasonable period of time to conduct an investigation, before a suspect should be permitted to meet with defense counsel.[86]

Admittedly, coerced confessions of suspects must be avoided. However, there is no intrinsic value for society in encouraging suspects to avoid confessing guilt or not to cooperate with the police in their investigation.[87] Yet this is the consequence of allowing detainee-attorney consultation during the investigatory stages, thereby handicapping law enforcement agencies in the discharging of their duty to expose the truth, enforce the law, and protect the public.[88] There is nothing abhorrent in voluntary confession.[89] Justice Scalia, in his *Dickerson* dissent, averred that there is a world of difference between compelling an accused to incriminate himself and preventing him from doing so of his own volition.[90] The identification and conviction of criminals is frequently the result of the criminal's own stupidity.[91] According to Justice Scalia, the right to counsel and the obligation to give notice thereof protects the second situation of a suspect incriminating himself.[92] The presence of counsel is not technically necessary to inform the suspect of his right to silence as the interrogators are charged with this duty.[93] However, counsel, as opposed to the interrogator, will advise the detainee to exercise this right to keep silent.[94] In an adversarial system, defense counsel's role in contributing to the uncovering of the truth at trial is not

86. O'Neill, *supra* note 80, at 191-92; Stewart Field & Andrew West, *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, 6 CRIM. L.F. 473, 486 (1995) (presenting a prevalent view in France that the police should be allowed an initial period of investigation undisturbed by giving rights to suspects**,** such as rights to silence and counsel, that can impede the investigation).

87. Moran v Burbine, 475 U.S. 412, 426-27 (1986).

88. *See* Leigh, *supra* note 66, at 43-44.

89. Dickerson v. United States, 530 U.S. 428, 449-50 (2000).

90. *Id.* at 449.

91. Minnick v. Mississippi, 498 U.S. 146, 166-67 (1990) (Rehnquist, C.J., Scalia, J., dissenting).

92. *Dickerson*, 530 U.S. at 449.

93. This is based on the assumption that the interrogators are diligent in the discharge of their duty, which is not always the case in practice. See *Missouri v. Seibert*'s ruling on the unconstitutionality, under *Miranda*, of the "question-first" tactic employed by some police departments that entails giving no warnings of the rights to silence and counsel until confession has been extracted. 124 S. Ct. 2601, 2605 (2004).

94. *Dickerson*, 530 U.S. at 449.

disputed.[95] However, it is claimed that prior to an indictment, defense counsel does not necessarily contribute to discovering the truth to the same extent,[96] and that his presence even serves to conceal rather than reveal the truth.[97] By advising the suspect to invoke his right to silence, defense counsel prevents the submission of voluntary confessions. In doing so, he protects no interest and only makes it more difficult to prove the suspect's guilt.[98] A defense attorney will not advise his client to confess his guilt early on in the process because he stands to gain nothing in comparison to the advantage he can gain at a later stage during negotiations with the prosecution.[99] The suspect is better advised to remain silent than make a false statement since submission of a false statement may entrap the suspect, thus substantiating his guilt beyond any reasonable doubt.[100] Indeed, counsel's presence during the interrogation can affect the result of the trial irrespective of the suspect's innocence or guilt.

The suspect should not have an automatic right to have an attorney present during interrogatory procedures. There need not be a constitutional right of counsel whenever counsel can benefit the suspect.[101] It may even be argued that the police should not be required to advise the suspect not to cooperate with them through informing the suspect of his rights to silence and counsel, for this is tantamount to obligating the police to actively thwart their own investigation.[102] In *Moran v. Burbine*, the United States Supreme Court ruled that the Constitution does not compel the police to provide a suspect with all of the information necessary for a suspect to make an informed decision whether to make a statement or remain silent[103] The Court determined that imposing that kind of duty on the police would cause unwarranted harm to the interests of law enforcement.[104]

Some commentators hold that there are other potentially effective methods of protecting the accused from coercion, apart from the

95. Enker & Elsen, *supra* note 19, at 66.

96. Dep't of Justice, Office of Legal Policy, *'Truth in Criminal Justice' Series Office of Legal Policy: The Law of Pretrial Interrogation*, 22 U. MICH. J.L. REFORM. 437, 505-07 (1989).

97. Arnold N. Enker & Sheldon H. Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 66 (1964).

98. *Id.* at 66-67.

99. *Id.* at 68.

100. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

101. Escobedo v. Illinois, 378 U.S. 478, 496 (1964) (White, Clark, Stewart, JJ., dissenting).

102. M.K.B. Darmer, *Lessons from the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 259 (2002).

103. Moran v. Burbine, 475 U.S. 412, 422 (1986).

104. *Id.* at 422, 426.

presence of counsel, while not thwarting an interrogation. One such method is filming the suspect's statements on video.[105] Videotaping the interrogation in the absence of counsel can largely, but not absolutely, ensure the propriety of the interrogator's conduct and of the methods utilized for interrogating the suspect. However, videotaping cannot dispel the inherent pressure of a custodial interrogation as articulated by the *Miranda* Court.[106] This is so because it is not sufficient to require the police to inform the detainee of his rights in order to neutralize that pressure. Academic studies indicate the large extent to which interrogators apply psychological pressure on a detainee in order to obtain a waiver of the rights to silence and counsel.[107] For example, the interrogators may persuade the detainee that it is better for him to tell the truth or make some kind of statement than to remain silent. There is a substantial and substantiated fear that the police will present information in a skewed and biased manner and therefore it is difficult to rely on the police to give detainees objective answers regarding their rights. This is not an issue of malice on behalf of police. There is an inherent conflict of interest between the desire to advance the interrogation by obtaining any incriminating information from a suspect and the duty to explain to the suspect his right not to cooperate in the interrogation. The detainee is unlikely to ask the same questions of police as he would of his own attorney when he apprehends that even his questions might incriminate him. Videotaping an interrogation does not overcome the suspect's fear; and thus, videotaping an interrogation does not satisfy the rationale of *Miranda*. The *Miranda* Court noted the necessity of counsel's presence during the interrogation in order to mitigate the danger of subjugating the will power of the detainee to that of his interrogators.[108] The Court ruled that the atmosphere of the custodial interrogation could easily crush the detainee's resistance when the interrogators, and not defense counsel, are informing him of his rights.[109]

Contrary to the desire to give a suspect as many protections as possible to ensure the voluntary nature of his confessions, it has been claimed that, as a matter of principle, the police duty to inform the

105. *See* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 311 (1996); Paul G. Cassel, *Debate: Will* Miranda *Survive?* Dickerson v. United States*: The Right to Remain Silent, the Supreme Court, and Congress*, 37 AM. CRIM L. REV. 1165, 1190 (2000); Richard A. Leo, *Criminal Law: The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-82 (1996) (arguing, outside of the context of the right to counsel, "that substantive due process requires that we legally mandate the electronic-recording of custodial interrogations in all felony cases.").

106. Miranda v. Arizona, 384 U.S. 436, 447-55 (1966).

107. *See* Leo, *supra* note 105, at 658-65.

108. 384 U.S. at 469-70.

109. *Id.*

suspect of his rights cannot be reconciled with the permit given for custodial interrogation.[110] Actually, there are only a few commentators who challenge custodial interrogation.[111] The English House of Lords has even maintained that it is legitimate to detain a suspect in order to induce him to cooperate with the police.[112] English police can therefore exploit the pressure and tension attendant to the denial of freedom.[113] It therefore can be claimed that the tension inherent in custodial investigation is an essential, justified means for an effective interrogation. According to this line of thinking, it might be argued that only weak justification exists for granting procedural guarantees, such as rights to silence and counsel, to absolutely dispel the pressure of custodial interrogation. Instead, guarantees should be established that lessen the fear of exaggerated pressures, such as physical violence or the threat of violence, which can substantially diminish the voluntariness of the suspect's confession.[114]

IV. THE LEGAL POSITION OF THE STATE OF ISRAEL REGARDING THE CUSTODIAL SUSPECT'S RIGHT TO MEET WITH COUNSEL

A. The General Principle in Israel—Recognition of the Custodial Suspect's Right to Consult with His Attorney

How does Israeli law resolve the conflict between the suspect's interests and law enforcement needs? The Detention Law provides a detainee the right to meet and consult with an advocate.[115] The officer in charge must immediately arrange such a meeting at the detainee's request.[116] The Israeli Supreme Court has held in two separate rulings that the custodial suspect's right to communicate with an attorney derives from his right to personal freedom found in section five of the Basic Law: Human Liberty and Dignity.[117] Nonetheless, in other cases the Court has articulated that the question of whether a suspect's right to counsel is a constitutional right remains to be decided.[118] The Detention

110. O'Neill, *supra* note 80, at 191.

111. Enker & Elsen, *supra* note 19, at 85. For a position denying the legality of custodial interrogation see Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 110 (1989).

112. Mohammed-Holgate v. Duke, 3 All. E.R. 526, 531 (Q.B. 1983).

113. *Id.*

114. *See*, Note, *Developments in the Law–Confessions*, 79 HARV. L. REV. 935, 1002 (1966).

115. Detention Law, 1996, S.H. 1592 page 338 § 34(a) (L.S.I.).

116. *Id.* at § 34(b); Cr.A. 307/60, Yasin v. Attorney General, 17 P.D. 1541, 1570.

117. H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843, 850-51; H.C. 3425/01, Tarek v. Minister of Defense, 55(4) P.D. 581, 583.

118. Cr.A. 6613/99, Smirk v. Israel, 56(3) P.D. 529, 554-56; Cr.A. 5203/98, Hasson v. Israel, 56(3) P.D. 274, 283.

Law specifies a number of means for giving effect to the suspect's right to meet counsel. For example, the detainee must be able to speak with his counsel under conditions of privacy to ensure confidentiality of the discussion.[119] In addition, notification of his arrest must be given immediately to a person close to him.[120] The officer in charge must also inform the detainee of his right to either retain his own attorney or have one appointed for him.[121] According to the Israeli Supreme Court, the police have no obligation to remind a detainee of his right to counsel at the commencement of each interrogation; but when the interrogation is protracted, the police should occasionally remind the suspect of his rights.[122] The police must provide the detainee a list of advocates, prepared by the Advocates' Bar, who are willing to represent detainees.[123] However, the police are under no obligation to allow the detainee to directly contact an attorney other than through a police officer.[124] The Detention Law does not grant the detainee the right to have counsel present during an interrogation.[125] This is distinct from counsel's ability to meet and consult with a suspect prior to and in between interrogations.[126] Contrary to *Edwards v. Arizona*,[127] the Israeli Supreme Court ruled that there is no obligation to stop an interrogation when the detainee expresses a desire to communicate with an attorney.[128] Additionally, in contrast to *Miranda*, the Israeli Supreme Court has held that the failure to apprise a detainee of his right to remain silent or right to counsel is only one factor to be considered in the totality of the circumstances surrounding a confession and is not alone sufficient to automatically render the suspect's confession involuntary.[129] It should be

119. Detention Law, 1996, S.H. 1592 page 338 § 34(c).

120. *Id.* at § 33(a). This article does not define the degree of affinity between the detainee and the person who will receive notice of his detention, leaving the detainee latitude to designate the person who will receive notice.

121. *Id.* at § 32(1).

122. Cr.A. 334/86, Sabach v. Israel, 44(3) P.D. 857, 866.

123. Detention Law, 1996, S.H. 1592 page 338 § 33(c).

124. Detention Law § 33(b) requires only that the attorney named by the detainee be notified of the detention. In practice, often times the police officer will make the initial phone call informing the attorney of the detention.

125. Detention Law § 34 only grants the detainee the general right to consult with a lawyer without referring to his right to have counsel present during the interrogation. Although this law does not explicitly deny the right to presence of counsel during interrogation, in practice, counsel is not allowed to be present in the interrogation room.

126. *Id.*

127. 451 U.S. 477, 484-85 (1981).

128. Cr.A. 533/82, Zakkai v. Israel, 38(3) P.D. 57, 66-68; Cr.A. 5203/98, Hasson v. Israel, 56(3) P.D. 274, 282.

129. Cr.A. 115, 168/82, Mooadi v. Israel, 38(1) P.D. 197. According to this ruling, only extremely illegitimate measures create an absolute presumption that the suspect's confession was not free and voluntary.

noted that, to date, Israeli case law has not endorsed the exclusionary rule by which evidence obtained by illegal means is not admissible at trial.[130] Consequently, a voluntary confession obtained in contravention of the law is still admissible at trial.

B. The Interest Balancing Approach

Israeli Law recognizes the importance of the suspect's right to counsel although it gives it less weight than in American Law. However, even though Israeli law recognizes a custodial suspect's right to counsel, the Israeli Detention Law, by enabling judges and law enforcement authorities to postpone the detainee-attorney meeting, does not create an absolute right to counsel.[131] The goal, as reflected in the provisions of the Detention Law, of striking a balance between the right to counsel and the need to combat crime is articulated in the Israeli Supreme Court ruling, averring that in opposition to the right to communicate with an advocate:

> [T]here are important public interests such as combating crime, protection of state security and public peace, exposure of the truth, and the need to protect the rights of the victim of an offense who was harmed as a result of the criminal act. What is required therefore is a delicate and complex balance between a variety of competing values and interests, in accordance with the values of our legal system.[132]

The difficulty of balancing individual rights and law enforcement needs becomes even more acute when dealing with suspects of terror offenses and offenses against state security.[133] The following sections will specifically address the way in which the Israeli Supreme Court balances state security with the detainee's right to counsel.

C. Identification of Overriding Interests that Justify the Delay of Detainee-Attorney Meeting

In light of this balance, the Israeli Detention Law permits the delay

---

130. *Id.*; F.H. 9/83, Military Court of Appeals v. Vaknin, 42(3) P.D. 837. In Israel there are only two laws that provide the exclusionary rule as a discretionary rule: (1) Secret Monitoring Law, 1979, S.H. 938 page 118 § 13 (L.S.I.); and (2) Protection of Privacy Law, 1981, S.H. 1011 page 128 § 32 (L.S.I.).

131. Detention Law, 1996, S.H. 1592 page 338 § 34(d), 34(e), 35.

132. Cr.A. 6613/99, Smirk v. Israel, 56(3) P.D. 529, 555. Regarding the need to balance between the interests of the suspect and the needs of the investigation, see O'Neill, *supra* note 80, at 188.

133. M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 322 (2003).

of detainee-attorney meeting. Even before the detainee's right to meet with an attorney and the scope of this right was enshrined in law, the Israeli Supreme Court ruled that in exceptional cases where the police had just cause, they are entitled to delay such a meeting.[134] The current Detention Law provides what constitutes "just cause" necessary for postponing the meeting. When a detainee is involved in an interrogatory or other investigation action that requires his presence—such as reconstructing the commission of an offense—and the interruption or postponement of that interrogation would materially impede the investigation, a Superintendent or higher officer in charge of the investigation may, upon written order, delay the meeting for a few hours.[135] The meeting can be postponed for up to twenty-four hours after the arrest if the officer in charge believes that a meeting between the detainee and the advocate would obstruct the arrest of additional suspects in the same matter and prevent the discovery of evidence in connection with that offense.[136] A meeting can be postponed for forty-eight hours if the officer in charge deems it is necessary to protect human life or frustrate a future crime.[137] It is rare to postpone a meeting between an advocate and a detainee not suspected of security offenses for more than a few hours. Conversely, when custodial suspects of security offenses are involved, the power to postpone the meeting is routinely exercised. The permitted period of postponement for suspects of security offenses is up to twenty-one days if (1) the meeting would interfere with the arrest of other suspects; (2) the meeting would disrupt the discovery or seizure of evidence, or impede the investigation in some other manner; or (3) if the prevention of the meeting is necessary to frustrate a future offense or to protect human life.[138] The President of a District Court can postpone the meeting for twenty-one days,[139] while the authority of the officer in charge is limited to postponing the meeting for ten days.[140] The Israeli Supreme Court has ruled that it is mandatory to immediately inform the detainee of the decision to postpone his meeting with his defense counsel.[141] The rationale for this notice is founded in a person's right to be aware of any change in the status of his rights as well as to allow the

134. Cr.A. 307/60, Yasin v. Attorney General, 17 P.D. 1541, 1570.

135. Detention Law, 1996, S.H. 1592 page 338 § 34(d); Cr.A. 115, 168/82, Mooadi v. Israel, 38(1) P.D. 197, 232.

136. Detention Law, 1996, S.H. 1592 page 338 § 34(e).

137. *Id.* at § 34(f).

138. *Id.* at § 35(a).

139. *Id.* at § 35(d).

140. *Id.* at § 35(c).

141. H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843, 852-53; H.C. 3425/01, Tarek v. Minister of Defense, 55(4) P.D. 581, 583.

detainee to take action to realize the infringed right.[142] For example, a detainee is entitled to appeal the decision to postpone the detainee-attorney meeting.[143] However, failure to notify the detainee of his right to object will not necessarily result in the exclusion of any statements made by him in the absence of his counsel.[144] Furthermore, during appeal proceedings, the state is allowed to rely upon material that is kept secret from the appellant.[145] Only defense counsel has an opportunity to be heard during appeal proceedings as they are conducted in the absence of the suspect.[146] Israeli courts have rarely accepted a detainee's appeal regarding the prevention of the meeting with his attorney.[147]

Israeli law enumerates, then, the reasons justifying the postponement of the detainee-attorney meeting. In *Center for Defense of the Individual v. IDF Commander of West Bank*, a military commander issued a blanket order applicable to all detainees of the 2003 Defensive Wall Operation.[148] The order precluded the detainees from meeting with their attorneys during the custodial period. In rejecting the petition against the order filed by four human rights organizations, the Israeli Supreme Court stated:

> [I]n our opinion it is inconceivable that during times of combat actions or thereabouts, the respondent will allow counsel[-]client meetings to people against whom there are suspicions that they endanger, or are liable to endanger, the security of the zone, the security of I.D.F forces, or of the public at large until conditions evolve that allow consideration of the individual circumstances of each particular detainee.[149]

The investigation by its very nature may strengthen or weaken the suspicion against a person in the commission of a criminal offense or the intention to commit one in the near future.[150] The question is, however, why should the fact that the individual circumstances of the detainee have not yet been sufficiently clarified affect whether the meeting between the detainee and the advocate takes place? The Detention Law specifies different reasons for postponing the detainee-attorney meeting

142. *Soofian*, 47(2) P.D. at 852-53.

143. Detention Law, 1996, S.H. 1592 page 338 § 35(g).

144. Cr.A. 6613/99, Smirk v. Israel, 56(3) P.D. 529, 555-56.

145. H.C. 6302/92, Rumchia v. Israeli Police, 47(1) P.D. 209, 211; *Tarek*, 55(4) P.D. at 583.

146. *See* Detention Law, 1996, S.H. 1592 page 338 § 35(f).

147. *See, e.g.*, H.C. 2568/90, Anon v. Israel, Tak-El 90(2), 423 (unpublished).

148. H.C. 2901/02, Center for Defense of the Individual v. IDF Commander of West Bank, 56(3) P.D. 19.

149. *Id.* at 21.

150. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 289 (2002).

that are mainly designed to prevent the obstruction of the investigation.[151] This raises the question of how a meeting with an advocate leads to all of the grave consequences enumerated in the Detention Law justifying postponement of the meeting. The examination of Israeli case law that follows demonstrates the actual motivation for delay in allowing the detainee-attorney meeting to take place.

1. Obstruction of the investigation caused by meeting with an attorney

In certain cases, the urgency of the investigation occasionally precludes the postponement of the detainee-attorney meeting when the offense is presently being committed, or is about to be committed, or where the danger exists of the disappearance of evidence, the disappearance of accessories, or the actual commission of the offense.[152] However, even in cases where an urgent investigation is crucial, there is no justification for the postponement of the detainee-attorney meeting for more than a few hours and certainly not for three weeks. Even during the course of an immediate investigation that takes place over several days, time can be found for a meeting between detainee and attorney.

Another fear during investigatory proceedings is that the defense attorney will convey sensitive information to or from the suspect. This information may concern the fate of accomplices, in particular, whether any of them have been arrested and whether any of them made statements that incriminate the suspect. The defense attorney might discuss with the detainee information he heard from others, such as accomplices or other involved parties. It is also possible that defense counsel might warn a suspect or his accomplices about developments in the investigation. The relay of sensitive information by defense counsel may constitute criminal obstruction of justice.[153] This kind of conduct on the part of an advocate is presumably rare,[154] but the possibility that defense counsel might be conveying such information to the suspect cannot be ruled out altogether. Justice White, in *Miranda*, expressed this fear in another context, that of an attorney who represents individuals involved in organized crime. Such an attorney may ensure that each client remains silent whether or not it is in the client's best interest to avoid incriminating others involved in the organized crime ring.[155]

151. Detention Law, 1996, S.H. 1592 page 338 § 34(d), 34(e), 35.

152. Jim Weller, *The Legacy of* Quarles*: A Summary of the Public Safety Exception to* Miranda *in the Federal Courts*, 49 BAYLOR L. REV. 1107, 1114-15 (1997).

153. *Compare with* Regina v. Samuel, 2 All E.R. 135, 143 (C.A. 1988).

154. *Id.* at 143-44.

155. Miranda v. Arizona, 384 U.S. 436, 544 (1966) (White, J., dissenting).

However, Justice White's fear can be dealt with on an attorney-by-attorney basis and does not warrant the generalization that all defense attorneys will act in such an unethically questionable manner.[156]

There are several ways to overcome the general fear of relaying sensitive information from or to the suspect. For example, in Israeli military courts, only advocates who are authorized to deal with security secrets may represent suspects.[157] Military personnel who are custodial suspects in the army may only consult with a military attorney or a defense counselor authorized to represent in military courts.[158] Only defense counsel, whose loyalty to the State is deemed unwavering by the security services, receives this kind of authorization. Israeli Criminal Procedure Law broadens this concept to representation in civil courts, stipulating:

> Where the Minister of Defense has certified in writing that the security of the State necessitates such a restriction, a suspected or accused person shall not be entitled to be represented—whether in investigation proceedings or in proceedings before a judge or a court—save by a person authorized, by unrestricted authorization, to act as a defense counsel under section 318 of the Military Justice Law 1955.[159]

However, in the *Soofian* holding, Advocate Dan Yakir, the general counsel of the Association for Civil Rights in Israel, petitioned on behalf of an individual suspected of security offenses who had been denied his detainee-attorney meeting.[160] Advocate Yakir requested that the hearing to determine whether the postponement of his detainee-attorney meeting was justified be conducted in the detainee's presence.[161] Advocate Yakir had unrestricted authorization to represent in military courts. The Israeli Supreme Court rejected the application requesting the detainee's presence stating that "conducting the session in the petitioner's presence in the special circumstances of this case would undermine the prohibition on meetings between the petitioner and an attorney."[162] The Court did not give further explanation for not allowing any contact between Advocate Yakir and the detainee. It is unlikely that the Israeli Supreme Court suspected that Advocate Yakir would hinder the State's investigation had

156. *Samuel*, 2 All E.R. at 144.
157. Military Justice Law, 1955, S.H. 189 page 171 § 318 (L.S.I.).
158. *Id.* at § 227A.
159. The Criminal Procedure Law, 1982, S.H. 1043 page 43 § 14 (L.S.I.).
160. H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843.
161. H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843, 856.
162. *Id.*

he been permitted to contact the detainee.[163] The Court's reasoning for affirming both the order that prohibited the meeting of the detainee with his defense counsel and the conduct of the judicial hearing in the detainee's absence was not based, therefore**,** upon the suspicion of a particular attorney.

Another fear expressed in Israeli case law regards the possibility that defense counsel may become an unwitting courier for sensitive information, as articulated in the following holdings.[164] For example, a detainee may have made advance arrangements with his accomplices regarding secret codes that can be relayed by way of an innocent conversation with defense counsel. This may have been the fear expressed in *Maraab*,[165] which adjudicated the legality of an order issued by military commander prohibiting all meetings between a detainee and his defense counsel.[166] The order was initially for eighteen days but was subsequently reduced to four days.[167] The Israeli Supreme Court affirmed the order rather laconically, stating that:

> [O]ur answer is that the rule in these kinds of situations must be the effectuation of the basic right to a meeting with an advocate. Nonetheless, important security considerations may prevent this. For example: in their response, the respondents argue that an advocate-suspect meeting may be prevented if it is suspected that the lives of the combat forces may be endangered due to the possibility of messages being conveyed from detainment installations to the outside, overtly or encoded . . . we agree with this . . . accordingly, our view is that there was nothing defective in the arrangements prescribed in the order . . . with respect to preventing the meeting with an advocate.[168]

In the *Chen* holding, Israeli Supreme Court Justice Zamir, while presiding over an appeal to the decision of the President of the Jerusalem District Court, expressed fear that defense counsel could serve as an unwittingly courier of sensitive information.[169] The issue in *Chen* was whether to permit a detainee-attorney meeting subject to the following

---

163. *Compare with Samuel*, 2 All E.R. at 145. In *Samuel*, the court noted that the police had illegally delayed the meeting between the detainee and his attorney, despite knowledge of the attorney's identity as highly respected and experienced attorney unlikely to be hoodwinked by his twenty-four year old client.

164. *See infra* notes 165-76 and accompanying text.

165. H.C. 3239/02, Maraab v. IDF Commander in Judea and Samaria Zone, 57(2) P.D. 349.

166. *Id.* at 356-59.

167. *Id.* at 358-59.

168. *Id.* at 381-82.

169. Cr.M 306/99, General Security Service v. Shimon Chen, Tak-El 99(1) 702 (unpublished).

restrictions: defense counsel would undertake not to relay any information from the outside to the detainee; the detainee would undertake not to relay any message, even innocent, to his advocate; defense counsel would not share with anyone any event, utterance, greeting, or any other information shared by the detainee; a representative from the General Security Service (GSS) could be present at the meeting.[170] It is difficult to imagine a more restrictive situation to ensure that no information was leaked from the detainee to his defense counsel. The Israeli Supreme Court nonetheless quashed the decision of the President of the District Court and restored the validity of the blanket prohibition of the detainee-attorney meeting for three days.[171] Defense counsel was permitted only to transfer a letter to his client indicating the following: (1) that he was aware of the suspect's detention; (2) that he was unable to meet with the suspect; and (3) that defense counsel could inform the suspect of his statutory rights, including the right to remain silent.[172] The Court held that when a serious threat to State security exists, regardless of its potential for materializing, a planned but disguised message, an accidental slip of the tongue, and even a presumably innocent statement, might be meaningful, and perhaps even lethal.[173] It is, however, rare for an advocate to unwittingly transfer information[174] as this requires both a sophisticated detainee and naivety and stupidity on behalf of the advocate.[175] Though a tremendous degree of sophistication can be ascribed to certain security detainees, there is no reason to assume all defense attorneys are naive.[176]

One way of assessing the intention underlying the suspension of a right is to examine whether there is a less restrictive means for achieving the same goal. The fears concerning the interference of an investigation as a result of a detainee-attorney meetings can be overcome by limiting the right of communication at the preliminary stages to certain attorneys while also imposing a prohibition on transferring any message to or from the suspect. These attorneys should be drawn from those who have unrestricted authorization to serve in military courts and defense attorneys who belong to the internal staff of the public defender's office.[177] It is unlikely that a defense counsel with unrestricted

170. *Id.* at § 5 of the holding.

171. *Id.* at § 7 of the holding.

172. *Id.* at § 8 of the holding.

173. *Id.* at § 7 of the holding.

174. Regina v. Samuel, 2 All E.R. 135, 144 (C.A. 1988).

175. *Id*.

176. *Id*.

177. Compare the position of the English Criminal Appeals Court that regards the fear of an innocent transmission of information on the part of attorneys that pertain to Duty Solicitors as

authorization would violate this prohibition and convey, even accidentally, any information to or from the suspect. True, this suggestion violates the detainee's right to retain a counsel of his own choice.[178] However, it violates the detainee's rights to silence and counsel to a lesser degree than a total ban on meeting with counsel. However, the fact that no method to minimize the potential damage of a detainee-attorney meeting has been proposed short of a blanket prohibition on such meetings indicates that its postponement is not solely premised on the fear of leaked information.

2. Defense counsel and the right to silence

There is a fear that the number of statements made by the detainee to his interrogators and admissions of guilt will decrease as defense counsel is allowed to inform the detainee of his right to remain silent. The Israeli Supreme Court does not regard this as a valid argument for delaying a detainee-attorney meeting. On the contrary, the Court has ruled that the fear of an attorney influencing the detainee to avoid making any statement to the police does not constitute valid cause for delaying that meeting.[179] The fact that the custodial suspect has not yet made a statement to the police does not, of itself, provide a reason for denying him a detainee-attorney meeting nor does the assessment that the suspect will be unwilling to cooperate with the police if such a meeting takes place.[180] The Court stressed that infringement of a suspect's right to meet with counsel is "tolerated only when critical from the perspective of security needs and necessary in terms of the advancement of the investigation. Regarding the advancement of the investigation . . . it must be shown that a meeting between the detainee and the attorney will interfere with the investigation."[181] It is not legal to postpone a detainee-attorney meeting out of fear that defense counsel will alleviate the custodial pressure or inform the suspect of his right to remain silent, as long as it remains a recognized right.[182] These decisions imply that silence alone does not obstruct an investigation, as opposed to active means of obstruction such as warning other accomplices or giving

negligible. *Id.*

178. Regarding the defendant's right to have the assistance of a retained lawyer of his choosing, see *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961).

179. Cr.A. 307/60, Yasin v. Attorney General, 17P.D. 1541, 1570.

180. Compare with English case law: Van Kessel, *supra* note 49, at 55.

181. H.C. 6302/92, Rumchia v. Israeli Police, 47(1) P.D. 209, 213; H.C. 128/84, Hazan v. Meir, 38(2) P.D. 24, 27.

182. Regina v. Samuel, 2 All E.R. 135, 144 (C.A. 1988).

instructions to hide evidence that an investigation has been impeded.[183]

As elucidated in *Miranda*, the postponement of the attorney-detainee meeting is intended to "overcome" the tight connection between the right of counsel and the right to silence.[184] The *Sharitach* decision, which involved a security suspect, provided proof of this proposition.[185] In *Sharitach*, the Israeli Supreme Court not only affirmed the decision to bar a detainee-attorney meeting, but also rejected the attorney's request to inform the detainee of his right to silence and that his family had retained an attorney.[186] In their brief decision on November 27, 2001, entailing only a few lines, Justices Cheshin, Shtrasberg-Cohen and Dorner stated:

> Petitioner is aware that a meeting between himself and an attorney was, and is still prohibited. However, Advocate Rozental . . . requests that petitioner be informed that people on the outside have appointed an attorney—Advocate Rozental—to represent him. We put the question to the respondent and his representatives, and we are satisfied that informing the petitioner of this, in addition to informing him of the prohibition on his meeting with an advocate—will harm the 'advancement of the investigation.' Advocate Rozental further requests that he be permitted to convey a letter to the petitioner, informing him of his right to remain silent during interrogation and not to incriminate himself. Here too we have listened to the respondent and his representatives, and in this matter too we are satisfied that the 'advancement of the investigation' and the 'security of the region' prevent us from assenting to Advocate Rozental's request.[187]

Moreover, in opposition to previous explicit holdings of the Israeli Supreme Court, according to which a detainee must immediately be informed of the denial of a detainee-attorney meeting,[188] in the case of *Basaam Natshe*, the Court ignored this precedent.[189] Justice Cheshin determined in this case that although "[t]he petitioner's attorney requested that the petitioner be informed of the prohibition on his

---

183. *Supra* note 181.

184. Miranda v. Arizona, 384 U.S. 436, 469 (1966).

185. H.C. 9314/01, Usama Ali Sharitach v. General Security Service, Tak-El 2001 (3) 645 (unpublished).

186. *Id.*

187. *Id.*

188. *See* H.C. 3412/91, Soofian v. IDF Commander in Aza Zone, 47(2) P.D. 843, 852-53; H.C. 3425/01, Tarek v. Minister of Defense, 55(4) P.D. 581, 583.

189. H.C. 801/00, Basaam Nachsha v. Erez Military Court, Tak-El 2000 (1) 359 (unpublished).

meeting with an attorney, [the Court has] assented to the State's request not to inform the petitioner, and for the same reasons for which he was not permitted to meet with his attorney."[190] These decisions attest to the dual nature of Israeli law regarding the right to remain silent and the right to a detainee-attorney meeting during the investigation stage.

In *Escobedo*, the United States Supreme Court ruled that the Constitution strikes a balance in favor of the accused's right to be advised by defense counsel of the privilege against self-incrimination.[191] A legal system should not abhor the right of a suspect to confer with counsel in order to become aware of his rights, unless there is a basic defect in that system.[192] Professor Yoram Shachar, an Israeli commentator, similarly noted that:

> Apparently, the main fear inducing investigating authorities to interrogate before the meeting is their fear of the defense counsel's ability to inform the suspect of the panoply of his legal rights during the interrogation, especially the right of silence. If indeed this is the fear, then it expresses deep contempt for the rule of law and human dignity. The essence of the Law is its public enactment, and it is directed at people to know it. An interrogator seeking to exploit the ignorance of a person unaware of his statutory rights, and refuses to allow an attorney to inform him of his rights at precisely the moment when he most requires them . . . does not give him equal treatment and respect. Even if his intentions are commendable, his actions are not.[193]

V. THE DISTINCTION BETWEEN AN INVESTIGATION INTENDED TO UNCOVER A CRIMINAL OF A PAST OFFENSE AND AN INVESTIGATION AIMED AT PREVENTING A FUTURE OFFENSES

Israeli Law may be rescued from its apparently conflicting rulings and the chasm between rhetoric and reality by drawing a distinction between investigations intended to discover a criminal of a past offense and investigations intended to obtain information aimed at preventing future offenses. The Detention Law permits the postponement of the detainee-attorney meeting without regard to a distinction between these two types of investigations.[194] However, the Israeli Supreme Court has

190. *Id.*

191. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).

192. *Id.* at 490.

193. Yoram Shachar, *Criminal Procedure*, *in* ANNUAL YEARBOOK OF LAW IN ISRAEL 375, 400 (1993).

194. Detention Law, 1996, S.H. 1592 page 338 § 35 (L.S.I.).

drawn this distinction in *Smirk*.[195] Smirk, a German citizen who had joined Hezbollah, was detained after arriving in Israel on charges of taking photos of targets for suicide attacks.[196] In his appeal following conviction, Smirk claimed, *inter alia*, improper elicitation of his out-of-court incriminating statements without notification of his right to remain silent and right to counsel.[197] Dismissing his claim, the *Smirk* Court distinguished between investigations conducted for the purpose of obtaining information necessary to prevent the commission of a future offense against state security and an investigation intended to connect a suspect with a past offense.[198] The first case does not trigger a duty to apprise the detainee of the right to silence.[199] This distinction can explain the ruling in *Sharitach*.[200] If there is no obligation on behalf of law enforcement authorities to apprise the detainee of his right to remain silent, then likewise, it follows logically that there is no need of defense counsel to inform the detainee of this right. The right to counsel fits into a legal system that recognizes the suspect's right to remain silent during his investigation. In a legal system which does not recognize a right to remain silent or where law enforcement authorities are permitted to try to prevent the suspect from exercising the right to remain silent, a defense attorney is regarded as a hindrance to the discovery of the truth.

The *Smirk* Court[201] assumed that a case involving an imminent act of terrorism is beyond the confines of a standard police investigation. Indeed, in a case such as this, the General Security Service (GSS), not the police, controls the investigation of terrorist suspects. GSS interrogators do not take written statements from the suspect. After the GSS investigation is concluded, the suspect is transferred to the police for continued interrogation. Only then is a written statement taken and is the suspect informed of his right to remain silent and, if the prohibition on a meeting has been removed, of his right to meet with defense counsel.[202]

In *New York v. Quarles*, the United States Supreme Court recognized the "public safety exception" to the *Miranda* ruling.[203] When the immediate investigation of the suspect is required to protect the public,

195. Cr. A. 6613/99, Smirk v. Israel, 56(3) P.D. 529.

196. *Id.* at 535.

197. *Id.* at 539.

198. *Id.* at 545-46.

199. *Id.*

200. H.C. 9314/01, Usama Ali Sharitach v. General Security Service, Tak-El 2001 (3) 645 (unpublished).

201. 56(3) P.D. 529.

202. *Id.* at 547.

203. 467 U.S. 649 (1984).

there is no need to notify him of his rights to silence and counsel.[204] In *Quarles*, the complainant notified the police that she had just been raped, and that the rapist had entered a nearby supermarket, armed with a gun.[205] One of the police officers entered the supermarket and began pursuing a person whose description matched that given by the complainant.[206] At the end of the pursuit, the police officer grabbed the suspect, handcuffed him, and asked him for the location of the gun.[207] The suspect pointed to some empty cartons and responded, "the gun is over there."[208] The Court ruled that in this circumstance, though the police officer questioned the suspect without giving him the required *Miranda* warnings, the confession and the gun were admissible evidence.[209] The Court thereby balanced the interests of the suspect's rights against the need to obtain information necessary to protect public safety and security.

The *Quarles* Court did not define the extent of this public safety exception thereby opening the door for potential abuse by law enforcement authorities in general and the police force in particular.[210] This ambiguity in the public safety exception and the fact that a criminal at large poses a threat to the public safety might give rise to a broad exception to the *Miranda* ruling.[211] If by "[l]eaving a criminal's gun at large creates a danger to the public, but leaving the criminal who wields the gun at large creates an even greater danger,"[212] then conceivably, it may become legitimate to investigate dangerous criminals without recognition of their rights to silence or counsel.[213] This is further supported by the assumption that some criminals who are not indicted due to a lack of sufficient evidence or who are acquitted at trial will continue, nonetheless, to endanger public safety through the commission of additional offenses.[214] The *Miranda* Court recognized that letting criminals go free (with the knowledge that some of them may repeat their crimes) is an inevitable price the public must pay to secure a detainee's

204. *Id.* at 653.

205. *Id.* at 651-52.

206. *Id.* at 652.

207. *Id.*

208. *Id.*

209. *Id.* at 651, 653.

210. Steven Andrew Drizin, *Supreme Court Review, Fifth Amendment–Will the Public Safety Exception Swallow the* Miranda *Exclusionary Rule?*, 75 J. CRIM. L. & CRIMINOLOGY 692, 713 (1984).

211. *Id.* at 692-93, 713-14.

212. Dep't of Justice, Office of Legal Policy, *supra* note 96, at 526.

213. Drizin, *supra* note 210, at 714.

214. For this assumption see *Miranda v. Arizona*, 384 U.S. 436, 542-43 (1966) (White, J., dissenting).

privilege against self-incrimination. The dissenting opinion highlighted the danger of slowing down the investigation in cases in which time is of the essence, such as kidnapping, crimes involving national security, and offenses committed by organized crime.[215] Notwithstanding the preference given in *Miranda* to the right to counsel over the interest in public safety, the *Quarles* Court established the public safety exception. Given this exception, and despite the difficulty of determining the exact scope of the implications of the *Quarles* decision, it is hard to dispute the fact that terror offenses constitute a clear threat to public safety and can therefore justify the application of the public safety exception. This is particularly true for suspects that have information regarding imminently scheduled terror offenses.[216] The United States Supreme Court, to date, has not definitively ruled on the question of whether the public safety exception can permit the continued interrogation of a suspect who requests a consultation with his defense counsel.[217] Some commentators hold that proper policy considerations mandate broad application of the exception in these circumstances to prevent the future commission of crimes against state security.[218] Indeed, the Israeli Detention Law permits a postponement of the detainee-counsel meeting for three weeks even when the detainee explicitly requests to meet with his lawyer.[219] This time frame enables the "subjugation" of the natural unwillingness of terror suspects to cooperate with their interrogators by isolating them from the outside world. If this approach is accepted in the United States under the exception of *New York v. Quarles*, it will expand the options for preventing the detainee-attorney meeting both by allowing an ample delay in apprising the detainee of his rights and by permitting the investigation to continue even when the detainee has invoked his right to counsel.

One conceivable approach is to render inadmissible any evidence obtained by law enforcement authorities in the prevention of future crimes if they deny a suspect the ability to effectuate his rights. Justice Marshall, in *Quarles*, noted that if a bomb were about to explode in a crowd or if there was an immediate threat to national security, a suspect should be able to be interrogated without advising him of his rights

215. *Id.* at 544.

216. *See* Darmer, *supra* note 133, at 372. On the basis of analogy from the *Quarles* exception, the author suggests the creation of an exception that permits the interrogation of suspects outside the borders of the United States without having to administer the *Miranda* warnings as long as their statements are voluntary. However, according to this line of thought, all suspects of terror offenses can be interrogated without having been given *Miranda* warnings if they have information regarding the commission of future terrorist offenses.

217. Darmer, *supra* note 102, at 243.

218. Weller, *supra* note 152, at 1115; Darmer, *supra* note 102, at 245.

219. Detention Law, 1996, S.H. 1592 page 338 § 35(a) (L.S.I.).

though his confession would not be admissible at trial.[220] Such a ruling avoids the abridgement of the interrogated suspect's rights under the guise of preventing the commission of an offense. It would force law enforcement authorities to choose one of two paths and prevent them from having their cake and eating it too.[221] However, the *Quarles* majority refused to impose this requirement on law enforcement authorities. The Court determined it unwise to force law enforcement authorities to balance the need to protect public safety against the desire to enforce the law and convict criminals; choosing the former would mean sacrificing evidence against the suspect.[222] When interrogating a suspect who poses a threat to public safety, the desire to uncover the criminal who committed past offenses is inseparable from the desire to protect public safety from the commission of future offenses.[223] The *Quarles* majority held, therefore, that once a police officer acted appropriately by interrogating a suspect without giving the *Miranda* warnings, there is no justification for punishing him by excluding the suspect's confessions.[224]

When dealing with terror suspects it is difficult to oblige law enforcement authorities to choose *ad hoc* between preventing additional imminent terrorist attacks and the desire to convict and punish criminals for past terrorist acts and thus preventing future crimes by their imprisonment. Additionally, the boundaries of the public safety exception are more easily delineated in cases of terror suspects, the vast majority of whom are presumed to be in possession of valuable information that may prevent future terrorist acts. This is based on an assumption that has not yet been proven at the interrogative stage, that they are indeed factually guilty.

However, interrogating those suspected of state security offenses without apprising them of their rights to silence and counsel opens the door for grave abuse of interrogation powers where counsel is not present to ensure that the detainee is not coerced to give an admission by violence, threats, or another kind of undue pressure. The temptation to exert undue pressure in interrogations of individuals suspected of security offences is particularly acute. In these cases, an overriding public concern exists to detect the criminals and neutralize imminent dangers. In addition, interrogators in situations like these often feel

220. New York v. Quarles, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting).

221. *See* Steven D. Clymer, *Are the Police Free to Disregard* Miranda, 112 YALE L.J. 447, 550 (2002).

222. *Quarles*, 467 U.S. at 657-58.

223. *Id.* at 656.

224. *Id*. at 658 n.7.

tremendous hatred towards detainees who are prepared to undermine the state. During these public safety interrogations there may, therefore, be even a greater need for defense counsel to be present.

VI. CONCLUSION

Suspects of terror offenses pose a special challenge to law enforcement authorities and may tilt the scales toward the needs of law enforcement and the protection of public security over individual rights. The Israeli Detention Law allows the postponement of the detainee-attorney meeting for suspects of security offenses for up to three weeks, as opposed to two days for suspects of other offenses. The detainee-attorney meeting of a suspect of a security offense is automatically delayed for a certain period of time. The Israeli Supreme Court has never openly acknowledged that it permits the delaying of the detainee-attorney meeting to pressure a suspect of security offenses into speaking by keeping him incommunicado and failing to inform him of his rights. On the contrary, the Israeli Supreme Court has made it clear that the fear of the detainee asserting his right to silence does not alone justify a delay in the detainee-attorney meeting. However, analysis of the decisions in which the Israeli Supreme Court affirmed sweeping prohibitions on detainee-attorney meetings of security detainees indicates that this indeed is the covert purpose of prohibiting the meeting between the detainee and his counsel. The Israeli Supreme Court nonetheless refuses to explicitly admit this proposition. This refusal to admit that the postponement of the detainee-attorney meeting is designed to overcome the detainee's will to remain silent prevents a serious discussion of the boundaries of the right to silence, and the appropriate limitations for the detainee's right of communication with an attorney, especially in the case of security-offense detainees. It forestalls consideration of the possible distinction between investigations intended to gather evidence to substantiate a suspect's guilt where a delayed meeting with the defense attorney for pressuring the suspect should be regarded as illegitimate, and an investigation intended to prevent the commission of an imminent dangerous offense. There are circumstances in which the abridgement of the right of consultation with a defense counsel, and consequently the privilege against self-incrimination, may be justified, such as in interrogations of terror suspects where there is a reasonable ground for assuming that they carry information regarding imminent terror offenses. In such cases however, suitable procedural safeguards should be instituted, such as video recording of the interrogation, to prevent abuse of the authority to delay detainee-attorney meeting for security suspects in order to elicit coerced confessions.