The Right to Counsel in Prosecutorial Interrogations

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The Right to Counsel in Prosecutorial Interrogations

In an attempt to bring crime under control, a growing number of states are extending to prosecutors the power to subpoena witnesses, including suspects, and to require them, under penalty of contempt, to answer questions. This subpoena power can be used to compel reluctant witnesses to come forward with vital information, thereby hastening the investigative process. Suspects can also be required to account for their actions relating to a particular crime. The information gained can then be used by the prosecutor to decide whether to file charges against a suspect.

A conflict has developed among state courts regarding the right of a subpoenaed witness to have counsel present at prosecutorial interrogations. This note argues that the fifth amendment, through the holding in Miranda v. Arizona, and the due process clause of the fourteenth amendment require that a witness subpoenaed to answer a prosecutor's questions has the right to have counsel present during the interrogation. The analysis includes examination of several types of interrogations which possess varying degrees of similarity to interrogations conducted by prosecutors. First, the note compares the potential for abusive treatment of a witness at a grand jury investigation with the similar danger posed by prosecutorial interrogations. The note concludes, however, that sufficient similarities between the two proceedings do not exist to deny the right to counsel at a prosecutorial investigation, despite the absence of any such right in grand jury investigations. Second, the note examines the differences between administrative interrogations and interrogations by a prosecutor to show why they should not be adjudicated by the same rule. Third, the note explores police interrogations and determines that sufficient similarities exist between prosecutorial and police

1 See, e.g., Del Code Ann tit. 29, § 2504(4) (1979); N.Y. Crim. Proc. Law § 610.20 (McKinney 1971). Most recently, the Indiana Supreme Court extended subpoena power to prosecutors in In re Order for Indiana Bell Tel. To Disclose Records, Ind., 409 N.E.2d 1089, 1091-92 (1980).

Prosecutorial subpoena power has been advocated by several organizations. See National Advisory Commission on Criminal Justice Standards and Goals, Police 244-46 (1973); National District Attorneys Association, National Prosecution Standards 121-22 (1977).

Compare Gill v. State ex rel. Mobley, 242 Ark. 797, 416 S.W.2d 269 (1967) with Gordon v. Gerstein, 189 So. 2d 873 (Fla. 1966). This note focuses on the rights of potential defendants at prosecutorial interrogations although a few comments are directed toward the questioning of witnesses who are not potential defendants.


The proposal argued by this note indirectly raises the issue whether the right to have counsel present at prosecutorial interrogations necessarily implies the right to have counsel furnished for this purpose to indigents. Due to the breadth of the constitutional and policy considerations involved in this issue, however, it is beyond the scope of this note.
interrogations to require the extension of the *Miranda* right to counsel to prosecutorial interrogations. Fourth, the note examines the possible application of the due process clause of the fourteenth amendment to prosecutorial interrogations and concludes that it also requires that individuals have the right to counsel when questioned by prosecutors.

**POSSIBLE MODELS FOR PROSECUTORIAL INTERROGATIONS**

*Protection for Witnesses Questioned Before a Grand Jury*

Prosecutorial interrogations have been analogized to grand jury investigations.⁵ Both share an investigatory purpose and under both proceedings subpoenas may be issued to compel testimony.⁶ Should this analogy be extended to include the right to counsel, a person questioned by a prosecutor would be allowed to have counsel standing by in an adjacent room for consultation, but would not be allowed to have counsel present in the room where the questioning is taking place.⁷

The persuasiveness of an analogy between interrogations by a prosecutor and grand jury investigations has been questioned.⁸ Prosecutorial interrogations lack the fundamental safeguard embodied in grand jury proceedings,⁹ the presence of neutral grand jurors.¹⁰ Without this safeguard, an individual questioned by a prosecutor has little protection from coercion by the prosecutor.¹¹ This potential for abuse has been

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⁵ *See* Dinnen v. State, 168 So. 2d 703, 704 (Fla. Dist. Ct. App. 1964); State v. Iverson, 187 N.W.2d 1, 17 (N.D. 1971). But *see* Gordon v. Gerstein, 189 So. 2d 873, 874 (Fla. 1966) (court upheld *Dinnen* but finds no analogy between a grand jury and a prosecutor's inquest under Florida law).
⁹ *See* Gordon v. Gerstein, 189 So. 2d 873, 874 (Fla. 1966).
¹¹ Justice Black has described the importance of the presence of the grand jury: They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them.


*It takes little imagination to foresee the oppression that could result if prosecuting
recognized by courts, but not discussed in the context of the availability of the right to counsel.\textsuperscript{13} With only the prosecutor's staff in attendance at the interrogation, the witness is fair game for any unsavory tactics the prosecutor may wish to employ. These tactics could range from "Mutt and Jeff" psychological techniques\textsuperscript{14} to severe physical beatings.\textsuperscript{15} Because the presence of jurors prevents many of these abuses, the secret questioning of a witness by a prosecutor renders the limited access to counsel given to a witness before a grand jury insufficient to protect the rights of a witness questioned by a prosecutor.

Grand jury witnesses are also protected by the fifth amendment privilege against compulsory self-incrimination.\textsuperscript{16} A witness may unknowingly forfeit this privilege if he is not aware of his rights and makes incriminating statements.\textsuperscript{17} Through coercion a witness may also be forced to give up his rights.\textsuperscript{18} Through their presence, grand jurors prevent a coercive atmosphere conducive to the unknowing or involuntary forfeiture of rights by a witness.\textsuperscript{19} Similar protection is not available for an individual questioned by a prosecutor.\textsuperscript{20} Without some equivalent safeguard, an unknowledgeable witness may fall prey to the skill and cunning of a prosecutor.\textsuperscript{21} The presence of counsel would prevent abuse by eliminating a coercive atmosphere in the same way that grand jurors do and would guarantee the availability of advice about constitutional rights at a prosecutorial interrogation.

\textsuperscript{15}See, e.g., Wakat v. Harlib, 253 F.2d 59, 61-62 (7th Cir. 1958).
\textsuperscript{16}The applicable clause of the fifth amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. This privilege against compulsory self-incrimination was extended to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).
\textsuperscript{17}The danger that a witness will be unaware of his privilege against compulsory self-incrimination could be avoided by a requirement that all witnesses be informed of this right before questioning. This question was expressly left open in United States v. Mandujano, 425 U.S. 564, 583 n.7 (1976). States have disagreed whether a grand jury witness who is a potential defendant must be given self-incrimination warnings. Compare State ex rel. Lowe v. Nelson, 202 So. 2d 232, 234-35 (Fla. Dist. Ct. App. 1967), aff'd, 210 So. 2d 197 (Fla. 1968) (the Miranda warning is not applicable to a witness appearing before a grand jury) with Commonwealth v. McCloskey, 443 Pa. 117, 143, 277 A.2d 764, 777 (1971) (to preserve the privilege against self incrimination a witness should be given a warning at a grand jury hearing). The Indiana Supreme Court has required that all grand jury witnesses be given self-incrimination warnings. State ex rel. Pollard v. Criminal Court, 263 Ind. 236, 259, 329 N.E.2d 573, 589 (1975).
\textsuperscript{18}See text accompanying notes 14-15 supra.
\textsuperscript{19}See note 11 supra.
\textsuperscript{20}The fifth amendment's privilege against compulsory self-incrimination, however, appears to apply to prosecutorial interrogations. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 7, at 723.
Four reasons have been advanced for not allowing counsel to accompany a witness into the grand jury room. First, "the grand jury is an investigation rather than a prosecution." Second, "the presence of counsel would breach the secrecy of the proceeding." Third, "counsel would disrupt the ex parte nature of the proceeding." Fourth, "the witness whose rights are abused has sufficient opportunity to exonerate himself at trial."

The first two justifications for the exclusion of counsel do not logically apply to prosecutorial interrogations. The first is not applicable because an interrogation conducted and controlled wholly by the prosecutor, in contrast to the grand jury's power to decide whether the evidence is sufficient to issue an indictment, is inherently more prosecutorial than investigative in nature. The second is weakened by the fact that even at a grand jury investigation, defense counsel can be informed about the content of the proceedings by the witness immediately after the questioning. With this potential for disclosure to counsel already present, the right to have counsel at the questioning would add little to the risk that important information will be prematurely revealed.

The third justification for exclusion of counsel—the danger of excessive delays—does not seem as compelling in the case of prosecutorial interrogations as in the case of grand juries because of the differences between the two proceedings. Delays might seriously hamper grand jury investigations because of the backlog of matters to be dealt with or the infrequency of meetings. Such problems would be relatively unimportant in the case of prosecutorial interrogations because the smaller number of participants allows more flexible scheduling and saves time in questioning. Moreover, prosecutorial interrogations, because they are discretionary, need not be used as frequently as grand jury proceedings.

Similarly, the fourth justification—the witness' opportunity to exonerate himself at trial—may be true for grand jury investigations, but cannot be claimed as strongly for prosecutorial interrogations. A victim of prosecutorial abuse would have to prove the impropriety of the circumstances surrounding a statement obtained at a prosecutorial interrogation to prevent it from being introduced as evidence. Proving this would be difficult if counsel was not present since the witnesses would all be members of the prosecutor's staff. The same proof problems would develop if the witness' incriminating statement was not used at trial, but merely

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2 C. WHITEBREAD, CRIMINAL PROCEDURE 388 (1980).
26 C. WHITEBREAD, supra note 22, at 388.
27 Id.
28 See Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 7, at 716.
29 Grand juries often convene year round in larger cities where they are unable to handle the heavy flow of cases. In smaller towns and rural areas, grand juries are often called only once or twice a year. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 7, at 11.
used to obtain other inculpatory evidence. Moreover, even if the victim of the abuse were able to have the evidence suppressed, it might still be available to the prosecution for impeachment purposes.

Although commentators suggest that the grand jury is no longer the guardian of liberty it once was, the value of the grand jury in preventing, at the least, egregious violations of an individual’s rights is hard to deny. This is partially a result of the role of grand jurors as witnesses. Without the presence of neutral grand jurors, an individual abusively treated during questioning by a prosecutor would have little chance of having the violations rectified because the only witnesses to the abuse would be members of the prosecutor’s staff. In contrast, should there by any question regarding events occurring before a grand jury, grand jurors can testify to what they witnessed. Counsel present at a prosecutorial interrogation could act in the same capacity as a grand juror by being a witness to the questioning who would have no ties to the prosecution. Otherwise, the situation would be identical to a grand jury without grand jurors. Hence, counsel at a prosecutorial interrogation would have the power and responsibility to stop any abuse of a witness, but should he fail, he would at least be available to testify on his client’s behalf.

Perhaps the most telling difference between the two forms of proceedings, however, is that the prosecutor has a greater incentive to abuse a witness than a grand jury due to his function in the criminal justice system. The main duties of a grand jury are to perform investigations and to consider indictments. The prosecutor, however, develops the case from beginning to end. He not only assists the investigation and sees the case through indictment or information, but also represents the people of the state at trial. A grand jury, on the other hand, has evidence brought before it, then weighs that evidence and decides solely whether to indict a suspect. If a grand jury investigation uncovers evidence tending to incriminate an individual, but that evidence is not sufficient for a conviction, the grand jury can still fulfill its duty by indicting the

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31 The presence of grand jurors prevents physical coercion as well as other blatant violations such as threats of additional prosecution. See Y. Kamisar, W. LaFave & J. Israel, supra note 7, at 720.
32 Even if the individual who was abused was able to produce witnesses to that abuse, a co-defendant could be convicted by evidence resulting from the abuse because he would not have standing to object. See Duckett v. State, 600 S.W.2d 18, 20-21 (Ark. Ct. App. 1980). This result further emphasizes the need for counsel at all prosecutorial interrogations.
35 There are a number of reasons why a case would be submitted to the grand jury before proof beyond a reasonable doubt is compiled. The prosecutor may think that the suspect is dangerous or may flee the jurisdiction and will have him indicted to legitimize
individual. Whether the investigation is by the prosecutor or the grand jury, however, if the state loses at trial, the prosecutor may suffer a personal embarrassment. Since the prosecutor is normally elected to office, any public embarrassment will hinder his chances for reelection as well as damage his reputation. The prosecutor therefore has an inherent incentive to obtain additional incriminating information by coercion or trickery. Of course, most prosecutors honor their ethical duty and do not coerce witnesses. Nevertheless, enforcement of constitutional guarantees is necessary to protect victims from those few prosecutors who would resort to coercion.

The prosecutorial interrogation's lack of the inherent safeguards present within the grand jury system destroys the persuasiveness of any analogy between the two types of investigations. The differences in the two types of interrogations also suggest that the protections of counsel afforded a person questioned by a grand jury are insufficient to fully protect a person compelled to answer a prosecutor's questions. The right to counsel is necessary not only to prevent possible abuse, but also to promote the witness' awareness and invocation of rights guaranteed to him by the Constitution.

Protection for Witnesses Questioned at an Administrative Investigation

Administrative investigations may also be compared to prosecutorial interrogations. Administrative investigations share some of the resemblances to prosecutorial interrogations that grand jury investigations have. In In re Groban, the United States Supreme Court held that an individual does not necessarily have a right to counsel when questioned by an administrative agency. This conclusion, however, was
based on the fact that administrative investigations are frequently not
adjudicatory in nature, but instead delve into issues of fact and only in-
cidentally uncover such facts as whether a crime has been committed.43
A majority of Justices noted that investigations directly leading to criminal
prosecutions, such as an investigation by a district attorney, would compel
a different result.44

The rationale of the separate opinion in Groban was subsequently ex-
tended by Mathis v. United States,45 in which the Supreme Court held that
an Internal Revenue Service agent is required to give Miranda warnings
and recitation of rights to a suspect before conducting a custodial
interrogation.46 Included among the Miranda rights is the right to counsel
to protect the privilege against self-incrimination.47 Mathis seems applicable
to virtually any administrative investigation.48 The right to counsel,
however, has rarely been addressed in recent years because most federal
administrative agencies have already promulgated guidelines providing
the right to counsel to individuals under interrogation.49

Although as a general rule individuals interrogated by an administrative
agency do not have a right to counsel, the majority of the Justices in
Groban drew a distinction between cases that lead to criminal prosecu-
tions and those that are civil in nature.50 This distinction has been ac-
ccepted by many administrative agencies that have issued guidelines afford-
ing the right to counsel to suspects subjected to interrogation. This distinc-
tion between criminal and civil investigations in the field of administra-
tive law leads to the conclusion that investigations which naturally lead
to criminal prosecution should require the right to counsel at the time
of interrogation.

Protection for Witnesses Interrogated by Police

Prosecutorial interrogations more closely resemble police interrogations

43 Id. at 332 (plurality opinion); see id. at 336 (concurring opinion).
44 Id. at 336-38 (Black, J., dissenting).
45 391 U.S. 1 (1968).
46 Id. at 4.
48 391 U.S. 1, 6-7 (1968) (White, J., dissenting); Note, Extending Miranda to Administrative
49 See, e.g., United States v. Leahey, 434 F.2d 7 (1st Cir. 1970).
50 See text accompanying note 44 supra.
than do the kinds of interrogations considered thus far. Both prosecutors and police interrogate suspects or other witnesses to discover relevant information. Both have the same goal: to obtain information that will lead to a criminal conviction. The potential for abuse by both is also similar. The legal maxim that similar cases should be treated in a similar manner is particularly appropriate in these circumstances.

Substantial inequities could result if prosecutors could interrogate suspects without the presence of counsel when under the same circumstances the police could not. Interrogations would be channeled through the prosecutor, who could get away with the same coercive tactics that the police would be prohibited from using. This would be an artificial distinction with little rational basis. This artificiality would be particularly apparent in cases involving the interrogation of a suspect by both prosecutors and police. Any analysis based on a determination of whether the incident was a police or prosecutorial interrogation would be nonsensical. The important issue should be whether any abuse took place, not the identity of the individuals who performed it. To avoid inconsistency and artificiality there must be an equal application of relevant constitutional provisions.

Sixth Amendment Protections

In response to abusive police interrogations, safeguards have been developed to protect individuals interrogated by the police. Of these safeguards, one of the most important is that provided by the sixth amendment which entitles an individual to have an attorney's assistance once adversary proceedings are commenced against him. The commencement of adversary proceedings occurs, however, when an individual is indicted or otherwise formally charged. This limitation of the application of the sixth amendment to post-indictment situations prevents individuals from asserting the sixth amendment right to counsel at routine pre-indictment police interrogations. Analogously, it appears that the sixth amendment as currently applied could not apply to prosecutorial interrogations that occur before indictment or the institution of formal charges.

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51 See text accompanying notes 14-15 supra. Abuses arising from police interrogations have been well documented. Perhaps the best known discussion is in Miranda v. Arizona, 384 U.S. 436, 445-56 (1966).
53 E.g., id. at 444 (Miranda warnings and recitation of rights).
54 See Brewer v. Williams, 430 U.S. 387, 401 (1977). The sixth amendment right to counsel was extended to the states through the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963).
57 Although this note advocates the application of the fifth and fourteenth amendments to create a right to counsel at prosecutorial interrogations, the sixth amendment would
Fifth Amendment Protections

Although the sixth amendment does not extend the right to counsel to a person being interrogated by a prosecutor before the commencement of adversary proceedings, the rights and warnings enunciated by the Supreme Court in *Miranda v. Arizona* arguably should apply. Among these rights is the right of an individual to have counsel present when he is subjected to a custodial interrogation. The presence of counsel safeguards the fifth amendment privilege against compulsory self-incrimination by providing protection from a coercive environment.

The rights and warnings of *Miranda* have been most frequently applied to police interrogations. The application of *Miranda* rights to individuals interrogated by prosecutors, however, would not be unprecedented. In *Vignera v. New York*, a companion case to *Miranda*, two inculpatory statements were obtained from a suspect. One was elicited by an assistant district attorney without advising the suspect of his right to counsel. The Court held that the statement was inadmissible because the defendant was apprised of neither his fifth amendment privilege against compulsory self-incrimination nor his right to have counsel present at the questioning. No separate discussion was presented to justify the exclusion of inculpatory statements obtained by a district attorney as compared to those elicited by the police. In light of *Miranda*'s reliance on a history of police abuse, however, further justification beyond *Vignera* may be necessary to allow the application of the *Miranda* rule to prosecutorial interrogations generally.

The *Miranda* court described all the cases involved in its decision as

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5 See notes 55-56 & accompanying text supra.


56 "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." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).


62 *Id.* at 493.

63 *Id.* at 494.
sharing the same salient features: “incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.” This description fits \textit{Vignera} because the interrogation by the assistant district attorney took place at a police station. There is no reason to assume, however, that, from the perspective of a subpoenaed witness, a prosecutor's office does not provide an atmosphere as coercive as that at a police station. Without a relevant distinction between the surroundings at police stations and prosecutors' offices, the \textit{Miranda} right to counsel should be extended to individuals interrogated by a prosecutor.

Furthermore, interrogation techniques used by police are equally available to prosecutors. Although prosecutors would seem to be less likely to engage in physical means of coercion, they may well be more adept at psychological interrogation techniques due to their more extensive legal and educational backgrounds. This is especially true when the time sequence of a criminal investigation is considered. After a crime has been committed, the police will conduct an investigation, often including a custodial interrogation of the suspect. Should the investigation uncover sufficient evidence, the suspect is indicted or otherwise formally charged, which initiates the individual's protection by the sixth amendment right to counsel. If the investigation does not uncover sufficient evidence, the suspect, if in custody, is released, but the investigation continues. After the investigation is more fully developed, it is turned over to the prosecutor, who continues the investigation. The prosecutor uses the information already uncovered by the police investigation to recreate the crime. Through circumstantial evidence and testimony from other sources, the prosecutor often knows the participants and circumstances of the crime, but does not possess sufficient admissible evidence to prosecute the case. The prosecutor now has all of the necessary ingredients to exert great pressure on the suspect. First, he has the factual basis of the crime developed by the police investigation that may not have been present at the time of the initial police interrogation. Second, the prosecutor has the skills necessary to coerce a suspect psychologically. Third, the atmosphere surrounding the interrogation is inherently coercive because all the participants are aligned with the prosecutor against a potential defendant who stands alone and must fend for himself. Fourth, the prosecutor possesses the power to manipulate charges to intimidate the suspect. Such manipulation could take the form of an offer of a plea bargain in return for a confession, or threats of resurrecting dismissed cases, prosecuting pending charges with additional vengeance, or vindictive pro-

\footnotesize{\textsuperscript{68} Id. at 445. \textsuperscript{69} Id. at 493. \textsuperscript{70} Along with psychological techniques, prosecuting attorneys are familiar with trial questioning techniques, such as the use of leading questions, that can trick suspects.}
secution in the future.\textsuperscript{71} Fifth, a prosecutor through the subpoena power can force a suspect to appear and answer questions under pain of contempt.\textsuperscript{72}

These factors not only develop and support an analogy between prosecutorial and police interrogations that requires extending the 	extit{Miranda} right to counsel to prosecutorial interrogations, but together suggest a potential for abuse surpassing that possible in police interrogations, chiefly as a result of the greater leverage available to the prosecutor. A prosecuting attorney conducting an interrogation begins with an advantage by possessing information from a more thorough investigation than that available to the police at the time of their interrogation. In both types of interrogations the suspect is held incommunicado at the office of the interrogator. From the standpoint of the suspect, one atmosphere is just as coercive as the other. At this point, the comparison between the investigations stops because the prosecutor has powers unavailable to the police, most notably the ability to manipulate charges. A policeman can say that a confession may be considered favorably by the prosecutor or judge,\textsuperscript{73} but cannot bind the state to a plea bargain. Any threat by the police regarding possible charges is likely to be viewed as police harassment rather than the credible threat of more intensive prosecution that a prosecutor may wield. Beyond the ability to manipulate charges, the prosecutor with the subpoena power might also compel a suspect to answer questions that the suspect could lawfully refuse to answer before the police. Should the suspect refuse to answer a prosecutor by invoking the privilege against self-incrimination, he would leave himself open to imprisonment for a contempt charge supported by testimony of the prosecutor and his staff.\textsuperscript{74} It is difficult to imagine anything more "compulsory" within the meaning of the fifth amendment than testimony at a prosecutorial inquisition induced by fear of imprisonment through use of the contempt power.

Without the aid of counsel, a suspect cannot be expected to withstand the pressure created by the contempt power, the manipulation of charges, a coercive atmosphere, and psychological interrogation techniques without involuntarily waiving constitutional rights. Even a suspect informed of his fifth amendment rights before interrogation would be unlikely to have any idea of when or how to raise any of his constitutional privileges.\textsuperscript{75} Any recitation of warnings absent the 	extit{Miranda} right to counsel would therefore likely be a hollow protection for the individual interrogated by

\textsuperscript{71} It is not known how often this type of behavior occurs, but the potential severity of the violations requires the presence of counsel as a prophylactic measure.

\textsuperscript{72} See note 1 \& accompanying text supra.

\textsuperscript{73} See Oregon v. Mathiason, 429 U.S. 492 (1977).

\textsuperscript{74} See notes 28 \& 32 \& accompanying text supra.

\textsuperscript{75} In re Groban, 352 U.S. at 345-46 (Black, J., dissenting).
a prosecutor. As the Supreme Court stated: "The presence of counsel . . . would be the adequate protective device necessary to make . . . interrogation conform to the dictates of the privilege [against compulsory self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."76

Application of Miranda to Prosecutorial Interrogations

For Miranda to apply to prosecutorial interrogations, two prerequisites must be met: first, there must be an interrogation,77 and second, the individual must be in custody at the time of the interrogation.78 An interrogation is a deliberate attempt to elicit information.79 A prosecutorial interrogation clearly meets this standard. In defining custody, the Supreme Court has stressed two factors: the individual's lack of freedom to depart80 and the involuntariness of the individual's appearance at the location of the interrogation.81 Both these factors are present in a prosecutorial interrogation. An individual who leaves the prosecutor's office during an interrogation can be held in contempt. The threat of contempt forces the witness to stay at the location of the interrogation. Any attempt to flee will merely result in the return of the individual to custody by his arrest. Likewise, any voluntariness in appearing at the location of the interrogation is illusory. An individual subpoenaed by a prosecutor could refuse to appear, but he would be arrested for contempt. The choice presented is to appear at the interrogation or to be arrested and taken to the interrogation, at which time Miranda would clearly apply. In either event, the individual will appear at the interrogation. The reality of the situation compels the conclusion that since the individual is not free to depart and did not appear voluntarily, he must be considered to be in custody within the meaning of Miranda.

Application of the Miranda right to counsel to prosecutorial interrogations is necessary to prevent abuse that otherwise would not be exposed. Miranda was based on a history and expectancy of police abuses.82 Pros-

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76 Miranda v. Arizona, 384 U.S. at 466. An alternative to the requirement of the presence of counsel at a prosecutorial interrogation would be to require the presence of a court reporter to record a verbatim account of the questioning. This, however, would not protect against abuses absent from the transcript or give the protection that only an adversary is capable of giving. See text accompanying notes 28-33 supra.


79 See Miranda v. Arizona, 384 U.S. at 444.

80 Oregon v. Mathiason, 429 U.S. at 495; Orozco v. Texas, 394 U.S. at 327.

81 Oregon v. Mathiason, 429 U.S. at 495. The individual need not be taken to the interrogation against his will to be in custody, but if he arrives at the scene of the interrogation voluntarily, an inference is created that the individual is not in custody. Id.

ecutors, like other state officials, are often presumed to act in a fair and orderly manner until challenged by facts to the contrary. This presumptive difference between prosecutors and police may be justified in theory, but it can only be expected that violations of constitutional rights by prosecutors would rarely be exposed. Due to the prosecutor's ability to threaten a witness with additional prosecution on unrelated charges and to prohibit the presence of parties who could testify for the witness regarding the coercion employed, the prosecutor may force a witness into acquiescing to intimidation.

The ability to hold a threat over the head of a witness to prevent the exposure of prosecutorial abuse along with the potential severity of these abuses buttresses the argument for counsel at prosecutorial interrogations. The solution for this problem is the Miranda right to counsel. The application of Miranda, as compelled by a showing of custodial interrogation, would fully protect the fifth amendment privilege against compulsory self-incrimination of an individual questioned by a prosecutor.

DUE PROCESS FOR A WITNESS QUESTIONED AT A PROSECUTORIAL INTERROGATION

Miranda and the fifth amendment do not stand alone in providing a basis for extending the right to counsel to a person being interrogated by a prosecutor before indictment. The concept of "fundamental fairness" embodied in the fourteenth amendment's due process clause dictates the same result.

The term "due process of law" is a flexible concept of justice which defines an exact definition appropriate for all occasions. In the criminal context the Supreme Court has defined its standard of review under the due process clause as focusing upon the inquiry of "whether the [state] action complained of ... violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' ... and which define 'the community's sense of fair play and decency.' " The goal of

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85 Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.
the criminal justice system in the United States is not merely to convict the guilty, but to insure that trials are conducted fairly. To compel the disclosure of information from a suspect through a closed interrogation introduces an element of unfairness which cannot be eliminated through after-the-fact judicial safeguards. Prevention of a fair trial by abuse of a witness in derogation of his constitutional rights at a prosecutorial interrogation can only be considered a violation of these "fundamental conceptions of justice."

Furthermore, failure to provide the right to counsel to a witness questioned by a prosecutor would allow the prosecutor to determine when the suspect's right to counsel begins. By delaying the indictment or information, the prosecutor could prolong the period in which he may lawfully interrogate the suspect without counsel under the sixth amendment.

The speedy trial provision of the sixth amendment applies only to the lapse of time after indictment. However, in United States v. Lovasco, the Supreme Court acknowledged that the due process clause prohibits a prejudicial delay in bringing an indictment because the practice deviates from standards of "fair play and decency." The Court recognized that prejudice to the defendant caused by the prosecutor's delay to gain a tactical advantage violates the due process clause. Any interrogation by a prosecutor violative of a witness' rights before indictment or information will similarly give the prosecutor a tactical advantage that will prejudice the witness because vital information that is given, even if suppressed, will cause irreparable damage. However, the routine reversal of any conviction following the obtaining of information through a pre-indictment prosecutorial interrogation seems unnecessarily harsh. A less


Brady v. Maryland, 373 U.S. 83, 87 (1963). In Brady the suppression of evidence favorable to an accused who had requested it was held to violate due process by preventing a fair trial. Brady, however, is merely one in a long line of cases using the due process clause to insure fair trials. See, e.g., Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213 (1942).

Brady v. Maryland, 373 U.S. at 87. See text accompanying notes 28 & 32 supra.

Many Supreme Court decisions have acknowledged that the protection of rights at trial is an objective of the pretrial privilege against compulsory self-incrimination. See Miranda v. Arizona, 384 U.S. at 466 (citing In re Groban, 352 U.S. at 340-52 (Black, J., dissenting)); Comment, The Coerced Confession Cases in Search of a Rationale, 31 U. Chi. L. Rev. 313, 320 (1964); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L.J. 1000, 1048-51 (1964).


Id. at 789-90.

Id. at 795 n.17.

See text accompanying notes 28-29 & 89 supra.
drastic solution would permit pre-indictment prosecutorial interrogations if the suspect enjoyed the right to counsel. Such an approach would protect the interests of the suspect as well as promote the interests of efficient law enforcement by allowing prosecutors to use a valuable tool in the investigation of crime. In terms of "fundamental fairness," the right to counsel would protect the rights of the suspect while placing the least possible burden on the state.96

Extension of a per se rule requiring the right to counsel through the due process clause of the fourteenth amendment is not an unprecedented development. The right to counsel was extended on due process grounds to juvenile proceedings that could result in confinement in *In re Gault.*97 The holding in *Gault* was based on the realization that counsel is often indispensable to a fair hearing.98 The rationale for extension of the right to counsel to juvenile proceedings can also be applied to individuals compelled to answer a prosecutor's questions. Without counsel, an individual has virtually no protection from unfair proceedings; other than the suspect, no witnesses will be available to testify to any abuse except witnesses favorable to the prosecution. Information discovered through unfair proceedings would necessarily taint the trial even if it were not introduced as evidence.99 The irremediable prejudice that would result calls for a prophylactic measure to prevent violations of constitutional rights. A per se application of the right to counsel would prevent prosecutorial abuse and insure the fairness required by the due process clause.100 The prophylactic effect of a per se application of the right to counsel would remedy the inherent difficulty in having abusive practices exposed101 as

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96 The fundamental unfairness of a prosecutor's attempt to restrict a defendant's right to appeal is analogous to the lack of fundamental fairness when a suspect does not have the right to counsel when interrogated by a prosecutor. In *Blackledge* v. *Perry,* 417 U.S. 21 (1974), the Supreme Court used the due process clause to prohibit a prosecutor from raising a criminal charge against an individual from a misdemeanor to a felony in retaliation for appealing conviction on the misdemeanor. *Id.* at 22-23, 28-29. *Blackledge* is applicable to prosecutorial interrogations because in both cases the prosecutor may attempt to prevent an individual from fully utilizing the means available to protect himself from criminal charges. In *Blackledge* the prosecutor attempted to chill the use of the appellate process, while in a prosecutorial interrogation the prosecutor might prevent the use of counsel. In fact, the argument for due process protection of the right to counsel for prosecutorial questioning is even stronger than for the appellate process because the prosecutor can eliminate the use of counsel in the critical period of interrogation. In *Blackledge* the individual was able to appeal the case, and was penalized only afterwards. *Id.*

97 387 U.S. 1, 41 (1967).

98 *Id.* at 40 (quoting N.Y. Fam. Ct. Act § 241 (McKinney 1962) (amended 1970)).

99 See text accompanying notes 28-29 & 89 supra.

100 The Supreme Court has used the due process clause to justify prophylactic measures against unfairness on many other occasions. See, *e.g.*, North Carolina v. *Pearce,* 395 U.S. 711 (1969) (due process prohibits judge from imposing greater sentence in retaliation for successful appeal); *Irvin* v. *Dowd,* 366 U.S. 717 (1961) (due process requires that jurors be impartial and disinterested to insure fair trial).

101 See text accompanying note 83 supra.
well as decrease the need for adjudication of complaints of prosecutorial abuse. 102

The fundamental fairness guaranteed by the due process clause of the fourteenth amendment requires that a per se application of the right to counsel be extended to individuals who are questioned at prosecutorial interrogations. Such an extension of the right to counsel is consistent with the Supreme Court's historical use of such a right as a means to insure fair proceedings. A per se application of the right to counsel would act not only as a remedy to the problem of prosecutorial abuse, but also as a deterrent to future abuse.

CONCLUSION

The fifth amendment, as interpreted and implemented by Miranda, and the due process clause of the fourteenth amendment should be interpreted to provide a right to counsel to a witness at a prosecutorial interrogation. Grand jury right-to-counsel cases are not applicable to prosecutorial investigations. Distinctions between the general rule for the right to counsel in administrative investigations and cases leading to criminal prosecution support the argument for a right to counsel for individuals subjected to prosecutorial interrogations. The similarities between prosecutorial and police interrogations require the application of the Miranda right to counsel to protect individuals questioned by prosecutors from possible abuse. The fundamental fairness standard of the due process clause of the fourteenth amendment also provides a basis for a per se application of the right to counsel at prosecutorial interrogations.

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102 Case-by-case adjudication of prosecutorial abuse would encourage an increased number of complaints because that would be the only way to redress abuse. The ability of the prosecutor to intimidate witnesses, however, may diminish the effect of this encouragement. A per se application of the right to counsel would diminish rather than increase the need for litigation of prosecutorial abuse cases.