People v. Bing: Did the New York Court of Appeals Throw Baby Bartolomeo Out with His Bathwater?

Charles J. Sullivan

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol40/iss3/5
COMMENTS

People v. Bing: Did the New York Court of Appeals Throw Baby Bartolomeo Out With His Bathwater?

CHARLES J. SULLIVAN*

Introduction ................................................... 836
I. Bing's Backdrop: The Federal Context ...................... 840
   A. Constitutional Admissibility of Statements Evidence ... 840
   B. Conflicting Rationales ..................................... 845
      1. Rights of Exclusion vs. Exclusionary Rules ........ 845
      2. Traditional Bases for Excluding Evidence .......... 848
      3. Evidentiary Exclusion Under the Sixth Amendment .... 849
II. New York's Version of the Right to Counsel .................... 850
    A. Critical Stages Approach .................................. 851
    B. The "Once an Attorney" Cases ......................... 852
       1. Development of the Doctrine ......................... 852
       2. The Road Not Taken .................................... 854
       3. Donovan & Arthur Revived ........................ 855
       4. Prior Representation Corollary to the "Once an Attorney" Rule ......................... 856
          a. People v. Rogers ................................ 856
          b. People v. Bartolomeo ............................ 858
III. The Masquerade: People v. Bing ........................... 860
    A. The Case .................................................... 860
    B. Bartolomeo Gets Thrown Out with His Bathwater ...... 862
    C. Right of Exclusion vs. Exclusionary Rule: Bing Tips the Scales ................................. 864
    D. Stare Decisis? .............................................. 865

* J.D., SUNY at Buffalo School of Law, May 1992. The author would like to thank Professor Palmer Singleton for his advice and guidance.
Conclusion .................................................................................................................. 868

INTRODUCTION

Even before the Supreme Court’s landmark decisions in Massiah v. United States,1 Escobedo v. Illinois,2 and Miranda v. Arizona,3 the New York Court of Appeals recognized that an accused person needs the protective assistance of an attorney prior to the beginning of his trial, not merely during it.4 In its 1960 People v. Di Biasi opinion, the Court of Appeals abandoned the prevailing federal court notion5 that the Due Process Clause of the Fourteenth Amendment, standing alone, offered adequate protection against convictions based on confessions illicitly obtained from suspects.6 In contrast, the Di Biasi court focused on the coerced confession problem by broadening the scope of an accused’s right

1. 377 U.S. 201 (1964). Massiah was the first case in which a majority of the Supreme Court recognized that the right to counsel guaranteed by the Sixth Amendment extended to pre-trial encounters between defendants and police, and that violations of that right would give rise to exclusion of evidence obtained during counsel’s absence. Id. at 206. Prior to Massiah, the Court chose to evaluate such encounters only in terms of whether the police used coercion to obtain evidence, especially incriminating statements, from defendants. See infra text accompanying note 41.

2. 378 U.S. 478 (1964). The Court had determined in the Massiah decision that a defendant has a right to counsel following his indictment. Massiah, 377 U.S. at 205-06. In Escobedo, the court broadened this protection to any situation where “the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . .” Escobedo, 378 U.S. at 491.

3. 384 U.S. 436 (1966). In Miranda, the Supreme Court implemented procedural safeguards to protect a suspect’s privilege against self-incrimination. Miranda requires that prior to questioning a suspect, police must inform the individual that (a) he has the right to remain silent, that anything the suspect says can be used against him in court; and (b) that he has the right to have an attorney present, and if he cannot afford one, an attorney will be provided for him. Id. at 444.

4. People v. Di Biasi, 166 N.E.2d 825 (N.Y. 1960). The Di Biasi court found that the questioning of an indicted defendant by the prosecution in the absence of defense counsel “was a violation of [a] defendant’s constitutional rights and that the admission in evidence, over objection, of his admissions made during that questioning after indictment and surrender for arraignment was so gross an error as to require reversal . . . .” Id. at 828. Although the Di Biasi court did not articulate which of Di Biasi’s constitutional guarantees had been violated, the majority relied upon dissenting opinions from the Supreme Court decision in Spano v. New York, 360 U.S. 315 (1959), which advocated the recognition of a defendant’s right to counsel prior to trial. See infra note 7 and accompanying text. In so doing, the Di Biasi court articulated a constitutional right that the majority of the Supreme Court did not recognize until 1964 when Massiah was decided.


6. Di Biasi, 166 N.E.2d at 827-28. Di Biasi had made incriminating statements to the police during a custodial interrogation that took place after he was indicted. The Di Biasi court chose not to examine the “totality of the circumstances” to determine whether the statements were voluntarily given (as the U.S. Supreme Court would have done at the time, see Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960)), but rather chose to reverse Di Biasi’s
to counsel, which previously had been held sacrosanct only once the trial had begun.\textsuperscript{7} Affording a suspect the right to have his or her attorney present during custodial interrogation was seen by the court as the most effective means of insuring that an accused would not knuckle under the coercive power of the State.\textsuperscript{8} \textit{Di Biasi} sent a direct message to police and trial courts concerning the permissible limits of obtaining statements. It took four more years for the U.S. Supreme Court to enunciate such a bright-line rule.\textsuperscript{9}

The New York Court of Appeals' progressive recognition of the pretrial right to counsel, and its later trend of incrementally broadening its construction of Article I, Section 6 of the New York Constitution,\textsuperscript{10} earned the Court of Appeals the reputation of being a greater protector of the rights of criminally accused persons than any other state appellate court in the nation.\textsuperscript{11} For three decades, the highest court of New York exceeded federal court standards for gauging Fifth and Sixth amendment rights,\textsuperscript{12} basing its decisions on the Federal Constitution,\textsuperscript{13} its state coun-

---

\textsuperscript{7} People v. Spano, 150 N.E.2d 226 (N.C. 1958), \textit{rev'd}, 360 U.S. 315 (1959) While the majority opinion in \textit{People v. Spano} stands for the proposition that the absolute right to counsel does not attach before trial, it is ironic to note that the rationale for holding that the right to counsel attaches at a critical stage prior to trial arose from its appeal to the Supreme Court in the concurring opinions. \textit{Spano v. New York}, 360 U.S. 315, 324, 326 (1959) (Douglas, Black, Brennan, and Stewart, JJ., concurring).

\textsuperscript{8} \textit{Di Biasi}, 166 N.E.2d at 828. In \textit{People v. Settles}, the court pointed out that, [I]n this State, the right of a criminal defendant to interpose an attorney between himself and the sometimes awesome power of the sovereign has long been a cherished principle. As early as 1777 (N.Y. Const. of 1777, art. XXXIV), it had been recognized that even the most intelligent and educated layman lacks the skill and knowledge of the legal system to adequately prepare a defense . . . . \textit{People v. Settles}, 385 N.E.2d 612, 614 (N.Y. 1978).

\textsuperscript{9} \textit{Massiah}, 377 U.S. 201 (1964).

\textsuperscript{10} Independent of the United States Constitution, Article I, Section 6 of the New York State Constitution guarantees the right to counsel in criminal proceedings. It provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . ." N.Y. CONST. art. I, § 6.


\textsuperscript{12} People v. Di Biasi, 166 N.E.2d 825 (N.Y. 1960). In \textit{Di Biasi}, the court went beyond Supreme Court mandates, holding that the right to counsel attaches when formal proceedings are commenced, not just at trial. 166 N.E.2d at 828. It has been widely recognized that a particular state may require more stringent constitutional protections than the Supreme Court mandates. \textit{See, e.g.}, \textit{Oregon v. Hass}, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting) ("It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum.").

\textsuperscript{13} The Fifth Amendment to the United States Constitution guarantees that no person "[s]hall
terpart, and New York common law. However, a gloomy shadow of doubt was cast upon the New York Court of Appeals' long-standing defendant-oriented posture during its 1990 "July decision days." According to many authors and judges, New York's progressive right to counsel reached its pinnacle in the 1981 decision of People v. Bartolomeo. On May 27, 1978, Bartolomeo was arrested by officers of the Suffolk County Police Department and arraigned on a charge of arson. He was represented by an attorney at the arraignment, who arranged for Bartolomeo to be released on bail. Thereafter, on June 5, 1978, he was apprehended by officers of the same department and questioned about his suspected involvement in a murder that was then under investigation. Although the police knew about Bartolomeo's May 27 arrest, they claimed no knowledge that he was represented on that charge, and neither the police nor Bartolomeo made any effort to contact his attorney. Bartolomeo waived his right to have his attorney present during the interrogation and made several statements which implicated himself in the murder. In ordering exclusion of Bartolomeo's confession, the Court of Appeals held that if a criminal defendant is represented by counsel on a prior pending charge, the police are precluded from interrogating him on the new charge unless his attorney is present, and he can only waive his right to counsel if his attorney is present. Bartolomeo also placed an affirmative duty upon the interrogating officers to inquire whether defendant was represented by an attorney, and thus extended the duty imposed by Rogers by making the police chargeable with what a reasonable inquiry would have disclosed. See infra notes 163-78 and accompanying text.

16. Traditionally, the Court of Appeals attempts to issue opinions in all cases which have been argued earlier in the year in July. N.Y. L.J., Aug. 28, 1990, at 3.
17. See, e.g., Zverins, supra note 11, at 365: "This decision [Bartolomeo] represents the broadest interpretation of the pre-trial right to counsel in the progression of New York case law in this area."
19. 423 N.E.2d 371 (N.Y. 1981), overruled by People v. Bing, 558 N.E.2d 1011 (N.Y. 1990). Bartolomeo placed an affirmative duty upon police officers to inquire whether defendant was represented by an attorney, and thus extended the duty imposed by Rogers by making the police chargeable with what a reasonable inquiry would have disclosed. See infra notes 163-78 and accompanying text.
20. 423 N.E.2d at 374.
21. Id.
22. Id.
23. Id.
24. Id. at 374-75.
to discover if the suspect was represented on a prior pending charge. The July 2, 1990, decision of the Court of Appeals in People v. Bing, however, abandoned the far-reaching mandate of Bartolomeo and may have marked the beginning of the end for a thirty-year-old tradition in New York criminal procedure law.

This Note critiques the analysis of the recent Bing decision, showing that Bartolomeo was not an unjustified departure from precedent as the Bing court explained, but rather a reasoned application of then-existing law and a logical progression from the prior caselaw which the Bing court professes to have left untouched. Since in the areas of Fourth, Fifth, and Sixth Amendment jurisprudence, no state court may ultimately "sink any lower" than the Supreme Court will permit, the discussion will begin by outlining the current federal Sixth Amendment right to counsel and the debates relevant to that inquiry. After tracing the development of New York law which led up to Bing, this Note argues that the Bing opinion is either a mistake, perhaps a result of pressure placed on the court from increased crime rates and the war on drugs, or a masquerade which cloaks a substantial change in the New York court's

---

25. Id.
27. The Bing court expressly overruled Bartolomeo, claiming that the earlier ruling was unworkable and created "an unacceptable obstruction to law enforcement . . . ." Id. at 1014, 1020.
28. Id. at 1022.
29. Id.
30. While state courts are permitted to provide criminal defendants with greater protection than guaranteed by federal law, see generally Galie, supra note 5, defendants in state prosecutions are guaranteed at least those protections recognized by the Supreme Court under the United States Constitution. Federal constitutional guarantees are incorporated through the Fourteenth Amendment and thus apply to state action. Michael E. Lubowitz, Note, The Right to Counsel & Choice After Wheat v. United States: Whose Choice is it?, 39 AM. U. L. REV. 437, 440 (1991). See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment violations found to give rise to exclusion of evidence in state courts, as well as federal, by way of incorporation of Fourth Amendment into the Fourteenth).
31. This analysis focuses upon federal Sixth Amendment guarantees because Article I, Section 6 of the New York Constitution, upon which the New York cases cited herein are based, is analogous to the Sixth Amendment. See N.Y. CONST. art. I, § 6 (1992); U.S. CONST. amend. VI.
32. Throughout the Bing opinion, the court indicates that the Bartolomeo decision upset the balance between a criminal defendant's rights and the State's interest in efficient law enforcement by "impos[ing] an unacceptable burden upon law enforcement." Bing, 558 N.E.2d at 1014. The Bing court noted that in "decisions after Bartolomeo," it had made efforts to "balance the benefits of evenhanded administration of the criminal law with the cost the rule exacted from effective law enforcement." Id. at 1017. See Abraham Abramovsky, The Right to Counsel: Part III, N.Y. L.J., Nov. 14, 1990, at 3 (the author characterizes the overruling of Bartolomeo as the court's response to increased drug use and violence in society).
political posture and abandons principles of stare decisis and institutional integrity. Bing distorts precedent and characterizes previously recognized fundamental state constitutional rights as “unworkable” procedures. By failing to clearly define its parameters, the decision has left New York right-to-counsel law in a state of flux. It is likely that Bing marks the prelude of a general change in the Court of Appeals’ orientation toward criminal defendants.

I. Bing’s Backdrop: The Federal Context

A. Constitutional Admissibility of Statements Evidence

The Supreme Court for many years has refused to base criminal convictions upon incriminating statements extracted involuntarily from defendants. Such “coerced confessions” traditionally have been excluded from trial because they are inherently unreliable and their use violates fundamental concepts of fairness and judicial integrity. It was not until 1964, however, that the Warren Court began enunciating bright-line rules based on the Sixth Amendment right to counsel, and later on the Fifth Amendment privilege against self-incrimination, which would govern custodial interrogations. Prior to this extension of the Sixth Amendment right to pre-trial questioning, the Supreme Court relied on the Fourteenth Amendment Due Process “coerced confession” doctrine to exclude statements which were impermissibly obtained. This doctrine called upon appellate courts to reexamine the facts of individual cases to determine whether a given defendant’s statements should have been admitted at his trial. Under this doctrine, appellate courts would sit in de novo review of the trial court’s decision to determine if, as a matter of law, (a) the confession in question was voluntarily given, and

33. In her dissent, Judge Kaye argued “[t]hat there are now four votes for those same [policy considerations rejected by the Bartolomeo court] is, of course, not a valid reason to overrule the case.” Bing, 558 N.E.2d at 1028.
34. See infra Part III.D.
35. See infra Part III.D.
36. Bing, 558 N.E.2d at 1022.
37. Bram v. United States, 168 U.S. 532 (1897) (holding that confessions obtained through threats or promises could not be used against a defendant at trial).
(b) whether the police behavior was inherently coercive. If a defendant made inculpatory statements under circumstances which showed coerciveness or generally indicated that the statements were not voluntarily given, those infected statements would be excluded from his trial. Although in the context of police interrogations the Court recognized the importance of counsel's presence as a safeguard against police and prosecutorial overreaching, whether counsel was present during an interrogation still was merely a factor in the "totality of the circumstances" surrounding a confession. The "voluntariness" test was inadequate as a standard governing the admissibility of statements evidence because: (1) the test required appellate review of countless cases; "voluntariness" proved to be a vague and elusive concept; and (3) it provided little guidance to police and trial courts concerning the permissible limits of questioning. The Court attempted to correct these problems, at least in federal prosecutions, by highlighting factors which would raise a presumption of involuntariness. In McNabb v. United States, and in Mallory v. United States, the Court held that long periods of detention prior to arraignment were grounds for excluding statements obtained during the detention. These holdings were not the kind of "bright-line rule" which many scholars argued was necessary to ensure proper police con-

43. Martin R. Gardner, The Emerging Good Faith Exception to the Miranda Rule — A Critique, 35 Hastings L.J. 429, 445-46 (1984). See Brown v. Mississippi, 297 U.S. 278 (1936). In Brown, a case of first impression involving the issue of a State coerced confession, the defendants had been badly beaten and were forced to sign the confessions that the police dictated to them. Id. at 281-82. See also Ashcraft v. Tennessee, 322 U.S. 143 (1944) (defendant's confession rendered inadmissible where police behavior other than physical brutality was found to be unduly coercive). The rationale for exclusion in such cases was twofold: (a) such coercion runs counter to fundamental ideas of justice, id. at 154-55; Spano v. New York, 360 U.S. 315, 320 (1959); and (b) such coercion increases the likelihood that the evidence will be unreliable. Stone v. Powell, 428 U.S. 465, 496-97 (1976) (Burger, C.J., concurring).

44. See Brown, 297 U.S. at 266. The court stated, "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id.

45. Kamisar et al., supra note 41, at 525.

46. See Kamisar et al., supra note 38, at 427.

47. See id. at 425-28. See also Yale Kamisar, What is an "Involuntary" Confession? in Police Interrogation and Confessions 1-26 (1980).

48. Kamisar et al., supra note 38, at 426.


To achieve that goal, the proper solution seemed to be the guidance and watchful eye of the defendant's attorney.

The evolution to a Sixth Amendment-based pre-trial right to counsel emerged in a series of cases beginning in 1958 with *Crooker v. California*.\(^\text{52}\) Crooker, who was a law student and fully understood his right to remain silent during interrogation, confessed to the murder of his lover. During the interrogation, he demanded, and was refused, an opportunity to speak with his lawyer.\(^\text{53}\) Although conceding that his confession was voluntary under traditional Due Process standards, Crooker contended that the failure of the police to allow him to confer with his attorney, and to cease questioning him after he made the request was a violation of his Due Process right to legal representation. The majority in *Crooker* summarily rejected this argument, finding that such an outcome "would have [a] devastating effect on the enforcement of criminal law, for it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney."\(^\text{54}\)

Justice Douglas's dissent, however, set the stage for the decisions which would follow.\(^\text{55}\) He argued that "[t]he right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself."\(^\text{56}\) One year later, in *Spano v. New York*,\(^\text{57}\) although still framing the exclusion in Due Process terms, the Court implied that once a person was formally charged by indictment or information, his constitutional right to counsel had "begun."\(^\text{58}\) Concurring Justices Douglas and Stewart indicated that the right to counsel after being charged was part and parcel of the defendant's Sixth Amendment right; denying the right prior to trial would allow the police and prosecution to effectively circumvent counsel's assistance at trial.\(^\text{59}\)

In the landmark case of *Massiah v. United States*,\(^\text{60}\) the Court finally recognized a Sixth Amendment right to counsel during interrogation.\(^\text{61}\)


\(^{53}\) *Crooker*, 357 U.S. at 434.

\(^{54}\) Id. at 441.

\(^{55}\) See Kamisar et al., *supra* note 41, at 526-27.

\(^{56}\) *Crooker*, 357 U.S. at 443 (Douglas, J., dissenting).


\(^{58}\) See id.; Kamisar et al., *supra* note 41, at 526.

\(^{59}\) *Spano*, 360 U.S. at 324-27 (Douglas & Stewart, JJ., concurring).

\(^{60}\) 377 U.S. 201 (1964).

\(^{61}\) Id. at 205-06.
Massiah, who had been arrested on federal narcotics charges, retained an attorney, pled not guilty to the indictment, and was released on bail. Colson, a codefendant, had agreed to aid the prosecution in secretly soliciting incriminating evidence from Massiah. Massiah met Colson in Colson's car and discussed the drug transaction for which the two had been arrested. Unbeknownst to Massiah, a radio transmitter had been placed under the seat in Colson's car to allow a nearby agent to listen to their conversation. Massiah made several incriminating statements which were later used against him at his trial. The Court held that the district court's failure to exclude these statements was a violation of Massiah's Sixth Amendment right to counsel.

In the same year that Massiah was decided, the Court rendered its opinion in Escobedo v. Illinois, and thereby solidified a concept which merely had been an assumption in Massiah: counsel can play a vital role in pre-trial interrogation settings. Escobedo was taken into custody for questioning concerning the killing of his brother-in-law. He made no statements and was released on a writ of habeas corpus secured by his lawyer. Di Gerlando, who was later charged for involvement in the murder, made statements implicating Escobedo. The Court found that this denial of the assistance of counsel warranted

---

62. Id. at 202.
63. Id. at 202-03.
64. Id.
65. Id. at 203.
66. The Court stated:

[T]he petitioner was denied the basic protections of that guarantee [of Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Id. at 206.
69. Escobedo, 378 U.S. at 484-85. The pre-trial right to counsel is, in part, considered ancillary to a defendant's right to counsel at trial, since the right to counsel at trial may be greatly devalued if the government could circumvent Sixth Amendment protections through uncounseled exchanges prior to trial. See James J. Tomkovicz, The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications, 67 N.C. L. REV. 751, 754-55 (1989).
70. Escobedo, 378 U.S. at 479.
71. Id.
72. Id. at 479-80.
the suppression of his murder confession.\textsuperscript{73} Although the scope and meaning of the \textit{Escobedo} decision was not completely clear, it did articulate a Sixth Amendment right to counsel at a "critical stage" prior to trial.\textsuperscript{74} \textit{Escobedo} focused not upon the commencement of formal proceedings, but on the nature of the investigation and interrogation conducted by the police:

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime." Petitioner had become the accused, and the purpose of the interrogation was to "get him" to confess his guilt despite his constitutional right not to do so.\textsuperscript{75}

The \textit{Escobedo} decision seemed to break down the distinction between judicial and extrajudicial settings and extend Sixth Amendment guarantees to the latter. However, less than two years later, the \textit{Miranda} Court's Fifth Amendment "privilege against self-incrimination" overshadowed \textit{Escobedo} and left determination of how broad the Sixth Amendment right to counsel would become for a later generation.\textsuperscript{76}

\textsuperscript{73} Id., 378 U.S. at 490-91. In reaching its decision, the Court claimed:

The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticality of that stage to the accused in his need for legal advice.

\textit{Id.} at 488 (citations omitted) (quoting \textit{Massiah v. United States}, 377 U.S. 201, 204 (1963)).

\textsuperscript{74} \textsc{Kaminsar et al.}, \textit{supra} note 41, at 531-32. Actually, the \textit{Escobedo} majority focused not upon the fact that a particular point in the proceeding had been reached, but rather that the investigation had focused upon a single suspect in custody who had demanded to speak with his lawyer. 378 U.S. at 490-91. The "critical stage" referred to was later held to be the commencement of formal proceedings; i.e., indictment or arraignment. \textit{Kirby v. Illinois}, 406 U.S. 682, 689-90 (1972). Relying on precedent, the \textit{Kirby} Court reasoned that the "right to counsel attaches only at or after the time that judicial proceedings have been initiated against [the defendant] . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." \textit{Id.} at 688-89 (citing \textit{Powell v. Alabama}, 287 U.S. 45 (1932); \textit{Johnson v. Zerbst}, 304 U.S. 458 (1938); \textit{Hamilton v. Alabama}, 368 U.S. 52 (1961); \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963); \textit{White v. Maryland}, 373 U.S. 59 (1963); \textit{Massiah v. United States}, 377 U.S. 201 (1964); \textit{United States v. Wade}, 388 U.S. 218 (1967); \textit{Gilbert v. California}, 388 U.S. 263 (1967); \textit{Coleman v. Alabama}, 399 U.S. 1 (1970)).

\textsuperscript{75} \textit{Escobedo}, 378 U.S. at 485 (citations omitted) (citing \textit{Spano v. New York}, 360 U.S. 315, 317 (1959)).

\textsuperscript{76} \textsc{Tomkovicz}, \textit{supra} note 68, at 14-15. In \textit{Miranda} the Supreme Court articulated a rule stating that all criminal defendants in custodial interrogation settings are entitled to have an attorney present during questioning, and that they must be informed of that fact. \textit{Miranda v. Arizona}, 384 U.S. 436, 471 (1966). This guarantee of counsel had nothing to do with the substantive grant of the right to counsel in the Sixth Amendment, but was intended as a safeguard against self-incrimination...
It was not until the Court's decision in Brewer v. Williams\textsuperscript{77} that Massiah and Escobedo were revitalized. Defendant Williams was arrested in Davenport, Iowa, in connection with the abduction and disappearance of a ten-year-old girl, 160 miles away in Des Moines.\textsuperscript{78} Williams had contacted a lawyer in Des Moines who advised him to turn himself in to the Davenport police.\textsuperscript{79} Williams' attorney, who had arranged for the Des Moines police to go to Davenport to retrieve him after his arraignment in that city, instructed the police that they were not to interrogate Williams before he had a chance to speak with him, and advised Williams of the same.\textsuperscript{80} Despite this warning, the officer who transported Williams was able to convince him to reveal the location of the abducted girl's body before they returned to Des Moines.\textsuperscript{81} The Supreme Court found his admission inadmissible because, under the circumstances he had been denied his Sixth Amendment right to counsel after formal judicial proceedings had been commenced against him.\textsuperscript{82} The Court's decision in Brewer v. Williams indicated that it was still (or perhaps once again) willing to recognize a substantive Sixth Amendment right to counsel prior to trial. Subsequent decisions have upheld the vigor of the Sixth Amendment Massiah-Escobedo doctrine.\textsuperscript{83}

B. Conflicting Rationales

1. Rights of Exclusion vs. Exclusionary Rules. The guarantees of the Fourth, Fifth, and Sixth Amendments dictate how states should act when attempting to obtain a conviction of a criminal defendant.\textsuperscript{84} However, nothing in those amendments indicates what will happen if the state

\textsuperscript{77} 430 U.S. 387 (1977).
\textsuperscript{78} Id. at 390.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 391.
\textsuperscript{81} Id. at 392-93.
\textsuperscript{82} Id. at 397.
\textsuperscript{84} I narrow the discussion of constitutional guarantees to those which may give rise to evidentiary exclusion of statements: (1) the Fourth Amendment prohibition against unlawful search and seizure, (2) the Fifth Amendment privilege against self-incrimination, and (3) the Sixth Amendment right to counsel.
steps outside of the boundaries the amendments create. There is no remedy articulated in the Constitution for violations of its guarantees. In the context of criminal prosecutions, the Supreme Court has found that the only plausible means of remedying a violation of a person's Fourth, Fifth, or Sixth Amendment rights is to exclude evidence obtained in violation of those rights from his or her trial. To use such evidence would create an unjust distinction between persons accused of crimes and those not accused of crimes, and would undermine the meaning of those guarantees.

Evidentiary exclusion is also employed by courts when police or prosecutors violate court-created "prophylactic rules." provides the clearest example of such a rule. Before police may interrogate a suspect, requires that they must inform the suspect of his or her privilege against self-incrimination and the right to have an attorney present during questioning. This notice is not a constitutionally protected right. It is a rule fashioned by the Supreme Court to afford people a realistic opportunity to exercise their constitutional right to remain silent. itself does not articulate constitutionally granted rights, yet evidence obtained in violation of is also excluded from a defendant's trial.

Although not all recognized "constitutional rights" are enumerated in the United States Constitution, there are certain interests that the Constitution itself singles out for protection against encroachment.

85. The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. CONST. amend. IV.

86. The Fifth Amendment prohibits compulsory self-incrimination: "nor shall [any person] be compelled in any criminal case to be a witness against himself ...." U.S. CONST. amend. V.

87. It is a fundamental principle of our legal system that all defendants are considered innocent until proven guilty; this implies that we have the same rights as accused citizens that we do as unaccused citizens. To allow prosecutors to use evidence merely because the State has obtained control over that evidence (albeit through unlawful means) would seem to create an unjust distinction between the rights of every citizen and the rights of the accused.

88. requires that they must inform the suspect of his or her privilege against self-incrimination and the right to have an attorney present during questioning. This notice is not a constitutionally protected right. is a rule fashioned by the Supreme Court to afford people a realistic opportunity to exercise their constitutional right to remain silent. itself does not articulate constitutionally granted rights, yet evidence obtained in violation of is also excluded from a defendant's trial.

89. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961). , a Fourth Amendment case, provides an excellent example of the rationale behind applying rules of evidentiary exclusion to state court prosecutions.


91. For example, the Sixth Amendment mandates that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI (emphasis added).
Courts are duty-bound to protect these rights against abridgement. Once an interest of any kind has been labelled part of a constitutionally enumerated right, that interest may not be abrogated unless there is a proven, compelling government interest. In contrast, there are lesser interests or guarantees which courts also recognize, such as the prophylactic safeguards introduced by *Miranda*. A prophylactic rule is merely a protection aimed at some narrow goal, usually the indirect protection of a constitutional right or deterrence of police misconduct, and may be changed or eliminated by courts as easily as it is created. Therefore, for courts to retreat from the level of protection ensured by prior case law, they must characterize the protection as something *less* than a constitutional right (e.g., a prophylactic rule).

The foregoing suggests that two means may be utilized by prosecution-oriented judges to erode what are truly constitutional guarantees. If the protection underlying the exclusion is not deemed a constitutional right, it is quite easy to argue that such an exclusion should not be granted in a particular case by either attacking the rule itself or by claiming that the rule was not meant to apply to the particular facts of a case. If, however, the protection underlying the exclusion is a constitutionally granted right, it may be attacked by severing the remedy of exclusion from the right itself, and arguing that the exclusion is a court-created rule intended to serve a goal not relevant to the particular facts of a case. In either case, the formula is the same: (1) characterize the benefit which the court is denying as a court-created rule rather than a constitutional right; then (2) argue that either (a) the narrow goals of the rule would not be served if it were applied to the facts before the court, or

---

92. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *Griswold* offers a good discussion of certain recognized peripheral rights, justified by the Constitution or the Bill of Rights, which fall within the "penumbras" of particular guarantees enumerated in the Constitution. *Id.* An example of a penumbral right is the freedom of association derived from the express First Amendment freedoms of speech and assembly. *See* NAACP v. Alabama, 357 U.S. 449 (1958). To the extent that penumbral rights are related to enumerated rights, the Supreme Court has barred any attempt to erode them. *See Griswold*, 381 U.S. at 484-86. By implication, therefore, those rights which are expressly provided for are offered absolute protection.


94. 384 U.S. at 436.


96. This is precisely the approach taken by the *Bing* court to strike down the *Bartolomeo* rule. The court characterized the *Bartolomeo* rule as an "unworkable" procedure rather than a substantive right to counsel. *People v. Bing*, 558 N.E.2d 1011, 1014 (N.Y. 1990). *See infra* Part III.A.

97. The Supreme Court majority in *Nix v. Williams*, 467 U.S. 431 (1984), was forced to use this approach to limit Sixth Amendment right to counsel protection, since *Massiah* had labelled the protection part of the defendant's Sixth Amendment right. *See infra* text accompanying note 110.
(b) since the rule itself does not protect the rights it intends to protect, it is therefore infirm and should be abandoned.

2. **Traditional Bases for Excluding Evidence.** The underlying rationale behind exclusion has been a more highly debated topic in Fourth and Fifth Amendment contexts than in the realm of Sixth Amendment right to counsel.\(^9\) Since evidentiary exclusion was introduced as a remedy for constitutional violations in the 1914 case of *Weeks v. United States*,\(^9\) a number of reasons have been advanced for excluding "fruits from the forbidden tree."\(^10\) The most compelling reason is that a criminal defendant has a substantive right not to be convicted at trial based upon incriminating evidence obtained only by breaching his constitutional rights.\(^10\) In other words, the "rights" guaranteed to criminal defendants under the Fourth, Fifth, and Sixth Amendments\(^10\) implicitly include the right to have unconstitutionally acquired evidence kept out of the courtroom.

Another important justification for excluding unlawfully obtained evidence is the assertion that it is necessary to maintain judicial integrity.\(^10\) As the Supreme Court recognized in *Mapp v. Ohio*:

"there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.\(^10\)

The Court has turned to a much less profound rationale in allowing exclusion, particularly in cases involving exclusion of evidence obtained in violation of the Fourth Amendment's ban against unreasonable searches and seizures. In this context, it has justified exclusion by claiming that the "exclusionary rule" deters the police from future transgressions.\(^10\) Assuming however, as the Court has, that exclusion is only warranted when the goal of deterrence is served, there may be many defendants who are subjected to egregious infractions of their constitutional

---

98. See *Kaminsar et al.*, supra note 41, at 39; Tomkovicz, supra note 68, at 752.
102. See supra note 85.
103. The *Weeks* Court stated that to allow the "tainted" evidence to be admitted at trial would involve the courts in the commission of a constitutional violation. 232 U.S. at 394.
guarantees, yet are denied the remedy of exclusion. In *Linkletter v. Walker*, for example, the Court refused to apply Fourth Amendment exclusion retroactively to a state prosecution which had arisen before Fourth Amendment exclusion was first applied to state cases. The court stated that such use would not serve to deter police from future acts.

3. **Evidentiary Exclusion under the Sixth Amendment.** Exclusion of evidence obtained through violations of the Sixth Amendment right to counsel presents a slightly different situation. The *Massiah* Court held that exclusion was necessary as part of the substantive guarantee of counsel, and was not merely a prophylactic safeguard against deprivations of counsel. Since that time, however, several Justices have argued that the Fourth Amendment deterrence rationale should be applied to evidentiary exclusion questions in right to counsel cases. This argument, which undercuts the concept of a Sixth Amendment right to pre-trial counsel, may have gained preeminence in the 1984 *Nix v. Williams* decision. The same Williams who came before the Court in *Brewer v. Williams*, challenged his second conviction which had been obtained despite the suppression of his incriminating statements. Williams argued that discovery of the body stemmed directly from the earlier violation of his Sixth Amendment rights, and that evidence obtained from that discovery should consequently be excluded. The Court, however, accepted the prosecution's contention that if the search had continued, the body inevitably would have been discovered. The Court maintained that it would recognize this inevitable discovery exception to exclusion, provided there was no evidence that the police acted in "bad faith." *Nix v. Williams* clearly indicates the modern Court's intention to abandon the Warren Court belief that *Massiah* and *Escobedo* repre-

106. 381 U.S. 618 (1965).
107. *Id.* at 637. The Supreme Court also disallowed exclusion when police acted with good faith belief that a warrant was valid. *United States v. Leon*, 468 U.S. 897 (1984).
112. At Williams's second trial, the prosecution was able to submit into evidence (a) the condition of the child's body as it was when it was found, (b) articles and photographs of her clothing, and (c) the results of the autopsy and other chemical tests performed on her body. *Nix v. Williams*, 467 U.S. at 437.
113. *Id.* at 437-38.
114. *Id.* at 445-46. This "good faith" exception first arose in the context of Fourth Amendment exclusion. *See* *United States v. Leon*, 468 U.S. 897 (1984).
sented broad constitutionally protected rights to counsel prior to trial. The \textit{Nix v. Williams} Court appears to have relegated Sixth Amendment evidentiary exclusion to the rank of a court created rule rather than part of a constitutionally enumerated right.

Deterrence as an underlying rationale for exclusion seems misplaced when one is considering a defendant's right to counsel in an adversary system of justice. If exclusion, as the remedy attendant to the right to counsel, is not considered to be an unseverable component of that Sixth Amendment right, then the right to counsel is meaningless. The Sixth Amendment guarantee of effective assistance of counsel contemplates a contest in which one player has a great advantage in nearly every aspect of the game.\textsuperscript{115} In the interests of fairness, justice and pursuit of the truth, our criminal justice system guarantees defendants the right to the knowledge, expertise, and savvy of an advocate who will stand up to the sometimes coercive power of the state.\textsuperscript{116} Viewing any portion of a defendant's entitlement to an attorney as anything less than a constitutionally protected right, therefore, undermines the integrity and effectiveness of our system of justice. As our focus turns to right-to-counsel law in New York, there are indications that the Court of Appeals, long revered as the great protector of defendant's rights, may also be straying down the wayward path of prophylactic exclusionary rules.

\section*{II. NEW YORK'S VERSION OF THE RIGHT TO COUNSEL}

The Court of Appeals has traditionally shown great reverence for the right to counsel, viewing it as the only way of maintaining rough equality between the accused and the law enforcement power of the sovereign.\textsuperscript{117} So much weight has been given to this right that in many situations, the court has not accepted purported waivers of the right, unless they were made while the accused's attorney was present.\textsuperscript{118} This protection acts to insure that such waivers are knowing, intelligent, and

\textsuperscript{115} See \textit{Escobedo}, 387 U.S. at 488-90 (recognizing that criminal defendants need the advice and assistance of counsel to combat the great tactical and procedural advantages held by police and prosecutors).

\textsuperscript{116} See \textit{People v. Donovan}, 193 N.E.2d 628, 629 (N.Y. 1963) ("It would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police."); \textit{Tomkovicz}, supra note 68, at 753. \textit{See also} \textit{People v. Di Biasi}, 166 N.E.2d 825, 828 (N.Y. 1960).

\textsuperscript{117} See \textit{People v. Cunningham}, 400 N.E.2d 360, 363 (N.Y. 1980).

\textsuperscript{118} See, e.g., \textit{People v. Donovan}, 193 N.E.2d 628 (N.Y. 1963) (holding defendant's written confession inadmissible where police refused to allow his attorney to speak to him).
voluntary.\footnote{People v. Hobson, 348 N.E.2d 894, 898 (N.Y. 1976).}

New York law regarding pre-trial right to counsel has developed along two distinct lines of cases.\footnote{See generally Abraham Abramovsky, The Right to Counsel: Part I, N.Y.L.J., Aug. 30, 1990, at 3.} One line parallels the reasoning of federal caselaw, holding that once a "critical stage" has been reached in the proceedings against a criminal defendant, the defendant’s right to counsel attaches.\footnote{See, e.g., People v. Di Biasi, 166 N.E.2d 825 (N.Y. 1990).} The other distinct group of cases holds that once an attorney has entered the proceeding, the defendant’s right to have counsel present during interrogation indelibly attaches, and the defendant may not intelligently waive his right to counsel unless the attorney is present at the time the defendant waives the right.\footnote{See infra notes 127-39.} Elements of both of these lines of precedent were instrumental to the holding in \textit{Bartolomeo}, as is discussed later.

A. \textbf{Critical Stages Approach}

New York first asserted its independent thinking regarding the right to counsel and privilege against self-incrimination cases in \textit{People v. Di Biasi}.\footnote{See infra notes 127-39.} In that case, the Court of Appeals chose not to follow the then-prevailing federal "coerced confession" doctrine.\footnote{Di Biasi, 166 N.E.2d 825 (N.Y. 1963).} Di Biasi, who had been indicted for first-degree murder, confessed to the police and the District Attorney during an interrogation while his attorney was absent. His confession was the primary evidence upon which he was later convicted. The court held that an absolute right to counsel attaches upon indictment and that refusing to allow a defendant to speak to his attorney at any time after indictment is a violation of his federal and state constitutional right to counsel.\footnote{See supra note 41 and accompanying text.} This "critical stage" threshold at which the right to counsel attaches has subsequently been moved to earlier stages in the criminal proceeding. For example, \textit{People v. Meyer}\footnote{182 N.E.2d 103 (N.Y. 1962).} established that the right attaches at arraignment, and \textit{People v. Samuels}\footnote{400 N.E.2d 1344 (N.Y. 1980).} moved the critical stage to the filing of a felony complaint.\footnote{See also N.Y. CRIM. PROC. LAW §§ 170.10 & 210.15 (McKinney 1984 & Supp. 1992). These sections guarantee a defendant the right to the assistance of counsel at all stages of the proceeding.}
B. The "Once an Attorney" Cases

1. Development of the Doctrine. It was not until the Court of Appeals delivered its decision in People v. Donovan\(^{129}\) that the critical distinction of New York law emerged. Donovan was taken into custody because of his suspected involvement in a robbery and murder and was questioned at length by both the police and the Queens County District Attorney.\(^{130}\) While Donovan was being questioned, his family retained an attorney for him.\(^{131}\) When the attorney went to the police precinct where Donovan was being held and demanded to see him, the police refused to allow him an opportunity to even confer with his client.\(^{132}\) At some point later, Donovan confessed to the robbery and murder, and was subsequently convicted of first-degree murder.\(^{133}\) The court found that the New York Constitution,\(^{134}\) as well as the New York Code of Criminal Procedure,\(^{135}\) required that Donovan's confession be excluded, even though he had not yet been formally charged.\(^{136}\) The Donovan court held that a confession obtained under circumstances such as these, where the accused has an attorney and is denied access to that attorney, "contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."\(^{137}\) The court's choice to base Donovan's right to speak to his attorney solely upon the New York Constitution and laws\(^{138}\) proved later to have profound effects

---

130. Id. at 629.
131. Id.
132. Id. at 630.
133. Id.
134. See supra note 10.
136. Donovan, 193 N.E.2d at 629.
137. Id. at 630 (emphasis added) (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)). Throughout the Donovan opinion, the court reinforces the entitlement to the assistance of counsel that it is recognizing as a right, including the right not to have confessions obtained "without the protection afforded by the presence of counsel" used against an accused at trial. Id. (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)).
138. The court stated:

   Since we have concluded that a confession obtained under the circumstances present here is inadmissible under New York law, we find it unnecessary to consider whether or not the Supreme Court of the United States would regard its use a violation of the defendant's rights under the Federal Constitution. In other words, we are of the opinion that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel, not to mention our own guarantee of due process, require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him.

   Id. at 629 (citations omitted) (emphasis added).
on the development of the right to counsel and the privilege against self-incrimination in New York. By divorcing its analysis from the constraints of U.S. Supreme Court decisions, the Court of Appeals set the foundation for the expansive right-to-counsel doctrine which emerged over the next three decades. Even Di Biasi, which showed the progressive tendencies of the high court of New York, did not go so far as to exclude the U.S. Constitution from the scope of its consideration. Just as significant, however, was the court's articulation of Donovan's entitlement to the assistance of counsel prior to trial as a right, not merely a prophylactic rule. As Judge Fuld stated:

Here we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also ... 'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'

*People v. Arthur* affirmed and extended the *Donovan* rule, requiring that:

Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.

*Arthur* presented an ongoing attorney-client relationship in which Arthur's attorney voluntarily went to the police station and demanded to see his client after learning of his arrest. After meeting with Arthur, the attorney told the police that his client was intoxicated and should not be subjected to further questioning. After Arthur's lawyer left, however, the police resumed questioning and obtained a confession.

*Arthur* was decided after the Supreme Court's decision in *Miranda v. Arizona*, yet the opinion seems to once again identify a distinct doctrine of New York law. It indicates that *Miranda* is a rule of protection while recognizing that New York caselaw approached the right to confer

---

139. *Id.* at 630 (citation omitted).
140. 239 N.E.2d 537 (N.Y. 1968).
141. *Id.* at 539 (citation omitted).
142. *Id.*
143. *Id.* at 538.
144. *Id.*
with counsel at an early stage as a *substantive right*, not merely a prophylactic measure intended to deter police misconduct. The *Donovan-Arthur* rule, or the "once an attorney" rule, greatly expanded a criminal defendant's pre-trial rights and provided room (in the form of unanswered questions) for continued growth. As the *Arthur* court stated, "[i]n enunciating the fundamental right of the accused to be represented by counsel, we painted with broad strokes." 

2. *The Road Not Taken.* By the time the Supreme Court reached its decision in *Miranda*, the New York Court of Appeals had surpassed the standards of most other states in the areas of right to counsel and privilege against self-incrimination. The volatility of the court's choice to go out on this constitutional limb was illustrated in a series of three cases that began with *People v. Robles* in 1970. In *Robles*, and then again in *People v. Lopez*, the court, in contrast to its previous decisions in *Donovan* and *Arthur*, failed to recognize as an indelible right the accused's right to have an attorney present when he formally waives his right to counsel. Instead, the court used the old "totality of the circumstances" review in each case to determine if the waivers of counsel and the resulting confessions were voluntarily given. What *Donovan* and *Arthur* had guaranteed as a right was now seen as a qualified protection

---

149. See Zverins, *supra* note 11, at 353.
150. 263 N.E.2d 304 (N.Y. 1970), overruled by *People v. Hobson*, 348 N.E.2d 894 (N.Y. 1976). In *Robles*, the defendant's attorney left the room in the police station where the defendant was being held, asking an officer to "watch" the defendant. While the attorney was gone, the officer solicited a confession from Robles. *Id.* at 304-05. The court held that since there was no evidence that the confession was not offered voluntarily, it was admissible. *Id.* at 305. The court tried to get around *Arthur* by stating that the rule was inapplicable unless there was evidence "which would indicate an intention to victimize a defendant or outwit his attorney in order to carry on an inquiry," and "[t]he assertion that once an attorney appears there can be no effective waiver unless made 'in the presence of the attorney' is merely a theoretical statement of the rule." *Id.* at 305. This opinion appears to have turned the court back to the old federal "voluntariness" standard, and while it did not expressly overrule *Arthur* or *Donovan*, it greatly limited and challenged the application of the "once an attorney" rule.
151. 268 N.E.2d 628 (N.Y. 1971), cert. denied, 404 U.S. 840 (1971), overruled by 348 N.E.2d 894 (N.Y. 1976). In *Lopez*, the court found a waiver of the defendant's right to counsel was valid, even though the waiver was obtained after indictment and at a time when the defendant had no counsel, as long as the waiver was made "knowingly and intelligently." *Id.* at 628-29. The third case in this series, *People v. Wooden*, 290 N.E.2d 436 (N.Y. 1972), cert. denied, 410 U.S. 987 (1983), followed the reasoning of *Lopez*.
to be applied only in certain situations.\footnote{153} This change in semantics is important because it is precisely the vehicle used later in Bing to erode the Donovan-Arthur family of rulings. However, the Court of Appeals overcame this temporary resurgence of the old voluntariness, or "coerced confession" standard, and set a clear objective for future decisions in People v. Hobson.\footnote{154}

3. Donovan & Arthur Revived. The Hobson court clearly restated what had been an accepted principle in New York law prior to 1970:

Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer . . . [any statements obtained after an impermissible waiver] are inadmissible.\footnote{155}

The police in Hobson knew that the defendant was represented by counsel, yet obtained a written waiver of his right to have his attorney present during interrogation.\footnote{156} The court found that the waiver was invalid, and that Hobson's statements were consequently inadmissible.\footnote{157} As in Donovan, the court articulated and sought to protect the right to counsel and the privilege against self-incrimination founded in the state constitution, over and above those required by the U.S. Constitution.\footnote{158}

While Hobson briefly regained the court's defendant-oriented posture, there are two alarming elements of this opinion which can be read to forecast the Bing decision and its potential aftermath. First, while the court shed the narrow vision of Arthur\footnote{159} upon which it had based the Robles decision, it retained Robles' vision of the right to counsel during pre-trial custodial interrogation as a prophylactic rule.\footnote{160} The second element is the seeming lack of consensus about the bases underlying the Hobson decision.\footnote{161} The importance of these points will be discussed

\footnotetext{153}{Id.}
\footnotetext{154}{348 N.E.2d 894 (N.Y. 1976).}
\footnotetext{155}{Id. at 896.}
\footnotetext{156}{Id.}
\footnotetext{157}{Id.}
\footnotetext{158}{Id. at 897-98.}
\footnotetext{159}{People v. Arthur, 239 N.E.2d 537 (N.Y. 1968).}
\footnotetext{160}{See supra text accompanying note 152. The Hobson court claimed, "[n]otwithstanding that warnings alone might suffice to protect the privilege against self incrimination [referring to Miranda warnings], the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel." 348 N.E.2d at 898.}
\footnotetext{161}{The Hobson majority opinion was written by Chief Judge Breitel, who had dissented from all three Robles decisions: People v. Robles, 263 N.E.2d 304 (N.Y. 1970); People v. Lopez, 268 N.E.2d 628 (N.Y. 1971); People v. Wooden, 290 N.E.2d 436 (N.Y. 1972). See also supra notes 117-18 and accompanying text. While no judges dissented, two judges wrote concurring opinions, indi-
below.

4. Prior Representation Corollary\textsuperscript{162} to the "Once an Attorney" Rule

a. People v. Rogers. Until its 1979 decision in \textit{People v. Rogers},\textsuperscript{163} the Court of Appeals expressly refused to extend the Donovan-Arthur rule to situations other than where the defendant is questioned by the police about the specific charges for which he is held. \textit{People v. Taylor}\textsuperscript{164} held that representation on a pending, unrelated charge did not qualify as counsel "entering the proceeding" for purposes of triggering the Donovan-Arthur rule, and therefore in such cases a suspect could waive her right to counsel in her attorney's absence.\textsuperscript{165} However, \textit{Rogers} extended the Donovan-Arthur ban on uncounseled waivers to include all situations in which the defendant is represented by an attorney on the charge for which he was taken into custody, and the police pursue a line of questioning that is unrelated to the matter for which he secured counsel.\textsuperscript{166} Rogers, arrested because of his alleged involvement in a robbery, informed the police that he was represented by an attorney, yet waived his right to have counsel present during his interrogation.\textsuperscript{167} After extensive questioning, Rogers' attorney contacted the police and instructed them to cease questioning him about the robbery.\textsuperscript{168} The police then continued to question Rogers (under a purported waiver of his right to counsel) about other unrelated incidents. At some point later, the defendant made a statement which indicated his involvement in the robbery.\textsuperscript{169} The Court of Appeals held that Rogers' statement was inadmissible because his right to counsel had indelibly attached, and he could only have waived that right if his attorney had been present.\textsuperscript{170}

Notably, the \textit{Rogers} court did not limit its decision to the narrow
facts before it, as the Bing court claimed, but instead expressed an intent to include all situations in which questioning is unrelated to the charges for which the suspect is represented. In defining the right to have the assistance of counsel during custodial interrogation, the Court of Appeals once again painted with broad strokes. Rogers, therefore, extended the Donovan-Arthur rule to exactly the situation that People v. Taylor had excepted—when a defendant is represented on a pending charge, has been released, and is subsequently apprehended and questioned on a new charge. The court's choice to expressly overrule Taylor, which excluded from the scope of the Donovan-Arthur rule the defendant who is represented on a prior unrelated charge, clearly indicates that the Rogers court intended its ruling to encompass the Taylor-like situation encountered in People v. Bartolomeo.

171. The Bing court claimed:
We emphasize in closing that although Rogers and Bartolomeo are frequently linked in legal literature and Rogers was the only case cited to support the new rule in Bartolomeo, the two holdings are quite different. In People v. Rogers, the right to counsel had been invoked on the charges on which defendant was taken into custody and he and his counsel clearly asserted it. To protect his rights, we established a bright-line rule preventing the police from questioning defendant about those charges or any other charges. In People v. Bartolomeo, however, defendant was taken into custody for questioning on a new, unrelated charge. He was not represented on that charge and freely waived his right to counsel.


172. Id. In Rogers, as in Arthur, the language of the court creates a very broad grant of the right to have counsel present during pre-trial procedures and requires the police to comply with the spirit of the rule, which protects defendants from the "[a]wesome and sometimes coercive power of the state." Rogers, 397 N.E.2d at 713. In interpreting the precedent upon which it based its rule, the Rogers court actually states that "[t]he common thread running through these holdings is the simple fact that defendant was represented by an attorney at the time of the interrogation." Id. The court's language, therefore, expressly included within the "once an attorney" rule all situations in which the defendant was, in fact, represented by an attorney. "Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence." Id.

173. People v. Taylor, 266 N.E.2d 630 (N.Y. 1971), excepted from the scope of the Donovan-Arthur rule the situation in which questioning was about charges unrelated to the one on which the defendant was represented. The Rogers court stated, however:
We today recognize that the Taylor rule is inconsistent with the principles enunciated in Hobson and declare that once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.
Rogers, 397 N.E.2d at 713.

Concerning the issue of whether the parameters of questioning are, in fact, unrelated to the prior pending charge for which the suspect is being represented, the court argued that "it is the role of the defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge." Id.

The Rogers decision was problematic, however. Rogers held that requiring a suspect's attorney to be present when the suspect waives his right to counsel is part of a criminal defendant's fundamental right to representation, and not just a prophylactic rule to help protect a suspect from incriminating himself.\(^{175}\) Although this reasoning is consistent with the Donovan and Arthur opinions,\(^{176}\) the facts of Rogers extended the Donovan-Arthur rule far beyond what had been previously recognized. Such an extension of the right to counsel left many questions concerning its implementation.\(^{177}\) A major concern left unanswered by the decision was how great a duty, if any, would be placed upon police to determine if the suspect is represented by counsel.\(^{178}\)

b. People v. Bartolomeo. People v. Bartolomeo\(^ {179}\) was the inevitable challenge to the parameters of the Rogers decision which the court had, up to that point, managed to forestall.\(^ {180}\) Defendant Bartolomeo was arrested by the Suffolk County Police Department, arraigned on an arson charge for which he obtained counsel, and released on bail.\(^ {181}\) He was subsequently arrested by officers of the same law enforcement agency as a suspect in a homicide case. At the time of the interrogation, Bartolomeo did not inform police that he had obtained an attorney for the prior charge, and the police did not claim any knowledge of the rep-

\(^{175}\) Rogers, 397 N.E.2d at 713.

\(^{176}\) See supra text accompanying note 152.

\(^{177}\) Rogers failed to specify exactly under what circumstances the court would find purported waivers ineffectual and how far the police were duty-bound to go in determining (a) if the suspect had any prior charges pending against him, and (b) if, in fact, he was represented by counsel on such pending charges. See Rogers, 397 N.E.2d at 713. For a period of time, enforcement of Rogers was largely hit-or-miss. Compare People v. Kazmarick, 420 N.E.2d 45 (N.Y. 1981) (holding admissible a confession obtained from a murder suspect who was previously arraigned without representation on a charge of shoplifting) with People v. Cunningham, 400 N.E.2d 360 (N.Y. 1980) (holding that an uncounseled waiver of a constitutional right is invalid if made after a defendant requests counsel).

\(^{178}\) The Kazmarick court stated:

We do not find it necessary on the present record to determine whether or under what circumstances knowledge, actual or constructive, by the police of a pending unrelated charge against defendant will be sufficient to put them on notice that defendant is in fact represented by counsel on that charge and, therefore may not be interrogated on the new matter, absent waiver of counsel in the presence of counsel.

420 N.E.2d at 49. The court did note, however, that "proximity in time and geographical location," as well as the "seriousness of the pending unrelated charge," would be important factors. Id. at 49 n.3.

\(^{179}\) See supra note 19.

\(^{180}\) The court had refused to decide upon the issue in Bartolomeo in earlier cases. See, e.g., Kazmarick, 420 N.E.2d at 49.

The defendant waived his right to have an attorney present, and made inculpatory statements about the murder.\textsuperscript{182}

The \textit{Bartolomeo} court recognized that the \textit{Rogers} rule applied to situations in which the defendant is represented by counsel on prior unrelated charges. The court saw \textit{Bartolomeo} as nothing more than the logical outcome of \textit{Rogers}, especially in light of its decision only months before in \textit{People v. Miller},\textsuperscript{184} which encountered a factual situation with elements of both \textit{Rogers} and \textit{Bartolomeo}.\textsuperscript{185} \textit{Bartolomeo} also placed an affirmative duty upon investigating police officers aware of prior charges against a suspect to conduct a reasonable inquiry to determine whether the suspect was in fact represented by counsel.

Having failed to make such inquiry, the officers were chargeable with what such an inquiry would have disclosed—namely, that defendant did have an attorney acting on his behalf. With such knowledge they were foreclosed either from questioning defendant or from accepting his waiver of counsel's assistance unless his attorney was then present.\textsuperscript{186}

If the defendant had no attorney representing him on the prior charge, then the defendant's waiver of his right to counsel without counsel's presence was valid. If the defendant had secured counsel for the prior charge, and the police failed to have the attorney present before soliciting a waiver from the defendant, then the waiver was invalid (and attendant incriminating statements would be inadmissible).\textsuperscript{187} Just as the \textit{Rogers} court had failed to do, however, the \textit{Bartolomeo} court did not clearly define the parameters of its holding, leaving questions such as whether

\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} 425 N.E.2d 879 (N.Y. 1981).
\textsuperscript{185} In \textit{Miller}, the defendant was suspected in a 1977 Rockland County rape. The District Attorney had sought, and the village court had denied, an order to have Miller appear in a corporeal lineup in connection with the rape. Miller was represented on this matter. In August 1978, Miller was arrested on a charge of criminal possession of stolen property for the theft of a car. The police also suspected him of the rape of a second woman, which had allegedly taken place in the stolen car. \textit{Id.} at 880-81. Miller was not represented during questioning on these most recent matters, and during the interrogation he made incriminating statements about all three crimes. \textit{Id.} at 880-81. The court held that Miller's statements had been improperly admitted at trial: (a) regarding the stolen property charge, because his right to counsel had indelibly attached since he had already been arraigned (i.e., waiver in absence of counsel impermissible); (b) concerning the 1977 rape, because the police were aware that Miller had been represented on that charge before; and (c) regarding the 1978 rape, because the post-arraignment interrogation was an integrated whole, in which the matters were so interrelated as to make them inseparable. \textit{Id.} at 881. "Moreover, as defendant was known to be represented by counsel in connection with the [1977] rape charge, questioning on other matters was precluded." \textit{Miller}, 425 N.E.2d at 881.
\textsuperscript{186} \textit{Bartolomeo}, 423 N.E.2d at 375.
\textsuperscript{187} \textit{Id.} at 371-75.
the right would be recognized when a prior charge is pending in a jurisdiction outside of New York.

From 1981 until 1990, when Bing was decided, several exceptions were carved out of the Bartolomeo rule by the Court of Appeals. Although these decisions served to limit the scope of Bartolomeo, they kept the central focus of the rule intact: that if police know, or reasonably could of prior pending charges against a suspect, they are duty bound to determine whether the defendant was represented on the pending charge before seeking an uncounseled waiver of his constitutional right to the assistance of his attorney.

III. THE MASQUERADE: PEOPLE v. BING

A. The Case

People v. Bing was a consolidation of three separate appeals that all presented Bartolomeo questions. Defendant Bing, who was suspected of a New York burglary, was arrested in New York by Nassau County Police on an Ohio warrant obtained through a police teletype. Although the New York police were aware of the extant charge in Ohio, they made no attempt to ascertain whether Bing had secured counsel on the Ohio charge before questioning him about the New York burglary. Despite the fact that Bing had counsel on the Ohio charge, he waived his right to counsel and admitted his involvement in the New York crime.

In Cawley, the defendant was charged in New York with robbery. He was released on bail following his arraignment, at which he was represented by an attorney. He absconded, and was returned to New York on a bench warrant six months later. Cawley had effectively abandoned his prior relationship with his attorney since he had no con-

---

188. See Antonoff, supra note 147, for a detailed analysis of the exceptions to Bartolomeo created by the court. One of the major limitations placed upon the Bartolomeo rule arose in the Court of Appeals' decision in People v. Lucarno, 460 N.E.2d 1328 (N.Y. 1984). When asked by police whether he was represented on any prior charges, Lucarno falsely indicated that he was not represented by an attorney. Id. at 1329. The Court of Appeals decided that the duty imposed upon police by the Bartolomeo rule required only a "simple inquiry of the defendant." Id. at 1332. Following Lucarno, therefore, police in New York needed only to elicit information about possible representation on prior charges from the defendant himself, and were not required to conduct their own inquiry into that question. Id.


190. 558 N.E.2d 1011 (N.Y. 1990). The two companion cases were People v. Cawley and People v. Medina. Id.

191. Id. at 1012-13.

192. Id. at 1013.

193. Id.
tact with his lawyer following the arraignment.194 Cawley waived his Miranda rights and submitted to questioning by a police officer who was unaware of the prior representation. Cawley confessed to his involvement with new, unrelated criminal conduct including two murders and another robbery.195

In Medina, the defendant was taken into custody because the police suspected him of murdering two of his neighbors. Medina told the police that he had been “let go” on a prior assault charge for which he had been represented.196 The detective concluded that the charges had been dismissed, and continued questioning. Medina made statements implicating himself in the two murders.197

The prosecution sought further exceptions to Bartolomeo in Bing and Cawley198 and total elimination of the Bartolomeo rule in Medina.199 The court found that all three appeals presented situations which fell within the scope of the Bartolomeo rule, and noted that the exceptions sought by the prosecution would do much more than modify the rule, as had been done in the past; they would undercut the rule to such a degree that it would no longer be viable.200 Overlooking the factual distinctions between these consolidated appeals and Bartolomeo, where the suspect had been arrested by officers of the same police department on the prior charge who were well aware of that charge, the court concluded that Bartolomeo was no longer justified:

The appeals demonstrate graphically the recurring problems we have had with the Bartolomeo rule. When it is applied to the circumstances in each case, the result is not only unworkable but it imposes an unacceptable burden on law enforcement. Nor can the results be avoided by modifying or creating exceptions to the rule without undermining its rationale. We conclude, therefore, that a fundamental change is required and, notwithstanding compelling concerns of stare decisis, we hold that People v. Bartolomeo should be overruled.201

194. Id. at 1019-20.
195. Id. at 1013.
196. Id.
197. Id.
198. In Bing, the prosecution sought to have the court recognize a limitation on the Bartolomeo rule to exclude prior representation outside of the State of New York, and in Cawley the prosecution sought an exception for when the defendant voluntarily abandons the attorney-client relationship. Id.
199. Ironically, only in Medina did the prosecution actually call for a reversal of Bartolomeo, arguing that there are recurring problems warranting its removal. Id.
200. Id. at 1014.
201. Id.
The court went on to state that Bartolomeo was antithetical to "the Taylor rule" and an unjustified departure from settled law, thus disregarding its People v. Taylor decision which expressly overruled the holding in Rogers more that two years before the Bartolomeo case. The Bing court further criticized the Bartolomeo decision for the lack of clarity with which it announced its rule, claiming that in the nine years since it had been decided, New York courts had been fraught with uncertainty regarding its application.

Bing concluded that Bartolomeo was merely an "unworkable" rule, and was not part of, or founded upon, any constitutionally granted right. The court further concluded that Bartolomeo was not based on sound public policy, since it tipped the balance heavily in favor of criminal suspects.

B. Bartolomeo Gets Thrown out with His Bathwater

One way of reading Bing may be to conclude that the court either made a mistake, or is beginning to show the signs of pressure from increased crime rates and the war on drugs. The court approached these cases from the premise that strict application of Bartolomeo would require exclusion of the incriminating statements in all three cases, and justice would not be served by overturning these convictions. The court further stated that creating exceptions to fit these situations would undercut Bartolomeo to such a degree as to make it ineffectual. This position is faulty, however, because all three factual situations in Bing are easily distinguishable from Bartolomeo, and therefore do not present the types of dangers which the Bartolomeo court sought to prevent—the knowing circumvention of a viable attorney-client relationship by police.

202. Id. at 1015-16.
203. Id. at 1016-17.
204. See id. at 1020-21.
205. Id. at 1014.
206. Id. at 1018.
207. Id. at 1019-20. In Bing, the court claimed that it would be unreasonable not to recognize representation in Ohio as triggering a Bartolomeo claim, especially since the court would have to recognize the defendant's right to counsel if defendant had retained his Ohio counsel on the New York charges. Id. at 1018-19. In Cawley, the court claimed that it would be requiring courts to look into the quality of the attorney-client relationship to determine if Bartolomeo applied, and this would be inconsistent with the rule, since the rule is indelible. Id. at 1019-20. The reasoning seems to be that if the defendant cannot expressly reject counsel without counsel's presence, it is impossible for the court to determine if he has impliedly done so. Id. at 1020. The reasoning of the court in both instances is strained and tenuous.
In effect, the Bing court narrowed the parameters of its inquiry such that the only possible outcome was to abandon Bartolomeo.

The court seemed determined to stretch the limits of imagination in order to show that the circumstances of these cases illustrate how "[t]he result [of applying Bartolomeo] is not only unworkable but it imposes an unacceptable burden on law enforcement."208 The court failed to explain why it could not limit the scope of the Bartolomeo rule to representation within New York State or allow an exception for when a defendant had voluntarily abandoned the attorney-client relationship. Rather, it speculated that the Nassau police (who had arrested Bing) might be confronted with just as great a problem if the fugitive had been from Buffalo rather than Ohio.209 Even though Bartolomeo had limited the scope of its inquiry to the particular police jurisdiction in question,210 the Bing court saw no "[l]ogical reason to proscribe the police conduct if the pending charge is in New York but permit it if the pending charge is in Ohio."211 The essence of Bartolomeo was to require police who do have knowledge of a pending charge against a suspect they wish to interrogate on an unrelated matter to make a reasonable inquiry to determine if, in fact the defendant is represented by counsel on the prior charge.212 As for the court's difficulty with accepting the exception advanced in Cawley, where the defendant had effectively released his attorney for the prior charge,213 it would seem that this issue was resolved in the pre-Bartolomeo decision of People v. Kazmarick.214 In Kazmarick, the court declared that the mere existence of a pending criminal charge to which the right to counsel had attached was insufficient to preclude waiver in the absence of an attorney.215

---

208. Id. at 1014.
209. Id. at 1019.
211. Bing, 558 N.E.2d at 1019.
212. Bartolomeo, 423 N.E.2d at 374-75. Even if the court were to reject an out-of-state exception, the police had knowledge of the charges facing Bing in Ohio, and because of the Court of Appeals decision in People v. Lucarno, 460 N.E.2d 1328 (N.Y. 1984), the police could have accepted at face value a direct response from the defendant regarding whether or not he has an attorney on for the prior charge.
213. In Cawley, on appeal, the People contended that the defendant had voluntarily abandoned his relationship with his attorney by absconding and breaking off contact. Bing, 558 N.E.2d at 1013. Apparently, the defendant could not remember his attorney's name nor even if "the attorney was a man or a woman." Id.
215. Kazmarick, 420 N.E.2d at 48-49. Although the 'prior representation corollary' to the Donovan-Arthur rule (i.e., the Bartolomeo rule) was not yet recognized when Kazmarick was de-
C. Right of Exclusion vs. Exclusionary Rule: Bing Tips the Scales

The Bing court sought to characterize Bartolomeo as either an anomaly in the law or an extension beyond reason in which the Bartolomeo court had indulged. The court cited the numerous exceptions that had been “carved out” of the rule over the preceding nine years to illustrate the practical difficulties it saw with the rule. The court went on to claim that Bartolomeo could not be justified as a constitutional entitlement or matter of public policy because it is necessary to “strike a balance between society’s need to investigate and prosecute crime and the right of individuals to be free from . . . police intimidation.” Not since the pre-Di Biasi days has the court articulated this type of due process test. In previous cases interpreting the New York constitutional grant of the right to counsel, the court based its decisions on what it saw as an expansive fundamental right under the right to counsel and privilege against self-incrimination clauses of the New York Constitution. New York’s bar of the use of confessions coerced from a defendant in the absence of his attorney was, up until Bing, a constitutional right of exclusion, not merely a judicial rule of exclusion aimed at deterring police misconduct. In Bing, the court stated:

[The] decision did not explain why a rule requiring the presence of counsel to waive one’s rights before criminal proceedings have been instituted, which is well beyond even the most generous reading of the State constitutional privilege against self-incrimination, was necessary.

This language may sound the death knell for New York’s broad constitutional grant of the right to counsel in pre-trial proceedings. It goes far beyond the stated purpose of Bing to remove the Bartolomeo rule. Espousing a much more limited interpretation of the state constitutional right to counsel than the court has advanced in over thirty years, it strikes at the very heart of this area of jurisprudence. The decision also characterizes the exclusion of uncounseled confessions as a sort of pro-

---

217. Id. at 1020.
218. See, e.g., People v. Spano, 150 N.E.2d 226 (N.Y. 1958), rev’d, Spano v. New York, 360 U.S. 315 (1959) (holding that a confession would be admitted unless defendant showed evidence indicating that his confession was not voluntarily given); People v. Mummiani, 180 N.E. 94 (1932) (finding that extended detention prior to arraignment alone would not render confession involuntary). Defendant must illustrate other factors indicating that he did not voluntarily confess. Mummiani, 180 N.E. at 95.
219. See supra notes 10 & 139 and accompanying text.
220. Bing, 558 N.E.2d at 1017.
phyllactic rule, solely for the purpose of protecting the privilege against self-incrimination and deterrence of future transgressions by the police, rather than as a component of a defendant's constitutional right to the assistance of counsel. The Court of Appeals, once steadfast in its assertion of the right to counsel, appears to be changing sides in the exclusionary debate which is raging in the federal courts. In so doing, it rejects the principles of fairness and judicial integrity that earlier cases had maintained by excluding statements obtained in violation of constitutional rights.

D. *Stare Decisis?*

The *Bing* opinion distorts precedent in order to arrive at its desired conclusion. The *Bartolomeo* court rightly saw its opinion as following naturally from and directly resolved by the *Rogers* decision, and therefore offered little justification for its holding. In light of this, the *Bing* court's contention that *Bartolomeo* was "[n]ot firmly grounded on prior case law" is untenable. As the majority in *Bing* pointed out, "*Rogers* was the only case cited to support the new rule adopted in *Bartolomeo.*" The reason for this is not because *Bartolomeo* was "bad law," or merely an extrapolation beyond the scope of its precedent, but rather that the *Rogers* opinion can, and was intended to be read to dictate the outcome in *Bartolomeo.*

The *Bing* court resurrected the *Taylor* rule by disregarding the fact that it had been overruled in *Rogers,* and declaring that *Taylor*

221. See id. at 1021.
222. See supra Part I.B(1) of this Note for a detailed discussion of the federal court debate concerning the rationale underlying the Sixth Amendment exclusionary rule.
224. *Rogers* concisely stated that if an accused is represented by counsel, even if the scope of the interrogation was outside of the charges for which the defendant is represented, the police may not solicit a waiver of the accused's right to an attorney without his attorney being present. People v. Rogers, 397 N.E.2d 709, 711 (N.Y. 1979). The rationale behind this holding is that in the formulation of a defense in a criminal trial, it is not for the police, or even the accused himself, to determine exactly what is unrelated to the charges for which the defendant has counsel. *Id.* at 713.
226. *Id.*
227. See supra notes 170-73 and accompanying text.
228. People v. Taylor, 266 N.E.2d 630 (N.Y. 1971). *Taylor* stood for the proposition that the "once an attorney" rule of Donovan-Arthur did not extend to situations where the questioning concerned charges unrelated to those for which the accused was represented. *Id.* at 631.
229. People v. Rogers, 397 N.E.2d 709 (N.Y. 1979). The added irony here is that the *Bing* court expressly renounced any claim that it might be undoing the *Rogers* ruling in any way. *Bing,* 558 N.E.2d at 1022.
had only been "modified." In so doing, the court was able to find a basis in law for abrogating the Bartolomeo rule, which was, in effect, the antithesis of the dead Taylor rule. The confusion remains, therefore, in determining exactly "how far" the Bing court intended to go. Its professed intentions are to overrule Bartolomeo and reinstate Taylor, but leave Rogers untouched. However, because Rogers overruled Taylor, holding that police may not seek an uncounseled waiver of the right to counsel and pursue interrogation on "unrelated matters," as Taylor permitted, and provided the exclusive rationale for the decision in Bartolomeo, the only logical conclusion is that the Bing court has gone far beyond its stated purpose. The confusion surrounding the scope of Bing is apparent from the multitude of lower court cases dealing with Bartolomeo-Bing issues which have been decided since Bing. Some have interpreted Bing to mean only that the police no longer have a duty to inquire whether an accused is represented by counsel on a pending charge, but indicate that if the police do know of the prior representation, waiver may still be invalid in the absence of counsel. While this understanding of Bing does no harm to Rogers, it is implausible that this is what was intended by the Bing court, because it is no more than a modification of the "unworkable" procedures of Bartolomeo. Other courts, such as the Second Department in People v. McEachern, have found that Bing totally abrogates the "prior representation corollary" to the "once an attorney" rule.

The Bing decision seems to have been decided independently of its logic, and is no more than the manifestation of the New York Court of Appeals' change in attitude regarding its jurisprudence in the areas of right to counsel and privilege against self-incrimination. This change may reflect an alteration of political posture of the judges, or may be responsive to growing pressure for faster, more efficient law enforcement. The court seems to manipulate precedent and distort facts in order to take the first step toward eliminating New York's expansive pretrial right to counsel. The central argument presented by the Bing majority is that Bartolomeo is not justified by social policy. The Bartolomeo court, however, determined that its holding was justified, and that the right for Bartolomeo to confer with his attorney before waiving his right

230. Bing, 558 N.E.2d at 1024.
231. Rogers, 397 N.E.2d 709. See cases cited supra note 172 and accompanying discussion.
234. See supra note 32.
to counsel was part of his constitutional guarantee of the assistance of counsel. As concurring Judge Kaye wrote in Bing, "[t]hat there are now four votes for those same rejected policy considerations is, of course, not a valid reason to overrule the case," for as the court stated in People v. Hobson:

The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men.

The harm that Bing could bring to the institutional integrity of New York courts, as well as to the rule of law in this state, was graphically displayed in People v. Green, a Supreme Court, New York County, decision rendered in October 1991. Green did not present a right to counsel question, and was factually dissimilar from either Bing or Bartolomeo, yet presiding Supreme Court Justice James J. Leff used Bing to threaten anarchy.

Varon Leroy Green was charged with sexually abusing his nine-year-old daughter. The molestations occurred over a period of nearly two years, but the prosecution was unable to specify any particular times when incidents occurred. In People v. Keindl, a case directly on point with Green, the Court of Appeals had ruled that Criminal Procedure Law § 200.50(6) requires that each count of an indictment alleging sexual abuse must specify "on or about" what date specific acts of sexual abuse occurred in order to protect the accused against vague and unsupported allegations.

Justice Left decided to ignore the controlling Keindl rule, however, arguing that "rigid compliance" with the pleading requirements of the Criminal Procedure Law under these circumstances would allow the defendant "to receive a benefit for his own conduct." Using Bing as his sword, Justice Leff asserted that he had the authority to ignore the "restrictions of stare decisis" when he believed following precedent would create "asinine" results. If Bing stands for the proposition that a judge may alter the law of criminal procedure every time he or she concludes that

---

239. Id. at 581.
241. Id.
the results would be unworkable or would be otherwise dissatisfying, the result is unthinkable.

CONCLUSION

*Bing* leaves many unanswered questions about the future of the right to counsel in New York. The language of the *Bing* opinion certainly raises cause for alarm, for what was once an absolute right has become a qualified protection with the potential to be granted or denied, as the court sees fit. Once judges turn their backs on precedent and degrade constitutional rights to the level of exclusionary rules, many more convictions may result from unlawfully obtained confessions. Courts need only articulate a reason why the narrow purpose behind the exclusionary rule would not be served in a particular case in order to deny its relief. If the Court of Appeals continues this trend of eroding the right to counsel guaranteed by the state constitution, it may eventually give rise to a federal Sixth Amendment challenge. Given the uncertainty of Sixth Amendment exclusion of statements evidence following *Nix v. Williams*, such a challenge may determine the scope of the Sixth Amendment entitlement. While the full effect of *Bing* may not yet be realized, there are strong indications that the decision marks the end of the New York Court of Appeals' reign as the "great protector" of an accused's constitutional rights.

242. See *supra* note 110 and accompanying text.