THE CURIOUS CONFUSION SURROUNDING 

ESCOBEDO v. ILLINOIS

Arrested on suspicion of murder, Danny Escobedo was interrogated by police until he confessed. Throughout the interrogation, his frequent requests to call his attorney were denied, and he was never advised by the police of his right to remain silent. The Supreme Court reversed the subsequent conviction:

We hold ... that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," ... 1

In recent months, both federal and state courts have differed greatly over the interpretation to be given this decision. Responsibility for this inconsistency can in part be placed on the opinion of the Court itself. For in the first place, while the holding is carefully confined to the facts, sweeping language in Mr. Justice Goldberg's opinion appears to justify a more expansive interpretation.2 Second, the Court failed to deal conclusively with prior case law; some cases which should have been expressly overruled were left standing, while others were inadequately distinguished.

Despite these problems, it is submitted that a careful examination


2 378 U.S. at 488-90. Moreover, the clear indication that Escobedo will not be confined to its facts was a major stimulant of the three vigorous dissents.
of Escobedo in the context of other recent right to counsel cases demonstrates that the interpretive difficulties encountered by the lower courts are unnecessary. The inconsistent interpretations of this decision on the part of state and lower federal courts probably stem not so much from difficulties with the meaning of the decision, but from an all too poignant judicial awareness of it. The many cases distinguishing Escobedo probably represent disagreement as to the policy behind the decision, and constitute resistance on the part of the lower courts to an uncertain and controversial doctrine.

The Court in Escobedo was primarily concerned with protecting the rights of the accused by guaranteeing a right to counsel which accrues and becomes unqualified at the point at which the criminal "process shifts from investigatory to accusatory . . . ."3 It is the thesis of this comment that the right is unqualified—unless the right is properly waived, the absence of counsel is in itself grounds for the exclusion from trial of all information prejudicial to the accused and the "fruits" thereof obtained during the police interrogation. This right is conditioned neither upon a request nor on delicate judicial analyses of the particular defendant's need for counsel or of the degree of prejudice resulting from its denial. It is the purpose of this comment to demonstrate that this conclusion is inescapable. Unlike most of the commentary on this landmark decision in constitutional criminal procedure, this comment will examine neither the implications on the enforcement of the criminal laws, nor the policy judgment of Escobedo v. Illinois.

I.

Until Escobedo, the law on the right to counsel during police interrogations was represented by the companion cases, Crooker v. California4 and Cicenia v. LaGay.5 In both cases the defendants were convicted of murder on the basis of confessions obtained during intermittent police interrogation following arrest. Both defendants had requested, but were denied permission to call an attorney. In fact, Cicenia's attorney attempted to, but was not permitted to communicate with his client. Crooker was a thirty-one year old college graduate who had completed one year of law school, and who had been informed of his right to silence; Cicenia was only twenty-one years old with little more than a grammar school education,6 and there was no evidence in the record that he was ever advised of his right to remain silent.

3 Id. at 492.
5 357 U.S. 504 (1958).
On the same day, the Supreme Court by a majority of five justices affirmed both convictions. Crooker had contended that his confession had been admitted into evidence erroneously because it was involuntary and because he had been denied the assistance of counsel. But the Court found the confession to be voluntary in light of the supposed intelligence of the accused, his knowledge of his right to silence and the absence of any physical coercion. To dispose of the second contention, the Court applied to the interrogation stage the Betts v. Brady standard that the absence of counsel in non-capital trials would render a conviction reversible only when it resulted in a denial of "that fundamental fairness essential to the very concept of justice."8

Ascertaining the existence of "fundamental fairness," like determining the voluntariness of a confession, entails an analysis of all the circumstances of the case. In so doing, the Court emphasized the intelligence and experience of the accused9 and concluded that "the sum total of all the circumstances here during the time the petitioner was without counsel is a voluntary confession by a college educated man with law school training who knew of his right to keep silent."10 It followed that the "fundamental fairness" guaranteed by the due process clause of the fourteenth amendment had not been infringed.11

It is significant that the majority did not stop here, but went on to discuss the implications of Crooker's contention that a denial of the assistance of counsel was in itself a deprivation of due process. Of


8 Crooker v. California, 357 U.S. 433, 439 (1958) (quoting from Lisenba v. California, 314 U.S. 219, 236 (1941)). It is significant that Crooker is a capital case. As the dissenters point out, "Betts v. Brady, which never applied to a capital case, see Powell v. Alabama, 287 U.S. 45 (1932), is now made to do so." Id. at 443. The majority attempted to meet this argument in a footnote where it distinguished between due process at a trial and due process at an interrogation. Id. at 441 n.6.

9 As will be seen from a discussion of Cicenia v. LaGay, 357 U.S. 504 (1958), it is doubtful whether these factors were material to the holding of the Court. See text accompanying notes 13-18 infra.

10 Crooker v. California, 357 U.S. 433, 440 (1958). A study has demonstrated that contrary to the Court's characterization, Crooker was a very confused, mentally disturbed defendant with doubtful capacity to make a voluntary, objective statement. Prettyman, Death and the Supreme Court 167-257 (1961).

11 Cf., Haley v. Ohio, 332 U.S. 596 (1948) (confession of a fifteen-year-old boy after prolonged interrogation during which the boy's attorney was denied access to the accused held inadmissible); Lisenba v. California, 314 U.S. 219 (1941) (absence of counsel during a police interrogation is merely a factor to be considered when determining the voluntariness of a confession). For a collection of cases in which factors in addition to the absence of counsel were held to deny "fundamental fairness," see Rothblatt & Rothblatt, supra note 1, at 29 n.23.
primary concern was the fear that such an absolute right to counsel would drastically curtail effective law enforcement:

[T]he doctrine suggested by petitioner would have a . . . devastating effect on 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.12

Which of these two considerations—fundamental fairness to the accused or the fear of interference with criminal law enforcement—was of primary concern to the majority is revealed in Cicenia v. LaGay.13 Cicenia had contended that his confession should have been excluded, not because it was involuntary, but because he had been denied the assistance of counsel.14 This case shows that the Court was not as concerned with “fundamental fairness” as it appeared to be in Crooker. The intelligence and experience of the accused were not considered at all.

The Court's disinclination to rely entirely on the totality of the circumstances or on “fundamental fairness” is emphasized by its expanded discussion of the policy considerations mentioned in Crooker.15 Underlying the Cicenia opinion was the theory that federalism allows the states to “have the widest latitude in the administration of their own systems of criminal justice.”16 Again, the majority was fearful of sanctioning a right which “would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases.”17 Thus, as the facts of Cicenia indicate, it was primarily this fear, rather than the “fundamental fairness” calculus, which was determinative to the majority in both Cicenia and Crooker. In this respect, Cicenia rather than Crooker, is the significant case because it demonstrates that the majority's primary concern was for effective law enforcement.

Crooker and Cicenia evoked vigorous dissents which are significant, not only because the dissenters included the Chief Justice and Justices Black, Brennan18 and Douglas, who, in addition to Mr. Justice Goldberg, later formed the majority in Escobedo, but because they enunciated the policies underlying the Escobedo decision. Although framed in the

14 Cicenia made no claim of coercion in the Supreme Court.
15 See text accompanying notes 11-12 supra.
17 Id. at 509.
18 Mr. Justice Brennan took no part in Cicenia.
conventional language of "fundamental fairness," the dissent in Crooker\textsuperscript{19} was concerned with a right to counsel which, if infringed, would itself constitute "a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment," without regard to any other circumstances.\textsuperscript{20} The minority contemplated two functions to be performed by counsel. First, the assistance of counsel enables the accused properly to exercise his rights; counsel is necessary to fulfill this function even when the accused, as in Crooker, is highly intelligent:

No matter how well educated and how well trained in the law an accused may be, he is sorely in need of legal advice once he is arrested. ... [He] may be caught in a web of circumstantial evidence that is difficult to break. ... He may be implicated by ambiguous circumstances difficult to explain away.\textsuperscript{21}

A second and more extensive function of counsel is to act "as a restraint on the coercive power of the police."\textsuperscript{22} To be an effective check against "secret inquisitions"\textsuperscript{23} and police excesses generally, the right to counsel must also exist independently of the intelligence or experience of the accused. In addition, the minority believed that the presence of counsel would eliminate the difficult task of proving coercion in cases where a confession was obtained during a closed interrogation: "The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion."\textsuperscript{24} With counsel present, the problem of police excesses would never arise—with counsel absent, the minority would reverse the conviction. Thus, the voluntariness of confessions would never be in issue.

To the minority, therefore, due process required that an accused be afforded the right to the presence of counsel during a police interrogation culminating in a confession. This right to counsel was to be unqualified in the sense that it would not depend on the intelligence of the accused, his knowledge of his right to counsel or any of the other "surrounding circumstances." The minority had thus rejected the "fundamental fairness" test and the voluntary-involuntary distinction employed by the majority.

\textsuperscript{19} The Cicenia dissent relied specifically on the dissenting opinion in Crooker.
\textsuperscript{20} Crooker v. California, 357 U.S. 433, 442 (1958).
\textsuperscript{21} Id. at 446-47.
\textsuperscript{22} Id. at 443.
\textsuperscript{23} Ibid.
A few years later, on very similar facts, the Supreme Court reached a different result. In *Haynes v. Washington*, the defendant had been convicted of robbery on the basis of a confession obtained during a lengthy period of police interrogation. Haynes had been repeatedly denied permission to call his wife or attorney and was never advised of his right to remain silent. Mr. Justice Goldberg, writing for a majority composed of the Chief Justice and Justices Black, Brennan and Douglas, reversed the conviction on the grounds that the confession was involuntary. The significance of the decision lies in the extremes to which the majority went in order to find coercion. The only uncontroverted fact upon which the finding was based was the refusal of the police to permit the accused to call his wife or attorney. Joined by Justices Harlan, Stewart and White in dissent, Mr. Justice Clark not only refuted the majority's interpretation of the facts, but pointed out that the majority had ignored that Haynes was of age, was intelligent, had criminal experience and probably knew of his right to silence. The minority argued that in light of the facts in *Crooker*, Haynes' confession was clearly voluntary.

This unusual extension of the voluntary-involuntary test can only be attributed to the policy motivating the majority. The appointment of Mr. Justice Goldberg to the Court had converted the *Crooker* and *Cicenia* minorities into the *Haynes* majority. As in the dissents in the earlier cases, the absence of counsel was considerably more significant than merely one factor in the determination of the voluntariness of a confession. The majority was concerned with ensuring both the assistance of counsel as a method of guaranteeing full exercise by an accused of his rights, and also the presence of counsel as a protection against coercive police tactics. As in the dissent in *Crooker*, the majority believed that the effectiveness of these guarantees was dependent upon the presence of counsel under all circumstances, and that this in turn was dependent upon an unqualified right to counsel. The *Crooker* dissent, by urging an unqualified right to counsel in terms of the "fundamental fairness" test, implicitly rejected the "fundamental fairness" test which was designed to avoid absolute rights; whereas, the *Haynes* majority created what was for all practical purposes an unqualified right to counsel by so distorting the voluntary-involuntary test as to render it meaningless.

*Massiah v. United States*, although concerned with a federal post-

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26 Id. at 514: "Here . . . the petitioner was alone in the hands of the police, with no one to advise or aid him, and he had no reason not to believe that the police had ample power to carry out their threats."
indictment situation, is significant because of the novel approach taken by the majority. Massiah had been convicted of a federal narcotics offense on the basis of incriminating statements made after indictment. The statements had been obtained by Government agents who, by means of an electronic listening device, overheard a conversation between Massiah and a co-defendant, who had both been released on bail pending trial. The Court refused to consider the defendant's fourth amendment contention, but reversed the conviction because the incriminating statements were obtained in violation of defendant's sixth amendment right to the assistance of counsel. Thus, for the first time, the majority utilized the sixth amendment to implement an unqualified right to counsel prior to trial. Neither the "fundamental fairness" test, nor the voluntary-involuntary distinction was mentioned in the opinion.

Finally, it is important to note two significant opinions handed down between Crooker and Escobedo. First, in Gideon v. Wainwright, the Court discarded the "fundamental fairness" test of Betts and held that the right to court-appointed counsel in state trials was guaranteed by fourteenth amendment due process. This was significant not only

28 The majority was composed of the Chief Justice and Justices Black, Brennan, Douglas, Goldberg and Stewart. Mr. Justice Stewart was in the majority only because the case involved a post-indictment violation of the right to counsel. See Escobedo v. Illinois, 378 U.S. 478, 493-94 (1964) (Stewart, J., dissenting on grounds that Cicenia v. LaGay, 357 U.S. 504 (1958) was controlling).

29 The holding was based on the concurring opinions in Spano v. New York, 360 U.S. 315 (1959), where, following the indictment, the defendant had been interrogated for more than eight hours in the absence of counsel. The concurring opinions of Mr. Justice Stewart (joined by Justices Douglas and Brennan) and Mr. Justice Douglas (joined by Justices Black and Brennan) contended that the subsequently obtained confession should have been inadmissible, not because it was involuntary, as the majority held, but because the police had violated defendant's right to counsel. It should be noted that in Massiah the brief for the petitioner did not even argue the right-to-counsel point, upon which the Court's holding was based.

30 The "fundamental fairness" test has never been used in federal cases, where the sixth amendment has always been applicable. It was developed for use in non-capital state cases, Betts v. Brady, 316 U.S. 455 (1942), and extended to the pre-trial phases of both capital and non-capital proceedings, Crooker v. California, 357 U.S. 433 (1958).

31 A vigorous dissent was based on the majority's "scrapping the voluntary-involuntary test for admissibility in this area" and the supposed effect of an absolute right to counsel on the ability of society to "maintain its capacity to discover transgressions of the law and to identify those who flout it." Massiah v. United States, 377 U.S. 201, 207, 210 (1964) (White, J., dissenting). Moreover, while discussing the implications of the Massiah holding, Mr. Justice White predicted the Escobedo result: "The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not...and...to criminal proceedings in state courts." Id. at 208.

because it raised the possibility that Massiah, decided the following year, could easily be extended to the states, but because Crooker was based on the "fundamental fairness" test.

The second case, Hamilton v. Alabama, involved a defendant who had not been represented by counsel during arraignment for a capital crime. The state supreme court affirmed the subsequent conviction on the grounds that the absence of counsel had not been prejudicial. The Supreme Court reversed and held that since the arraignment "may affect the whole trial," it was a "critical stage" at which defendant had a right to the assistance of counsel without regard to "whether prejudice resulted." Thus, a characteristic of the "critical stage" is the accrual of an unqualified right to counsel.

II.

Escobedo's incriminating statements constituted the basis for his conviction, which the Illinois Supreme Court sustained citing Crooker and Cicenia. Mr. Justice Goldberg, writing for the Chief Justice and Justices Black, Brennan and Douglas, reversed the conviction, holding that the statement was inadmissible because it was obtained in violation of defendant's right to the assistance of counsel under the sixth amendment as made obligatory upon the states by the fourteenth. To take seriously the Court's attempt to confine Escobedo to its facts would be to disregard the majority's repeatedly expressed intention to provide the accused with an unqualified right to counsel.

The first effect of Escobedo is to extend the "critical stage" of Hamilton forward into the pre-indictment investigation, to the point at which "the process shifts from investigatory to accusatory." Mr.

34 271 Ala. 88, 122 So. 2d 602 (1960).
35 Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961). Hamilton was a capital case. Had the denial of counsel occurred at the trial, Powell v. Alabama, 387 U.S. 45 (1967), rather than Betts v. Brady, 316 U.S. 455 (1942), would have been applicable. The significance of Hamilton lies in the fact that in extending the right to counsel to the pre-trial stages, the Court recognized the unqualified right of Powell rather than, as it had in Crooker, the "fundamental fairness" approach of Betts. See note 8 supra.
36 People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).
37 See text following note 32 supra.
38 See text accompanying notes 33-35 supra.
39 Escobedo v. Illinois, 378 U.S. 478, 492 (1964). An issue which is beyond the scope of this comment is the meaning of the standard Escobedo establishes to determine at
Justice Goldberg noted that the interrogation of Escobedo was "surely as critical as was the arraignment in Hamilton . . . ." The term "critical stage" has had a constant meaning for the majority. It was employed by Mr. Justice Douglas in *Hamilton* and in dissent in *Crooker*, and by Mr. Justice Goldberg in *Haynes* and *Escobedo* to designate that point of the process at which the right to counsel accrues independently of judicial analysis of "fundamental fairness," prejudice or coercion.

*Escobedo*, in light of the previous cases, also indicates a shift in emphasis from an analysis of the confession to the presence of counsel during interrogation. Moreover, it is clear from the *Escobedo* majority's earlier opinions that their primary concern is not with "nice calculations" as to the intelligence of the accused, his experience with criminal procedures or whether he was advised or knew of the right to silence. This majority would exclude the confession of a thirty-one year old with a college degree (*Crooker*) as well as the statement of a twenty-two year old Mexican with no police experience (*Escobedo*). They would exclude the confession of Crooker who had been advised of his right to silence, as well as the confessions of Cicenia and Haynes, who had not been so advised. They would exclude equally the confessions of Crooker, Cicenia and Haynes, although Crooker obviously knew of his right to what point in the investigation the right to counsel accrues. Phrases such as "when its focus is on the accused," *id.* at 492, and when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," *id.* at 490, are quite subjective and will raise difficult problems of application. For example, must the police have narrowed the investigation down to one suspect, or may there be more than one "accused" upon which the process has focused? Does the "focus" test relate only to the quantity of evidence gathered by the police, or does the subjective state of mind of the accused have any relevance? Does the test encompass confessions spontaneously given in the absence of counsel, but not in response to any questioning? See note 53 *infra*. Definitional problems have already begun to appear in the reports. See, e.g., United States v. Konigsberg, 356 F.2d 844 (3d Cir.), *cert. denied*, 379 U.S. 933 (1964); Greenwell v. United States, 356 F.2d 982 (D.C. Cir. 1964); Mitchell v. Stephens, 232 F. Supp. 497 (E.D. Ark. 1964); People v. McElroy, 43 Misc. 2d 924, 252 N.Y.S.2d 597 (Albany County Ct. 1964); Commonwealth *ex rel.* Storch v. Maroney, 204 A.2d 268 (Pa. 1964); Wansley v. Commonwealth, 205 Va. 412, 137 S.E.2d 865 (1964).

40 378 U.S. at 486.

41 The unconditional nature of the right is apparent from an examination of *Haynes* and *Massiah*. In *Massiah* the Court found it necessary to reject the voluntary-involuntary test, used with such difficulty in *Haynes*, which would have compelled a contrary result, and rather based the reversal on the sixth amendment. In *Escobedo*, however, there was adequate evidence—given the extremes of *Haynes*—to justify a finding of involuntariness. But, in conformity with its expressed distaste for qualifying tests, the majority "abandoned . . . the voluntary-involuntary test," 378 U.S. 478, 496 (White, J., dissenting), and followed the sixth amendment precedents of *Massiah* and *Gideon*.

silence, Haynes probably did as a result of past criminal experience, and Cicenia most likely did not. In fact, it seems reasonable to assume, as the dissenters did, that Escobedo was aware of his right to silence even though he had not been formally advised of it by the police. Thus, this complete disregard for the "totality of the circumstances" combined with the formal rejection of the "fundamental fairness" test in *Gideon* clearly indicates the majority's intention to extend to the accused during police interrogation an unqualified right to counsel.

This conclusion is not undermined by Mr. Justice Goldberg's assertion that *Crooker* was distinguishable on the grounds that Crooker, unlike Escobedo, had been advised of his right to silence. First, the Court neglected to point out that while Crooker was advised of his right to silence, the same result had been reached in *Cicenia*, where the accused was not so advised. Thus, *Crooker* was distinguished on a fact, which *Cicenia* indicates was not material. Second, as has been demonstrated, the majority has never been concerned with whether the accused knew of his right to silence, much less whether he was advised of it. It is quite clear that regardless of what the Court said, *Crooker* and *Cicenia* have been overruled. *Cicenia* is so like *Escobedo* on the facts that Justices Harlan and Stewart, in dissent, found it controlling. The only possible basis for confusion is that while clearly repudiating the "fundamental fairness" test, the Court failed to overrule explicitly those two earlier decisions which are representative of the "fundamental fairness" approach.

As expressed by members of the majority previously, an uncon-
ditional right to counsel is necessary in order to implement effectively the twofold function of counsel. First, the assistance of counsel must be ensured in order that the accused be able to exercise to the fullest extent all of his constitutional rights:

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights.

Second, the presence of counsel not only provides an effective deterrent to coercive police practices, but is essential to the proper functioning of the adversary system:

The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process . . . . Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals occasioned by these failures are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.

Escobedo holds simply that the absence of counsel after the right has

360 U.S. 287, 298 (1959) (Black, J., dissenting); In re Groban, 352 U.S. 330, 337 (1957) (Black, J., dissenting); In re Oliver, 333 U.S. 257 (1948).

The minority is motivated, as it was as a majority in Crooker, by its concern for federalism and its fear that criminal law enforcement "will be crippled and its task made a great deal more difficult . . . ." Escobedo v. Illinois, 378 U.S. 478, 499 (1964). Mr. Justice White feared that not only will the new rule be "impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side," but that "one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after, he commits a crime . . . ." Id. at 496-97.

378 U.S. at 490.

52 Id. at 490 n.13 (1964) (quoting from REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10-11 (1963)). The Attorney General's Report did not, however, recommend appointment of counsel at the arrest stage. See note 92 infra.
accrued is itself a violation of a constitutional right and is justification for reversal of any subsequent conviction.

Once this constitutional right is established, however, a remedy must be devised to rectify infringement of the right. One possibility would be to reverse any conviction of one who was interrogated without counsel, whether or not the interrogation produced information in any way prejudicial to the accused. The other possibility would be merely to exclude from evidence all prejudicial information obtained at the interrogation in the absence of counsel. It is submitted that the latter rule is sufficient. While in no way impairing the right to counsel, the exclusionary rule would avoid the wholly unjustified grant of complete immunity from conviction which would arise as a consequence of an illegal interrogation.

Although there is much disagreement as to the deterrent effect of the *Mapp-Weeks* exclusionary rule under the fourth amendment, there

53 See Davis v. North Carolina, 339 F.2d 770, 781 (4th Cir. 1964) (Sobeloff and Bell, JJ., dissenting): "The doctrinal importance of Escobedo is found in its recognition that the interrogation of a suspect in police custody is a critical juncture in the criminal process, and that the inquisition may not be persisted in without according him the right to counsel." This will in no way affect the admissibility of a voluntary spontaneous confession obtained immediately following arrest. Cf. United States v. Mitchell, 322 U.S. 65 (1944); Ramey v. United States, 336 F.2d 743 (D.C. Cir.), cert. denied, 379 U.S. 840 (1964).

54 Escobedo would seem applicable to pre-hearing investigations of administrative agencies. Generally, since the administrative process is non-criminal, the sixth amendment is inapplicable, and the right to counsel is wholly statutory. (See 1 Davis, *Administrative Law* § 8.10 (1958) for a discussion of the rights of parties and witnesses during administrative proceedings and investigatory hearings.) However, the nature of the penalties associated with tax and postal fraud, expatriation, deportation, etc., has led the courts to recognize, among other things, a constitutional right to counsel in these proceedings. The investigations and interrogations prior to such proceedings are no less "critical" to the accused than in the criminal process. See, e.g., Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960) (admissions obtained after seven hours of interrogation by immigration officers held involuntary and therefore inadmissible in deportation proceeding). Indeed, four members of the present majority have indicated that they would not distinguish between criminal and administrative investigations in cases where the latter could lead to criminal sanctions. In *In re Groban*, 352 U.S. 330 (1957) (witnesses at an investigation by a state fire marshal held not to have right to counsel), Mr. Justice Black, speaking for the Chief Justice and Justices Brennan and Douglas, dissented and stated in part: "It may be that the type of interrogation which the Fire Marshall and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel. . . . The rights of a person. . . . should not be destroyed merely because the inquiry is given the euphonious label 'administrative.'" *Id.* at 844, 849.

is reason to believe that such a rule may be more effective to deter interrogations without counsel present. First, it has been suggested that the exclusionary rule under the fourth amendment is ineffective to deter all illegal official conduct because a substantial amount of police investigation does not contemplate conviction. However, this is generally not the case as to interrogations within the Escobedo rule. Once an investigation "focuses" on an "accused," one could probably infer official contemplation of conviction; thus, presumably, the exclusionary rule would be an effective deterrent.

Second, the enforcement of the prohibition against illegal interrogations would probably be considerably more effective than the prevention of illegal searches and seizures. The fourth amendment protections apply to all phases of criminal investigation and to all law enforcement officers, from the chief of police to the corner policeman. Because of this diversity and because also of the spontaneous nature of many searches and seizures, it is not surprising that even if supervisory law enforcement officers actually do attempt to enforce the rules against illegal searches and seizures, they meet with little or no success. In contrast, however, the interrogations within the scope of Escobedo are generally conducted in the police station by experienced detectives and prosecutors, rather than anywhere in the city by any officer of the police force. Because of the relatively few officials and limited sphere of activity encompassed by Escobedo, it is reasonable to assume that a prosecutor or police chief would have the incentive and the physical control necessary to enforce the rule prohibiting interrogation in the absence of counsel. In other words, this phase of the criminal process, closely associated with judicial proceedings and primarily concerned with convictions, would seem peculiarly subject to the deterrent effects of an exclusionary rule.

Thus, as a matter of deterrence, it seems quite unnecessary to utilize

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58 Those interrogations which occur outside of the police station and which are conducted by the average police officer are known as "field interrogations" and in most cases are not within the Escobedo rule. See note 60 infra.
an absolute rule of reversal. However, it could be argued that since an exclusionary rule would apply only when the accused has in fact furnished the police with some incriminating information, only an absolute rule of reversal will provide a remedy for unproductive illegal interrogations. However, it seems undesirable to go so far as to hold that in the absence of a confession, incriminating statement, or other information prejudicial to an accused, interrogation in the absence of counsel constitutes a complete bar to conviction.\(^5\) While there is ample reason for excluding confessions obtained in violation of the rights of the accused, similar violations which fail to elicit incriminating statements and are therefore non-prejudicial do not justify immunizing the defendant from conviction.\(^6\)

\(^5\) Even assuming any remedy at all is desirable in such an instance, it is doubtful whether the accused could take advantage of it. In the absence of an incriminating statement or confession, there would be no evidence of an interrogation, thus making proof of interrogation in the absence of counsel extremely difficult. The police could simply deny the charges of the defendant. See text following note 23 supra.

\(^6\) The effect Escobedo will have on actual police practices is difficult to predict, in large part because of the difficulties involved in determining the nature of these practices, and the similarly difficult problem of defining the "focus" test. However, a few generalizations can be made. Escobedo will probably not affect the common practice known as "field" interrogations and the corresponding brief non-arrest police station interrogation. The goal of such interrogations is generally the elimination of a large number of suspects from consideration. See Barrett, supra note 57, at 31-32; LaFave, supra note 57, at 356-65; Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, in POLICE POWER AND INDIVIDUAL FREEDOM 11 (Howe ed. 1961). Although such interrogations sometimes lead to sufficient evidence for arrest, the police are generally only engaged in an investigatory process directed at no one in particular. Neither the literal words nor the rationale of Escobedo seem applicable to such practices. However, it is the next stage of the process to which Escobedo is applicable: where an arrest has occurred, or where the police have probable cause to arrest but not adequate evidence to charge or convict. At this point, the police generally detain the person for investigation and interrogation. See LaFave, supra, at 373-79. Regardless of the legality of such detention, it is at this stage of the process that the police begin to build a case against the accused and at which under Escobedo he has a right to counsel. Escobedo also applies to interrogations of an accused for purposes of determining his role in other crimes and discovering the identity of other offenders, see LaFave, supra, at 379-84, although incriminating evidence obtained will be admissible against other offenders because of their lack of standing to object to the illegal interrogation. Jones v. United States, 362 U.S. 257 (1960). It must be noted that the police have found such interrogations to be extremely productive of confessions. See, e.g., Barrett, supra, at 41-45. It cannot be doubted that the introduction of counsel at this stage will have a profound effect. However, it remains to be seen whether it will eliminate the usefulness of interrogations and frustrate law enforcement, or whether it will merely force the police to rely more on pre-arrest investigations and non-interrogation techniques. It must be noted further that as long as it is unknown exactly what kinds of crimes are solved by the interrogation of accused individuals, it will be impossible to predict the effect of Escobedo on the enforcement of the criminal laws.
I. The foregoing analysis has seemed necessary because many recent state and federal decisions have refused to acknowledge this interpretation of Escobedo. These cases raise two basic issues. First, whether and in what manner the right declared in Escobedo can be waived? Second, whether advising the accused of his right to silence can constitute a substitute for the right to counsel guarantee?

Escobedo had repeatedly requested permission to call his attorney. As a result, various courts have held either that Escobedo is inapplicable where the accused fails to request counsel, or that such failure constitutes a waiver by the accused of the right.61 Also, Escobedo had not been informed of his right to counsel. As a consequence, other state courts have seized upon this fact to hold that the right is waived when the record shows that the accused was advised of the right.62

Holding that the right to counsel depends upon a formal request is contrary to federal standards for waiver of constitutional rights, which, it is submitted, should be, and to some extent have already been, held applicable to the states. Briefly, in a federal proceeding, the right to counsel may be waived where there in fact has been an “intentional relinquishment or abandonment of a known right or privilege.”63 Not only must the waiver, to be effective, be voluntarily64 and intelligently65 exercised, but there exists a judicial presumption against the waiver of a constitutional right.66 The courts require that the right to counsel

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61 See, e.g., Edwards v. Holman, 342 F.2d — (5th Cir. 1965); Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964); People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), cert. denied, 35 Sup. Ct. 1104 (1965) (defendant had been convicted of arson on the basis of a confession obtained 2½ hours after arrest); Carson v. Commonwealth, 332 S.W.2d 85 (Ky. 1964); McCoy v. State, 236 Md. 632, 204 A.2d 565 (1964); Mefford v. State, 235 Md. 479, 201 A.2d 824 (1964) (court distinguished Escobedo as to defendant Mefford on the grounds that, since he did not request counsel, he was not denied counsel); Bichell v. State, 235 Md. 395, 201 A.2d 500 (1964) (although the defendants had been instructed of their right to silence, they had not requested counsel; Escobedo distinguished on this point); Sturgis v. State, 235 Md. 543, 201 A.2d 681 (1964); Commonwealth v. Maroney, 416 Pa. 55, 204 A.2d 263 (1964); Browne v. State, 181 N.W.2d 169 (Wis. 1964). But see Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964); Galarrza Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964); People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 92 (1964), aff’d on rehearing, 42 Cal. Rptr. 169, 398 P.2d 361 (1965), petition for cert. filed, 33 U.S. L. Week 3335 (U.S. April 15, 1965) (No. 1012); People v. Anderson, 40 Cal. Rptr. 287, 394 P.2d 945 (1964).

62 Haydn v. State, 201 N.E.2d 329 (Ind. 1964); Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964).


at trial be afforded the protection of the court\(^6\) and that extreme caution must be exercised when permitting waiver. Accordingly, failure to request the assistance of counsel at trial does not constitute waiver of the right under the sixth amendment,\(^6\) and waiver will not be presumed from a silent record.\(^6\)

It is not yet clear whether the ultimate effect of \textit{Gideon} will be to apply to state proceedings the entire body of federal standards relating to waiver of the right to counsel.\(^7\) But it is clear that the federal standards governing failure to request are applicable. In fact, these standards were applicable even before \textit{Gideon}. In \textit{Carnley v. Cochran},\(^7\) the Court held that the principle that the right to counsel in a federal proceeding does not depend on a request is "equally applicable to asserted waivers of the right to counsel in state proceedings."\(^7\) Furthermore, the Court has recently indicated that this principle shall also be applicable to the right of court-appointed counsel under \textit{Gideon}.\(^7\)

It seems quite apparent that extension of the right to counsel to a particular stage of the state proceeding carries with it the principle that failure to request does not constitute a waiver.\(^7\)


\(7\) 369 U.S. 506 (1962).

\(7\) \textit{Id.} at 515; \textit{accord}, Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960).

\(7\) In a \textit{per curiam} decision, the Court reversed a state decision which held that a defendant who had failed to request the assistance of counsel was not entitled to the appointment of counsel under \textit{Gideon}. Doughty v. Maxwell, 376 U.S. 202 (1964), reversing 175 Ohio St. 46, 191 N.E.2d 727 (1963). The Court cited \textit{Carnley} and thus made it clear that a request was not necessary to invoke the right. In this respect, a federal court has stated: "If we were to hold that Gideon might not be invoked by those who did not request the assistance of counsel, we would be penalizing precisely those defendants whom Gideon was most intended to protect—those so ignorant of or unfamiliar with criminal procedures that they were not even sufficiently sophisticated to request court-appointed counsel. . . . So to hold would make a mockery of the classic definition of waiver enunciated in Johnson v. Zerbst . . . ." United States v. LaVallee, 330 F.2d 303, 309 (2d Cir.), \textit{cert. denied}, 377 U.S. 998 (1964).

The other waiver problem raised by the state cases is whether there is a presumption of waiver if the accused had been advised of his right to counsel. In light of the foregoing discussion of federal standards of waiver, one wonders how failure of the accused to respond to the instruction as to the right to counsel could ever be considered a voluntary waiver of a known right. It certainly does not meet the test that "the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."75

A more interesting point, however, is that the police probably have an obligation to advise the accused of his right to counsel, not only as a means of protecting the accused, but to ensure that waivers be effective. This assertion is based on the premise that constitutionally required standards relating to counsel, which prior to Gideon were applicable only to federal prosecutions, are now applicable to the states. Rule 5(b) of the Federal Rules of Criminal Procedure requires that when the right to counsel accrues at the preliminary hearing, a defendant be instructed of that right.76 This rule, rather than being a mere exercise of the Supreme Court's supervisory authority over the federal courts, constitutes a statutory incorporation of the duty imposed different stage of the proceeding, has developed in New York. In People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960), the right to counsel after indictment was declared to be absolute, and further interrogation in the absence of counsel was prohibited. In People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961), this right was made independent of a request, and in People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962), the right was extended to arraignment and also held not to depend upon a request. See Rothblatt & Rothblatt, Police Interrogation: The Right to Counsel and to Prompt Arraignment, 27 BROOKLYN L. REV. 24, 48-60 (1960), for a discussion of the New York cases. However, more recently, the New York Court of Appeals has refused to extend this line of cases any further. In People v. Gunnar, 206, N.E.2d —, 257 N.Y.S.2d — (1965), it was held that a confession obtained in the absence of counsel prior to arraignment was admissible in spite of the fact that the police had failed to inform the accused of his right to counsel and right to silence.

Cases which hold that the right depends upon request, see note 61 supra, present an internal inconsistency. They hold that absent a request, a waiver is presumed. However, even those states require that in order to be effective, a waiver must be an intelligent waiver of a known right. See, e.g., People v. Greene, 111 I. 2d 235, 115 N.E.2d 265 (1953). It would seem therefore, that when the right to counsel under Escobedo is held waived in the absence of a request, it would at least be imperative that the defendant be informed of his right. Not one of these cases so holds.


76 FED. R. CRIM. P. 44 requires the same instruction when the right to court-appointed counsel accrues at the trial.
by the sixth amendment to advise the defendant of his right to counsel.\textsuperscript{77} It would follow that the same constitutional obligation is imposed upon the states after Gideon,\textsuperscript{78} and to state police interrogations after Escobedo.

Regardless of what arrangements are made to inform an accused of his right to counsel, it is submitted that unless the accused knew of his right to counsel and was aware of the consequences of waiver, there can never be an effective waiver if the accused is not adequately advised of his right.\textsuperscript{79} This follows from the general principle that a defendant can effectively waive only known rights.\textsuperscript{80}

The foregoing conclusions relating to waiver are in conformity with the policy underlying Escobedo.\textsuperscript{81} Any holding that the right to counsel is waived either when there has been no request, or when the accused was not advised of his right, would create a qualification which the Court would not sanction. Imposing these strict federal waiver standards in

\textsuperscript{77} Advisory Note 1 to Fed. R. Crim. P. 44 states: “This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions.” Cited by the Advisory Note are Glasser v. United States, 315 U.S. 60 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938). See BARRON, FEDERAL PRACTICE AND PROCEDURE, §§ 1871, 1873, 2461-62 (1951).

\textsuperscript{78} Accord, United States v. LaVallee, 330 F.2d 308, 308 (2d Cir.), cert. denied, 377 U.S. 998 (1964).

\textsuperscript{79} This is in conformity with the allocation of the burden of proof of waiver of the right to court-appointed counsel. Generally, courts indulge “every reasonable presumption against the waiver” of the right, Glasser v. United States, 315 U.S. 60, 70 (1942), and waiver will not be presumed from a silent record, Carnley v. Cochran, 369 U.S. 506, 516 (1962). Accordingly, the state must prove that the defendant was properly offered the assistance of counsel and that the offer was expressly declined. \textit{Id.} at 516-17. If this burden is satisfied, then the defendant must show by a preponderance of the evidence that the waiver was not voluntary and intelligent. Johnson v. Zerbst, 304 U.S. 458 (1938); Post v. Boles, 332 F.2d 738 (4th Cir. 1964). In this respect, when the particular facts of the case such as age, intelligence, or emotional condition of the defendant require, the court will presume that there was no voluntary or intelligent waiver. Moore v. Michigan, 355 U.S. 155 (1957). In other words, unless the state proves that the defendant was properly offered counsel, a conviction following a trial in the absence of counsel will be reversed. E.g., United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964); United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964) (dictum).

It is important to note that these rules were formulated for application to a trial situation with a judge presiding. Because of the different circumstances existing in a police station, it would not be surprising if the Court were to prescribe even more stringent requirements to ensure proper waiver at the interrogation stage. The states should keep this in mind when devising a procedure for informing the accused of his rights. Possibly only a signed statement administered by an official other than a police officer who would be able to testify that the right was voluntarily and understandingly waived will satisfy the state's burden of proof.


\textsuperscript{81} See text accompanying notes 49-54 \textit{supra}.
addition to the obligation to advise the accused of his right to counsel would further the Court's objective of ensuring an unqualified right to counsel during police interrogation.

Escobedo had not been advised of his right to silence. Some courts have found this to be a material fact and proceeded to hold that where the accused had been advised of his right to silence, the need for counsel was eliminated. However, these courts are proceeding under the false assumption that the only function of counsel is to inform the accused of his fifth amendment right to silence. This view, as expressed by the Court of Appeals of Maryland, is that "one of the essentials on which the Escobedo holding was based . . . is lacking here because the police supplied . . . [the accused] the advice as to his rights to remain silent which a lawyer would have given him . . . ." Yet, even assuming that this is the only function of counsel, it is doubtful that a police officer intent on obtaining a confession could effectively convey to the accused the importance and extent of his absolute right to remain silent.

But the Court in Escobedo did not contemplate such a narrow function of counsel. As has been shown, the majority was concerned with ensuring the assistance of counsel in order to prevent the police from taking advantage of the ignorance or inexperience of the accused.

In England, the conduct of the police during the interrogation is regulated in part by the Judges Rules. Once the suspect becomes the accused, the Rules require that the interrogating officer inform the accused of his right not to answer any further questions. "Whenever the evidence in the possession of the police has become sufficiently weighty to justify a charge, the charge is for this purpose treated as having been made and the suspect is thereafter treated as the accused." Devlin, The Criminal Prosecution in England 29 (1960). See also Art. 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831(b) (1958).

One week prior to Escobedo the Supreme Court held in Malloy v. Hogan, 378 U.S. 1 (1964), that the fifth amendment privilege against self-incrimination was an element of due process and therefore applied to the states through the fourteenth amendment.

See, e.g., Edwards v. Holman, 342 F.2d — (5th Cir. 1965); Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964) (in dissent, Fahy, J., argued that under Escobedo it is of no importance whether defendant had been advised of his right to silence or that he failed to request the assistance of counsel); United States v. Konigsberg, 336 F.2d 844 (3d Cir.), cert. denied, 379 U.S. 933 (1964); People v. Blanks, 40 Cal. Rptr. 223 (Dist. Ct. App. 1964) (dictum); Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964); Mefford v. State, 235 Md. 497, 201 A.2d 824 (1964); Bichell v. State, 235 Md. 395, 201 A.2d 809 (1964); Peace v. Cox, 74 N.M. 591, 396 P.2d 422 (1964); Commonwealth v. Maroney, 416 Pa. 55, 204 A.2d 283 (1964).


See Fahy, J., dissenting in Jackson v. United States, 337 F.2d 136, 144 (D.C. Cir. 1964): "It is of no great consequence that appellant may have been advised he need make no statement. Aside from the fact that he could hardly have remained silent when advised, advice from the police or even a United States Commissioner that he may remain silent is quite different from being told by counsel that he should or should not do so."
as well as with ensuring the presence of counsel as an effective deterrent to police excesses. It is clear that such an extensive function of counsel could not be fulfilled merely by advising the accused of his right to silence. In this respect, the Court’s emphasis on the presence of counsel and its corresponding lack of interest in whether the accused knew of his right to silence emphasizes the conclusion that Escobedo is in fact a sixth amendment right to counsel case as opposed to a fifth amendment confession case.

In conclusion, it is submitted that further refinement of the unqualified right to counsel announced in Escobedo requires the application of Gideon to the police interrogation stage. In light of the foregoing discussion of the Court’s policy, it would indeed, in the words of Mr. Justice White, “be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel.” The rationale of Gideon is as applicable to the interrogation as it is to the trial itself:

The conclusion that merely informing the accused of his right to silence will not eliminate the constitutional objection to the absence of counsel is in conformity with experience under Fed. R. Crim. P. 5(b). Among other things, rule 5(b) requires that the accused be instructed by the United States Commissioner of his right to silence and his right to counsel. If the basic purpose of rule 5(b) were only to inform the accused of his right to remain silent, it would follow that a confession obtained during illegal detention in violation of rule 5(b) would nevertheless be admissible under the McNabb-Mallory rule if the police had advised the accused of his right to remain silent. This would be the result according to those state cases which hold that the basic requirement of Escobedo is to make the defendant aware of his right to silence. But like Escobedo, rule 5 is directed at much more than the mere right to silence—it aims to avoid all the evil implications of secret interrogation of persons accused of crime.” McNabb v. United States, 318 U.S. 332, 344 (1943). In conformity with this purpose, a court of appeals has held that the function of informing an arrested person of his right to silence was, by rule 5, “taken away from the police, and entrusted to the independent judgment of the Commissioner.” United States v. Smith, 31 F.R.D. 553, 558-59 (D.C. Cir. 1962). Furthermore, courts generally hold that even after the accused has been properly instructed of his rights in a rule 5 preliminary hearing, any confession subsequently obtained in the absence of counsel is inadmissible. Ricks v. United States, 354 F.2d 964 (D.C. Cir. 1964) (statements made by the accused after his rule 5 preliminary hearing were held inadmissible regardless of the fact that he had been properly instructed of his right to remain silent); Queen v. United States, 335 F.2d 297 (D.C. Cir. 1964); cf., Massiah v. United States, 377 U.S. 201 (1964).

But see Note, The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 219-20 (1964). After this comment went to press it was learned that similar conclusions are reached in an article by Professor Herman in the forthcoming Fall 1964 issue of the Ohio State Law Journal.

Contra, McQueen v. Maxwell, 177 Ohio St. 30, 201 N.E.2d 701 (1964).

From the very beginning, our state and national constitutions and laws have laid great emphasis on . . . safeguards designed to assure . . . [that] every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.\textsuperscript{91}

Thus, when the right to counsel under \textit{Escobedo} accrues, the states should be obligated to appoint counsel for the indigent accused. Whether or not it will substantially increase the burdens on state defender systems and the criminal bar, this requirement is essential to effectuate the Court's policy of ensuring the proper functioning of the accusatorial system at all stages of the criminal process at which the police power of the state is directed at a particular individual.\textsuperscript{93}


\textsuperscript{92} The question of appointing counsel for indigents during police interrogation raises the problem of the burdens this will place on state and bar. Although there are no statistics relating to this precise problem, some writers have suggested that state defender systems and the criminal bar will be incapable of assuming the burdens, while others have suggested it can be done with relative ease. These differing opinions seem to be a function of whether the particular writer was in favor of counsel during interrogation and of where he obtained his information—judge, prosecutor, or defense attorney. \textit{E.g.}, \textit{compare} Inbau, \textit{Police Interrogation—A Practical Necessity}, in \textit{Police Power and Individual Freedom} 147 (Sowe ed. 1962) with Weisberg, \textit{Police Interrogation of Arrested Persons: A Skeptical View}, id. at 155. However, the general support for the appointment of counsel following arrest by the \textit{Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice} 38-39 (1963) (early appointment of counsel was suggested but not formally recommended because of vigorous opposition "by those who fear its consequences on law enforcement"), and among defense attorneys, see \textit{Silverstein, Defense of the Poor in Criminal Cases in American State Courts—A Preliminary Report by the American Bar Foundation} 25 (1964), indicates that the burdens on state and bar will not be insurmountable. Implicit in these suggestions might be the belief that an exclusionary rule such as \textit{Escobedo} would discourage interrogations generally while encouraging pre-arrest investigations, thus eliminating the need for counsel and therefore, also any new burdens on state and bar. See, \textit{e.g.}, Kamisar \& Choper, \textit{The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations}, 48 \textit{Minn. L. Rev.} 1, 47-48 (1963). For general discussions of the effect of the right to counsel during police interrogations on the administration of criminal justice, see Beaney, \textit{Right to Counsel Before Arraignment}, 45 \textit{Minn. L. Rev.} 771 (1961); Comment, 73 \textit{Yale L.J.} 1000, 1051-55 (1964).