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Police Interrogation and the Supreme Court–the Latest Round

by Prof. Jerold H. Israel*

My first task is to explain to some degree the nature of the problem embodied in our title. This book has been designated as "Escobedo—The Second Round." What we will be discussing is a series of cases, decided in June, 1966, the most noteworthy of which is *Miranda v. Arizona* [384 U.S. 436 (1966)]. In these cases, the United States Supreme Court prescribed a new set of standards governing the introduction in evidence of statements obtained from the defendant through police interrogation. Actually, to a degree these standards were not entirely new. They had been suggested, at least in part, in the *Escobedo* decision in June, 1964 [*Escobedo v. Illinois,* 378 U.S. 478 (1964)]. In that respect the *Miranda* standards can properly be described as "Escobedo—The Second Round." Really, however, the standards laid down go so far beyond those prescribed in *Escobedo* itself, that it is more accurate to describe this series of cases as "*Miranda*—The First Round" or, to be more accurate, "Police Interrogation and the Supreme Court—The Latest Round."

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The various chapters will deal with several aspects of the second-round cases and the problems that they present. My responsibility basically is to provide a general background for the chapters that follow. It is to provide an over-view, a basic context for appreciating the points to be raised in subsequent presentations. Thus, I will attempt first to describe the background of the *Miranda* decision, second, to describe the decision itself, and third, to raise in a general way some basic problems and ambiguities that are presented as a result of the decision. In this regard, I must say I am most fortunate because I have the opportunity simply to pose questions, but not the responsibility of answering them. I leave that for those who follow.

Miranda's Holding

In describing the general background of the "second round" cases, it perhaps is best to begin not at the beginning but at the end. It may be helpful in understanding how we came to *Miranda* to know first something about what that decision itself holds. Actually, the *Miranda* decision deals with a series of four cases decided on June 13, 1966, in a single opinion: *Miranda v. Arizona, Vignera v. New York, Westover v. United States,* and *California v. Stewart.* Since the Court issued only a single opinion covering the four cases, and the *Miranda* case was first mentioned in the masthead, the case is generally referred to as the *Miranda* decision.

All four cases involved in the *Miranda* decision concerned violent crimes—rape, robbery, etc. In each case the defendant was arrested and taken to the police station where he was interrogated. The interrogation lasted for various periods. In Miranda's own case, it lasted only two hours before the defendant confessed. In another, *Westover,* the defendant was interrogated by Kansas City police officers before being turned over to the F.B.I.; the state interrogation continued intermittently over a fourteen-hour period. In each case a confession was obtained and used in evidence to obtain a conviction. A di-

vided Supreme Court found in each case that the admission of the confession was in violation of the Fourteenth Amendment guarantee of due process. The *Miranda*, *Westover*, and *Vignera* cases were decided on a 5-4 basis with the Chief Justice writing the opinion and Justices Black, Douglas, Brennan and Fortas concurring. Justices Harlan, White and Stewart dissented in all cases, and Justice Clark dissented in all except the *Stewart* case, which was decided by a 6-3 vote.

The reasoning of the majority is summarized in the opinion itself:

> . . . [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. [384 U.S. at 444-45]

The Court thus sets up certain standards to be followed in obtaining statements through custodial interrogation by police

officers. Custodial interrogation specifically is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." [384 U.S. at 444] There was no question in each of these cases that there had been custodial interrogation, since the defendants clearly had been taken into custody prior to questioning. In such a situation, the Court held, police officers must give the defendant four warnings: First, the defendant must be told of his right to remain silent. Second, he must be told that anything that he says can be and will be used against him in court. Third, he must be told that he has a right to consult with an attorney prior to the interrogation and to have the attorney present during the interrogation. Fourth, in this connection, he must be informed that if he cannot afford an attorney, an attorney will be appointed for him. Since these four warnings were not given prior to interrogation in the *Miranda, Westover, Vignera* and *Stewart* cases, the confessions obtained as result of that interrogation were excluded from evidence as obtained in violation of the due process clause of the Constitution. It should be emphasized that I am, of course, referring here only to the majority opinion.

Development of the Doctrine

Having described the holding of the *Miranda* case, perhaps we may now return to the beginning of our story, and consider how the Court came to this result. For, at first glance, what we see here appears to be rather strange indeed: a federal court, by a margin of one vote, sets up a detailed code of police interrogation practices, "enforced" by the exclusion of evidence obtained in violation of those practices.

One may ask, first, how a federal court could reach this position with respect to the operation of state and local police officers. The starting point in answering this question necessarily is the Fourteenth Amendment. That amendment provides that no state shall deprive any person of life, liberty or property without due process of law. It seems clear that this

language gives the Supreme Court, as the ultimate interpreter of the Constitution, the authority to determine what constitutes due process insofar as the states' operations in the criminal procedure arena are concerned.

Actually, although the Fourteenth Amendment was passed shortly after the Civil War, it was not until many years later that the Court began to examine the basic operation of state criminal procedure. In fact, the first case involving police interrogation on a constitutional level, so far as the states were concerned, was decided only in 1936. That case, *Brown v. Mississippi,* 297 U.S. 278 (1936), was an ideal beginning because its facts were as barbarous as could be imagined.

In *Brown* it was alleged that the defendant's confession to murder had been obtained by what amounted to physical torture. While the nature of the physical abuse made it obvious, especially during the trying times of the late 1930's, that the Court would reverse the conviction obtained through use of the confession, it was not entirely clear exactly what basis would be found for the reversal.

At first glance, it might appear that the Fifth Amendment would furnish the most appropriate ground, since it provides that no person shall be compelled to be a witness against himself in a criminal trial. But the Fifth Amendment presented two problems. First, the concept of compulsion as used in the Fifth Amendment was not considered to be applicable to the police because they had no legal authority to compel an answer, although it was quite clear that the torture in effect constituted a very strong form of compulsion. Second, and probably of more pressing significance, only the Fourteenth Amendment applied to the states and not the Fifth, and the concept of due process in the Fourteenth Amendment had been restricted only to those rights deemed fundamental in a civilized society. Twenty years earlier, in *Twining v. New Jersey* [211 U.S. 78 (1908)], the Court had indicated that the privilege was not itself a fundamental right that was absorbed by the Fourteenth Amendment due process clause and so made

applicable to the states. Therefore, the *Brown* decision had to be based on some ground other than the strict privilege against self-incrimination.

The Court did in fact reverse Brown's conviction, but on the ground that the confession, because it had been obtained by torture, was not necessarily trustworthy, so that Brown had been deprived of a fair trial when his conviction was based on untrustworthy evidence. This ground clearly fitted within the "fundamental rights" interpretation of the due process clause, since it recognized that basic trial fairness was an essential attribute of due process.

Between the decision in *Brown* in 1936 and the decision in *Miranda* in 1966, there was a steady stream of confessions cases that manifested a process of gradual development of doctrine. While the Court at first concerned itself with confessions that were "coerced" through physical brutality, it soon began to reverse convictions based upon confessions obtained as a result of "psychological" coercion. Confessions obtained as result of threats and lengthy questioning, and in one case even through the use of a psychiatrist [*Leyra v. Denno,* 347 U.S. 556 (1954)], were found to be invalid. It was thus clear even ten years before *Miranda* that the key to the exclusion of confessions was no longer the issue of the trustworthiness of the confession.

The Court clearly stated this in the *Spano* case in 1959 [*Spano v. New York,* 360 U.S. 315 (1959)]. There, a close friend played upon the sympathy of the defendant and in this manner caused him to confess. In reversing the conviction based on the confession, the Court stressed that its opinion was based not on lack of trustworthiness of the confession, but was instead tied to the impropriety of the police action in putting pressure upon an individual to make him testify against his will. With this point well established, the Supreme Court in a series of cases over the succeeding five years, in one instance after another, held the use of various techniques to constitute undue pressure resulting in "involuntary" confessions.

Then, in 1964, the Court decided the *Escobedo* case. Escobedo had been arrested on suspicion of homicide. His request to see his lawyer was denied. When his lawyer actually came to the stationhouse to see Escobedo, the lawyer's request to see his client was also denied. After four hours of interrogation, Escobedo confessed. The Court in *Escobedo* did not rely on the "undue pressure" rationale of coerced confessions to reverse Escobedo's conviction. Instead, it approached the area of police interrogation along a new path—the right to counsel. The Sixth Amendment guarantees the assistance of counsel in all criminal cases. Prior to 1963 that amendment had not been held to be incorporated bodily into the Fourteenth Amendment. But in the now famous *Gideon* case [*Gideon v. Wainwright,* 372 U.S. 335 (1963)], the Court specifically held that the principles encompassed in the Sixth Amendment were all fundamental without exception and therefore completely applicable to the states under the Fourteenth Amendment due process clause. Escobedo had not had the opportunity to consult with his lawyer and his lawyer with him. This in itself, the Court ruled, could require the exclusion of Escobedo's statement as obtained in violation of his Sixth Amendment right to counsel.

The holding, however, was limited to the specific facts of the *Escobedo* case. The Court specifically noted that this was a case where: (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect had been taken into custody, (3) the police had carried out a process of interrogation that lent itself to eliciting incriminating statements, (4) the suspect had requested and been denied an opportunity to consult with his lawyer, and (5) the police had not specifically warned him of his absolute constitutional right to remain silent. All this, the Court noted, added up to a denial of the assistance of counsel in violation of the Sixth Amendment "as made obligatory upon the states by the Fourteenth Amendment," which in turn required the exclusion of any statements elicited during the interrogation.

During the two years following *Escobedo* the state and lower federal courts placed varying interpretations on its holding. Some narrowly restricted the case to its facts, while others read it as broadly applicable even if the specific circumstances mentioned in *Escobedo* itself were not present.

Departures from Escobedo

The *Miranda* case was viewed before it was decided as the vehicle by which the Court would clarify the *Escobedo* decision. In fact, *Miranda* turned out to be not a mere clarification or even a modification. It cut a new path with new signposts, although it seems to go in the same general direction as the *Escobedo* case. There are various differences between the *Escobedo* and *Miranda* decisions that should be noted.

First, the *Miranda* case rests on the Fifth Amendment privilege against self-incrimination as applied to the states under the Fourteenth Amendment, rather than upon the Sixth Amendment right to counsel. However, the *Escobedo* case, it should be noted, did *mention* the Fifth Amendment even though it was not based on that amendment.

Second, the *Miranda* case speaks in terms of the presence of counsel during interrogation in order to protect the self-incrimination privilege, whereas *Escobedo* is couched basically in terms of the right to consult with counsel prior to interrogation. Also, while *Escobedo* was in terms of consultation with one's own lawyer, *Miranda* is in terms of the right of the person interrogated to the *presence* of his own counsel or, if he cannot afford counsel, of counsel appointed by the state.

Third, *Escobedo* turned on the focus of the inquiry upon the accused as well as on the fact that the accused in that case had been in custody. The *Miranda* case rests strictly on the fact of custodial interrogation. The Court does define custodial interrogation [384 U.S. at 444] as encompassing any situation in which an individual is taken in custody or "otherwise deprived of his freedom of action in any significant way." In offering this definition, the Court appends a footnote that this is what it had referred to when in *Escobedo* it spoke of an investigation

which had focused on an accused. While this may very well be what the Court did in fact refer to, it seems quite clear that the concept of a custodial interrogation might encompass far fewer situations than those within the concept of "focus on the accused."

Fourth, it should be noted that *Miranda* purports to recognize some legislative power to provide other devices to protect the privilege against self-incrimination. While it denominates the standards it imposes as constitutionally required, it notes that these are required in order to protect the basic privilege against self-incrimination; the states may well find other means to further that protection [384 U.S. at 467]. The *Escobedo* case, in contrast, made no suggestion that there was any leeway in the specific requirements on interrogation that it imposed.

The Opinion Dissected

Having described the background of *Miranda,* and the points at which *Miranda* departs from the prior cases, it may be worthwhile to examine the opinion in greater detail. It is divided into five parts. The first two lay out the basic themes of the opinion. The third sets up the rules that the Court will impose to govern police interrogation. The fourth justifies these rules, and the fifth applies them to the facts of the four cases before the Court.

In Part One, the Court deals with the nature of the interrogation process. It notes that all persons questioned by police are generally questioned in a room cut off from the outside world. It is quite clear throughout this section that the Court speaks in terms of police station, in-custody interrogation, although its eventual definition of "custodial interrogation" comprehends any restriction that might deprive a person of his freedom of action in any significant way, and thus appears to be much broader than stationhouse interrogation. The Court concludes that interrogation of this kind is inherently compulsive. It relies on several police manuals describing police interrogation to emphasize the following factors: The interrogation is secret

and private. The police tend to display a persistence which wears the individual down. Frequently it is accompanied by deception; excuses are offered to encourage the man to testify. Sometimes the interrogators presume to offer legal advice and the individual is persuaded not to call upon an attorney. The Court therefore concludes that these techniques inevitably lead to intimidation that in many cases trades on the weakness of the individual.

This conclusion that police interrogation is inherently compulsive is sharply attacked by the dissenters. The dissenters first question the Court's ability to obtain an accurate description of total police practice throughout the country on the basis of a few police manuals. They also question the accuracy of the Court's description of the impact of these techniques on criminal defendants.

Having established that police interrogation is inherently compulsive, the Court next considers whether this compulsion violates the privilege against self-incrimination. The primary issue here is whether the privilege applies to police interrogation. The argument was made that it did not because there was no legal compulsion to testify. It also had been argued, as I mentioned previously, that the Fifth Amendment privilege was not fundamental, and therefore did not apply to the states through the Fourteenth Amendment. The Court was able to reject both contentions on the basis of various precedents. It cited in particular an early federal case, the *Bram* case [*Bram v. United States,* 168 U.S. 532 (1897)], which applied the privilege to a confessions case. It noted further that in recent years, most notably in *Escobedo* and the *Malloy* case [*Malloy v. Hogan,* 378 U.S. 1 (1964)], the Fifth Amendment had been held to be fundamental in all respects and thus applied to the states through the Fourteenth Amendment. It concluded that the logic behind the Fifth Amendment privilege of self-incrimination was meant to apply to informal compulsion like that imposed through police interrogation. This conclusion was also a point of major contention by the dissents, which questioned the his-

torical accuracy of the majority's conclusion that police interrogation was within the purpose and function of the Fifth Amendment privilege against self-incrimination.

Having established that the privilege did apply to police interrogation, and that such interrogation had an inherent tendency to violate that privilege, the Court then set forth various rules and regulations necessary to protect the privilege. In doing so, however, the Court noted that the rules announced were not absolutes, but that in the absence of legislation they were to be applied. The Court stated in particular:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. [384 U.S. at 467]

The Court then proceeds to lay down the safeguards. The first is the warning of the fact that the individual has a privilege against self-incrimination. The Court emphasizes that this warning must be given in "clear and unequivocal terms." The reasons for requiring the warning are: (1) Some defendants may be unaware of the privilege. (2) Even if they are aware, it may be too difficult to determine on a case-by-case basis who was and who was not aware of his privilege. (3) Even though the person clearly was aware of his privilege the mere fact that the warning is given indicates an absence of pressure. This in turn tends to overcome the inherent pressure in the police interrogation process by showing that the police recognize the

existence of the defendant's privilege against self-incrimination, and indicate their willingness to abide by his exercise of privilege.

The Court then turns to its second required warning, that anything the individual says can and will be used against him. This is obviously necessary in order to reinforce the warning that the individual has a privilege against self-incrimination. The Court is not entirely clear in its statement, however, as to exactly in what form this warning should be given. At one point [384 U.S. at 469] it talks in terms of a statement that the evidence "can and will" be used against the defendant. At another point the term used is that the evidence "may" be used against the defendant [384 U.S. at 444]. There is an obvious ambiguity here into which, I understand, we will go more thoroughly.

The Court then turns to what may be the crux of the *Miranda* warnings. The individual must be told that he has the right to have counsel present and to consult with counsel. It is important to emphasize that the Court here goes beyond *Escobedo*. There is no requirement that the individual initiate the request that he be given the opportunity to consult with counsel or to have counsel present. The offer must first be made by the police. The Court emphasizes that this is the only way to protect the right not to incriminate one's self.

First, the warning of privilege may not itself be sufficient because the pressure inherent in the interrogation process may overcome the effect of that warning. Second, even preliminary discussions with counsel prior to interrogation may not be enough, as evidenced by the *Escobedo* case in which the defendant actually had talked with his counsel before he was picked up for interrogation. Third, if the individual does decide to make a statement, counsel according to the Court can ensure an accurate statement. Finally, though this ground is not stressed by the Court, it is very clear that counsel will also serve as a witness to the making of the statement; he therefore serves as an outside third party who destroys the secrecy of the interrogation process.

The Court then goes on to make an obvious point. The rich defendant can obtain his own counsel, and therefore the indigent defendant must have the same opportunity. He must be told that he can have appointed counsel and that no questioning will be done until counsel is appointed and present. This is based on the principle developed in a series of cases arising in Illinois, holding that a poor defendant should not have fewer procedural rights than the rich defendant, at least in terms of the functional effect of those rights. The Court emphasizes, however, that while the indigent is entitled to have a lawyer appointed if the police engage in interrogation, there is no automatic requirement that a lawyer be appointed in any event. If the police do not engage in interrogation, the Court does not require them at this early a stage in the proceeding to obtain the appointment of counsel for the indigent.

The Court then proceeds to discuss what must be done after the four warnings have been given [384 U.S. at 475-76]. It notes at the outset that if the defendant indicates "in any manner" that he does not want to be interrogated, no interrogation can ensue. It further notes that even if the defendant starts to answer questions, interrogation must cease immediately, if he later stops answering or indicates that he would like to consult a lawyer at that point. I think, myself, that this is an additional point that could very well be included in the original warnings. Also, if the defendant indicates that he will answer questions, but first desires to see a lawyer, no questioning can of course be undertaken until the lawyer arrives and the defendant has had full opportunity to consult with him. If a lawyer is present, however, and the defendant asks not to make a statement, the Court indicates that possibly some questioning may still be done. This is a little developed aspect of the *Escobedo* decision which is noted in footnote 44 [384 U.S. at 474].

The opinion then turns to the very important issue of waiver, for of course if the defendant waives his right to consult with counsel, and his privilege against self-incrimination, his confession may be admitted [384 U.S. at 478]. The issue there-

fore arises as to what constitutes waiver. The Court notes at the outset that a heavy burden rests on the prosecution to prove waiver; the prosecution can best bear that burden because the facts are more readily available to it than to the defendant. It emphasizes that an express statement can constitute waiver but that waiver will not be assumed from silence. Nor will waiver be assumed from a partial answer. The Court indicates also what problems may be presented in the waiver area. It suggests that if there is a lengthy interrogation or incommunicado incarceration after the person has supposedly waived, there is a serious question about the voluntariness of the waiver. Also, any waiver obtained by trickery, threats or cajolery will not be viewed as voluntary. Finally, the Court turns to the consequences of a statement obtained after an involuntary waiver, or resulting from a failure to give the warnings or to respect the defendant's request to remain silent or have his lawyer present.

The Court stresses that any statement obtained in violation of the defendant's rights must be excluded from evidence. This applies to any statement, whether it be a confession or an admission, and whether inculpatory or exculpatory. In other words, if the defendant says, "I didn't do it, X did it," or "I shot him but he shot first," his statement is as excludable from evidence as if he had confessed to commission of the whole crime, and to all its elements as well.

The Court stresses, however, that there are limits to this exclusionary rule; it applies, as do all the requirements in the opinion, only to statements obtained as a result of custodial interrogation. The majority points out, for example, that if a person should voluntarily enter a police station and state that he wishes to give a confession, the confession would be admissible because voluntary. Furthermore, statements may be admissible if they were the result of a general inquiry when the person was not under restraint. The Court emphasizes [384 U.S. at 477] that general on-the-scene questioning about facts surrounding the crime is not prohibited by the *Miranda* holding.

Finally, in Part Four of the opinion, the Court tries to show that its ruling is consistent with efficient law enforcement. It stresses the importance of protecting individual rights, questions the need for the use of confessions in many cases, and stresses in particular that the F.B.I. has followed a practice very similar to that which it establishes. It also notes the English and Scottish experience with similar types of rules. This part of the majority opinion is subjected to a sharp dissent by Justice Clark who emphasizes that the F.B.I. did not in fact follow a practice identical to *Miranda;* there were a number of important differences in the F.B.I. practice. In particular, as Justice Clark sees it, the F.B.I. traditionally informed the defendant that he had a right to have counsel appointed by the judge, but did not state that they would not question him until that counsel was in fact appointed. Also, according to Justice Clark, the F.B.I. had always continued to question on matters other than the individual's guilt even after he had insisted that he wished to claim privilege against self-incrimination. I must say, as a side matter, that certainly on this issue, my limited conversations with F.B.I. officials suggest that Justice Clark more accurately describes past Bureau practices than does the majority opinion.

The fifth section of the opinion is somewhat anticlimactic. Having established its rules concerning custodial interrogation and having justified those rules historically and theoretically, the Court applies them to the facts of the cases before it. In all four situations before it, the *Miranda* requirements had of course not been complied with in their entirety, and the confessions were therefore excludable.

Unresolved Problems

Although the *Miranda* opinion is quite extensive and the Court more than once succinctly summarizes its rulings, the case is still not clear in all respects. Ambiguities lie in several points that the Court raises, and the *Miranda* rules also suggest new possibilities which were not presented to the Court in the *Miranda* setting. I would like at this point to mention briefly some

of these issues, which will be dealt with in subsequent chapters.

First, what is the nature of custodial interrogation emphasized by the Court? Although the cases before the court all involved in-custody interrogation, the Court's definition extends much beyond that. The Court talks in terms of one who is deprived of his freedom of action in any significant way. Would this apply to a person who is stopped on the street? Would it apply to a person who is questioned at home? The Court notes that there is a different psychological impact if a person is questioned at home [384 U.S. at 449]. At a later point [384 U.S. 478, note 46] it quotes a Scottish court that also noted the difference between questioning at home and in a police station. Would the answer depend upon the presence of other persons, or on whether there is more than one police officer involved in the questioning, or how the questioning was phrased, or on something besides these matters? Would the Court possibly accept the concept that there may be a continuum involved here? In other words, in some situations far removed from custodial interrogation no warning might be needed. In an instance of custodial interrogation, all the warnings must be given. Perhaps, in areas that fall somewhere between, like on-the-street interrogation or at-home questioning, it might be necessary only to warn the individual beforehand against self-incrimination, but not necessary to warn him of his right to counsel, or perhaps to the appointment of counsel. In this regard, one obvious factor of considerable significance will be the determination of what exactly is left of the "focus upon the individual suspect" concept of the *Escobedo* case. As I mentioned earlier, the Court indicated that its definition of custodial interrogation encompasses this concept [384 U.S. at 444, note 4].

Second, another question of utmost importance will concern the determination of waiver. What if a person refuses to sign a waiver form? Are there also some persons who because of their peculiar background or low intelligence are in such a condition that they may not waive their rights in the absence of a lawyer?

Still a third question will be the means by which a lawyer will be obtained for the indigent. What of the delay involved in getting a lawyer? Will that have a bearing on the duty of prompt arraignment, especially in lightly-populated regions where considerable delay may be involved?

Fourth, what is the consequence of failure to give the *Miranda* warnings? Does it merely require the exclusion of the confession, or does it also require the exclusion of any evidence obtained through leads furnished by the confession? This raises the issue as to whether the fruit of the poisonous tree doctrine is applicable to the ruling, a point discussed at length by Professor George and Justice Cohen.

A fifth question concerns what remains of the right to counsel concept of *Escobedo*. Does *Escobedo* continue to have any independent validity? For example, there are presently before the Court two cases involving a line-up in which the defendant insisted upon the right to consult with counsel before appearing in the line-up. Do these cases continue to pose some sort of Sixth Amendment problem, or could *Escobedo* now be looked upon as basically a Fifth Amendment case? In this regard, also, what if the defendant does not request to see his lawyer and indeed indicates that he would like to continue the discussion without a lawyer, but his lawyer requests the opportunity to see his client? In this context the New York case cited by the Court is of interest [384 U.S. at 465, footnote 35]. One other issue which may have relevance concerns the impact of the *Massiah* case [*Massiah v. United States,* 377 U.S. 201 (1964)], which deals with application of the right to counsel when a person is being interrogated after indictment by a person whom he does not realize to be in the employ of the police. Could the *Massiah* case now be looked upon as a Fifth Amendment self-incrimination case, and if so, could that Fifth Amendment concept be extended to the pre-indictment stage? I really have serious doubts about such an extension of the *Massiah* doctrine, but it should be noted that *Miranda* creates this possibility, though I do not consider it much more than that.

It should be emphasized that one of the major issues opened up by *Miranda* has already been settled. In the *Johnson* case, [*Johnson v. New Jersey*, 384 U.S. 719 (1966)], the Court held that *Miranda* was not retroactive, but will apply only to cases that go to trial after June 13, 1966. A similar approach was adopted for the *Escobedo* case; its ruling will be applied only to cases tried after it was decided. The purpose of the Court in refusing to apply its decision retroactively is very clear. It is not equally clear, however, exactly why it chose the date of trial, rather than the date at which the confessions were obtained. Apparently, the primary concern was that the prosecutor realized before going to trial that the confessions were not sufficient in themselves. I would think, however, an equally important factor might have been that the police officers at the time the confession was obtained before the *Miranda* ruling, could hardly have been expected to anticipate that ruling.

Finally, the *Miranda* case may have some implications for other areas of criminal procedure. For example, I think it may reflect on the type of consent needed for a search. It may also be relevant with respect to the possible extension of other constitutional rights to the state defendants by virtue of the Fourteenth Amendment, as was done with the Fifth Amendment self-incrimination rulings in the *Miranda* and *Malloy* cases.

Also, the decision in *Johnson* as to retroactivity reemphasizes the fact that all new rulings by the Court in the criminal procedure area will be applied prospectively. The Court, by stating a broad rule in *Miranda* going beyond the facts of the particular case, may also be indicating that it will seek to establish broad rules in other areas of criminal procedure.