12-1-1966

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If "trial by newspaper" involves not only the conflicting guarantees of the first and sixth amendments, but also the conflict between the right of the public to be informed and the "equally great right to be free from detriment through crime," it requires careful handling indeed. Through its flexible holding the Court in Sheppard has not made the administration of a fair trial or the attainment of convictions either extremely difficult, or slow; and it has attempted to preserve as much as possible the traditional freedoms by urging a more liberal use of existing procedures. Hopefully, where judicial or political criticism is unnecessary, and the interests of the public are satisfied, the press will learn "to be content with the task of reporting the case as it unfold[s] in the courtroom"—not "pieced together from extra-judicial statements."[142]

C. B. GRAY

Privilege Against Self-Incrimination—Police Interrogation

Miranda v. Arizona[1] applies the exclusionary rule to statements taken during police interrogation without compliance with procedural guarantees designed to implement the fifth amendment[2] privilege against self-incrimination. The rationale of the decision is that information, and, in the situation where no arrest has been made, the identity of the suspect and details of investigative procedures be withheld except to assist in the "apprehension of the suspect" or to warn the public of any "dangers." Id. at 10-11. It is possible to interpret these provisions to allow or actually demand a complete blanket of silence where a white collar crime is involved, because such a crime rarely poses problems of "apprehension," "warning the public of dangers" or investigation generally. See notes 93 & 134 supra.

142 384 U.S. at 362. Since mistakes will be made, perhaps waiver of a jury trial could be encouraged to avoid any further restrictions on the free flow of information. A defendant, however, cannot waive a jury trial in a federal court without consent of the government prosecutor and the court under Fed. R. Crim. P. 23(a). Singer v. United States, 380 U.S. 24 (1965). But in Singer, though prejudicial publicity was not in issue, the Court said in considering that possibility: "We need not determine in this case . . . where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." Id. at 37. For various state provisions, some of which allow for waiver without consent of the government, see id. at 36. The ABA recommendations also provide for waiver of jury trial, if knowingly and voluntarily made and if necessary to increase the likelihood of a fair trial. ABA Project 14.

2 "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." U.C. CONST. amend. V.
custody interrogation is inherently compulsory and therefore the fifth amendment, as applied to the states through the due process clause of the fourteenth amendment, requires the state to take affirmative action to neutralize the element of compulsion. Under *Miranda*, when an extra-judicial statement is offered in evidence the only questions properly before the trial court are whether the privilege against self-incrimination attached before the statement was taken, and if so, whether the procedural guarantees have been complied with.\(^3\)

At the initial stage of a criminal proceeding, the fifth amendment privilege applies only to individuals who are (1) in the custody of the police, and (2) are being interrogated. In *Miranda* the Court said, "by custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way."\(^4\) Herein the "focus" point of *Escobedo v. Illinois*\(^5\) is re-

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\(^3\) The decision leaves the states free to develop their own procedures for effectuating the fifth amendment privilege, with the limitation that any such procedures must be as effective as the ones outlined in the decision. 384 U.S. at 467. However, in the absence of other procedures, once the privilege has attached a fourfold warning must be given to a suspect before any interrogation can be made: (1) of the suspect's right to absolute silence, (2) that any statement made may be used against him, and (3) that he has a right to the presence of counsel, retained, or (4) appointed if he is an indigent. *Id.* at 468-72. The record must show that the warnings were given as no inquiry will be made into whether the suspect was aware of his rights without being informed of them. *Id.* at 468. The rights to silence and the presence of counsel can be waived by a suspect only upon an informed basis, and proof of waiver becomes an element of the state's burden of proof. *Id.* at 475-76. Once the warnings have been given and even after waiver or after the suspect has begun to answer questions, if he indicates in any manner that he does not wish to be questioned the police must respect his right to silence. If the suspect elects to exercise his right to the presence of counsel, there can be no questioning until an attorney arrives. *Id.* at 445, 474. The purpose of this note will be to examine aspects of the decision which are likely to become the subject of further litigation.

\(^4\) *Id.* at 444.

\(^5\) 378 U.S. 478 (1963). "We hold that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with a lawyer." *Id.* at 492.

The decision has been the subject of heated debate. See, e.g., *Proceedings of the Twenty-Eighth Annual Judicial Conference, Third Judicial Circuit of the United States* 39 F.R.D. 375, 423 (1966). For a narrow construction of *Escobedo*, see, e.g., Latham v. Crouse, 338 F.2d 658 (10th Cir. 1964); United States v. Ogilvie, 334 F.2d 837 (7th Cir. 1964); Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964); Mefford v. State, 235 Md. 497, 201 A.2d 824 (1964). For a liberal construction of the decision, see,
defined. The Court did not specify, beyond the language quoted above, in what circumstances the privilege would attach. Unlike a constitutional right that can be asserted at any time (e.g., a first amendment right), the privilege against self-incrimination arises only in connection with another event, such as a trial. It is possible to avoid the requirements of the privilege simply by delaying the other event, which in a *Miranda* context will be an arrest or a taking into custody. The question arises as to what conduct less than an overt arrest will bring the privilege into play, or in what circumstances will police questioning be justifiable without giving the *Miranda* fourfold warning. No decision of the Supreme Court seems to be in point, but a recent court of appeals case provides some basis for a possible answer.

In *Seals v. United States* the defendant was stopped by an FBI agent while walking on a street. The agent asked Seals "If he [Seals] minded stepping over to the automobile, I wanted to talk to him." Seals voluntarily accompanied the agent to the automobile where he was informed that he was not under arrest. The party proceeded to Seals' home, which was searched with his consent. During this time Seals freely answered questions put to him concerning a robbery of which he was suspected. At 4:14 P.M. the agents asked Seals to accompany them to the FBI field office "to talk further." Seals consented and upon arrival at the FBI office was warned of his rights to silence and the presence of counsel. Twice during the subsequent interrogation Seals asked if he was "locked up" and was advised that he was not. At 7:10 P.M. Seals

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e.g., United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3rd Cir. 1965); Collins v. Beto, 348 F.2d 823 (5th Cir. 1965); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964); Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965).

8 378 U.S. at 444 n.4. "This is what we meant in Escobedo when we spoke of an investigation which had focused on the accused." *Id.* at 444 n.4. *Escobedo* now applies to trials begun between June 22, 1963, and June 13, 1966. See note 43 infra. A literal interpretation of this language leads to the conclusion that the Court intends its *Miranda* redefinition of the *Escobedo* focus point to apply to cases yet to be reviewed under *Escobedo* standards of admissibility. In its decision not to apply *Miranda* retroactively, the Court did not pass on this point. See note 43 infra.


8 325 F.2d 1006 (D.C. Cir. 1963).

9 *Id.* at 1007.

10 *Id.* at 1007.

11 *Id.* at 1007.
admitted his participation in the robbery, and was then told that he was under arrest. One hour later he was taken before a magistrate.

At trial the government contended that the arrest did not occur until 7:10 P.M., the point at which Seals was notified he was under arrest. The court held that an arrest had occurred not later than 4:30 P.M., the time he arrived at the FBI office, and therefore the delay of more than three hours before arraignment was unnecessary and required suppression of Seals’ admissions under the Mallory[12] rule. In deciding that Seals was arrested not later than 4:30 P.M. the court necessarily applied a subjective standard. It said that “[E]ven without any physical restraints Seals necessarily must have understood that he was in the power and custody of the FBI and that he submitted to the questioning in consequence.”[13] That is, judged from Seals’ view point, even though he was told on two occasions that he was not under arrest, the authorities’ conduct must have led him to believe that his freedom of movement was limited.[14]

[12] Mallory v. United States, 354 U.S. 449 (1957), Mallory held that confessions obtained during a period of unreasonable delay between arrest and arraignment were inadmissible in federal courts under Fed. R. Crim. P. 5(a).
[14] Contra, Commonwealth v. Slaney, — Mass. —, 215 N.E.2d 177 (1966). The Seals court’s theory of de facto arrest is that an arrest is made whenever the individual believes himself to be under the power and control of the police. This is not a reasonable man standard, but an absolutely subjective test. Applying Miranda to the facts of Seals, this rationale leads to the conclusion that anything Seals said after entering the agents’ car should have been inadmissible. If Seals must have understood he was in the control of the FBI not later than the time he entered the field office, it is difficult to see how he felt any less under their control when he entered the agents’ automobile. For a discussion of de facto arrest, see Long v. Ansell, 69 F.2d 386 (D.C. Cir. 1946). In Henry v. United States, 361 U.S. 98 (1959), in passing on the issue of probable cause, the Supreme Court noted that when federal agents waved a defendant’s automobile to a stop, an arrest occurred: “when the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete.” Id. at 103. See Fisher v. United States, 324 F.2d 775 (8th Cir. 1963); United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960).

In Swetnam v. F. W. Woolworth Co., 83 Ariz. 189, 318 P.2d 364 (1957), the plaintiff alleged in false imprisonment action that she had been unjustifiably detained from leaving the defendant’s department store by defendant’s manager. In holding that no imprisonment had occurred, the Arizona court stated:

the conduct of the other party toward her [the plaintiff] must be such as to give her reasonable ground to believe that the other party intends to control her actions, and, if necessary, to use force for that purpose and thereby restrain her from acting upon her own volition, and if by reason thereof she submits to the control of the other party, then the proof will be sufficient to sustain a charge of false arrest.
In *Westover v. United States*, a companion case to *Miranda*, the defendant was arrested by state authorities on local charges. No warnings were given. Westover was held by state authorities for fourteen hours and interrogated at length before being turned over to the FBI. After two hours of interrogation by the FBI, Westover signed confessions to both state and federal offenses. At trial an FBI agent testified that when the FBI obtained custody, Westover had been warned of his right to silence and the presence of counsel, and that anything he said could be used against him. Reversing Westover's conviction, the Court found the warnings had come at the end rather than the beginning of custodial interrogation, saying "although the two law enforcement agencies are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning." As the court of appeals did in *Seals*, the Supreme Court here is looking beyond the conduct of the authorities and focusing on the state of mind of the defendant.

Under pre-*Escobedo* standards of admissibility, a critical factor was the strength or weakness of the defendant's cognitive powers—hence the way events appeared to him—at the time interrogation took place. That a mentally defective or physically exhausted

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*Id.* at 192, 318 P.2d at 366. This is a reasonable man standard. *Cf.* Humphreys v. St. Louis-San Francisco R.R., 286 S.W. 738 (Mo. 1926). For a general discussion, see Prosser, *TORTS* § 12 (3d ed. 1964).

*Old.* at 496.

*7* See, e.g., Townsend v. Sain, 372 U.S. 293 (1962) (suspect was under the influence of drugs); Galleogos v. Colorado, 370 U.S. 49 (1962) (suspect was a fourteen-year-old boy); Reck v. Pate, 367 U.S. 433 (1960) (suspect had not had any sleep); Blackburn v. Alabama, 361 U.S. 199 (1959) (suspect was mentally retarded); Payne v. Arkansas, 356 U.S. 560 (1958) (suspect had been threatened with physical harm); Haley v. Ohio, 332 U.S. 596 (1948) (suspect was a fifteen-year-old boy and had been interrogated for five hours); Brown v. Mississippi, 297 U.S. 278 (1936) (suspects had been physically tortured). While originally the due process standard of admissibility was used to separate factually reliable from unreliable confessions, see, e.g., Ward v. Texas, 316 U.S. 547 (1941), the rule evolved as a shorthand for a complex of values the Court elected to protect in applying the exclusionary rule to confessions. An inexhaustive list of the values protected would include: freedom from incommunicado interrogation, Davis v. North Carolina, 384 U.S. 737 (1966); from lengthy detention before arraignment, Haynes v. Washington, 373 U.S. 503 (1963); from physical deprivation, Reck v. Pate, 367 U.S. 433 (1960); from physical brutality, Stroble v. California, 343 U.S. 181 (1952). A serious flaw in this rule was that the Court, on a case by case basis, had to reconstruct the *in camera* station house proceedings in which the confession was obtained, and of which the Court had no objective, independent record. And defen-
suspect had confessed weighed against admissibility and went to the question of whether the authorities' conduct had violated due process. The Escobedo focus language seemed to change this by making an external factor—whether police suspicion had focused on the accused—the only relevant factor in determining whether the Escobedo sixth amendment right to counsel had attached. However, the Court's explanation in Miranda of the Escobedo focus language, and the new standard of in-custody interrogation, make the critical factor whether the defendant has been deprived of his liberty before being interrogated. In Miranda the Court assumes that compelling influences necessarily flow from being in the custody of the police. The Seals analysis of arrest should bring into play the subjective-cognitive factors relevant to due process standards of admissibility, as determination of whether the individual has been deprived of his liberty would depend in part upon his conception of what was done to him. If the defendant feels that he is under the power and control of the authorities, the privilege against self-incrimination should attach. On the other hand, absent an overt arrest some police questioning without the fourfold warning should be justifiable provided the individual does not feel under compulsion to answer. That police suspicions have in fact focused on the defendant—the touchstone of Escobedo—should not be relevant. If such suspicions are communicated to the defendant, however, the risk is run of intro-

_dants had no means of developing such a record on appeal or on collateral attack. In Crooker v. California, 357 U.S. 433 (1958), the defendant was questioned intermittently for twelve hours, while in Haley v. Ohio, 332 U.S. 596 (1948), the defendant was questioned for only five hours. Crooker had made a request for counsel in the police station, which was denied, and Haley had not. Crooker's confession was upheld. Haley's was not. The decisive factors were that Crooker was a thirty-one-year old college graduate who had attended law school for a year, 357 U.S. at 440; while Haley was a fifteen-year old boy of limited education, 332 U.S. at 509, who presumably had less capacity to resist interrogation. While the Court's decision in Crooker rested principally on his maturity and education, i.e., his capacity not to be coerced, an examination of Crooker made by the psychiatric staff of San Quentin Prison revealed an immature, confused and emotionally unstable personality. This factor, among others, led Governor Brown to commute Crooker's sentence to life imprisonment. Prettyman, Death and the Supreme Court 167-257 (1961)._
In delimiting standards for waiver of the fifth amendment privilege, the Court in *Miranda* applied the familiar doctrines that a request to exercise a constitutional right is not necessary to bring the right into play, and that a waiver of such a right can be made only with knowledge of its existence. The Court generally adhered to the principle that exacting standards are required for proof of waiver of constitutional rights. It said that "whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." This raises a significant point. Included in the relief asked for by two of the three state defendants in *Miranda* was a plea that the *Mallory* rule, or some variant thereof, be applied to the states on constitutional grounds. The Court's

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19 In State v. Baker, — Wash. —, 413 P.2d 965 (1966), police officers knocked on the defendant's door, identified themselves and were admitted by his wife. The officers observed the defendant emerging from a room and immediately asked if he was the owner of an automobile parked in front. The defendant said he was. No warnings were given and at the time the officers had no reason to believe that the automobile, which had been used in a holdup, belonged to anyone in the defendant's house. The admission of ownership was admitted into evidence over defendant's objection. Arguably, the admission of the statement would pass colors under both *Escobedo* and *Miranda*. The officers' suspicion had not yet focused on the defendant, nor had they given him any reason to believe that he was being deprived of his liberty, or was about to be deprived of his liberty. Another result might obtain if the officers did suspect the defendant (under *Escobedo*), and if such suspicions had been communicated to him (under *Miranda*).


22 Under *Miranda*, if a suspect is interrogated without the presence of counsel a "heavy burden" rests upon the state to prove waiver of the right to silence and of the right to the presence of counsel. 384 U.S. at 436, 475. Failure to request counsel does not constitute waiver. In no event can a valid waiver be made if the fourfold warning has not been given. Id. at 470. The fact that the defendant has begun to answer some questions, or has volunteered information, will not constitute waiver. Id. at 476. What will constitute waiver should at least include the following—after the fourfold warning has been given, an express statement that the individual does not want a lawyer and that he is willing to make a statement. Id. at 475.

23 Id. at 476.

24 See note 12 supra.

language seems to represent a roundabout application of this rule to the states—an elevation to constitutional dimensions of the Court's censure of lengthy or incommunicado police detention. While formerly such detention militated against admissibility, it was only a factor among the "totality of the circumstances" considered to determine if due process had been denied. Under the Court's formula above, lengthy interrogation or incommunicado detention is strong evidence of lack of waiver, whatever the testimony of the authorities. Absent proof of waiver, interrogation of a defendant without the presence of counsel will result in suppression of any statements made, or automatic reversal if the statements are allowed in evidence by the lower court.

The critical point with respect to waiver not answered by Miranda is what evidentiary standard the Court will require for proof of waiver. A confession typically involves disputed testimony as to the circumstances under which it was obtained. Such disputes are usually resolved against the defendant. In his dissent in Miranda, Justice Harlan pointed out that "those who use third degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." Giving the Court's premises, the failure to specify a stringent evidentiary standard seems to be an obvious flaw in the decision. The presence of counsel in the station house will serve as objective verification of the authorities' testimony. This verification was designated by the Court as a subsidiary function of counsel who is present during interrogation. In the case of waiver, however, an attorney will not be present. Two of the four cases before the Court in Miranda presented a waiver

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27 If a confession is found to be inadmissible, the Court will reverse no matter how much independent evidence of guilt the trial record discloses. Stroble v. California, 343 U.S. 181, 190 (1952). Nor will the fact of independent evidence influence the Court as to the admissibility of the confession. Some state courts do not follow this practice. See, e.g., State v. Janovic, — Ariz. —, 417 P.2d 527, 529 (1966).

28 E.g., People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825, rev'd sub nom. on other grounds, 378 U.S. 478 (1964); State v. Haynes, 58 Wash. 2d 716, 364 P.2d 935, rev'd sub nom., 373 U.S. 503 (1963). And then the defendant is up against the reluctance of appellate courts to overturn findings of fact. The United States Supreme Court, however, will undertake an independent review of the record to determine factual issues. 373 U.S. at 515.

29 384 U.S. at 505.

30 Id. at 470.
problem. At the top of Miranda's signed confession was a typed paragraph stating that the confession was being made voluntarily, without threats or promises of immunity, and "with full knowledge of my [Miranda's] legal rights understanding that any statement I make may be used against me." In reversing, the Court said it found no evidence that Miranda's privilege against self-incrimination had been protected by the authorities by the fourfold warning or other means, stating as to waiver, "the mere fact that he [Miranda] signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights." In Westover, an FBI agent testified, and a paragraph on each of Westovers' statements stated, that the defendant had been advised he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney. The Court found that this alone did not constitute waiver, and that under the circumstances—a sixteen-hour period of detention and interrogation—the warnings, given at the end of this period, were not an adequate protection of the privilege against self-incrimination. The Court is in effect saying that on the facts of Westover a waiver of rights would be impossible.

Where the only dispute is as to proof of waiver—given an adequate waiver if the authorities' version of the facts is accepted—there are two possibilities: (1) the Court will accept uncorroborated police testimony, or (2) the Court will insist upon some objective, independent verification, such as motion pictures and sound recordings. The Court's treatment of the waiver issue in Miranda and Westover seems to indicate a preference for the latter. Language elsewhere in the opinion concerning the state's "heavy burden" in showing waiver, together with the otherwise meticulously detailed procedure designed by the Court to implement the fifth amendment privilege, also seems to point to the latter possibility.

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31 Id. at 492.
32 Id. at 492.
33 Id. at 496.
34 But note the possibility of tampering with mechanical devices.
35 See not 21 supra.
36 Relief which went beyond what any of the defendants had asked for, and far beyond what was necessary for the disposition of the cases at hand. Brief for Petitioner, pp. 6-9, Miranda v. Arizona, 384 U.S. 436 (1966); Brief for Petitioner, pp. 12-15, Westover v. United States, 384 U.S. 436 (1966); Brief for Respondent, pp. 17-19, California v. Stewart, 384 U.S.
SELF-INCrimINATION

Miranda does not render all confessions inadmissible. Confessions are freely admissible when taken after the procedural requirements have been complied with. Moreover, the fourfold warning is not required in the case of an individual who is not in the custody of the police and is not being interrogated. The police are also free to detain an individual without giving the fourfold warning while an investigation is being carried out in the field. It is important to bear in mind that the police are free to interrogate a suspect without giving the warnings, providing that any statements made are not used against this particular individual.40 As Miranda con-


"Confessions remain a proper element in law enforcement." 384 U.S. at 478.

It should be noted that the Miranda exclusionary rule applies to both confessions and admissions, to both inculpatory and exculpatory statements. Statements inadmissible under Miranda cannot be used to impeach the testimony of the person who has made the statements. Id. at 476-77. Nor does failure of counsel to object to the admission of statements made by the defendant constitute a waiver of the claim. Id. at 495 n.69.

Id. at 477. However, lengthy detention may create a barrier to the admission of any statements the defendant subsequently makes. See note 23 supra, and accompanying text.

It is not clear whether the "fruits of the poisonous tree" doctrine of Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), as applied in Wong Sun v. United States, 371 U.S. 471 (1963), will be applied to statements taken in violation of the Miranda rules. Wong Sun applied a fourth amendment exclusionary rule to oral evidence. "The right of the people to be secure... against unreasonable searches and seizures shall not be violated..." U.S. Const. amend IV. Although Wong Sun was a federal case, in Traub v. Connecticut, 374 U.S. 493 (1963), the Court reversed a state decision per curiam on the basis of Wong Sun. And in Ker v. California, 374 U.S. 23 (1963), the fourth amendment was held to apply to the states in all respects. Where statements are taken in violation of the Miranda rules, the statements cannot be used directly or collaterally against the person making them. Where the statements are used to procure independent evidence, the defendant will have to rely on the fruits of the poisonous tree doctrine to suppress the evidence. Wong Sun stands for the principle that oral evidence can be inadmissible under this theory. There are three limiting factors in the case: (1) it was based on the fourth amendment; (2) only the person whose rights of privacy have been violated can assert the theory, as other persons have no standing to do so; and (3) the connection between the evidence objected to and the original unlawful conduct on the part of the authorities must be sufficiently strong that the original taint has not been attenuated. As to the first limitation, it is open to a defendant to argue that evidence obtained in violation of the Miranda code represents an unreasonable search within the meaning of the fourth amendment, i.e., unlawful interrogation is an unreasonable search of the defendant's mind. Or the defendant may argue that the underlying rationale of both the fourth and fifth amendments is the protection of a zone of private conduct from governmental intrusions. Cf. Griswold v. Connecticut, 381 U.S. 479 (1965). And therefore the poisonous tree doctrine of one should
tains a limiting factor—it only applies to persons being deprived of their liberty—the decision should not interfere with the use of informers and undercover agents.\footnote{It is difficult to see how the element of compulsion could be present when an individual does not know he is talking to a representative of the police. However, the decision may have some impact on the usefulness of dragnet arrests and arrests on suspicion.\footnote{Miranda will not interfere with admissibility of so-called threshold confessions, \textit{e.g.}, where an individual blurts out his guilt upon initially encountering the authorities without being questioned. The critical factor is not whether the individual can be allowed to talk to police at all, but whether he can be interrogated. Nor will the decision foreclose general on-the-scene questioning of persons not in the custody of the police.}} It is difficult to see how the element of compulsion could be present when an individual does not know he is talking to a representative of the police. However, the decision may have some impact on the usefulness of dragnet arrests and arrests on suspicion.\footnote{Writers have suggested that a logical extension of the \textit{Escobedo} rule would result in the exclusion of statements made to informers and undercover agents. See, \textit{e.g.}, Enker \& Elson, \textit{Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois}, 49 MINN. L. REV. 47, 84 (1964).}
A recent North Carolina case, *State v. Gray*, is significant in the light of *Miranda*. The defendant was warned that he had a right to silence, to presence of counsel, and that anything he said could be used against him. He was not given the fourth *Miranda* warning, that if he were an indigent he was entitled to appointed counsel. At trial incriminating statements made by the defendant during custodial interrogation were admitted into evidence over his objection. In affirming the conviction, the North Carolina Supreme Court held that state evidentiary standards require suppression of involuntary confessions, and that the due process clause of the fourteenths amendment, as interpreted in *Miranda*, requires suppression of confessions taken in violation of the privilege against self-incrimination. The North Carolina court found that (1) the record did not disclose any basis for believing that defendant was an indigent, and (2) therefore he had no right to appointed counsel and it was not necessary to warn him of a right he did not have. It

standards was improbable in light of the due process test of admissibility which will be applied to trials pre-dating Escobedo. This is open to serious question. See, e.g., Comment, 64 Mich. L. Rev. 832 (1966).

In *Johnson*, the Court indicated that in cases not governed by *Miranda*, failure to give the *Miranda* warnings would be considered in determining admissibility. 384 U.S. at 730. To date, two state courts have ignored this admonition. In *Mathis v. State*, — Ala. —, 189 So 2d 564 (1966), decided subsequent to *Miranda*, the Alabama court did not take into account the failure of the interrogating officers to give any warnings at all. In *State v. Winge*, — Minn. —, 144 N.W.2d 704 (1966), the Minnesota court did not consider the interrogating officers' failure to give the fourfold warning.

The Los Angeles County District Attorney's Office conducted a post-*Miranda* survey of the effect of the decision on law enforcement efficacy. *Younger, Dorado-Miranda Survey* (1966). Work sheets were compiled on 11,437 defendants against whom requests for the issuance of felony complaints had been made. After concluding that (1) confessions were essential to successful prosecution in only ten per cent of the cases studied, and (2) that the percentage of cases in which confessions or admissions were made had not decreased because of the *Miranda* requirements, the report stated:

The *Miranda* decision is causing some problems in the prosecution of current cases filed prior to the decision, but should not create significant difficulties in the prosecution of future cases. . . . The one thing that we [the district attorney's office] cannot cope with and the thing that disturbs most citizens in and out of law enforcement, is the fact that some of the changes [not *Miranda* or Escobedo] become effective retroactively. If the Supreme Court wants police officers to sing "Yankee Doodle" to a suspect before taking a confession, we will do our best to see that every police officer in Los Angeles County learns the words and tune and sings at the appropriate time; but we can't anticipate the requirement.

*Id.* at 3.

relied heavily on the Supreme Court's language that the states are not bound to follow the *Miranda* procedures so long as other equally effective means are employed to protect the substantive privilege.

In *Miranda* the Supreme Court addressed itself to precisely the situation found in *Grey*. It said that

> While a warning that the indigent may have counsel appointed need not be given to a person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score.⁴⁵

This seems to be contrary to the result in *Grey*. The North Carolina court drew an inference from the record that the defendant was not an indigent.⁴⁶ It did not address itself to the question of whether the officer was aware of this before commencing custodial interrogation. The logic is compelling, but it is inconsistent with the *Miranda* opinion, in that it equates the concept of "effective methods" of protecting the substantive privilege (which *Miranda* leaves the states free to devise) with the absence of prejudice.⁴⁷ In the sense of the *Miranda* opinion, "effectiveness" clearly goes to the question of whether the compulsion the Court regards as inherent in custodial interrogation has been effectively neutralized.⁴⁸ It is not whether the means actually employed avoided prejudicing the defen-

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⁴⁵ 384 U.S. at 473 n.43.

⁴⁶ The defendant had been released on bond prior to trial; at trial he had been represented by two attorneys; subsequently he had attended East Carolina College. The record did not reveal any information that anyone but the defendant or his family had paid for these things. 286 N.C. at 80, 150 S.E.2d at 10. Moreover, the defendant did not contend on appeal that he was an indigent. *Id.* at 80, 150 S.E.2d at 10.

⁴⁷ The court is saying that since the defendant was, by inference, not an indigent, therefore he was not entitled to appointed counsel, therefore failure to warn him of a right he did not have did not have did not prejudice him in any respect. *Id.* at 83.

⁴⁸ It is obvious that such an interrogation environment [an interrogation room in a police station] is created for no purpose other than to subjugate the individual to the will of his examination. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

384 U.S. at 457-58.
RIGHT TO COUNSEL WAIVER

An accused may waive his right to counsel, guaranteed to him by the sixth amendment.1 The courts, however, have been charged with a protective duty to assure that such waiver is "intelligent and competent."2 As an accused's right to counsel has now been extended to state criminal proceedings,3 the problem of waiver may well become very important.

1 "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Fed. R. Crim. P. 44. "[T]he Constitution does not force a lawyer upon a defendant. He may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." Adams v. United States ex. rel. McCann, 317 U.S. 269, 279 (1942).
3 See Gideon v. Wainwright, 372 U.S. 335 (1963). See also Miranda v. Arizona, 384 U.S. 436 (1966), extending the right of counsel to any suspect whose freedom has been curtailed "in any significant way." Id. at 444.