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LAWYERS IN THE STATION HOUSE?

(Comments upon *The Supreme Court And The Police: A Police Viewpoint*,
by Vincent L. Broderick)

ROBERT E. ENGLISH*

As a state court judge, I should like to comment at the outset upon the impact which has been made by the *Escobedo* decision¹ on the state courts. Thus far it has been surprisingly moderate in relation to the determination of actual cases, but there is, of course, deep concern over developments in the law which may lie just around the corner. This concern is shared about equally, I believe, by those whose anticipation is laced with alarm, and those who already find ground for satisfaction and hopefully look for more. For, surely, the existing large-scale involvement with the problems of police investigation could only have been occasioned by the *dicta* and not the decision, itself, in the *Escobedo* case.

Since *Escobedo* there have been a number of cases around the country in which precisely opposite results have been reached on application of the fringe features of the *Escobedo* opinion. These differences have arisen, I would say, from conflicting judicial points of view as to the appropriate function of the lower courts in relation to the Supreme Court. Some, recognizing the law as it existed prior to *Escobedo*, have refused to depart therefrom in cases distinguishable from *Escobedo* on the facts. They have thus left the admissibility of confessions unchanged except for cases which might fall within the strict confines of the *Escobedo* decision.

An example of such a holding is *People v. Hartgraves*² in which the Illinois Supreme Court held that rejection of a confession elicited through police interrogation was not required, because the accused had not requested the assistance of counsel. And this, even though the defendant had been given no warning that his confession might be used against him, no advice that he had a right to legal counsel, and no advice concerning his right to remain silent. *United States v. Cone*,³ decided en banc by the Court of Appeals for the Second Cir-

cuit, is another case to the same general effect, but for varying reasons expressed by several judges in concurring opinions. The New Jersey opinion in *State v. Taylor*⁴ is also of interest on this point.

Other courts, notably California⁵ and the Third Circuit,⁶ apparently concluding that they perceived a trend in the law, have sought to anticipate the next moves of the Supreme Court in line with the *dicta* in *Escobedo*. They have held, therefore, that failure of an accused to request counsel when questioned by the police did not distinguish the case from *Escobedo*. They held further that this constitutional right to counsel precludes use of incriminating statements elicited by police questioning unless the right is waived; and that it cannot be intelligently waived unless the accused is informed of both his right to remain silent and his right to counsel.

As to which judicial approach is preferable, I would not hesitate to put in with the Supreme Court of Illinois. I should not want to participate in the release of a convicted defendant on the basis of what the Supreme Court of the United States might do in the circumstances were such a case to be presented to it, and then find out later that the Court was disinclined to go quite that far. As to which decisions will ultimately turn out to be the law, however, I suspect nobody knows, not even the Supreme Court Justices themselves.⁷

In commenting upon Mr. Broderick's talk, I would never be so brash as to try to tell Mr. Broderick anything about the administration of a police force, and I agree with many of his statements. He has stated admirably, I think, the goal of the police as being the maintenance of a climate within which the liberties of a citizen may properly be exercised. Mr. Broderick, however, appears to

⁴ 46 N.J. 316, 217 A. 2d 1 (1966).

⁵ *People v. Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), cert. denied, 381 U.S. 937 (1965).

⁶ *United States ex rel. Russo v. New Jersey*, 351 F. 2d 429 (3rd Cir. 1965).

⁷ Since this paper was delivered the issue has been decided in *Miranda v. Arizona*, 86 S.Ct. 1602 (1966).

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¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

² 31 Ill. 2d 375, 202 N.E. 2d 33 (1964), cert. denied 380 U.S. 961 (1965).

³ *United States v. Cone*, 354 F. 2d 119 (2d Cir. 1965).

me to be either disarmingly ingenuous or unnecessarily generous when he says that "we in law enforcement should accept enthusiastically the principle which underlies (the *Escobedo* case)." He seems to be, and I am sure he must be, convinced of the essentiality of pre-arraignment police interrogation. Yet he attributes to the Supreme Court "an intense concern for consideration of the due administration of justice," equating the term "administration of justice" in this context to the other pan of the scales in contradistinction to the "rights of individuals". I do not join him in reading that degree of concern on the part of the Court into the *Escobedo* opinion. I see, instead, a threat (which, of course, may not materialize) to exalt the newly recognized right to counsel to a level at which it could very easily eliminate altogether any meaningful police interrogation of an accused. Nor do I believe that the Court's majority would be intensely or even sorrowfully concerned over the passing of this important phase of crime detection. I refer, in part, to these words of Justice Goldberg:

... 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. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.⁸

Compare these statements with the understanding of police problems expressed by the Court only a short time before in *Cicenia v. Lagay*:⁹

On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position [that any state denial of a defendant's request to confer with counsel during police questioning violates due process] would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases. *A satisfactory formula for reconciling these competing concerns is not to be found in any broad pronouncement that one must yield to the*

other in all instances. Instead, . . . this Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness. (Emphasis added.)

Now, I grant that to translate Justice Goldberg's language into an admonishment that police questioning will be done away with, I must attach great significance to an accused's right to counsel. And I do—very great. I also foresee far more serious consequences of the policeman's warning the accused of that right than do either Mr. Broderick or Professor Packer.

Returning for a moment to the newly recognized prearrest right to counsel, there can be no doubt that we will here be dealing with a completely new field of experience for police administrators. The discovery of this right (together with its exclusionary sanction) was remarkable, indeed, in view of the language of the sixth amendment declaring the right to exist "in all *criminal prosecutions*", with 175 years of acceptance of the original meaning of that term as indicating ordinarily the proceedings commenced by indictment but not earlier than the magistrate's hearing. As stated by the Second Circuit in the *Cone* case,¹⁰ "Text, context and history of the sixth amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and procedural niceties of the criminal law."

Historically, I am sure that the drafters of the Illinois constitution of 1818 considered they were declaring a right essentially the same as that in the sixth amendment when they wrote¹¹ that "in all *criminal prosecutions*, the accused hath a right to be heard by himself and counsel . . ." (Emphasis added.) Approximately the same language was carried forward into the Illinois constitution of 1848.¹² Our current constitution, which was adopted in 1870, provides,¹³ "In all *criminal prosecutions* the accused shall have the right to appear and defend in person and by counsel . . ." (Emphasis added.) There is no doubt in my mind that

¹⁰ *Cone*, *supra* note 3 at 123.

¹¹ Const. Art. VIII, §9 (1818).

¹² Const. Art. XIII, §9 (1848).

¹³ Const. Art. II, §9 (1870).

⁸ *Escobedo*, *supra* note 1 at 490.

⁹ 357 U.S. 504, 509 (1958).

the words "appear and defend" apply exclusively to judicial proceedings.

In the matter of "original meaning" of constitutional terms as contrasted with a later expanded interpretation of the same language, I should like to read to you the comments of one of the Supreme Court justices as expressed in his dissenting opinion:

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be 'shackled to the political theory of a particular era,' and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast with this Court's more enlightening theories of what is best for our society. It seems to me that this is not only an attack on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a 'political theory' embodied in our Constitution becomes outdated, it seems to be that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.¹⁴

It impresses me that this comment may be more appropriate or less so, depending upon the particular language of the constitution which is under consideration. I cannot disagree with the cliché that the constitution must be interpreted by the courts as a "living document", competent to cope with the changed conditions of the twentieth vis-à-vis the eighteenth century. Thus, for example, it seems to me only reasonable that the term, "commerce among the several states", should have taken on by now a new interpretive meaning which could not possibly have been contemplated in 1789, because the extent and the very character of commerce today were themselves unforeseeable. But

¹⁴ Harper v. Virginia State Board of Elections, 383 U.S. 663, 677-78 (1966) (Black, J., dissenting).

when it comes to constitutional language employing the terms which were used to declare the right of an "accused" to have the "assistance of counsel for his defense" in "criminal prosecutions", the factual background of 1966 is not substantially different from that which existed at the time when the constitution was drafted. We had then, as we have now, interrogation of suspects, both investigatory and accusatory. We had, and still have, arrest, custody, indictment, criminal prosecution, public jury trial, etc. Neither the circumstances nor the consistent application of the constitutional language changed appreciably in 175 years. What, then, was the reason for changing the original meaning of the words "criminal prosecution" in the context of the Sixth Amendment? Justice Black's criticism of the Court's departure from "original meaning", which I read to you from his dissent in the Virginia Poll Tax case, would seem to have especial relevance and significance. So we turn to the *Escobedo* opinions to see how sharply Justice Black must have dealt with the majority there, only to find, of course, that he had joined in the opinion of Justice Goldberg. Could this, then, have been just another result-oriented decision?

Earlier courts might be forgiven their inability to discern so important a constitutional right as that declared in *Escobedo* when it is borne in mind that they were looking only for factors which, in "the totality of the circumstances"¹⁵, might establish that an inculpatory statement had been made voluntarily or involuntarily. As recently stated by Justice Frankfurter for the court in *Culombe v. Connecticut*: "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."¹⁶

A great many tests were developed judicially through the years to assist the courts of this country in determining whether or not a confession was voluntary. I shall not take time to detail them. Within these guidelines the law enforcement agencies were given the opportunity to preserve

¹⁵ Fikes v. Alabama, 352 U.S. 191, 197 (1957); see also Watts v. Indiana, 338 U.S. 49, 53 (1949).

¹⁶ 367 U.S. 568, 602 (1961).

the security of society and maintain "a climate of law and social order". Certainly there were deplorable violations, but I submit that their remedy lay in enforcing the established voluntary-involuntary rules, or amending or extending them, not in pulling out of the hat, as it were, a completely new exclusionary principle. I think that there had been a very considerable promise for the improvement of law enforcement attendant upon the increased attention being given to the burgeoning problems of the burgeoning urban and metropolitan areas, but if the *dicta* of *Escobedo* are to become law, I would not be so sanguine. In that event, I should judge, the delicate balance, so long sought, between the rights of the individual and the safety of the public, would be drastically and dramatically upset.

I suppose this makes me a prophet of doom in the eyes of many. I noticed a recent piece by Professor Kamisar in the publication of American Trial Lawyers in which he cautioned against heeding those who counselled that we were losing ground in "the war against crime".¹⁷ If I understood his point correctly, it was that such people should be ignored, partly because they "have *always* insisted that traditional safeguards are no longer necessary in 'modern times'" (a point which obviously does not apply to those who are perturbed about *Escobedo*); and partly because there had been people like them in every decade of this century. Implicit in such an argument, of course, is the cheering thought that the premise on which such fears are based does not in fact exist; that we are actually winning "the war against crime", and have been doing so right along. It appears that Professor Kamisar and I have not been living in, or visiting, or reading about the same cities, or studying the same statistics. If crime in general, and unpunished crime in particular, have not shown an increase by any and all standards during recent decades I shall be happy to yield the point.

In most of what I have read on assessment of the situation existing since *Escobedo*, I have found an excess of self-chastisement, for I consider pejorative comments about the police to be, essentially, self-deprecation. This seems to be the vogue in other fields, too, as demonstrated by the many public, though unofficial, efforts to place or accept the blame for the president's assassination.

¹⁷Kamisar, *Courts Must Not Yield To Prophets Of Doom In Crime Crisis Battle*, AM. TRIAL LAW. 14, December-January, 1966.

It is popular these days to run down many of the principles and institutions which have proved their value in the past. Collective guilt is in; community pride is out. Aside from being exaggerated, and, to that extent, wrong, I believe that criticism of the police at this time is more than a little anachronistic. It is somewhat akin to deploring the sweatshops, the 12-hour day, and starvation wages. Certainly there are, and, I am afraid, will continue to be, instances of "police brutality" and places where such activities are countenanced. In making generalized criticism of these isolated cases, however, there is a real possibility that we may carry the theme too far, and in the wrong places, to the hurt of all public safety.

While on a discouraging note, I might mention that I do not share fully Mr. Broderick's optimism that the *Escobedo* rule will not be given retroactive effect. I am aware of the *Walden*,¹⁸ *Wade*,¹⁹ and *Negri*²⁰ opinions which refuse to make retrospective application, and the weight of authority so far is in that direction. But *Russo*²¹ inferentially held to the contrary, and there could be room for holding that the "purpose of the rule" encompasses more than a purely deterrent principle and might extend to "the very integrity of the fact-finding process".²² The dissenting opinion in *Negri*²³ is a very thoughtful expression of that point of view.

I heartily agree with Mr. Broderick's proposal that law enforcement agencies should proceed constructively with the gathering of presently unavailable data relating to police problems which will or may develop under *Escobedo*. I should like to suggest a pilot project or two.

The first arises from the position taken by the Second Circuit in the *Cone* case concerning the moment of crossover from investigatory to accusatory questioning by the police. Judge Lumbard there stated:

It has been suggested that the process of questioning suspects may be dissected into "investigatory" and "accusatory" phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel "attaches" and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police ques-

¹⁸ *Walden v. Pate*, 350 F. 2d 240 (7th Cir. 1965).

¹⁹ *Wade v. Yeager*, 245 F. Supp. 67 (1965).

²⁰ *Commonwealth v. Negri*, 213 A. 2d 670 (1965).

²¹ *Russo*, *supra* note 6.

²² *Linkletter v. Walker*, 381 U.S. 618, 639 (1965).

²³ *Negri*, *supra* note 20 at 677.

tioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the "accusatory" stage when Cone was questioned immediately after his arrest, would serve no useful purpose. . . . To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the "investigatory" stage and had entered the "accusatory" stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized.²⁴

Sympathetic as I am toward this statement, I respectfully submit that it impresses me as a sort of rear-guard action which is not likely to prevail. In any event, it would be in keeping with Mr. Broderick's suggestions if a project were undertaken to develop a workable answer (if one is possible) to this extremely difficult police problem; the more so since it does at the moment seem extremely unrealistic.

Such a project might also include a factual study of the practical experience in England under the Judges' Rules,²⁵ about which there have been such conflicting reports. To the extent that they may have proved workable, other than through their circumvention, it may be because they do not include the right to, or appointment of counsel at the police interrogation stage. What they do require is that when the police have decided to charge a suspect he may not be questioned further unless he is cautioned that he need say nothing and that

what he does say may be used in evidence. These Rules, which were promulgated in 1912, do not have the effect of law, but there is no question about their having influenced greatly the administration of criminal law in England even without our exclusionary rule as to illegally obtained evidence. It is interesting to note that the discouragement which the Rules afforded to the questioning of a suspect in custody was largely removed by amendment in 1964, and such interrogation is now expressly authorized. This, incidentally, is a move which is counter to the trend we are experiencing, and the factual background which prompted the change ought to make an interesting study.

If our Supreme Court were to decide a case based factually upon the full stretch of its *Escobedo* proclamation concerning right to counsel, it would, of course, have the effect of law. Thus the Court might already be embarked upon a course which would preempt the field otherwise available for the development of American Judges' Rules based upon the type of warnings given to an accused in England. Furthermore, the English Rules bear basically upon the voluntary-involuntary test, a standard which has now lost its primacy in this country, and may turn out to have less and less relevance.

I can understand Mr. Broderick's wish that "the constitutional focus of the Court should be on whether or not, in light of all the circumstances, the statements elicited from the defendant are voluntary", but I believe the *Escobedo* opinion effectively discarded that criterion. There is no reason to believe that *Escobedo's* confession was not voluntary. Justice Goldberg did not say that denial of consultation with counsel had rendered the confession involuntary. And Justice Stewart spoke correctly, I think, when he said, "The confession which the Court today holds inadmissible was a voluntary one".²⁶

A few further words about the warnings to be given by a policeman to his accused. It may well be that the person about to be questioned will have the right to have the policeman advise him that he has the right to refrain from answering questions, the right to his own counsel, the right to have counsel assigned under certain circumstances, the right to be told that whatever he may say could be used in evidence against him, and the right to waive any or all these rights if he wants to do so. It may be, however, that he will have the right to

²⁴ *Cone*, *supra* note 3 at 123.

²⁵ The origin and development of the Judges' Rules are traced by Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 593-598 (1961).

²⁶ *Escobedo*, *supra* note 1 at 494.

have a lawyer tell him that he has the right to waive these rights. It could get mighty complicated, and it would appear extremely probable that in some cases erroneous legal advice would be given by a policeman who would ordinarily not be licensed to practice law. I am not suggesting that the courts would proceed against a lay policeman for the illegal practice of law on the basis of his having done what the courts have indicated he must do if he is to obtain a usable confession. I do point out, however, that a suspect could hardly have a more unlikely or inappropriate source of legal advice than the officer who at that time would presumably be taking affirmative action to secure the evidence necessary for the suspect's conviction.

I seriously believe that the most important project for all of us to contemplate is the one which will face the police questioner when the right to counsel, about which the accused has been warned, materializes into a real live lawyer at the station house representing his client during the accusatory interrogation. I cannot understand why it is that so much of the thought and effort being devoted to procedures for the warning stages is apparently being done in the expectation that the questioning may then proceed and that the right to counsel will not be exercised.

Having proclaimed that the stage of accusatorial interrogation is that at which legal aid and advice are most critical to an accused, I cannot foresee the court's retracting these brave, new words and retracting with them this newly-determined constitutional right. If that be correct, then it is equally difficult for me to foresee application of the rule only to persons able to retain their own attorneys. I agree with Justice White's conclusion that such a forecast would be naive.²⁷ It would then become a certainty that the right of an indigent defendant to assigned counsel at his trial would be advanced by way of *Gideon*,²⁸ *Escobedo*,²⁹ and the sixth amendment to the protection of an accused during interrogation at the police station.

The new Federal Rules of Criminal Procedure, proposed to become effective July 1 of this year, provide that "every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless

he waives such appointment". (Rule 44.) The right to assigned counsel will thus no longer be related to financial inability to pay. Also, the right, which, under present rules, commences upon appearance in court, will, in the future, apply before the commissioner as well. And the commissioner will then, for the first time, be required to inform the defendant "of his right to request the assignment of counsel . . .". (Rule 5.) That counsel may have to be assigned at a still earlier stage was recognized in the Advisory Committee's Notes to the proposed rule which state, "These rules do not cover procedures other than those in the courts of the United States and before United States commissioners. . . . Hence, the problems relating to the providing of counsel prior to the initial appearance before a court or commissioner are not dealt with in this rule. Cf. *Escobedo* . . ."

In February, 1966 the American Bar Association Standing Committee on Legal Aid and Indigent Defendants recommended approval of certain Revised Standards for Defender Services. They provide, in part, that persons without financial means to secure competent counsel, when charged with an offense carrying the possibility of a jail sentence, should be provided with legal representation "immediately after the taking into custody or arrest."³⁰ These standards are the work of the National Legal Aid and Defender Association which adopted them last November. We should note that if these standards are met, they would go far toward giving substance to the concern of Justice White that the *Escobedo* rule will be "wholly unworkable and impossible to administer unless police cars are equipped with public defenders".³¹

The Illinois Public Defender Act became law in 1933. Thus Illinois was one of the enlightened states which anticipated *Gideon v. Wainwright*³² by a good many years. The statute provides that the Public Defender is to appear *before the court* for criminal defendants who are found by the court to be unable to employ counsel. There is, therefore, no authority for the Public Defender to represent an accused at any stage earlier than his first appearance in court. The statutory authority of the Public Defender to represent a defendant in court is also subject to the direction of the court. In practice he does not appear for any defendant except by ap-

³⁰ American Bar Association, *Recommendation Concerning Revised Standards For Civil Legal Aid and Defender Services*, February, 1966—No. 45.

³¹ *Escobedo*, *supra* note 1 at 496.

³² *Gideon*, *supra* note 28.

²⁷ *Id.* at 495.

²⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁹ *Escobedo*, *supra* note 1.

pointment of the court and then only after the court has conducted an inquiry to determine the defendant's indigence.

Assuming that the authority of the Public Defender were extended so that he would somehow be designated to represent criminal suspects at the police station, he would require a tremendously increased staff. In a place such as Cook County, Illinois, I can think of no satisfactory solution to this personnel problem other than to have an Assistant Public Defender assigned to each police station in the county to which suspects are customarily brought for questioning at any and all times of day and night. On this hypothesis, the service of the Public Defender's Office would require three assistants at each station, on eight-hour shifts. The volume of business at many of the Chicago police stations would unquestionably require more.

There are in Cook County 137 such police stations, including those of the Chicago and suburban police departments, the Sheriff, and the Illinois State Police. I would estimate that at least 500 Assistant Public Defenders would be required for this purpose. Assuming a minimum salary of \$7,500, the staffing of these positions would cost the county almost \$4,000,000 annually, without making any allowance for office space, desks or stenographic help. And this would be only for services commencing with the suspect's appearance at the station. It would not contemplate that interrogation requiring counsel could, and probably would, take place before that time.

Considering this situation a little further, it would seem to me inescapable that the policy of such a Public Defender staff (or the policy of any lawyer, for that matter) would be to advise the client not to answer any questions. Justice Jackson cogently stated this fact of legal life in his opinion in *Watts v. Indiana*³³ where he said:

... To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, *any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.* (Emphasis added.)

³³ 338 U.S. 49, 59 (1949).

I can assure you that, whatever the situation might be elsewhere, in Chicago every lawyer is "worth his salt". There would be no questions answered by a suspect in the presence of his counsel, except in so far as the latter might want him to make an exculpatory statement of some kind. If that were true, there would be no admissions or confessions. I would even predict that if incriminating answers were given by a suspect with his attorney present under these circumstances, a point would be raised by post-conviction petition alleging that incompetency of counsel had deprived the defendant of the effective assistance of counsel guaranteed to him by the sixth amendment. And we would then be right back where we started.

Now, I don't think that \$4,000,000 or anything like that amount would be budgeted in Cook County when its effect would be merely to guarantee that the police would not elicit confessions through interrogation. It would be much simpler and cheaper to direct the police not to take any confessions. This would probably mean the termination of all questioning at the moment of suspicion, since that would be the point at which, by hindsight, it would probably be determined that the right to counsel attached, and no officer could be certain in advance that he could safely maintain the line between investigatory and accusatory interrogation. Thus the time and effort of the police saved by contraction of the questioning procedures, and augmented by the funds otherwise required for the furnishing of counsel to indigent suspects, could be spent in developing and perfecting other methods of crime detection—an area which, I think law enforcement officials would be the first to admit, could stand some improvement. This is the area, too, which Justice Goldberg was describing when he said in *Escobedo*:³⁴

Nothing we have said today affects the powers of the police to investigate "an unsolved crime," . . . by gathering information from witnesses and by other "proper investigative efforts" (citing *Spano*³⁵ and *Haynes*³⁶).

Surely, the Court's suggestion falls in the category of things more easily said than done. What the results of such a limited detection process would be, I suspect no one can foretell. It seems obvious, though, that fewer crimes would be solved than if both lines of investigation could with propriety be

³⁴ *Escobedo*, *supra* note 1 at 492.

³⁵ *Spano v. New York*, 360 U.S. 315, 327 (1959).

³⁶ *Haynes v. Washington*, 373 U.S. 503, 519 (1963).

pursued simultaneously toward the perfection of each. Were it to be possible to acquire and maintain an adequate control over crime without the questioning of suspects, we would then, of course, enjoy the best of both worlds, for I know of none who considers desirable the least infringement of individual liberties except when demanded for the common good.

Most of what I have discussed relates to the greatest imponderable for law enforcement agencies in the entire *Escobedo* situation, namely, the results which would follow if appointment of counsel were required for the interrogation of

suspects. I realize that the majority of commentators on this point state or imply that this will not take place. I am simply not sure that it won't. In the words of Justice Stewart, "I can only hope we have completely misunderstood what the Court has said"³⁷.

In conclusion, I consider it extremely important that we all recognize the crescendo of conflict between law enforcement and civil liberty, for only then will we be made aware of the absolute necessity for resolving that conflict.

³⁷ *Escobedo*, *supra* note 1 at 495.