Some Aspects of the Right to Counsel

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SYMPOSIUM:

ADMINISTRATION OF CRIMINAL JUSTICE

PART I

Where is the proper balance between police power and individual freedom? This country is now undergoing a needed, albeit agonizing, reappraisal of its administration of criminal justice. The following Comments and those comprising Part II of the Symposium (which will be published in the next issue of the REVIEW) are an outgrowth of papers prepared by the authors for a Seminar on Administration of Criminal Justice offered by Professor Pugh during the past semester. In the subsequent preparation of the Comments for publication, some were supervised by Professor Bennett and some by Professor Pugh.

SOME ASPECTS OF THE RIGHT TO COUNSEL

The United States Supreme Court is currently expanding the rights of the individual who comes in contact with the law enforcement process. This development has intensified the conflict between the two basic societal objectives of protecting the individual's rights and providing an effective police power to maintain order. The purpose of this Comment is to investigate one part of this conflict — the right of an indigent defendant to appointed counsel.

The existing rules in this area are recent ones on which little gloss has been imposed. Confusion and uncertainty pervade the area and few conclusions can be reached, for only the Supreme Court can provide the definitive answers. In attempting to clarify this uncertainty, this Comment considers the right to counsel in Louisiana before Gideon v. Wainwright, the impact of recent federal cases, possible extension of the right, the prob-

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lems raised by Escobedo v. Illinois and the nature of a proper waiver of the right. It avoids historical background, to a great extent, to concentrate on recent developments.

LOUISIANA LAW AND PRACTICE BEFORE GIDEON V. WAINWRIGHT

The right to counsel was established early in Louisiana's history, the first Legislative Council of the Territory of Orleans enacting in 1804:

"That every person accused and indicted shall be admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall immediately upon his request, assign to such person such counsel as such person may desire, to whom such accused shall have free access at all seasonable hours."

This statute, without significant expansion and with some restrictions, has remained the basic Louisiana law on right to counsel, although there are no indications that the provision for appointment of counsel "as such person may desire" was followed. It is possible that the early statute did not encompass appointed counsel, but the courts recognized this right of indigents as early as 1862.

The current statutory provision, article 143 of the Code of Criminal Procedure, provides for appointment of counsel in felony cases if the defendant requests an attorney and makes affidavit asserting inability to employ counsel. An oath made before the court when counsel is requested is sufficient to meet the affidavit requirement. In conformity to the statute, appointment was restricted to felony cases, including relative felonies. Early jurisprudence interpreted the provision requiring

5. Subsequent statutes omitted this provision.
the accused to request appointment of counsel to mean a court has no duty to inform an accused of his right to have counsel appointed. However, the courts attempted to establish a different rule at the turn of the century. In *State v. Rollins,* the court noted that the general practice was to inform an accused he is entitled to counsel although there was no duty to do so, and reversed the conviction of a defendant who was not so informed, considering this as one of many circumstances that established the defendant had not been given full opportunity to avail himself of the defense the state guarantees an indigent. *State v. Youchunas,* in 1937, went further and held that the court had a duty to determine whether an accused desired appointed counsel and a duty to appoint one if he then requested it. *Youchunas* was partly overruled in 1950 by *State v. Hilaire,* which held that when the accused pleads guilty, the court has no duty to inform him of his right to counsel and no duty to appoint an attorney unless he requests one. The court distinguished *Youchunas* by pointing out that in that case the accused protested his innocence, while the defendant pleaded guilty in the instant case. To the extent that *Youchunas* established the duty to inform an accused of his right to counsel, it was limited in *Hilaire* to those situations in which the defendant pleaded not guilty.

In *Hilaire,* the court expressed a fear of opening prison doors:

"For us to hold otherwise at this time, after the several courts of this State have been accepting pleas of guilty on arraignment without assigning counsel to the accused under the practice and procedure long prevailing, would only serve as an avenue for the release of a majority of the inmates of the Louisiana Penitentiary who are now serving under pleas of guilty."

Article 143 does not state when counsel must be appointed. However, the assistance of counsel must be effective, which re-
quires that an attorney must be given adequate time to prepare a case. Since appointment at the beginning of trial does not meet this rule, counsel had to be appointed some time before trial. The general practice had been to appoint counsel after a defendant pleaded at arraignment. However, the advisability of earlier appointment was cited as the better practice, especially in capital cases.

Therefore, prior to Gideon, Louisiana required appointment of counsel for indigent defendants in felony cases in time to prepare for trial, when requested, and the court had no duty to inform a defendant of this right if he pleaded guilty at arraignment.

**IMPACT OF THE FEDERAL CASES**

**The Federal Standard**

Gideon v. Wainwright, applying the sixth amendment right to counsel to the states, elevated the right of an indigent to appointed counsel in state trials to the constitutional level. Consequently, it is now required that the court inform an accused of this constitutional right, that it appoint counsel unless the accused waives the right, and that the records of the proceeding show that he was informed. The federal district courts sitting in Louisiana recognized this change in Martin v. Warden and Byrnes v. Walker.

The Supreme Court has also prescribed the time at which the accused must be informed of his right and at which counsel must be appointed. That time is the point at which the proceedings reach the "critical stage" for the accused — when rights are preserved or lost, or when damaging pleas or admissions

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18. See Bennett, Right to Counsel — A Due Process Requirement, 23 La L. Rev. 662 (1963); Comments to Title XIV, Exposé des Motifs, LOUISIANA STATE LAW INSTITUTE CODE OF CRIMINAL PROCEDURE REVISION (1962).
could be used against a defendant at trial. Louisiana’s arraignment proceedings meet this test; therefore, a defendant must be advised of his right before he pleads at arraignment. If he does not waive his right, an attorney must be appointed to assist him in pleading. In White v. Maryland, the right was applied to a preliminary hearing at which a plea was made; this was considered a critical time. Since Louisiana’s preliminary hearing involves no pleas or assertion of rights that cannot be asserted later, the present rule would probably not require appointment of counsel then. However, there may be situations where counsel would have to be appointed much earlier under the doctrine of Escobedo v. Illinois, which will be discussed later.

Some problems may arise in this area as a result of Pointer v. Texas, which held that the sixth amendment right of confrontation requires cross-examination through counsel. In Pointer, a witness who had testified at a preliminary hearing at which the defendant was not represented by counsel was unavailable at the trial. The court held inadmissible the witness’ testimony given at the hearing because the defendant had no opportunity to cross-examine through counsel. Testimony given at a Louisiana preliminary hearing may be used at the trial, if a witness is unavailable. Thus, if a defendant is unrepresented by counsel at the hearing, the testimony obtained would be inadmissible at the trial. Louisiana may be willing to forego the use of such testimony instead of requiring appointment of counsel for preliminary hearings. However, the possible extension of Pointer blends into the implications of Escobedo in suggesting appointment be made prior to the preliminary examination or earlier.

Gideon applied the right to counsel in a felony case. While the Supreme Court has not explicitly held that counsel must be appointed for misdemeanors, there is language in Gideon which

30. LA. R.S. 15:155 (1950) : “The deposition of the accused, given voluntarily as aforesaid, and of any witness, whenever it shall be shown that such witness is dead, absent from the state, can not be found, or is too ill to testify, certified by the committing magistrate and the official court stenographer, or the stenographer appointed and sworn for the purpose, shall be received in evidence upon the trial of the case or in any subsequent judicial proceeding.”
implies that conclusion. The Fifth Circuit Court of Appeals is apparently of that view. This problem is discussed later, but it seems the Louisiana provision requiring appointment only in felony cases may not fulfill due process requisites.

The Guilty Plea

The rule of *Gideon* is retroactive. Thus, persons now imprisoned without having been given the full right to counsel will be entitled to a new trial, or, in absence of that, release. Included in this category are those who pleaded guilty without having been advised of their right to counsel, a guilty plea not being a sufficient waiver of the right. In Louisiana, the majority of criminal cases have been disposed of by guilty pleas, many of these defendants probably not being advised of their right to counsel since the law then did not require it and the general practice seems to have been otherwise. Therefore, many of the inmates of the Louisiana penitentiary who are serving sentences under pleas of guilty, and whom the Louisiana Su-

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31. 372 U.S. 335, 344 (1963): “Not only these precedents, but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” (Emphasis added.)

*Ibid.*: “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” (Emphasis added.)

*Ibid.*: “This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.” (Emphasis added.)

32. McDonald v. Moore, 373 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). These cases are discussed later in the text accompanying note 67 infra.

33. Remaining unchanged is the requirement that the accused must make affidavit that he cannot employ counsel. Since the right to appointed counsel depends on one’s indigence, there should be no objection to determining that status or requiring affirmation to inability to employ counsel. It does not interfere with the substantive right to counsel, and it is not a practical difficulty impeding the exercise of the right since an oath in open court suffices.


36. For statistics reflecting the enormity of the problem Louisiana faces in this regard see the Report of the Judicial Council of the Supreme Court of Louisiana Table xxviii (1964). For example, in Caddo Parish 1568 of 2440 criminal cases (70%) were disposed of by guilty pleas; Avoyelles, 235 of 341 cases (69%); Jefferson, 3877 of 4628 (84%); East Baton Rouge, 2720 of 5226 (52%). Of course, these statistics include misdemeanors which are not punishable by imprisonment in the penitentiary and cases in which defendants pleaded guilty with advice of counsel. Still, there remains a large body of prisoners eligible for release.
Supreme Court refused to release in *State v. Hilaire,*\(^{37}\) may now apply for habeas corpus relief under the doctrine of *Gideon.*\(^{38}\) In habeas corpus proceedings, a petitioner seeking release on the grounds of denial of the right to counsel will usually have the burden of showing he was deprived of the assistance of counsel and that he did not waive this right.\(^{39}\) However, there is a presumption against waiver\(^{40}\) which will make it difficult to counter a petitioner's claim that he did not waive and was not advised of the right, especially if there is a scant record of the proceedings.

A more important problem relates to future procedures and practices. Guilty pleas, if they are to meet constitutional standards, must be made with assistance of counsel or after a knowing and intelligent waiver of the right. Rigorous standards should be adopted to judge waivers made in connection with guilty pleas and some means devised to ensure that such waivers are intelligently made and are completely voluntary.\(^{41}\) Considering the present requirements that an accused be informed of his right to counsel before he pleads, and believing it self-evident that fewer guilty pleas and more requests for counsel will be made, it is submitted that the impact of the large number of additional trials resulting will not be inconsequential. The state will be expected to formulate some procedure for meeting the additional demands.\(^{42}\)

**Proposed Code of Criminal Procedure Revision**

The proposed revision of the Code of Criminal Procedure seeks to incorporate the constitutional standards explicitly es-

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37. 216 La. 972, 45 So.2d 360 (1950). See text accompanying note 13 supra.

38. Applicants for habeas corpus relief will be aided by the recent liberalization of federal habeas corpus procedure. *Fay v. Noia,* 372 U.S. 391 (1963); *Townsend v. Sain,* 372 U.S. 293 (1962). For a detailed analysis of these cases and the general liberalization in post-conviction remedies, refer to the companion comment in this Symposium, 26 LA. L. Rev. 705 (1966). *Gideon* is extended to misdemeanors, there would be little additional retroactive impact since misdemeanors are not punishable by imprisonment in the penitentiary and most often involve short sentences in parish jails or fines.


41. The problem of waiver of the right to counsel is discussed later in this Comment in the text accompanying note 125 infra.

42. This subject is under consideration by the Criminal Law Section of the Louisiana State Bar Association.
tablished by the federal decisions without anticipating the stricter implementation of the right to counsel that some commentators predict will eventually be required and which the Fifth Circuit seems to be adopting.\textsuperscript{43} It limits the rights to appointed counsel to felonies. It establishes a time for appointment — before the accused pleads to the indictment. It, of course, requires the courts to inform a defendant of his right to counsel before he pleads. The requirement of an affidavit attesting to indigency remains, also the provision that counsel appointed in capital cases must have five years' experience.\textsuperscript{44}

The revision requires other higher standards in capital cases.\textsuperscript{45} Counsel must be appointed when the accused appears at arraignment without an attorney, irrespective of indigency. Appointment must be made at arraignment, although earlier appointment is cited as a laudable practice.\textsuperscript{46} The provision for automatic appointment whether the accused desires counsel or not could raise problems in the case of a defendant who does not want an attorney, for he may have a constitutional right to personally defend his own case. The Supreme Court has not so ruled, but there are dicta to that effect. In \textit{Price v. Johnston},\textsuperscript{47} the court said that one has a "recognized privilege of conducting his own defense at the trial." The Fifth Circuit Court of Appeals has specifically ruled that it is error to deny a defendant the right to conduct his own defense and to appoint unwanted

\begin{footnotes}
\footnotetext[43]{McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). These cases are discussed later in the text accompanying note 67 infra.}
\footnotetext[44]{\textit{Louisiana State Law Institute Code of Criminal Procedure Revision, Exposé des Motifs} art. 3, tit. xiv (1962): "In other felony cases [non-capital], when a defendant appears for arraignment without counsel, the court shall inform him, before he pleads to the indictment, of his right to have the court appoint counsel for him if he is financially unable to procure counsel. When a defendant states under oath that he desires and is financially unable to procure counsel, and the court finds the statement to be true, the court shall assign counsel to the defendant before he pleads to the indictment. Counsel assigned by the court shall serve without cost to the defendant." It should be noted that title xiv was drafted before the decision of \textit{Gideon v. Wainwright}, and that the redactors of the revised Code intended to expand and clarify the right to counsel without being required to do so by the recent decisions.}
\footnotetext[45]{Id. art. 2: "When a defendant charged with a capital offense appears for arraignment without counsel, the court shall assign counsel for his defense. Such counsel may be assigned earlier, but must be assigned before the defendant pleads to the indictment. Counsel assigned in a capital case must have had not less than five consecutive years experience at the bar. An attorney with less experience may be assigned as assistant counsel. Counsel assigned by the court shall serve without cost to the defendant."}
\footnotetext[46]{Id. comments to art. 2.}
\footnotetext[47]{334 U.S. 266 (1948),}
\end{footnotes}
counsel when the defendant is *sui juris* and mentally competent.48 Other circuits are in accord.49 In the proposed comment, the redactors point out that these cases are not capital cases, and it is stressed that a defendant who rejects appointed counsel is usually socially or mentally disoriented and must be protected against his inadequate appreciation of the need for counsel. It further advises that the status of unwanted counsel would be at the discretion of the trial judge. This proposed mandatory appointment would serve the laudable end of protecting the rights of the mentally incompetent who might unjudiciously reject counsel, although it would have to yield to the constitutional right of a mentally competent person to conduct his own defense without an attorney. The proposed code also requires that the minutes of the court show that a defendant was represented by counsel or informed of his right to court-appointed counsel.50

**POSSIBLE EXTENSION OF GIDEON TO ALL CASES**

A vexing problem not solved by *Gideon* is whether the right to appointed counsel extends to all criminal cases, or whether there remains some category of offenses for which the right is not guaranteed. Before *Gideon*, absolute applicability of the right was based on a capital-noncapital distinction,51 with due process also requiring appointment in noncapital felonies when special circumstances existed.52 *Gideon* erased the distinction and applied the right in a felony, breaking and entering with intent to commit a misdemeanor, for which a five-year sentence was imposed. Justice Clark spoke out against the capital-noncapital distinction and concurred on the grounds he could find no acceptable rationalization for it. Justice Harlan indicated that the "special circumstances" rule of *Betts v. Brady*53 should be abandoned in those cases which carry "the possibility of a substantial prison sentence" but added: "Whether the rule should extend to all criminal cases need not now be decided."54

49. *Burnstein v. United States*, 178 F.2d 665 (9th Cir. 1949); *Mayes v. United States*, 177 F.2d 505 (8th Cir. 1949); *United States v. Gutterman*, 147 F.2d 540 (2d Cir. 1945).
Until the Court does decide the question, the administrators of the criminal law will be in an uncertain position with few authoritative guidelines. The question is of immediate and great concern; its solution seems to be bothering the Court itself, the equivocal nature of the Gideon decision probably reflecting a compromise of differing, uncertain views. Gideon and subsequent decisions of the Court, however, can be the basis for predicting what course the Court will take.

A necessary starting point in formulating such a prediction is to define the rule of Gideon. Is the standard the "fundamental fairness" concept of the due process clause of the fourteenth amendment, or is the more nearly absolute sixth amendment right to counsel now obligatory on the states? If it is a due process test, and due process may be considered that which "at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities," the possibility of limiting Gideon to a point short of applying to all crimes is better than if the sixth amendment applies with its requirement that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Justice Black's majority opinion in Gideon accepts "Betts v. Brady's assumption . . . that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment," then finds the right to counsel to be of this fundamental nature. Due process language is used, as it must be, to apply the right-to-counsel provision to the states. But once the right is established, the language used is persuasive of the view that the right is the same as the federal sixth amendment right. For example, Justice Black's majority opinion speaks of the "right of one charged with crime to counsel" as fundamental, and says that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (Emphasis added.) Further, Justice Douglas in his concurring opinion said, "My Brother Harlan is of the view that a guarantee of the Bill of Rights that is made applicable

56. U.S. Const. amend. VI.
58. Id. at 344.
to the states by reason of the Fourteenth Amendment is a lesser version of that same guarantee applied to the Federal government.” “But,” he continues, “that view has not prevailed and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.”\footnote{59}

More recent Supreme Court decisions have discussed the nature of due process, and tend toward Douglas' view. \textit{Malloy v. Hogan}\footnote{60} held the fifth amendment privilege against self-incrimination applicable to the states and said that the privilege is governed by federal standards. In applying federal standards, the majority of five, through Justice Brennan, thus referred to \textit{Gideon}: “We have held that the guarantees of the First Amendment, ... the prohibition of unreasonable searches and seizures of the Fourth Amendment, ... the right to counsel guaranteed by the Sixth Amendment, \textit{Gideon v. Wainwright}, ... are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”\footnote{61} The following term, \textit{Pointer v. Texas}\footnote{62} held that the sixth amendment right of confrontation was obligatory on the states. Speaking for six members of the Court, Black held this right to be enforceable according to federal standards. Concurring, Goldberg agreed with the theory of due process which imposes on the states the federal standards of the Bill of Rights. Two Justices, Harlan and Stewart, objected to this decision as another step in the adoption of the incorporation doctrine.

While \textit{Gideon} cannot be seen as explicitly applying federal standards of the right to counsel to the states, the language used in the case, the Court's interpretation of the case in \textit{Malloy}, and the holdings of \textit{Malloy} and \textit{Pointer} indicate strongly that the Court will apply the federal sixth amendment test to the right to counsel instead of a flexible due process test.

In making a case for the opposing view — that the \textit{Gideon} standard is less absolute than the federal standard — it may be significant that, in \textit{Betts v. Brady},\footnote{63} the Court referred to the
prevailing state practice of nonappointment of counsel in judging whether the right was fundamental, and that in Gideon, the Court also noted the amicus brief of twenty-two states arguing against Betts v. Brady. If, in the future, the Court looks to the sentiments of the states and finds they consider appointing counsel too burdensome, it might be influenced in that direction. It might also be persuaded by the congressional statement in the area, the Criminal Justice Act, which draws the line at petty offenses in providing payment to appointed counsel in federal cases. A petty offense is a misdemeanor with a penalty not exceeding six months' imprisonment or $500 fine or both. It may be that the Malloy and Pointer cases are the limits to which the doctrine of applying federal standards to the states will be extended. It is also possible that the “federal standard” and the sixth amendment requirements are not necessarily synonymous, since the Court could require more of federal officials under its supervisory powers. Even if the federal supervisory standard required appointment in all cases, the sixth amendment guarantee might be somewhat less rigorous, applying only where it is reasonable or feasible for society to provide it.

However, it is submitted that the considerations favoring application of the federal sixth amendment standard may predominate, and that the state must be prepared to adapt its procedures to this interpretation of Gideon.

POSSIBLE EXTENSION OF GIDEON — THE FIFTH CIRCUIT

Louisiana is now directly affected by two recent Fifth Circuit Court of Appeals decisions which, applying the federal standard, enforced the right to counsel in misdemeanor cases. Harvey v. Mississippi extended the Gideon rule to the misdemeanor of possession of whisky, for which the maximum penalty of a $500 fine and 90 days in jail was prescribed. In Harvey, the defendant was an illiterate Negro who pleaded guilty informally to a justice of the peace, who apparently led the defendant to believe his penalty would be a small fine. Following

66. Proponents of these views will find little comfort, however, in the appointment of the court of Mr. Abe Fortas, the attorney who argued for the Gideon decision and who wrote, before his appointment, that the right to counsel should extend to all cases. Fortas, The Consequences of Gideon, 22 LEGAL AID BRIEF CASE 7 (1964). See Lewis, Gideon’s Trumpet (1964).
67. 340 F.2d 263 (5th Cir. 1965).
Harvey, McDonald v. Moore applied the Gideon rule in a case in which a fine of six months or $250 was imposed. In this case, the extreme facts of Harvey were not present, so it seems that Harvey will not be limited to its facts.

In both cases, the court quoted with approval from Evans v. Rives, a court of appeal case applying the sixth amendment right to counsel in a federal misdemeanor: “And so far as the right to assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.” In Harvey, the court acknowledged that the rule of Gideon had not been expressly extended to misdemeanor charges in state tribunals, but it argued that such a principle is implicit in Gideon. It pointed out that the cases establishing the right to counsel were felonies, but said their rationale did not depend on the felony-misdemeanor dichotomy. However, the court did speak of serious consequences: “One accused of crime has the right to the assistance of counsel . . . because of the serious consequences which may attend a guilty plea.” This language could leave room for the view that Gideon may not be extended to those cases where conviction does not have serious consequences.

The more recent McDonald case, however, rejected a serious consequences rule: The court believed that Harvey had rejected this rule and that Gideon had repudiated any special circumstances such as was found in Betts v. Brady. It said: “We are without any authority authorizing the announcement of a petty offense rule.” Yet, the McDonald opinion seems to reflect grave concern of the consequences of extending the right to all cases.

In any event, Gideon has been extended by the Fifth Circuit to misdemeanors and beyond the Criminal Justice Act. It is in this milieu that Louisiana must formulate its criminal law enforcement practices. In the absence of Supreme Court determination of the question, it is submitted that the prudent Louisiana judge will provide for appointment of counsel in the more serious misdemeanor cases.

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68. 353 F.2d 106 (5th Cir. 1965).
69. The conviction was for possession of illegal alcohol, punishable by six months in the county jail or $500 fine. Fla. Stats. § 562.45 (1951).
70. 126 F.2d 633 (D.C. Cir. 1942).
71. 340 F.2d 263, 269 (5th Cir. 1965).
72. 353 F.2d 106, 110 (5th Cir. 1965).
Rationale for Drawing a Line

If a line is to be drawn at some point short of extending *Gideon* to all cases, the categorical felony-misdemeanor distinction seems inadequate. The classification remains in many states more often by historical accident than by logical planning. Differences in classification of crimes exist among the states, and some serious misdemeanors carry substantial sentences and stigmatize an offender as much as or more than some minor felonies. If one is convicted of several counts of a misdemeanor, the cumulative punishment can be very grave indeed. It would be more appropriate to look to the potential penalty for the crime and apply the right according to the severity of the maximum possible sanction.

It may be strongly argued that practical considerations impel the drawing of a line short of all cases. The courts are burdened with oversized dockets now, and a general provision requiring counsel in all cases would greatly increase the number of trials. It would place a very heavy burden on the bar if such cases were handled on a court-appointed basis. In recent years, there has been increasing public awareness of the growing crime rate and demand for stricter control of criminal activity which may influence the court.\(^4\) Presumably, the public does not feel strongly about the right to counsel for traffic offenses, criminal trespass, and cruelty to animals. In balancing the rights of an individual and society's interest in orderly law enforcement, it may be difficult to justify extension of the right to counsel in all cases. Such an extension would create problems that would require basic changes in the techniques of law enforcement and judicial administration.

On the other hand, the Supreme Court seems dissatisfied with the state of criminal procedure and prison administration in the United States.\(^5\) Its decisions are often met with hostility by state courts and law enforcement officers. It is understandable that the Court might question the views of police officers who continue to use techniques that seem contrary to the stand-
ards it has established.\textsuperscript{76} Also, the policy considerations discussed above which seem to compel the drawing of a line are of less weight under the sixth amendment test than under a due process test. Courts must look to interpretations of the sixth amendment in federal cases as a starting point. Here, no line has been drawn; the Supreme Court has not yet had the opportunity to decide whether the right to counsel extends to all cases. Some language of the Court, however, suggests that it is applicable to misdemeanors. In \textit{Bute v. Illinois}, the Court said: "The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense."\textsuperscript{77} Also, in \textit{Foster v. Illinois}: "By virtue of [the sixth amendment] . . ., counsel must be furnished an indigent defendant prosecuted in a federal court in every case, whatever the circumstances. . . ."\textsuperscript{78} This language, however, is dictum. In the 1942 case of \textit{Evans v. Rives},\textsuperscript{79} the Court of Appeals for the District of Columbia held that the rule of \textit{Johnston v. Zerbst},\textsuperscript{80} the leading case recognizing the sixth amendment right to court-appointed counsel, was applicable in a misdemeanor case. \textit{Evans} was quoted at length in \textit{Harvey} and \textit{McDonald} to support the Fifth Circuit's application of the \textit{Gideon} rule to a misdemeanor. Further, Rule 44 of the Federal Rules of Criminal Procedure\textsuperscript{81} seems to guarantee this right to an accused misdemeanant.

One possible basis for drawing a line is derived from the fact that another guarantee of the sixth amendment has not been applied absolutely by the Supreme Court. The right to trial by jury was held not to extend to petty offenses in \textit{District of Columbia v. Clawans}, the Supreme Court noting: "At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily with-

\textsuperscript{76} For an excellent account of the problems and attitudes of a police officer in a large city, see \textit{The Detective}, \textit{Life Magazine}, Vol. 59, No. 23, p. 90D (Dec. 3, 1965).
\textsuperscript{77} 333 U.S. 640, 666 (1948).
\textsuperscript{78} 332 U.S. 134, 136 (1947).
\textsuperscript{79} 126 F.2d 633 (D.C. Cir. 1942).
\textsuperscript{80} 304 U.S. 458 (1938).
\textsuperscript{81} FED. R. CRIM. P. 44: "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 proceedings unless he elects to proceed without counsel or is able to obtain counsel."
The offense in question, dealing in secondhand property without a license, was found to be petty. The Court pointed out, however, that it was not foreclosed from considering severity of penalties in determining if an offense would be so serious as to be comparable with common-law crimes, thus entitling the accused to the right of jury trial. Of course, the right to trial by jury has not paralleled the development of the right to counsel. Nevertheless, the existence of a doctrine limiting another clause of the sixth amendment to exclude petty offenses provides an analogy for restricting the right to counsel. Validity of the analogy seems to depend on the nature of the right to counsel at the time of the adoption of the Constitution and Bill of Rights.

The historical sources and secondary works covering the right to counsel during the colonial period are inconclusive and unsatisfying. Although statutes were enacted to protect the right to counsel, the practice under them and their intent are not clear. During this period, the right in England was in a state of flux. England allowed retained counsel in minor cases under the apparent rationale that the state's interest was so slight that it could afford to be lenient to defendants. By statute, Parliament in 1695 decreed that those accused of treason had a right to appointed counsel. Cases before the Star Chamber, usually of a political nature, required the presence of counsel. Yet, in the great mass of felonies, the accused was not permitted even retained counsel in the fullest sense until 1836, and there certainly was no requirement for appointment of counsel. The practice, however, may have been more lenient.

Emerging from this background, the colonial tendency was to enlarge the right to retained counsel and, in some cases, to create a right to appointed counsel. However, the colonies were neither clear nor consistent in their enforcement of the right. In the debates concerning the Bill of Rights, there was little discussion of the right to counsel and no clear expression of congressional intent.

Connecticut, as early as 1750, apparently provided for appointment of counsel if the accused requested it. Pennsylvania,

82. 300 U.S. 617, 624 (1936).
83. See generally Beaney, Right to Counsel chs, 2, 3. (1955).
84. 7 & 8 Will. 3, c. 3, § 1 (1695).
86. Comment 73, Yale L.J. 1000, 1056 (1964).
by statute, listed a large number of capital crimes for which counsel had to be assigned to the accused; this has been interpreted to include most felonies, since most of them were punishable by death.\textsuperscript{87} Delaware provided for appointment in capital cases;\textsuperscript{88} South Carolina had a similar right.\textsuperscript{89} Virginia and Rhode Island\textsuperscript{90} had statutory recognition of the right to be represented by retained counsel. In the remainder of the colonies, a modified English procedure seems to have prevailed.\textsuperscript{91}

From this experience, it is difficult to abstract a homogeneous concept of the right to counsel. The few cases after adoption of the sixth amendment shed little light. However, the general trend of the times — expansion of the limited British right to counsel — plus the fact that some colonies granted the right to appointed counsel for what can loosely be termed felonies or serious offenses and not in lesser cases, can be the basis for concluding there was a division in the applicability of the right. Some cases were excluded, but that class is not as homogeneous or well defined as the “petty offenses” for which the trial by jury was not granted. Even so, some crimes were excluded in those colonies which provide for appointment of counsel. This could furnish historical support for a court decision that an amorphous group is still to be excluded from the right, the boundaries of this group to be determined on considerations of fairness, as with the right to trial by jury.

Considering the language in \textit{Bute} and \textit{Foster} and the holding in \textit{Evans}, in addition to the unreasonableness of the felony-misdemeanor distinction, the contention that all misdemeanors will be excluded from the rule of \textit{Gideon} seems unsound. Supported by the Court’s interpretation of the right to trial by jury, buttressed somewhat by historical sources, it seems that the contention that petty offenses might be excluded merits serious consideration. Petty offenses might be considered to include such things as traffic violations and infractions of minor health regulations, the line probably depending on the severity of the sanction.

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\textsuperscript{87} \textit{id.} at 1056; \textit{Beaney, Right to Counsel} 16 (1955).
\textsuperscript{88} Comment, 73 \textit{Yale L.J.} 1000, 1057 (1964); \textit{Beaney, Right to Counsel} 16 (1955).
\textsuperscript{89} See note \textsuperscript{88} supra.
\textsuperscript{90} See note \textsuperscript{88} supra.
\textsuperscript{91} \textit{Beaney, Right to Counsel} 21 (1955).
\end{flushleft}
It is submitted that such an application of the *Gideon* rule achieves a justifiable balancing of the interests in individual rights and efficient administration of criminal laws. It amply protects individual rights, including within its ambit felonies, serious misdemeanors, and generally, those crimes considered *malum in se* for which the penalties are the most severe and with respect to which counsel would be most necessary to prevent miscarriages of justice, plus some offenses considered *malum prohibitum* for which the sanctions are serious. It excludes from the right those numerous minor offenses where its application might seriously handicap law enforcement officers and the criminal courts. In many of these minor cases, especially the traffic violations which flood the courts, affluent defendants seldom employ attorneys. Such local court proceedings are often less accusatorial and adversary and more inquisitorial in nature, with the outcome resting in the discretion of a trial judge. In such proceedings, justice is often done without activity by counsel on either side, with the judge considering explanations and extenuating circumstances and often suspending sentence, and apparently society does not consider the lack of counsel unfair.

**WHEN TO APPOINT COUNSEL**

Another serious problem is when in the investigatory-arrest-trial proceedings counsel must be appointed. The *Gideon* decision was concerned primarily with extending the right beyond capital cases, and does not touch directly the question of time of appointment since the facts of the case involved denial of counsel at the trial itself. However, there is little doubt that earlier appointment is required. Before *Gideon*, *Hamilton v. Alabama,* a capital case, required appointment before the defendant pleaded at arraignment. *White v. Maryland* applied the right to a preliminary hearing at which a plea was made. The rationale of these decisions is that counsel is required at all critical stages in criminal proceedings at which rights are preserved or lost. With the distinction between capital and noncapital cases erased by *Gideon*, the Court will undoubtedly use the critical-stage rule of *Hamilton* and *White* in all cases in which *Gideon* applies. However, this problem blends into the implications of *Escobedo v. Illinois,* which poses even more serious questions regarding

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the time at which counsel must be appointed, and which may be the vehicle for extension of the right to an earlier time in the criminal justice process.

*Escobedo* fuses several difficult areas of criminal law — right to counsel, admissibility of confessions, the right against self-incrimination and the nature of police detention. Aware of the problems raised by the case, the Supreme Court has decided to hear four cases dealing with interpretations of *Escobedo*, and will presumably clarify the decision shortly. In *Escobedo*, the Court held that when a police investigation focused on the accused as a suspect rather than being a general investigation, the refusal to comply with the accused's request to see his retained counsel during questioning was a denial of the right to assistance of counsel. Incriminating statements made to the police during detention when Escobedo's counsel was not permitted to be present were ruled inadmissible at the trial.

Although the holding of the case seems limited to the facts presented, the Court used broad language in reaching its decision: "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. *Powell v. Alabama* . . . . This was the 'stage when legal aid and advice' were most critical to petitioner. *Massiah v. United States* . . . . It was a stage surely as critical as was the arraignment in *Hamilton v. Alabama*, . . . and the preliminary hearing in *White v. Maryland* . . . . What happened at this interrogation could certainly 'affect the whole trial' . . . since rights may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." Furthermore, the Court could have disposed of *Escobedo* on more traditional grounds, finding the incriminating statements 'involuntary' and in violation of due process because of coercion and trickery. This departure from traditional procedure and reliance on the right to counsel seems indicative of an expansionist trend. Further evidence is provided by the dissent of White.

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Clark and Stewart: “At the very least the court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.”

Left open are the problems of (1) whether Escobedo merely recognizes the right of one to see retained counsel or whether it establishes a new right that one must be given the right to have assigned counsel during accusatory investigation. (2) If the right extends to appointed counsel, must one request a lawyer or must one be advised of the right and a lawyer appointed unless the right is waived? (3) Does Escobedo establish a rule to enforce the right to counsel during interrogation that would make inadmissible the statements an accused made during the time when the right to counsel was violated? or (4) does it encompass the fruit of the poisonous tree theory to the extent that all leads and tangible evidence secured as a result of the questioning are inadmissible? (5) If the right to counsel is extended to questioning, is this right retroactive? (6) Assuming the existence of the right, must the lawyer be present during all interrogation, or is it possible that he need merely consult with the accused before questioning, the police being allowed to question freely after the consultation? These questions are before the Court now.

Existence of the Right

The first step in an expansion process is the recognition of a constitutional right of an indigent to appointed counsel during accusatory investigation, rather than limiting Escobedo to a right to see one’s retained counsel. It has been suggested that the reasoning and effect of Gideon indicate that there may be a right to appointed counsel whenever the right to retained counsel exists. Gideon erased the distinction in felony prosecutions; Hamilton and White carry the right to the critical stage of the proceedings. In any event, the distinction between the two areas of retained and appointed counsel has been lessened, and the trend has been to extend to an indigent the right to appointed counsel formerly restricted to retained counsel. If questioning during detention is a critical stage at which actions are taken that would affect the whole trial, then, under the tests of Hamilton and White, counsel should be appointed at that stage. If the

right is applied, there arises the difficult question of defining the point at which an investigation ceases to be general and becomes accusatory, the point at which the right is activated. Presumably, arrest would generally meet the test, for it involves an accusation of crime. Under the terms of the "investigatory-accusatory" test, it is plausible that the right might arise before arrest in some cases, as when the police questioning is no longer for general elicitation of information about a crime but is to elicit incriminating statements or confessions from the person believed to be guilty.

**Informing a Suspect of the Right**

If the right to counsel at the accusatory stage is recognized as a due process right, it would seem that counsel must be appointed unless the suspect waives the right. To waive, one must know of the existence of the right, so it would be required that the defendant be informed of this right as soon as he is definitely accused of the crime. If the accusatory stage is a critical one, failure to advise the defendant of his right to counsel can be as prejudicial as failure to inform him of this right at arraignment or trial. Presumably it would be the duty of the booking officer, in the case of an arrest, or the questioner, in the case of a pre-arrest "accusatory investigation," to inform a suspect of this right to counsel, and it would be before those officers that the right could be waived. This would require some procedure for assuring a suspect of his right to counsel before further questioning. Difficulties of proving that a waiver was completely voluntary might arise, and the advisability of depending on the police officers for carrying out the right might be questioned by some courts. In light of these problems there may arise subtle pressure on the states to adopt or enforce provisions that an accused be taken to a committing magistrate without unnecessary delay after arrest, as in the federal procedure, and to have the committing magistrate advise the suspect of his rights. It may be that the right to counsel would not have to be enforced at this stage if the police do not intend to quesire a suspect after arrest. Statements made during questioning when the right to

100. The federal *McNabb-Mallory* rule makes inadmissible in court all statements by a person detained in violation of the provision that the accused must be taken before a committing magistrate without unnecessary delay. See *Mallory* v. United States, 354 U.S. 449 (1957); *McNabb* v. United States, 318 U.S. 332 (1942).
council is violated would not be admissible at trial. If there is to be no questioning, it would seem that counsel would not be required. It may also be that the police might choose to question even though counsel is not present, where they know the results of the questioning would not be used at trial. But, if they do so, the courts could conceivably apply the fruit of the poison tree doctrine to exclude whatever evidence is obtained as a direct result of the questioning.

Enforcement of the Right

If the right is recognized, the problem of its enforcement arises. In *Wolf v. Colorado*, the Court held that a right against illegal search and seizure applied to the states, but it tempered this by holding that enforcement of the rule did not require exclusion of the evidence so obtained. *Wolf* was reversed by *Mapp v. Ohio*, holding that a rule of exclusion was required to enforce the right effectively. From this experience, it seems the Court would apply an exclusionary rule in the right to counsel area, also. The *Escobedo* decision did that—it excluded the incriminating statements made during detention. Thus, assuming the Court applies the right, an exclusionary rule is inevitable. This result would be similar to the exclusionary *McNabb-Mallory* rule applied in federal courts. Practically, it is obvious that an exclusionary rule is necessary to enforce the right, for separate civil prosecutions for damages or criminal prosecutions for violating the right are ineffective, as shown by the experience with *Wolf*.

The Poisonous Tree Doctrine

There is also a possibility of extension beyond the exclusion of the statements themselves. It could be established that leads and other tangible evidence obtained during questioning without counsel would be inadmissible as fruit of the poisonous tree. This poison fruit doctrine, in the search and seizure area, provides not only that the evidence obtained by an illegal search or seizure is inadmissible, but that any additional evidence secured as a result of the illegal activity is also tainted with the illegality and is inadmissible. This doctrine, originating with

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103. See note 100 supra.
Silverthorne v. United States,\textsuperscript{104} seems to be applicable to the states.\textsuperscript{105}

The doctrine can be analogized to the right to counsel, if the right is held to extend to accusatory questioning. Here again, the purpose of the exclusionary rule would be to enforce the original right. It can be argued that effective enforcement of the right also requires more than mere exclusion of the incriminating statements themselves and requires exclusion of the fruits. Otherwise, the police still might have reason for conducting illegal questioning in order to obtain leads to tangible evidence.

However, the poison fruit doctrine has not been applied in the confession area.\textsuperscript{106} Under the prevailing doctrine, confessions involuntarily obtained are inadmissible, but there is no limitation on using them to obtain other evidence. The potential right to counsel in this area is more closely related to the confession cases than the search and seizure cases. Also, under the federal McNabb-Mallory rule, the poison fruit doctrine has not been applied. There has been some discontent, however, with the lack of a poison fruit doctrine under McNabb-Mallory and there is some commentary urging that such a rule is needed.\textsuperscript{107}

If additional evidence obtained as a result of leads obtained from a confession can be used at trial, almost as much damage is done to the accused as if the information came from him, and this damage would result from the denial of a constitutional right. On the other hand, forbidding, at trial, any results of questioning would present serious practical problems for the police and might deter them in investigating crime. The Massiah\textsuperscript{108} case which prevents the use in federal trials of incriminating statements made by a defendant after indictment without counsel, in response to the foregoing argument, noted that the rule of the case was to prevent the use of such evidence at trial, thus allowing the police to continue its further investigation: "We do not question that in this case, as in many cases, it

\begin{itemize}
  \item \textsuperscript{104} 251 U.S. 385 (1920).
  \item \textsuperscript{106} LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL CRIMINAL PROCEDURE 135 (1964).
  \item \textsuperscript{107} Comment, 73 YALE L.J. 1000, 1052 (1964) and material there cited.
  \item \textsuperscript{108} Massiah v. United States, 377 U.S. 201 (1964).
\end{itemize}
was entirely proper to continue an investigation of the suspected
criminal activities of the defendant and his alleged confederates,
even though the defendant had already been indicted. All that
we hold is that the defendant's own statements, obtained by fed-
eral agents under the circumstances here disclosed, could not
constitutionally be used by the prosecution as evidence against
him at the trial.109 In Massiah, the police claimed the defendant
was a minor part of a narcotics peddling gang, and that further
questioning was conducted to attempt to locate the leaders of
the gang; the Court did not seem to disapprove such activities.
It is not clear, however, whether this further investigation per-
mitted by the Court encompasses questioning of the defendant
directly, or only continuing independent investigation. Since it
seems evident, however, that the police may make a continuing
independent investigation, it is submitted that the former mean-
ing—questioning the defendant directly—is what is intended to
be allowed. In this light, the Court might be receptive to argu-
ments by the police to limit its expansion of Escobedo short of
the poisonous tree doctrine. It is submitted that the determina-
tion whether the poisonous tree doctrine is to apply to the right
to counsel area will not be made until after the initial right
has been clarified.

Retroactivity

The possible retroactivity of Escobedo presents another prob-
lem. Gideon has been applied retroactively; Mapp v. Ohio,110
applying the fourth amendment protection against unreasonable
searches and seizures to the states, has not. This distinction, as
enunciated in Linkletter v. Walker,111 seems to be that Gideon
established a right, in the absence of which a trial might have
been unfair because the defendant was unable to present a prop-
er defense — innocent men may have been convicted because of
lack of counsel. In Mapp, however, there was established an ex-
clusionary rule holding inadmissible evidence improperly se-
cured. Use of evidence violated a right, but did not result in the
possibility of an unfair trial; that is, it did not cause the con-
viction of an innocent person. Escobedo is between these cases,
but it seems closer to Mapp in that the rule it might establish
would exclude certain evidence. Trials conducted under the

109. Id. at 207.
111. 381 U.S. 618 (1965).
old voluntary-confession doctrine would not be tainted by being unfair as to determination of guilt or innocence. Thus, it seems reasonable to expect Escobedo's extension, if it comes, not to be applied retroactively. This interpretation is reinforced by the latest Supreme Court statement on retroactivity, Tehan v. United States ex rel. Shott,\textsuperscript{112} which relied on Linkletter and held that the rule applying the fifth amendment right against self-incrimination to the states was not retroactive.

\textit{Questioning After the Right Vests}

\textit{Massiah v. United States}\textsuperscript{113} seems to preclude the possibility of contending that once counsel is appointed for an accused and counsel has consulted with his client, the right to counsel is fulfilled and the accused could then be properly questioned even though counsel is not present. \textit{Massiah} was a federal case which excluded incriminating statements made after indictment when counsel was not present. Here, counsel had been procured and had been consulted earlier, and the admissions were excluded. So too in \textit{Escobedo}, counsel had been procured and consulted, and the admissions were not allowed in evidence at trial.

\textit{Some Interpretations}

The foregoing discussion has considered the possibilities of extension of \textit{Escobedo}. It is not denied that the possible effects are far-reaching and could require a major adjustment in the methods of criminal law enforcement in the states. It should also be admitted that the extension has a constitutional rationale, and that the degree of extension will depend on policy considerations, upon the outcome of a balancing process between individual rights and society's need for orderly and effective enforcement of its laws.

Currently, the public is aware of the inadvisability of hamstringing the police. The police claim the Court's decisions have already limited their effectiveness and that further extension would be disastrous. These claims are in the context of increasing public awareness of the extent of crime and a rising crime rate. Presidents and presidential candidates have vowed to cut

\textsuperscript{112} 34 U.S.L. Week 4095 (U.S. Jan., 1966).
\textsuperscript{113} 377 U.S. 201 (1964).
crime in this country. The police claim it is virtually necessary to question suspects freely in order to uncover crime and find the guilty. However, the Court does not seem to be very receptive to the arguments of impracticability in the enforcement of what it considers important and fundamental rights. Other countries with restrictive codes regulating police questioning seem to function satisfactorily—India, Scotland, and Great Britain.\footnote{114} Further, the McNabb-Mallory rule imposed on federal agents has not greatly impeded their effectiveness.\footnote{115} Thus, it seems that the states may expect extension of an accused's right to counsel in some manner into the investigatory-accusatory area. An indirect result of this might be the creation of a more efficient police—one that would investigate independently instead of relying on confessions.

\textit{State Interpretation of Escobedo}

California has extended the holding of \textit{Escobedo} to a situation in which the accused did not request counsel. The court stated: "The Constitutional right does not arise from the request of counsel but from the advent of the accusatory stage itself."\footnote{116} Oregon is in accord,\footnote{117} so is Rhode Island.\footnote{118} Most states, however, have construed \textit{Escobedo} on its facts and have not applied it to cases in which the accused did not request counsel.\footnote{119} A recent Louisiana Supreme Court decision indicates little enthusiasm for extending \textit{Escobedo}. In \textit{State v. Carter},\footnote{120} the court limited \textit{Escobedo} to its unusual fact situation and indicated it would wait until the United States Supreme Court clarified the area before changing its position. The court then disposed of the case on the traditional ground that a confession was not voluntarily made.

\begin{enumerate}
\item \footnote{115} \textit{Ibid}.
\item \footnote{116} People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 952 (1965).
\item \footnote{117} People v. Neely, 395 P.2d 557 (Ore. 1965).
\item \footnote{118} State v. Mendes, 210 A.2d 50 (R.I. 1965); State v. Dufour, 206 A.2d 82 (R.I. 1965).
\item \footnote{119} \textit{See}, \textit{e.g.}, Duncan v. State, 176 So. 2d 840 (Ala. 1965); Bean v. State, 398 P.2d 251 (Nev. 1965); People v. Agar, 44 Misc. 2d 396, 253 N.Y.S.2d 761 (1965); Johnson v. New Jersey, 43 N.J. 572, 206 A.2d 737 (1965), \textit{cert. granted}, 34 U.S.L. Week 3193 (1965); Brown v. State, 131 N.W.2d 169 (Wis. 1965).
\end{enumerate}
Again, the Fifth Circuit seems to be leading the expansion. In *Clifton v. United States*, a case involving a federal crime where the defendant did request to see his attorney, the court stated this doctrine: "Escobedo and Massiah represent a broad endorsement by the Supreme Court of the right to have counsel present during an interrogation once the investigation has begun to focus on a particular suspect." Here, the defendant had counsel, but the interviewing federal agents seemed unaware of that fact. Although the defendant asked to see his attorney, that request was made to a local police official and not to the federal agents who questioned him. The court indicated the investigators had the burden of inquiring whether the accused had an attorney. This is not far removed from saying that once the inquiry discloses that no counsel has been retained, there is also a burden to advise of the right to counsel.

The *Escobedo* Court said that the right to counsel would be a hollow thing if a conviction is already assured by a pre-trial examination. It added: "We have learned the lesson of history, ancient and modern, that a system which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." This language is complementary to the traditional notion of arrest as the last stage in a criminal investigation, where one arrested was brought immediately before a magistrate to determine if there was sufficient evidence to detain him. Detention was primarily to prevent escape. More recently, the concept of arrest is that of an investigatory tool used to provide detention with the aim of securing information or a confession. The court's actions may be calling for a return to the earlier notion.

The English judge's rule provides rigorous standards for informing suspected persons when an investigation becomes accusatory. When a police officer has reasonable grounds to prefer charges against a person being questioned, he must inform that person that he may be prosecuted for the offense, and that any statement he might make may be used as evidence.

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121. 341 F.2d 649 (5th Cir. 1965). See Miller v. Warden, 338 F.2d 201 (4th Cir. 1965); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1965) for cases in accord.
122. 341 F.2d 649, 652 (5th Cir. 1965).
Then, the rules continue with an additional provision: "It is only in exceptional cases that questions relating to the offense should be put to the accused person after he has been charged or informed that he may be prosecuted." The exceptions concern questioning to prevent loss to someone or to the public or for clearing up an ambiguity in a previous answer or statement. Such a procedure might also be the outgrowth of the Escobedo case, with questioning after the accusatory stage being permitted only when counsel is present, or under some safeguards to protect a suspect's rights.

WAIVER OF THE RIGHT TO COUNSEL

It has long been held that an accused may waive his right to appointed counsel. The Supreme Court characterizes a waiver as an intentional relinquishment or abandonment of a known right or privilege, adding that the courts indulge every reasonable presumption against waiver of fundamental rights. The required waiver has been described as being intelligent, free, voluntary, and competent; it is required that one have full knowledge of his rights before he can waive them. It is the duty of the court to inform a defendant of the charges against him, possible pleas and punishments, and to do this in such a way that the defendant understands this information. Such varying facts and circumstances as age, education, mental capacity, background, and conduct are considered in deciding if waiver was intelligent. A mere guilty plea is not an intelligent waiver. A printed statement on a confession form waiving the right is not necessarily sufficient if it is shown that the accused was not fully informed of the right. In essence, it must appear that the defendant knew of the right through some information given by authorities, clearly understood that right, and then waived it without coercion. The Fifth Circuit has held that even an intelligent waiver of the right to counsel at trial does not cure the deprivation of this right earlier at arraignment.

The courts are not lenient in considering waivers. The standards for proper waiver should be made known to those applying

125. Ibid.
128. Clifton v. United States, 341 F.2d 649 (5th Cir. 1965).
129. Ibid.
the criminal law so that they can correctly inform defendants of their rights, and so that waivers when made will be proper. Such a procedure would clear the dockets of many habeas corpus petitions in this area. It appears that an indigent defendant informed of his right to appointed counsel will seldom waive that right, and it would be unwise to depend on waivers as a means of lessening the impact of recent Supreme Court decisions in this area. It is also imperative that the minutes of a court accurately reflect how a defendant was advised of his rights, so that waivers that are made will be upheld in the appellate courts, and there will be proof of the fact that the defendant was so advised, since appellate courts often decide waiver questions on the basis of the record and engage in presumptions against waivers. It also appears that the requirements for intelligent waiver will not lessen, but will become stricter in view of the recent trend in criminal rights cases.

SOME OBSERVATIONS

As this paper demonstrates, the area of right to counsel is fraught with uncertainty and confusion. The Supreme Court is enunciating constitutional rules on a case by case basis, overturning long accepted law and practice. Behind these developments can be seen great dissatisfaction with the methods of law enforcement. In this context, the Court's expansionist mood is understandable. However, there is little solid ground in the area; there are few rules and many questions. The process does not lend itself to quick and speedy answering of these questions. Congressional and state legislation is needed to fill the gaps. The administrators of the criminal law need certainty, need rules they can follow without question. These rules should come from a comprehensive legislative enactment in the area, consistent with the Supreme Court ground rules already established.

What is needed is collaboration among policemen, lawyers, judges, criminologists, and penologists to fashion a comprehensive mechanism for enforcement of criminal law that will take advantage of current knowledge in the area and conform to the newly-established constitutional rights.

SOME GUIDELINES

1. Presently, counsel must be appointed to indigent defendants in felony prosecutions. However, prudent authorities should
appoint counsel in serious misdemeanor cases to ensure that such convictions will not be overruled by cases expanding the right and, more important, to ensure full implementation of this fundamental human right.

2. Counsel must be appointed before the defendant pleads. The better practice, especially in the more serious cases, would be to appoint soon after arrest.

3. It is not required by the Supreme Court that counsel be appointed immediately after arrest, but the bench and bar should realize that this may be required in the event Escobedo is extended.

4. Full implementation of the right requires thorough and complete explanation to a defendant of the right and its scope; perfunctory reference to the right is not sufficient.

Lee Hargrave

REIMBURSEMENT OF EXPENSES OF APPPOINTED COUNSEL

The decision in the Gideon case in 1963 has emphasized several problems in the administration of criminal justice. Among them are the following: when to appoint counsel, how to select counsel, how to finance alternatives to the appointed counsel system, whether to provide compensation for appointed counsel, and whether to reimburse appointed counsel for expenses. This Comment will attempt an exploration of the last of these questions, with emphasis on the practical need for reimbursement, the difficulties involved in securing reimbursement, and the practice in Louisiana as compared to the federal system and the other states.

THE PROBLEM

Gideon v. Wainwright established that an indigent accused of a felony has an absolute right to the assistance of counsel for his defense. Enforcement of the decision has made necessary a great increase in the number of attorneys representing in-