

# Louisiana Law Review

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Volume 27 | Number 1  
December 1966

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## Constitutional Law - Right to Counsel

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### Repository Citation

Thomas R. Blum, *Constitutional Law - Right to Counsel*, 27 La. L. Rev. (1966)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol27/iss1/13>

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dient than a formula. It requires conscious inclusion, an ingredient that was unavailable before, but which is now permissible for formulas to be precisely developed in the future. Certainly the instant case leaves many questions, for the court did not deal with the practical problems of the nebulous area between "inclusion" and "inclusion of predetermined numbers." It simply opens the way by overruling *Collins* and seems to suggest that as subsequent cases arise, specific guidelines will be considered. With *Collins* the door was closed to any method of deliberate inclusion, even as a means of procuring a fair representation of Negroes. *Brooks* removes the impossible situation of *Collins* by not only permitting conscious inclusion, but demanding it where necessary to promote fair representation. Thus the holding in *Brooks* is limited, only putting aside the barrier that prevented use of the most logical means of producing fairly representative jury lists, *i.e.*, consciously correcting exclusion by inclusion. Undoubtedly the court must and will establish more stringent sanctions in the actual administration of permissible inclusion. As the Fifth Circuit Court said earlier, "[W]e synthesize principles and sanctions which experience demonstrates are needed."<sup>43</sup>

*Brooks* is more in keeping with earlier decisions than *Collins* and puts forth a mandate that is a workable component in the major problem in jury selection—a solution at least during our present racially conscious times.<sup>44</sup> It is submitted that the instant case offers to a judge instructing a jury commission the safe position of stating the dual constitutional requirements of *Brooks* and offers to the commission a realistic means of adhering to those instructions.

John T. Cox, Jr.

#### CONSTITUTIONAL LAW — RIGHT TO COUNSEL

Incriminating statements obtained by isolated interrogation of each of four defendants in police custody were admitted at trial. No defendant had been warned of his constitutional rights at the outset of questioning. *Held*, convictions reversed. If state-

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43. United States v. Ward, 349 F.2d 795, 802 (5th Cir. 1965).

44. The court intimates that the affirmative duty of inclusion may pass away as the ultimate formula is devised. "As success is achieved and the constitutional ideal of a prejudiceless society is attained, the law will surely have both the capacity for and the duty of molding its relief to that hoped for situation." *Brooks v. Beto*, No. 22809 at 55, U.S. Ct. App., 5th Cir., July 29, 1966.

ments procured by custodial interrogation are to be admissible, the person interrogated must be warned, prior to any questioning, that (1) he has the right to remain silent; (2) any statement he makes may be used as evidence against him; and (3) he has the right to the presence of an attorney, either retained, or, if he is indigent, appointed. If the right to remain silent or to have counsel present during interrogation is waived, the state must conclusively show that waiver was made "voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 436 (1966).

*Miranda* is an extension and, to a degree, a clarification of *Escobedo v. Illinois*.<sup>1</sup> Although *Escobedo* rested on the sixth amendment right to counsel, and the instant case requires presence of counsel to safeguard accused's fifth amendment privilege against self-incrimination,<sup>2</sup> the practical problems in applying the rules are similar. In *Escobedo* the court predicated illegality of the interrogation on denial by police of *Escobedo's* request to consult his retained attorney; however, there was language indicating that the right would include appointment of counsel for an indigent.<sup>3</sup> As a result, right to counsel was left in need of clarification.<sup>4</sup>

The instant case, in expanding *Escobedo*, specifies not only that an accused must be allowed to consult his attorney before custodial interrogation begins, but that (1) he has the right to presence of an attorney during the entire questioning; (2) he has the right if indigent to appointment of an attorney; and (3) even if he waives his right to an attorney and elects to make a statement, should he later desire legal advice, questioning must

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1. 378 U.S. 478 (1964).

2. In *Escobedo*, the court avoided resting its decision on fifth amendment grounds, preferring instead the undeveloped area of the sixth amendment right to counsel. In *Miranda*, however, the Chief Justice said: "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege." 384 U.S. 436, 466 (1966).

3. For instance the Court said: "The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice." 378 U.S. 478, 488 (1964). "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." *Id.* at 490. If, as this language seems to indicate, the right to counsel is essential in preserving constitutional rights, there would be no logical basis for drawing a distinction between retained and appointed counsel.

4. For a discussion of the state of the law in the right to counsel area prior to *Miranda* see Comment, 26 LA. L. REV. 666 (1966).

cease until an attorney consults him.<sup>5</sup> These procedures regarding counsel are apparently a means of making effective the right against self-incrimination and are not themselves constitutional requirements.<sup>6</sup> The court said, however, that unless other adequate protective devices are employed, a violation of *any* of the announced rules would render inadmissible any statement made. No indication was given as to what other devices might be satisfactory.

On the question whether an accused must be warned of his right to remain silent, the court was explicit:

“The fifth amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.”<sup>7</sup>

The same reasoning is applied to the necessity of informing a suspect of the right to retained counsel<sup>8</sup> and the right of appointment of counsel for an indigent.<sup>9</sup> Therefore, failure to give the warnings will render any subsequent statement inadmissible.

The problem of the warnings is related to the question of what constitutes a waiver “voluntarily, knowingly, and intelligently” made of the right to remain silent or the right to counsel. The court in *Miranda* did not determine what would constitute a waiver but it indicated what would not. Failure to ask for a lawyer is not a waiver of the right to counsel. If an accused waives his right to silence or to counsel at the outset, this will not prevent his effectively invoking these rights later.<sup>10</sup> In addi-

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5. The accused has the same right to stop questioning should he simply desire to say no more to the authorities. In this regard the Court said: “Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.” 384 U.S. 436, 474 (1966).

6. “As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required.” *Id.* at 444.

7. *Id.* at 468.

8. *Id.* at 469.

9. *Id.* at 472.

10. However, the Court did indicate that if an individual “indicates his desire to remain silent, but has an attorney present there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.” *Id.* at 474, n.44.

tion, the court emphasized that any statement made must be truly voluntary, that is, free from all intimidation. Therefore, the state must show that waiver was without any threat or promise of benefits. Mere signing of a statement saying the accused made the confession voluntarily and with full knowledge of his legal rights does not "approach the knowing and intelligent waiver required to relinquish constitutional rights."<sup>11</sup> Thus, the state will have a difficult burden in proving intelligent waiver.

The question arises whether the court will extend *Miranda*. Four Justices dissented strongly in the case,<sup>12</sup> expressing grave reservations about the wisdom of the majority's rules, and in a later case,<sup>13</sup> they indicated firm adherence to their position. This fact may restrain the majority from extending *Miranda*, especially since it answers most of the questions left open by *Escobedo*.

One problem left by *Miranda*, but later solved by the court, concerns retroactive application. *Johnson v. New Jersey*<sup>14</sup> held that the rules established in *Miranda* and *Escobedo* would be available only to persons whose trial began after the dates of the respective decisions; although this seems clear, *Davis v. North Carolina*,<sup>15</sup> decided the same day, casts doubt on the decision. In *Davis* the court found the accused was not properly informed of his rights, which but for *Johnson* would require reversal under *Miranda*, and held the confession involuntary stating that the lack of warnings was indicative of involuntariness and might be considered with other circumstances to determine whether the statements were coerced. Other circumstances relied on by the court in reversing the conviction were the police arrest sheet, which indicated defendant was to be held incommunicado; inadequacy of food; the fact he was an illiterate Negro; and especially that he was detained and questioned every day for sixteen days. But there was evidence that, notwithstanding the police record, he was not held incommunicado;<sup>16</sup> he never complained of insufficiency of food; the questioning ses-

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11. *Id.* at 492.

12. Justices Harlan, Clark, Stewart, and White.

13. *Johnson v. New Jersey*, 86 Sup. Ct. 1772 (1966).

14. *Ibid.*

15. 86 Sup. Ct. 1761 (1966).

16. Although police arrest records showed that no one was to see Davis nor was he to use a telephone, he was not as a matter of fact kept incommunicado. Instead, when he asked to see his sister, the police sought to bring her to the jail to see him but she refused to go. *Id.* at 1771 (Clark, J., dissenting).

sions, although conducted daily, lasted only about an hour each; and not only was there no showing of coercion, but Davis himself admitted his treatment was "very fine and that everybody was courteous and kind to him."<sup>17</sup> With regard to detention, it appears that Davis was an escaped convict and the police were following procedures standard in such cases. One concludes that, while the court will not apply *Miranda's* rules retroactively, it will be governed by their spirit and, in determining whether confessions were coerced, will require that the *Miranda* standard for voluntariness be substantially met.

Although it is certain that statements obtained without adherence to *Miranda's* guidelines are inadmissible, the court did not expressly decide whether all tangible evidence procured through the statements must also be excluded. This is the fruit of the poison tree doctrine, now applied to the states in the search and seizure area.<sup>18</sup> As reflected by the current federal *McNabb-Mallory*<sup>19</sup> rule, the doctrine has not traditionally applied to involuntary confessions.<sup>20</sup> When given the opportunity to decide applicability of the doctrine where incriminating statements were made after the right to counsel had attached, the court, in *Massiah v. United States*,<sup>21</sup> indicated only that the statements were inadmissible as evidence against the defendant. However, *Massiah* protected the right of an accused to have counsel present at every stage of the procedure after indictment, whereas in the instant case the Court seeks to prevent police from obtaining self-incriminating evidence from the suspect by using what it considers illegal inquisitional practices. Since a person can be just as greatly harmed by tangible evidence as by a confession, it would seem that protection would be inadequate if incriminating tangible evidence, obtained by methods which would render a confession inadmissible, were not also excluded. Further, in *Miranda* the Court said: "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him."<sup>22</sup> (Emphasis added.) Although this may be dictum, it is

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17. *Id.* at 1772 (Clark, J., dissenting).

18. See *Wong Sun v. United States*, 371 U.S. 471, 486 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

19. See *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1942).

20. LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL CRIMINAL PROCEDURE 135 (1964).

21. 377 U.S. 201, 207 (1964).

22. 384 U.S. 436, 479 (1966).

indicative of the Court's position.<sup>23</sup> It would therefore seem advisable for police interrogators to follow the *Miranda* guidelines whether the statements sought to be elicited are to be used in Court or not.<sup>24</sup>

The authorities need not provide an attorney if they wish to detain the accused while they conduct an investigation in the field — as long as it is not for an unreasonable time and they do not attempt to interrogate him.<sup>25</sup> Furthermore, *Miranda* does not prevent on-the-scene questioning by police to ascertain facts surrounding a crime, the reason being that the element of compulsion present after detention is not present before.<sup>26</sup> However, law enforcement officials must give the necessary warnings before questioning at any time "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>27</sup> The plain import of this language is that after a person is detained, even before being taken to the station, he must be warned of his rights before questioning can begin. It is advisable for officers not to question a suspect until he is taken to the station where the proper means are available to fully inform him of his rights and to prove intelligent waiver and voluntariness of any statements made. In addition, because of the presumption against waiver, it is suggested that police officers should inform a suspect of his rights, even where he wishes to volunteer a statement;<sup>28</sup> otherwise, if the confession is made

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23. Justice Clark in his dissent is evidently of the same mind for in commenting on the Court's opinion he says: "The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, *as well as the fruits thereof.*" (Emphasis added.) *Id.* at 500.

24. Another argument supporting this position may be derived by analogy to *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964), where it was held that if a witness is granted immunity from prosecution under state or federal law and so is impelled to relinquish his fifth amendment right against self-incrimination, neither the incriminating statements nor their fruits may be used in a prosecution against him in another jurisdiction. Therefore if forfeiture of the privilege renders both statements and fruits inadmissible in other proceedings then an argument could be made that action which deprives an individual of his right to invoke it would have the same effect.

25. 384 U.S. 436, 474 (1966).

26. *Id.* at 477, 478.

27. *Id.* at 444.

28. What is envisioned here is a defendant volunteering a statement after detention when police have no intention to interrogate him. It seems a different conclusion would result if a man simply walked in off the street and volunteered a statement before the police focused on him as a suspect. In this regard, the court stated: "There is no requirement that police stop a person who enters a police station and states that he wishes to confess a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478.

after detention or confinement, the court could find there are "compelling circumstances" which deprived the confession of its voluntary nature.

Police authorities might take the following steps to meet the burden of proving intelligent waiver: (1) Completely inform the suspect of his rights, explain them slowly, and allow him sufficient time to reach a decision (perhaps a prepared statement simply stating an individual's rights could be read to the suspect and then further explained if need be). (2) Conduct both the warning and the subsequent interrogation in a well-lighted room, preferably one similar to other rooms in the building. (3) Employ some type of recording device and record all that occurs during interrogation. These measures are important to demonstrate that improper interrogation tactics<sup>29</sup> deplored by the court are not employed. If a suspect waives his rights and these procedures are followed there should be little doubt of the admissibility of statements so procured.

There remains the possibility of devising some method of protecting a suspect's right without requiring an attorney's presence during interrogation. Although the Court states that its rule requiring counsel is a guideline and need not be followed absolutely, common sense and the language of the court indicate that there will be no acceptable substitute. The Court says: "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the fifth amendment privilege under the system we delineate today."<sup>30</sup> In addition it is said that the presence of counsel will serve several "subsidiary functions," such as lessening the possibility that coercion will be practiced by police, and insuring that the transcription of any statement made is trustworthy.<sup>31</sup> Another factor is the unmeasurable psychological boost the presence of an attorney gives to a person being held

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29. The Court disapproved of what it believed were improper police practices as outlined in several manuals suggesting interrogation procedure. It went to great lengths in disapproving as coercive the practice of isolating a defendant and using psychological techniques to encourage a suspect to confess, *e.g.*, the friendly-unfriendly technique. *Id.* at 445-59. On the other hand, the Court specifically approved of the general methods used by the Federal Bureau of Investigation, especially as justifying its opinion that confessions are not needed for efficient enforcement of the law. *Id.* at 479-86.

30. *Id.* at 469.

31. *Id.* at 470.

by police. In view of these considerations, it is difficult to suggest another expedient that would protect the rights of the accused as does the presence of counsel.

Concluding that the presence of an attorney is necessary presents the authorities with immense practical difficulties. No machinery exists for the appointment of counsel when required by *Miranda*; if such machinery were devised, great hardship would be placed on the bar in working it. Perhaps a public defender system or the presence of a committing magistrate during questioning might be the answer. However, since no attorney-client relationship would exist between the accused and the magistrate, that system may be deemed unsatisfactory by the court. When an attorney is present, if he is to fulfill the traditional role of advocate of his client's interests, it seems he will advise the accused to remain silent; thus the number of confessions procured will be substantially reduced.

These problems do not lend themselves to an easy solution, in fact the different situations existing in city and country parishes and even between city and city will probably require different procedures. A truly workable solution in each instance can only be had after thorough and careful consideration by the law enforcement authorities, the bar and the courts.

*Thomas R. Blum*

#### CONSTITUTIONAL LAW — SCOPE OF CONGRESS' AUTHORITY TO LEGISLATE IN AID OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The United States sought injunctive relief in federal district court against individual property owners of West Feliciana Parish for allegedly violating section 11(b) of the 1965 Voting Rights Act<sup>1</sup> by their individual acts<sup>2</sup> of discrimination against Negro citizens who had registered to vote. In refusing the injunction, the court *held* section 11(b) of the 1965 Voting Rights Act unconstitutional in that it purports to penalize purely individual acts which interfere with a person's right to vote in state

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1. Section 11(b) of Public Law 89-110, 89th Congress, commonly known as the Voting Rights Act of 1965 provides: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote, or intimidate, threaten, or coerce