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Criminal Procedure—MIranda: the Application of the Fifth Amendment Right Against Self-Incrimination to Confessions—A Change in Approach.

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questions on a case by case basis, the refusal of the Court to deny the applicability of the double jeopardy clause of the fifth amendment to the states, and the dissents lodged in *Williams v. Oklahoma*,[44] *Ciucci v. Illinois*,[45] and *Chichos v. State*[46] indicate that the United States Supreme Court, when confronted with this issue, will decide in accord with the prediction made by the New York Court of Appeals in the instant case.

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CRIMINAL PROCEDURE—MIRANDA: THE APPLICATION OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION TO CONFESSIONS—A CHANGE IN APPROACH.

Ernesto Miranda was arrested on suspicion of kidnapping and raping an eighteen year old girl. After being identified by the victim, he was escorted to a special interrogation room to be questioned by police officers. Miranda was not advised of his right to have an attorney present, nor made aware of his privilege against self-incrimination. Though at first denying his guilt, within two hours Miranda gave a detailed confession, admitting and describing the crime. At his trial before a jury, the confession was admitted into evidence over the objection of defense counsel. Subsequently, Miranda was found guilty as charged. On appeal, the Supreme Court of Arizona affirmed the conviction, holding that Miranda's constitutional rights were not violated in obtaining the confession.[1] The United States Supreme Court, in a 5-4 decision, reversed the conviction. *Held,* the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation[2] of the defendant, unless it demonstrates the use of procedural safeguards which effectively protect the defendant's privilege against self-incrimination. Unless equally effective safeguards are adopted, the following procedures must be employed: prior to any questioning, the person must be informed in clear and unequivocal terms that he has the right to remain silent, and that anything said can and will be used against him in court. He must be clearly informed that he has the right to consult with a lawyer and to have the lawyer present during the interrogation. Also, it is necessary to inform him that if he is indigent, a lawyer will be appointed to represent him. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Similarly, the opportunity to exercise his right

44. 358 U.S. 576, 587 (1959).
45. 356 U.S. 571, 573 (1958).
46. 35 U.S.L. Week 4003, 4004 (Nov. 14, 1966).

1. State v. Miranda, 98 Ariz. 18, 401 P.2d 721 (1965).
2. Custodial interrogation is defined by the Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

to assistance of counsel must be afforded him throughout the interrogation. The defendant may waive these rights, provided the waiver is made voluntarily, knowingly and intelligently. The fact that he may have voluntarily consented to answer some questions does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the prosecution to demonstrate that the defendant knowingly and intelligently waived his constitutional rights. *Miranda v. Arizona* (consolidated in a single opinion with three companion cases, *Vignera v. New York*, *Westover v. United States* and *California v. Stewart*), 384 U.S. 436 (1966).

The privilege against self-incrimination, incorporated in the Federal Bill of Rights,[3] and the constitutions of forty-eight states,[4] including New York,[5] guarantees the freedom of an individual from testimonial compulsion. Historically, the privilege originated in England during the reign of Charles I (1625-1649).[6] The English government made great use of special prerogative courts: the Court of High Commission, which investigated and prosecuted religious subversion; and the Court of Star Chamber, which specialized in political subversives.[7] Both courts made use of a device known as an "ex officio oath" by which the accused was compelled to give self-incriminatory testimony.[8] This oath became a powerful and hated weapon of persecution.[9] As a result, Parliament abolished both the "oath" and the prerogative courts by statute in 1641.[10] The principle thereby established—that a person could not be compelled by oath to incriminate himself—won recognition in the common law courts, so that before the middle of the eighteenth century, the privilege was firmly established in English law.[11] Similarly, and in light of the English experience, the privilege had a place in American law from earliest colonial days, having been incorporated into the Massachusetts Body of Liberties of 1641 and the Connecticut Code of 1650.[12] The practices of the prerogative courts of the Royal Governors

3. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V, § 2.

4. Iowa and New Jersey are the only states whose constitutions do not embody the privilege against self-incrimination. Iowa has held the privilege to be required by constitutional due process. Amana Soc'y v. Selzer, 250 Iowa 380, 383, 94 N.W.2d 337, 339 (1959). New Jersey grants the privilege by statute. N.J. Rev. Stat. § 2A:84A-17 (Supp. 1963).

5. N.Y. Const. art. I, § 6, using language similar to the fifth amendment, *supra* note 3; see also N.Y. Code Crim. Proc. § 10.

6. 8 Wigmore, Evidence § 2250 (McNaughton rev. 1961); for other historical expositions of the privilege against self-incrimination, see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1 (1930); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935); Griswold, The Fifth Amendment Today (1955); Fellman, The Defendant's Rights (1958).

7. 8 Wigmore, *op. cit. supra* note 6.

8. *Ibid.*

9. *Ibid.*

10. 16 Car. I, cc. 10, 11 (1641).

11. 8 Wigmore, *op. cit. supra* note 6, § 2250, nn.71-72.

12. Fellman, *op. cit. supra* note 6, at 155.

and Councils solidified opinion on the subject, and ultimately led to the adoption of the privilege against self-incrimination in the Bill of Rights of the federal constitution.[13] At common law, the privilege did not apply where there was no official right to compel answers, and hence, did not apply to confessions elicited by police interrogation.[14] This limitation led to a parallel but distinct development of protections in the area of police-secured confessions, namely, that coerced confessions are inadmissible as evidence.[15] The earliest confession cases in the United States Supreme Court emerged from federal prosecutions and were settled on a non-constitutional basis. The Court adopted the common law rule that absent inducement, promises or threats a confession was voluntary and admissible.[16] However, starting in 1936 with *Brown v. Mississippi*,[17] the Supreme Court has been determining the admissibility of confessions on the constitutional basis that the interrogation at which a confession is obtained is part of the process by which a state procures a conviction, and therefore, is subject to the requirements of the due process clause of the fourteenth amendment. The constitutional test of voluntariness has become, whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer . . . ,"[18] and whether the physical and psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed . . . ."[19] Being incorporated in the fourteenth amendment, these standards were made applicable to the states.

Unlike the confession rules, the federal privilege against self-incrimination has not, until recently, been applicable to the states through the due process clause of the fourteenth amendment.[20] New York was, therefore, free to develop its own standards in applying the privilege to police-elicited confessions. Traditionally, New York courts have held that the privilege does not apply to police interrogations, and accordingly the police were under no obligation to warn the accused that he need not answer any questions.[21] However, in recent years, the Court of Appeals has been extending the privilege in two separate situations: police interrogations after formal judicial proceedings have begun, and to some degree, to police interrogations prior to the institu-

13. Pittman, *supra* note 6, at 783.
14. 8 Wigmore, *op. cit. supra* note 6.
15. *Ibid.*
16. Pierce v. United States, 160 U.S. 355 (1896); Hopt v. Utah, 110 U.S. 574 (1884).
17. 297 U.S. 278 (1936).
18. Lisenba v. California, 314 U.S. 219, 241 (1941).
19. Haynes v. Washington, 373 U.S. 503, 513 (1963). For a complete discussion of the development and application of the confession rules, see *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935 (1966).
20. Malloy v. Hogan, 378 U.S. 1 (1964), overruled Adamson v. California, 332 U.S. 46 (1947) and Twining v. New Jeresy, 211 U.S. 78 (1908), thereby making the privilege applicable to the states.
21. People v. Dusablon, 16 N.Y.2d 9, 209 N.E.2d 90, 261 N.Y.S.2d 38 (1965); People v. Leyra, 302 N.Y. 353, 98 N.E. 553 (1951); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909).

tion of judicial proceedings. These extensions have come about, in large part, as an incident of the extension of the constitutional right to counsel.

In *People v. DiBiasi*,[22] the Court of Appeals considered the question of whether the defendant's post-indictment confession was admissible in evidence. The Court took the position that after indictment, the right of the accused to assistance of counsel is absolute, and any confession secured without such assistance amounts to *testimonial compulsion*. *People v. Waterman*[23] broadened this protection to a confession elicited by the police during the period between the return of a "John Doe" indictment and the arraignment. The Court concluded that there was no difference between an indictment naming the defendant and one in which his name was later inserted. In holding the defendant's confession inadmissible because it violated his constitutionally protected right to counsel, the Court of Appeals stated, the state "may not circumvent the defendant's privilege against self-incrimination by introducing . . . statements obtained from him [following indictment] . . . where . . . he was not first advised of his privilege and his right to assistance of counsel."[24] *People v. Meyer*[25] extended the protection of the right to counsel to post-arraignment questioning prior to formal indictment.[26] However, *People v. Bodie*[27] restricted these doctrinal extensions by holding that the accused may waive his constitutional rights. Professor Paulsen summarizes these and other New York cases as holding that "a statement or confession taken from an accused after the formal opening of a criminal action against him (whether by indictment, information or a judicial decision holding him for grand jury action), may not be used against him," unless the accused has been made aware of his right to remain silent, and of his right to an attorney, and has effectively waived them.[28]

However, New York has not been as liberal when the confession occurs prior to the institution of formal criminal proceedings. In such a situation, the affirmative duty to warn the accused of his constitutional rights has been held less than absolute, and arises only after the accused requests counsel[29] or when the accused's attorney has requested access to his client. In *People v. Donovan*,[30] the defendant was arrested and taken to a police station for interrogation. While there, his retained counsel requested to see him. The police

22. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
23. 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).
24. *Id.* at 566, 175 N.E.2d at 448, 216 N.Y.S.2d at 75.
25. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).
26. The Appellate Division has held that a confession obtained from a suspect prior to arraignment is inadmissible where the arraignment is delayed in order to secure the confession. People v. Richardson, 25 A.D.2d 221, 268 N.Y.S.2d 419 (1st Dep't 1966); People v. Veitch, 26 A.D.2d 764, 271 N.Y.S.2d 729 (4th Dep't 1966). This rule is similar to the *Mallory-McNabb* rule in the federal courts. See Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).
27. 16 N.Y.2d 275, 213 N.E.2d 444, 266 N.Y.S.2d 104 (1965).
28. Paulsen, *The Winds of Change: Criminal Procedure in New York: 1941-1965*, 15 Buffalo L. Rev. 304 (1965).
29. People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 216 N.Y.S.2d 79 (1961).
30. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

refused and the defendant subsequently confessed. The Court of Appeals, in holding this confession inadmissible, on the grounds that it constituted a denial of his constitutionally protected right to counsel, stated, "In this case [the right to counsel and the privilege against self-incrimination] converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities, is to preserve his client's privilege against self-incrimination."[31] *People v. Failla*[32] extended *Donovan* to a situation in which the confession was recorded in part, before the time the defendant's lawyer had made contact with the police. The Court felt that to fragment the confession would only lead to confusion and uncertainty in the admissibility of evidence. It was at this point that *Malloy v. Hogan*[33] incorporated the fifth amendment privilege against self-incrimination into the due process clause of the fourteenth amendment, thereby making the federal privilege applicable to the states. The first opportunity for New York and the other states to follow the federal standard in applying the privilege to police secured confessions came about as a result of the Supreme Court decision in *Escobedo v. Illinois*.[34] Danny Escobedo confessed to the murder of his brother-in-law. This confession occurred after the police had denied Escobedo's request to consult with his attorney. Justice Goldberg, writing for the majority of the Court, concluded:

> We hold, therefore, that where as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out the process of interrogation that lends itself to eliciting incriminatory statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the *police have not warned him of his absolute right to remain silent*, the accused has been denied "Assistance of Counsel" in violation of the 6th Amendment to the Constitution as "made obligatory upon the states by the 14th Amendment", Gideon v. Wainwright, 372 U. S. at 342, 83 S. Ct. at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[35]

This decision became the subject of "judicial interpretation and spirited legal debate."[36] State courts, in considering its implications, arrived at varying conclusions. California, as a result of *People v. Dorado*,[37] represented the broad interpretation of *Escobedo*: that is, prior to any interrogation, the police are under an affirmative duty to warn the accused of his privilege against self-incrimination and of his right to assistance of counsel, regardless of whether the accused has requested an attorney. In the absence of such warnings, any confessions elicited by the police will be inadmissible as evidence. New York,

31. *Id.* at 151, 152, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.
32. 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964).
33. 378 U.S. 1 (1964).
34. 378 U.S. 478 (1964).
35. *Id.* at 490, 491 (Emphasis added.).
36. Miranda v. Arizona, 384 U.S. 436, 440 (1966).
37. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

on the other hand, interpreted *Escobedo* narrowly, as meaning that defendant's constitutional rights arise only upon his affirmative invocation of them. In *People v. Gunner*,[38] the defendant did not request an attorney prior to his confession. The Court of Appeals stated the defendant's argument:

> Relying on People v. Dorado . . . and . . . Escobedo v. Illinois . . . , the defendant contends that the statements obtained by the police, in the absence of counsel, after his arrest should be held inadmissible, even though he never requested a lawyer, . . . since he was then the prime suspect . . . . At such point, the defendant argues, he became entitled to the aid of counsel and accordingly, it was incumbent upon the police to advise him of his right to refrain from answering any questions and also of his right to a lawyer.[39]

The Court, with Judges Fuld and Desmond dissenting, found this argument without merit and held that the rules previously announced in its decisions[40] should not be *extended* to render inadmissible inculpatory statements obtained by the police from a person who, taken into custody prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer. *Miranda* has made this extension for the Court of Appeals, thereby giving New York a comprehensive system of protection for the accused both prior and subsequent to the initiation of formal judicial proceedings. This extension is based exclusively on the privilege against self-incrimination with the right to counsel attached merely as a protective device for the privilege, absent other equally effective procedural safeguards.

Chief Justice Warren, delivering the opinion of the Court, explained that certiorari was granted in order to explore facets of the problems raised by *Escobedo v. Illinois* of applying the privilege against self-incrimination to custodial interrogation, and to provide concrete constitutional guidelines for law enforcement agencies and courts to follow.[41] The Court was not concerned with whether Miranda's confession was voluntary in traditional terms,[42] but rather concerned itself primarily with the interrogation atmosphere and the evils it can bring.[43] The Chief Justice started with the proposition that the modern practice of in-custody interrogation is psychologically rather than physically oriented, but that coercion can be mental as well as physical.[44] To demonstrate this, the Court analyzed interrogation methods as outlined in Inbau and Reid, *Criminal Interrogation and Confession* (1963) and O'Hara, *Fundamentals in Criminal Interrogation* (1961), which are used extensively by law enforcement agencies themselves as guides to effective interrogation. From this study, the Court described the nature and evils of modern police interrogation techniques:

38. 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).
39. *Id.* at 232, 205 N.E.2d at 855, 257 N.Y.S.2d at 928-29.
40. The Court referred to *Failla, Donovan, Meyer, Noble, Waterman,* and *DiBiasi.*
41. Miranda v. Arizona, 384 U.S. 436, 441, 442 (1966).
42. *Id.* at 457.
43. *Id.* at 456.
44. *Id.* at 448.

> To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object can be obtained." When normal procedures fail to produce the needed result, the police may resort to deceptive strategems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.[45]

The Court deemed such a process inherently compulsive, and therefore at odds with the fundamental principle that the individual may not be compelled to incriminate himself.[46] Turning to the history of the privilege, and its precedents, namely *Bram v. United States*,[47] and *Escobedo v. Illinois*,[48] the Court concluded that the privilege against self-incrimination is fully applicable to police interrogations.[49] In order to protect the privilege so applied, the accused must be adequately and effectively warned of his constitutional rights, and the rights must be fully honored. The Supreme Court explained that its decision was not intended to create a constitutional "straightjacket" which would handicap future efforts of reform.[50] The Court encouraged Congress and the states to continue their search for effective means of protecting the rights of the accused, but warned that any procedure thereby adopted must be equally effective as those promulgated by the Court.[51]

The Court also maintained that its decision was not intended to, nor should it, have the effect of hampering the traditional functions of police officers in investigating crime.[52] In this context, the Court answered the traditional argument that society's need for interrogation outweighs the privilege against self-incrimination.[53] The majority maintained that the limits placed on the interrogation process should not constitute an undue interference with a proper system

45. *Id.* at 455.
46. *Id.* at 457, 458.
47. 168 U.S. 532 (1897). In *Bram* the Court held that confession cases are controlled by the fifth amendment privilege against self incrimination. Justice Harlan, dissenting, was critical of the majority for relying on *Bram* since the case has not been generally followed and its historical premises were disproved by Wigmore; Miranda v. Arizona, 384 U.S. 436, 506 n.2 (1966).
48. 378 U.S. 478 (1964). Harlan maintained that *Escobedo* contained no reasoning or even general conclusions addressed to the fifth amendment but rather was based on the sixth amendment. Miranda v. Arizona, 384 U.S. 436, 512 n.9 (1966). He argued that the Court's reliance on *Escobedo* and other sixth amendment cases demonstrated "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion was made the basis for extension to a wholly different situation." *Id.* at 514.
49. *Id.* at 467.
50. *Ibid.*
51. *Ibid.*
52. *Id.* at 477.
53. *Id.* at 479, 491.

of law enforcement.[54] The Court argued that the dangers to law-enforcement through curbs on interrogation are greatly "overplayed."[55] As evidence, the Court discussed the Federal Bureau of Investigation, which has maintained effective law enforcement while following primarily the safeguards which the Supreme Court established.[56] Also, the Court relied on the experience of other countries, England,[57] Scotland,[58] India,[59] and Ceylon[60] to further negate the argument of danger to law enforcement.

Justice White, dissenting, maintained that the rules announced by majority will measurably weaken the effectiveness of law enforcement agencies. He characterized the Court's decision as a deliberate calculus to prevent interrogation and to reduce the incidence of confessions and pleas of guilty.[61] As such, the decision could have no other than a corrosive effect on the criminal law as an effective device to prevent crime.[62] Maintaining that the Court's rules will return killers, rapists and other criminals to the streets to repeat their crimes whenever it pleases them, White refused to share any responsibility in the Court's decision.[63]

Since *Miranda* extends the right to counsel in terms of a protective device for the fifth amendment privilege against self-incrimination, the significant question arises as to whether the sixth amendment, under the *Escobedo* rationale, has any applicability as an independent basis for a right to counsel in the police station. Consider in this regard Note 35 in the majority opinion,[64] stating that if the police prevent an attorney from consulting with his client, such action, independent of any other constitutional proscription, constitutes a violation of the sixth amendment right to assistance of counsel, citing the New York case of *People v. Donovan.*[65] Does the Court mean that even if the police have no intention of subjecting the accused to the process of custodial interrogation, and therefore, there is no need for fifth amendment protective devices, the police must nevertheless honor an attorney's request to consult with his client? The need to protect the suspect by enforcing the limitations on certain police investigatory procedures[66] would argue for the independent right to counsel in the police station. This argument is strengthened by the fact that the pre-interrogation investigatory process may constitute the "*critical*

54. *Id.* at 481.
55. *Id.* at 486.
56. *Id.* at 483, 486. Harlan contended that the F.B.I. procedures fall sensibly short of the Court's formalistic rules. *Id.* at 521.
57. *Id.* at 486-488.
58. *Id.* at 488.
59. *Id.* at 488, 489.
60. *Id.* at 489. Harlan maintained that the laws of these foreign countries are not comparable to the *Miranda* rules in that they reflect a more moderate conception of the rights of the accused as against those of society. *Id.* at 521-22.
61. *Id.* at 541.
62. *Id.* at 543.
63. *Id.* at 542.
64. *Id.* at 465.
65. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).
66. *E.g.*, lineups and bloodtests. See Schmerber v. California, 384 U.S. 757 (1966).

stage" in the criminal prosecution of the accused, on the grounds that the physical evidence thereby secured may be sufficient, in itself, to sustain a conviction.[67] However, the Court's interpretation of *Escobedo*, and its insistence that the adversary system commences only *"when the individual is first subjected to police interrogation* while in custody at the station or otherwise deprived of his freedom of action in any way,"[68] implies that the sixth amendment has no applicability beyond the interrogation process.[69] It is doubtful whether New York, under *Donovan* and *Gunner*, has gone beyond the Supreme Court in this regard, since these cases extend the right to counsel only in an interrogation context. Thus, it would seem that neither New York nor the United States Supreme Court now provides for the right to counsel if the police do not interrogate the accused.

Note 35 may mean, therefore, that once custodial interrogation is commenced (*i.e.*, once the adversary system begins) the independent right to counsel arises. The result might possibly be that even though a suspect has been warned of his constitutional rights, and insists on talking, the resulting confession will be inadmissible if his attorney has been denied access to him at any point during the questioning. Such an interpretation is conceptually consistent with the holding in the instant case, that after waiver the accused can still invoke his privilege against self-incrimination and refuse to answer any further questions. This must mean that the privilege has continuing applicability during all stages of the interrogation process, regardless of waiver. Accordingly, the privileges' protective device, the right to counsel, also has continuing applicability; therefore, any police refusal of an attorney's request to consult with the suspect constitutes a violation of the suspect's constitutional rights.

Another possible explanation of Note 35 is that the Court has provided the right to counsel, independent of its use as a protective device for the privilege against self-incrimination, so as to provide a suspect with an attorney in the event that the states, following the invitation of the Court,[70] adopt fifth amendment protective devices other than the right to counsel (*e.g.*, magistrates or other court officers present during interrogation). A magistrate's presence would constitute the requisite protective device for the privilege, thereby relieving the police of the obligation to provide the accused with counsel. However, the need for an attorney in such circumstances is clear. The presence of a magistrate will only insure that the police do not compel or coerce the accused to involuntarily waive his privilege against self-incrimination. It will not provide the suspect with the strategic advice necessary during

67. See Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); and Hamilton v. Alabama, 368 U.S. 52 (1961).

68. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

69. For a discussion of the same problem, where the author comes to a different conclusion, see Schwartz, 33 U. Chi. L. Rev. 719, 766, 767 n.243 (1966).

70. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

any police interrogation. Footnote 35 guarantees the accused this advice by providing him with the right to counsel in such circumstances.

It should be noted that while New York already provides for this independent right to counsel, under the *Donovan* and *Gunner* decisions, the right is severely limited to only those defendants who have either retained or requested counsel. However there would seem to be little reason in a society like ours to require a man to request those rights guaranteed him by the Constitution.[71] Moreover, such a concept was expressly condemned in *Miranda* when the right to counsel is used as a protective device for the privilege against self-incrimination, on the grounds that the requirement of request discriminates against those defendants who are not aware of their constitutional rights.[72]

Miranda also provides no guidance in answering such questions as whether statements made by the accused were spontaneous or the product of interrogation, whether non-testimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, and also, what constitutes a significant deprivation of liberty so as to require the *Miranda* warnings. This last question is of special importance to New York in light of its "Stop and Frisk"[73] statute which expressly permits the police "to stop any person abroad in a public place . . . and . . . demand of him his name, address, and an explanation of his actions."[74] The state police have been officially advised that *Miranda* does not require them to warn suspects, detained under this statute, of their constitutional rights.[75] However this issue must ultimately be decided by the United States Supreme Court on the basis of whether a person so detained "has been deprived of his freedom of action in any significant way."

GARY M. COHEN

DECEDENTS' ESTATES AND TRUSTS—INCORPORATION BY REFERENCE—CONDITIONAL BEQUEST RENDERED ABSOLUTE BY INADMISSABILITY OF CONTRARY DIRECTIONS

Testator bequeathed his clothing, jewelry, the remainder of his paintings, and similar personal effects "to be distributed as I shall direct in a memorandum to be found with this will or in my safe deposit box now at the First National City Bank of New York . . . or in my office safe, or in the absence of such directions, to be distributed by my said wife or niece as she shall deem proper."[1]

71. Note, 15 Buffalo L. Rev. 719, 721 (1966).
72. Miranda v. Arizona, 384 U.S. 436, 470, 471 (1966). See also People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).
73. N.Y. Code Crim. Proc. 180-a.
74. N.Y. Code Crim. Proc. 180-a(1).
75. McKane, *Comments on Miranda v. Arizona*, 1 Law Enforcement Executive (No. 2) p. 7 (1966).

1. Matter of Salmon, 24 A.D.2d 962, 265 N.Y.S.2d 373, 374 (1st Dep't 1965).