a warning to the accused that he may remain silent, that anything that he says may be used against him and that he is entitled to "consult with his lawyer" Escobedo v Illinois, 378 US 478,

It is with regret that I find it necessary to write in these cases. However, I find myself unable to join the majority because the opinion goes too far or too little while my dissenting brethren do not for me go quite far enough.

I

The issue dividing the majority ~~rule~~ has no support in our cases. Indeed, the court ~~says that~~ admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." ~~I find no case that decision that even goes it a proper and many that reject even portions of it~~ In short, the Court ~~decides to~~ (~~adopt~~ its proposal) has added to the traditional requirements of ~~Miranda v Arizona, 384 US 436 (1966)~~, a constitutional rule that no custodial interrogation may be engaged in by the police without ~~clear warning a first stating~~ first advising, ~~stating~~, in addition to the traditional warnings, (under the 5th Amendment) the accused that he has a right to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. ~~Contrary to the~~ With due deference to my brothers, I find no such requirement in any criminal jurisprudence in the world.* Such a strict constitutional specific inserted at the nerve center of crime detection (at this point) may well kill the patient. Since, admittedly, there is a paucity of information and a total lack of empirical knowledge on the ~~practical~~ practical question of such a requirement I would be more restrained. Lest we go too far too fast.

further Recedo that the Court

And ~~that~~ failure to so do will ipso facto require the exclusion of any statement by the accused, as well as the fruits thereof.

II

~~The fact that~~ Custodial interrogation ~~has~~ ~~is~~ has long been recognized as "undoubtedly an ~~an~~ essential tool ~~to~~ in effective law enforcement" ~~Crooker v California~~ Mr Justice Goldberg in Haynes v Washington, ~~357 US 440~~ ( ) ~~we must~~ warning us to ~~requirements to~~ guard against the promulgation of ~~a~~ doctrinaire rules. Especially is this true where ~~it is written into the~~ the Court ~~holds~~ finds that "the Constitution has prescribed" its holding. Furthermore, since the light of our past cases from Hopt v Utah 110 US 574 ( ) down to Haynes v Washington 373 US 503 ( ) are to the contrary, Indeed, the celebrated (we should move speed slowly.)

373 US 503, 515 (1963)

(2

nor of the burden of proof as to waiver being on the state;

Escobedo case, 378 US 478, (1964) never hinted that an ~~the~~ affirmative "waiver" [~~prior~~ was a prerequisite to questioning]; nor of the presence of counsel - absent a waiver - during interrogation; nor the furnishing of counsel to those unable to pay; nor of admissions and exculpatory statements being "confessions"; nor that a waiver can be withdrawn at the will of the accused. To require all those things at one gulp might cause the Court to choke over more cases than Crooker, supra, and Cicenia v Lagay, 357 US 504 (1958) which it expressly overrules today.

The rule prior to today, as the author of Escobedo [~~as author of Escobedo, supra~~] stated it in Haynes v Washington depended upon "a totality of the circumstances evidencing an involuntary... admission of guilt." at 574. And he concluded

> "detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible... The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducement on the mind and will of an accused... We are here impelled to the conclusion, from all of the facts presented, that the "boundary line

process has been excluded" at 515.

III

I would continue to follow that rule. In the "totality of the circumstances" [rule] which my brother Goldberg spoke in Haynes in 1963, I would take into consideration whether, in a given case, the police officer [prior to custodial interrogation] added the warning that the suspect might have counsel present at the interrogation and, further, if he was too poor to employ counsel that the court of competent jurisdiction would appoint one at his request. In the event these warnings were not given the ~~consider that along "with all the facts presented in making my appraisal of the voluntariness of the confession~~.

burden would be on the state to prove that counsel was waived or that on the totality of the circumstances, including the failure to give the warnings, the confession was voluntary.

Rather than employing the arbitrary rule which the Court lays down I would follow the traditional, more pliable one that we are accustomed to administer and which we know [from our cases] is an effective instrument in the administration of the Due Process Clause of the 14th Amendment. In this way we would not be acting in the dark nor in one full sweep changing the traditional rule of custodial interrogation which this Court has for so long recognized as "undoubtedly an essential tool in effective law enforcement." It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding. I therefore dissent.

fu

* The Court points to England, Scotland and India as having equally protective rules. As my brother Harlan points out in his dissent, infra p. 19-20, the Court is mistaken in this regard. Moreover, the requirements of the Federal Bureau of Investigation as set forth in the Attorney General's letter appear to be so strict in at least two respects: (1) the offering of counsel ~~uses the verb "consult with", apparently taken from Escobedo. The presence of counsel at the custodial interrogation is not mentioned in the warning. Nor (2) does the FBI warning include~~ is put in the phrase that suspects have "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. ~~(2) The offer of counsel to those unable to pay merely advises that "such counsel will be assigned by the Judge.~~ Indeed, the practice is that wherever the accused "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point... When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that counsel is not present at the interview. ~~(2) As to the warning of those not able to pay for counsel the~~ (2) The same practice is followed as to indigents, except that in addition the Agent advises "those who have been been arrested for an offense under the FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge." The right will be interpreted by the type of suspect which the Court continually mentions as meaning that he could get counsel when tried ~~not~~ by the Judge not at custodial interrogation.

they are mostly law review articles and books written by Professors without practical experience.

NOR CAN I JOIN IN THE Court's CRITICISM OF THE POLICE AND INVESTIGATORY AGENCIES ~~CUSTODIAL INTERROGATIO~~ present practice as to custodial interrogation. THE BOOKS and articles THAT it refers to as "police manuals"[x] are not shown by the papers in the record here to be the official manuals of any police department OR being in universal use in crime detection. ~~On the contrary I dare say none of them enjoy such recognition~~. Moreover THE EXAMPLES of police brutality mentioned by ~~by the Court are but a drop in~~ the Court are the rare exception to the thousands of cases that ~~are in~~ appear in the law reports every year. I am proud of our State police agencies all the way from "New York's Finest" to the "Pride of ~~San Francisco~~ Berkeley" and the federal bureaus as well.

[x] Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, ~~Techniques~~ Technics for the Crime Investigator (1952); La Fave, ~~Arrest ETC~~ 1962 WASH. U.L.Q. ~~1962~~ 331; Barrett, Police Practices and the Law - 50 Calif Law Rev 11 (1962); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub L. 25 (1965); Inbau and Reid, Criminal Interrogation and Confessions, (1962); ~~Ohara~~ O'Hara Fundamentals of Criminal Investigation (1959)