St. John's Law Review

Volume 54
Number 3 *Volume 54, Spring 1980, Number 3*

Article 9

July 2012

Recent Developments in the Expanding Right to Counsel

Michael G. Glass

Thomas D. Giordano

Joseph J. Tesoriero

Court.[96]

Carole F. Barrett

Recent developments in the expanding right to counsel

During the past several years, the Bar has witnessed significant activity by the Court of Appeals in its continuing effort to evolve an acceptable right to counsel standard. The Court's often expressed belief that the criminal defendant is at a great disadvantage when confronted with the "coercive police power of the state"[97] has served as the primary impetus for the Court to afford considerable protection to a defendant in custody. In order to strike a balance between the competing interests of effective law enforcement on the one hand and preserving the rights of the criminally accused on the other, one solution offered by the Court

---

[96] Although the *Torsney* Court's equal protection analysis appears sound, its liberal construction of CPL § 330.20 raises questions as to the protection afforded society by the resultant "judicial amendment." Indeed, the Court itself acknowledged the dichotomy that may now exist between the subjective, nonuniform concept of mental illness that justifies acquittal and the objective criteria mandated by due process to justify continued confinement. 47 N.Y.2d at 683, 394 N.E.2d at 271, 420 N.Y.S.2d at 202. Judge Jasen suggested that the solution to this "friction" might lie with legislative reevaluation of the insanity defense itself. *Id.* The Department of Mental Hygiene has recommended that the insanity defense be abolished and replaced by a plea of "diminished capacity under which evidence of abnormal mental condition would be admissible to affect the degree of crime for which the accused could be convicted." New York State Department of Mental Hygiene, *A Report to Governor Hugh L. Carey on the Insanity Defense in New York* 9 (1978). *See also* Steadman, *Insanity Acquittals in New York State, 1965-1978*, 137 AM. J. PSYCH. 321 (1980). It also has been suggested that the insanity defense be modified to "guilty, but insane," to allow for retention and treatment within the criminal justice system itself. *See* R. PERKINS, CRIMINAL LAW 883 (2d ed. 1969); Note, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351 (1979). Alternatively, it is suggested that a statute requiring testimony on present sanity and specific jury determination on that issue should be adopted. Upon a finding of acquittal with continued insanity, the defendant would then be automatically committed for treatment. *See* Note, *Commitment—Standard for Commitment Following Acquittal by Reason of Insanity made Uniform with that for Civil Commitment—State v. Krol*, 7 SETON HALL L. REV. 412 (1976). While discussion of the possible statutory amendment of Penal Law § 30.05, *see* note 61 *supra*, is beyond the scope of this article, it is submitted that legislative review of CPL § 330.20 should include review of Penal Law § 30.05, in order to ensure that any proposed statutory scheme protects both the constitutional requisites of due process, equal protection, and the general societal interests of the State.

[97] People v. Hobson, 39 N.Y.2d 479, 485, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 423 (1976); *see* People v. Settles, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 614, 412 N.Y.S.2d 874, 877 (1978).

was to "breathe life" into a defendant's right to counsel by permitting its waiver only in the presence of a lawyer.[98] This "indelible" right to counsel rule was first applied only in cases where an attorney actually had entered the proceeding—commonly known as the Donovan-Arthur rule.[99] The inequity of affording the represented defendant substantially greater protection than the unrepresented defendant, however, led the Court to declare that the commencement of "formal judicial proceedings . . . by indictment or arraignment" also triggers the indelible right to counsel.[100]

---

[98] People v. Hobson, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 422, (1976); *see* People v. Settles, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 614-15, 412 N.Y.S.2d 874, 877 (1978).

[99] The *Donovan-Arthur* rule is the product of several Court of Appeals decisions. In People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), the court suppressed the statements of a criminal defendant that were made after the police had denied his attorney access to him. *Id.* at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843. The Court declared that it was illegal for the police to interrogate a defendant after he, his lawyer, or his family had sought permission from the police to speak together. *Id.* at 153, 193 N.E.2d at 630, 243 N.Y.S.2d at 844. The Court later made it clear that the defendant need not actually be denied access to counsel or explicitly request counsel for the mandates of *Donovan* to apply. People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965); People v. Friedlander, 16 N.Y.2d 248, 212 N.E.2d 553, 265 N.Y.S.2d 97 (1965). In People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), the Court indicated that the moment the police become aware that the defendant has retained or been assigned counsel, or once a lawyer informs the police that he is representing the defendant, the right to counsel attaches. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. Moreover, the Court held that an effective waiver of the right can be made only in the presence of the defendant's attorney. *Id.*

Although the validity of the *Donovan-Arthur* rule later became the subject of doubt, *see* People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied,* 404 U.S. 840 (1971); People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied,* 401 U.S. 945 (1971), the rule was forcefully endorsed by the Court in People v. Hobson, 39 N.Y.2d 479, 485-86, 348 N.E.2d 894, 899, 384 N.Y.S.2d 419, 423-24 (1976), *discussed in The Survey,* 51 ST. JOHN'S L. REV. 201, 218 (1976). The *Hobson* Court, however, noted three situations in which the *Donovan-Arthur* right would not attach: when the defendant was not in custody, when the statement was "spontaneously volunteered," and when the defendant was represented by counsel in an unrelated proceeding. 39 N.Y.2d at 483, 348, N.E.2d at 897, 384 N.Y.S.2d at 422. *But see* notes 145-179 and accompanying text *infra.* For further discussion of the *Donovan-Arthur* line of cases, see *The Survey,* 53 ST. JOHN'S L. REV. 803, 856 n.259 (1979); *The Survey,* 52 ST. JOHN'S L. REV. 485, 512 n.130 (1978); 1978 *Survey of New York Law,* 30 SYRACUSE L. REV. 15, 121 (1979).

[100] People v. Settles, 46 N.Y.2d 154, 166, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978). Just as the *Donovan-Arthur* protection of represented defendants evolved through a series of cases, *see* note 99 *supra,* so did the general right to counsel that applied to all defendants, based upon the stage of the criminal proceeding. People v. Bodie, 16 N.Y.2d 275, 213 N.E.2d 441, 266 N.Y.S.2d 104 (1965); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); People v. Di Biasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960). In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court declared that the right

Recently the Court addressed three additional issues: whether a request for counsel triggers the indelible right; whether the filing of other accusatory instruments may give rise to the indelible right; and finally, whether the indelible right extends to an unrelated charge.

People v. Cunningham:[101] *Request for counsel triggers indelible right*

The defendant in *Cunningham* was charged with murder in the second degree for his alleged participation in the shooting of a

---

to counsel attaches upon "the initiation of adversary judicial proceedings . . . by . . . formal charge, preliminary hearing, indictment, information or arraignment." *Id.* at 689. Subsequently, the Court of Appeals ruled that a defendant has a right to the assistance of an attorney once an accusatory instrument has been filed. People v. Blake, 35 N.Y.2d 331, 339-40, 320 N.E.2d 625, 631-32, 361 N.Y.S.2d 881, 890-91 (1974). In other words, the filing of an accusatory instrument, *see* CPL § 1.20(1) (Supp. 1979-1980) marks the commencement of the "critical stage" of the prosecution, during which all defendants enjoy the right to counsel. *See* People v. Settles, 46 N.Y.2d at 165, 385 N.E.2d at 618, 412 N.Y.S.2d at 881; People v. Blake, 35 N.Y.2d at 339-40, 320 N.E.2d at 631-32, 361 N.Y.S.2d at 890-91. The Court has held, however, that in addition to the filing of an accusatory instrument, a court order of removal also is "sufficiently 'judicial' in nature" to trigger the right to counsel. People v. Coleman, 43 N.Y.2d 222, 225-26, 371 N.E.2d 819, 821, 401 N.Y.S.2d 57, 59-60 (1977); People v. Sugden, 35 N.Y.2d 453, 461, 323 N.E.2d 169, 174, 363 N.Y.S.2d 923, 929 (1974).

Whether the "critical stage" right to counsel was also "indelible" was more problematical. In People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied,* 404 U.S. 840 (1971), the Court held that an unrepresented defendant in a post-indictment setting could waive his right to counsel in the absence of a lawyer. *Id.* at 25-26, 268 N.E.2d at 628-29, 319 N.Y.S.2d at 826-27. *Lopez* was overruled in People v. Hobson, 39 N.Y.2d 479, 485-90, 348 N.E.2d 894, 899-902, 384 N.Y.S.2d 419, 423-27 (1976); *see* People v. Settles, 46 N.Y.2d at 162, 385 N.E.2d at 615, 412 N.Y.S.2d at 878. Although it was unnecessary to overrule *Lopez* since Hobson was a represented defendant against whom no accusatory instrument had been filed, *see* 39 N.Y.2d at 482, 348 N.E.2d at 896, 384 N.Y.S.2d at 421, in so doing, the *Hobson* Court seemed to indicate that both represented and unrepresented defendants during a critical stage could waive the right to counsel only in the presence of an attorney. *The Survey,* 51 ST. JOHN'S L. REV. 201, 220; *see* 39 N.Y.2d at 493, 348 N.E.2d at 904, 384 N.Y.S.2d at 428 (Gabrielli, J., concurring). Confusion was caused, however, by the Court's subsequent decision in People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977). In *Coleman,* the Court held that although an unrepresented defendant's right to counsel had been triggered by a court order of removal issued prior to the filing of an accusatory instrument, 43 N.Y.2d at 225-26, 371 N.E.2d at 821, 401 N.Y.S.2d at 59-60, the right could be waived without the assistance of a lawyer. *Id.* at 226-27, 371 N.E.2d at 821, 401 N.Y.S.2d at 59-60. For an examination of *Coleman* see *The Survey,* 52 ST. JOHN'S L. REV. 485, 505 (1978). The Court clarified its position somewhat in People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 616, 412 N.Y.S.2d 874 (1978), when it ruled that upon the return of an indictment or at arraignment, there attaches an indelible right to counsel that is waivable only in the presence of an attorney. *Id.* at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. For a discussion of the *Settles* case, see *The Survey,* 53 ST. JOHN'S L. REV. 804, 856 (1979).

[101] 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (per curiam).

service station attendant.[102] The police arrested the defendant and administered the requisite *Miranda* warnings.[103] Cunningham invoked his constitutional rights, including his right to consult with an attorney.[104] The police then terminated all interrogation and placed him in a jail cell.[105] Several hours later, the defendant informed the police that he wished to make a statement.[106] Notwithstanding his initial willingness to speak, Cunningham reiterated his request for a lawyer.[107] After conferring with his wife, however, the defendant agreed to submit to police questioning without the assistance of counsel and thereafter made incriminating statements.[108] The lower court denied the defendant's pre-trial motion to suppress the statements, and the Appellate Division, Second Department, affirmed without opinion.[109]

In a unanimous per curiam opinion, the Court of Appeals reversed.[110] The Court reasoned that since a demand for an attorney is indicative of a defendant's inability to deal with the police without legal assistance,[111] any decision on the part of the defendant to waive his right to counsel outside the presence of a lawyer could not be the product of an informed choice.[112] Moreover, the Court

---

[102] *Id.* at 205, 400 N.E.2d at 361, 424 N.Y.S.2d at 422.

[103] *Id.* at 205, 400 N.E.2d at 362, 424 N.Y.S.2d at 422.

[104] *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 423. When the defendant was first apprehended, he was promptly given *Miranda* warnings. Although at this juncture he agreed to speak with the police, he made no incriminating statements. *Id.* at 205-06, 400 N.E.2d at 362, 424 N.Y.S.2d at 422. Later in the evening the defendant was told that he was being put under formal arrest and, at that time, was given a second set of *Miranda* warnings. The defendant then indicated his desire to confer with counsel. *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 423.

[105] *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 423. The police informed Cunningham that he would be able to see an attorney "after he had been 'booked' and arraigned." *Id.* The police, however, did not attempt to secure an attorney for the defendant prior to his arraignment. *Id.*

[106] *Id.*

[107] *Id.* After Cunningham requested to make a statement, he was removed from his cell and again given *Miranda* warnings. When asked to sign a written waiver of his constitutional rights, however, the defendant "balked" and renewed his demand for the assistance of counsel. *Id.* The police terminated all interrogation and proceeded to return the defendant to the jail cell. *Id.*

[108] *Id.* As the defendant was being returned to his jail cell, he spied his wife, who had been at the station since the defendant's arrest. *Id.* He was permitted to speak with her privately. *Id.*

[109] *Id.* at 205, 400 N.E.2d at 361-62, 424 N.Y.S.2d at 425.

[110] 49 N.Y.2d at 210, 400 N.E.2d at 365, 424 N.Y.S.2d at 426.

[111] *Id.* at 209, 400 N.E.2d at 364, 424 N.Y.S.2d at 425; *see* Michigan v. Mosley, 423 U.S. 96, 110 n.2 (White, J., concurring) (1975).

[112] 49 N.Y.2d at 210, 400 N.E.2d at 365, 424 N.Y.S.2d at 426.

observed that while the indelible right to counsel attaches for both represented and unrepresented defendants "upon the commencement of formal adversary proceedings,"[113] it protects represented defendants at all stages of the custodial process.[114] To redress this imbalance between the rights of represented and unrepresented defendants, the *Cunningham* Court concluded that once a defendant in custody requests a lawyer, he cannot thereafter waive his right to counsel except in the presence of an attorney.[115]

The *Cunningham* holding was premised upon a desire to avoid pivoting right to counsel protection on the "fortuitous circumstances of the defendant having had an attorney prior to his arrest."[116] Regardless whether the defendant had prevously retained or been assigned a lawyer, the Court indicated that without the assistance of an attorney, the defendant's ability to waive counsel knowingly and voluntarily is doubtful.[117] It is suggested that a similar rationale could be applied with equal force to a defendant who, rather than requesting a lawyer, waives his right to counsel immediately after his arrest and receipt of *Miranda* warnings. Since police encounters often generate confusion and fear, it would appear that such a waiver is likely to be less considered or informed than one made by a defendant who was aware of and asserted his right to have an attorney present.[118]

---

[113] *Id.* at 208, 400 N.E.2d at 363, 424 N.Y.S.2d at 424; *see* note 100 and accompanying text *supra.*

[114] 49 N.Y.2d at 208, 400 N.E.2d at 364, 424 N.Y.S.2d at 424; *see* note 98 and accompanying text *supra.*

[115] 49 N.Y.2d at 210, 400 N.E.2d at 365, 424 N.Y.S.2d at 426. The *Cunningham* Court stated that its holding represented a "logical" extension of the right to counsel in New York:

> Indeed, it makes little sense to say that a *represented* defendant in custody cannot effectively waive his right to counsel in the absence of counsel, while at the same time holding that an individual who has not yet secured an attorney but who has nonetheless requested the services of one can subsequently make an informed and voluntary decision to waive his rights without the advice of a lawyer.

Id. at 209-10, 400 N.E.2d at 364, 424 N.Y.S.2d at 425 (citations omitted) (emphasis in original).

[116] *Id.* at 210, 400 N.E.2d at 364, 424 N.Y.S.2d at 425.

[117] *Id.* at 209-10, 400 N.E.2d at 364, 424 N.Y.S.2d at 425.

[118] In Miranda v. Arizona, 384 U.S. 436, 469 (1966), the Court noted: "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." *Id. Cf.* People v. Settles, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 878 (1978) (attorney's presence necessary to counter awesome power of the state). It is submitted that *Cunningham* lends support to the proposition that a waiver made immediately after the giving of *Miranda* warnings is more suspect than a waiver made after the right to counsel has been invoked. The most significant factor in *Cunningham* is that upon his initial apprehension, the defen-

As a result of the principle it established, the *Cunningham* decision has dispelled much of the post-*Miranda* uncertainty concerning the effect of a waiver of counsel following an affirmative request for counsel.[119] While the Court's effort to ameliorate the

---

dant waived his constitutional rights. 49 N.Y.2d at 205-06, 400 N.E.2d at 362, 424 N.Y.S.2d at 422. Indeed, it was not until 3 ½ hours after his arrest and after the second administration of *Miranda* warnings that Cunningham decided to request the assistance of counsel. *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 423. Throughout Cunningham's custody, there was no evidence that the police had engaged in coercive tactics. Cunningham received *Miranda* warnings three times during his stay at the police station. *Id.* at 205-06, 400 N.E.2d at 362, 424 N.Y.S.2d at 422-23. Upon both his requests for counsel, the police "immediately cut off the questioning." *Id.* at 206, 400 N.E.2d at 362, 424 N.Y.S.2d at 423. Moreover, it was only after the police had permitted the defendant to confer with his wife that he decided to forego his prior requests and submit to interrogation. *Id.* Nevertheless, the Court, focusing on the requests, found the defendant unable to confront the police without the advice of a lawyer. *Id.* at 209, 400 N.E.2d at 364, 424 N.Y.S.2d at 425. It is suggested that the same could be said of the defendant at the time of his initial waiver; it would appear that Cunningham's second waiver was more informed than his first.

[119] In Miranda v. Arizona, 384 U.S. 436 (1966), in addition to establishing the now traditional constitutional warnings that the police must give every suspect before subjecting him to a custodial interrogation, *id.* at 444, the Court also addressed the procedure to be followed once a defendant invokes his right to counsel, *id.* at 473-74. The Court stated:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Id. at 474.

The *Miranda* decision failed to provide adequate guidelines for applying its mandated procedures. *See* People v. Grant, 45 N.Y.2d 366, 372, 380 N.E.2d 257, 260, 408 N.Y.S.2d 429, 432 (1978). One of the more difficult areas concerned the ability of the police to resume interrogating a defendant after he had asserted his constitutional rights. *See* People v. Aponte, 69 App. Div. 2d 204, 216 & n.5, 418 N.Y.S.2d 651, 658 & n.5 (2d Dep't 1979). Nine years later the Supreme Court confronted the right to silence aspect of the issue in Michigan v. Mosley, 423 U.S. 96 (1975). Upon being advised of his rights, Mosley refused to submit to police questioning, invoking his right to silence, but never requested a lawyer. *Id.* at 97. Subsequently, however, he agreed to speak and made incriminating statements. *Id.* at 98. Finding the statements admissible, the Court held that when a defendant expresses a desire not to speak to the police, questioning need not cease indefinitely but can be renewed if the defendant's request to remain silent is "scrupulously honored" by the police. *Id.* at 103-04.

Although it was unnecessary for the *Mosley* Court to consider the admissibility of statements made subsequent to a request for counsel, the Court declared in a footnote that the *Miranda* Court had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." *Id.* at 104 n.10 (citation omitted).

Notwithstanding this statement by the *Mosley* Court, the New York Court of Appeals refused to apply a per se rule prohibiting the police from custodially interrogating a suspect after he had asserted his right to counsel, stating that the issue had not yet been clearly

coercive atmosphere of custodial detention is laudatory,[120] it is hoped that in the future, the Court will consider the important role police investigation plays in the criminal process. It is submitted that any further expansion of the *Cunningham* principle would be unwarranted, since it would disrupt the balance between "the competing interests of society in the protection of cherished individual rights" and the need for "effective . . . investigation of crime."[121]

People v. Samuels:[122] *Indelible right to counsel triggered by filing of felony complaint*

Following the filing of a felony complaint pursuant to which

---

decided. *See* People v. Johnson, 48 N.Y.2d 565, 567, 399 N.E.2d 936, 938, 423 N.Y.S.2d 905, 907 (1979); People v. Dean, 47 N.Y.2d 967, 393 N.E.2d 1030, 419 N.Y.S.2d 957 (1979); People v. Clark, 45 N.Y.2d 432, 380 N.E.2d 290, 408 N.Y.S.2d 463 (1978); People v. Munlin, 45 N.Y.2d 427, 380 N.E.2d 288, 408 N.Y.S.2d 461 (1978); People v. Grant, 45 N.Y.2d 366, 380 N.E.2d 257, 408 N.Y.S.2d 429 (1978); People v. Buxton, 44 N.Y.2d 33, 374 N.E.2d 384, 403 N.Y.S.2d 487 (1978). Instead, the Court transplanted and rigorously applied the *Mosley* test, inquiring whether the police had "scrupulously honored" the defendant's request for counsel. *E.g.*, People v. Clark, 45 N.Y.2d 432, 440, 380 N.E.2d 290, 294-95, 408 N.Y.S.2d 463, 468 (1978); *see* People v. Aponte, 69 App. Div. 2d 204, 216-17, 418 N.Y.S.2d 651, 659 (2d Dep't 1979). The validity of employing the "scrupulously honored" test was suspect, however, since *Mosley* was exclusively a right-to-silence case. It is suggested that under the guise of the *Mosley* test, the Court appeared to be edging toward a per se exclusion of waivers after a request for counsel had been made. *See generally* People v. Buxton, 44 N.Y.2d 33, 36-37, 374 N.E.2d 384, 386-87, 403 N.Y.S.2d 487, 489 (1978); Kelder, *Criminal Procedure, 1979 Survey of New York Law*, 30 SYRACUSE L. REV. 15, 121 (1979).

The *Cunningham* holding is not unique. Many jurisdictions have also adopted such a rule. *See* People v. Grant, 45 N.Y.2d 366, 375 n.1, 380 N.E.2d 257, 262 n.1, 408 N.Y.S.2d 429, 434 n.1 (1978) and cases cited therein. Other courts, however, have refused to hold that the mere request for counsel precludes further interrogation on the ground that *Miranda* does not require a per se approach. *See, e.g.*, United States v. Charlton, 565 F.2d 86 (6th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978); United States v. Womack, 542 F.2d 1047, 1050-51 (9th Cir. 1976); United States *ex rel* Hines v. LaVallee, 521 F.2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); State v. Greene, 91 N.M. 207, 572 P.2d 935 (1977); Nash v. State, 477 S.W.2d 557 (Tex. Ct. App.), *cert. denied*, 409 U.S. 887 (1972).

[120] The *Cunningham* Court stated:

> Our special solicitude for this fundamental right [of counsel] is based upon our belief that the presence of an attorney is the most effective means we have of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the State.

49 N.Y.2d at 207, 400 N.E.2d at 363, 424 N.Y.S.2d at 424 (1980) (citing People v. Settles, 46 N.Y.2d 154, 161, 385 N.E.2d 612, 615, 412 N.Y.S.2d 874, 877 (1978); People v. Hobson, 39 N.Y.2d 479, 485, 348 N.E.2d 894, 898-99, 384 N.Y.S.2d 419, 423 (1976)).

[121] People v. Donovan, 13 N.Y.2d 148, 150, 193 N.E.2d 628, 628, 243 N.Y.S.2d 841, 842 (1963) (quoting People v. Waterman, 9 N.Y.2d 561, 564, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 73 (1961)).

[122] 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980).

an arrest warrant was issued, Samuels was apprehended for the robbery of a store in Nassau County.[123] The defendant was then brought to the police station for processing where he was appraised of his constitutional rights and, in the absence of counsel, interrogated by the police.[124] During the questioning, Samuels made incriminating statements.[125] After his unsuccessful attempt to suppress the statements, the defendant was tried and convicted of robbery in the first degree.[126] The Appellate Division, Second Department, affirmed, and the defendant appealed.[127]

The Court of Appeals reversed.[128] In a unanimous opinion written by Judge Wachtler, the Court held that the indelible right to counsel attaches upon the filing of a felony complaint.[129] The Court observed that similar to an indictment, a felony complaint constitutes a "formal accusation which the defendant must answer in court" and marks the point at which the proceeding is no longer merely investigatory in nature.[130] It is therefore at this stage, emphasized Judge Wachtler, that the assistance of a lawyer becomes critical.[131] Since counsel generally enters the proceedings at arraignment[132] and prompt arraignment is statutorily required sub-

---

[123] *Id.* at 220, 400 N.E.2d at 1345, 424 N.Y.S.2d at 893.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 218, 220, 400 N.E.2d at 1345, 424 N.Y.S.2d at 893.

[127] *Id.* at 221, 400 N.E.2d at 1345, 424 N.Y.S.2d at 894.

[128] *Id.* at 223, 400 N.E.2d at 1347, 424 N.Y.S.2d at 895.

[129] *Id.* The defendant's argument that his right to counsel had attached when the felony complaint was filed against him was not raised until his appeal to the appellate division. *Id.* at 221, 400 N.E.2d at 1345, 424 N.Y.S.2d at 894. His initial motion to suppress had been based on other grounds. *Id.* at 220, 400 N.E.2d at 1345, 424 N.Y.S.2d at 893. The Court, however, stated that this was not fatal to the defendant's appeal, invoking the "settled" rule that the failure to raise a right-to-counsel issue at trial will not preclude its review on appeal. *Id.* at 221, 400 N.E.2d at 1345, 424 N.Y.S.2d at 894 (citing People v. Dean, 47 N.Y.2d 967, 393 N.E.2d 1030, 419 N.Y.S.2d 957 (1979); People v. Ermo, 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968)).

[130] 49 N.Y.2d at 222, 400 N.E.2d at 1346, 424 N.Y.S.2d at 895; *see* People v. Settles, 46 N.Y.2d 154, 163, 385 N.E.2d 612, 616, 412 N.Y.S.2d 874, 879 (1978). While the Court admitted that investigation may continue after a felony complaint is filed, it refused to accept the prosecutor's argument that a complaint is merely an investigatory tool. 49 N.Y.2d at 222, 400 N.E.2d at 1346, 424 N.Y.S.2d at 895. Instead, the Court stressed that the purpose of an arrest warrant issued on the basis of a felony complaint is to secure the defendant's presence at arraignment on the complaint. *Id.*

[131] 49 N.Y.2d at 222, 400 N.E.2d at 1346, 424 N.Y.S.2d at 895.

[132] CPL § 180.10(3) (1971), which codifies the right to counsel at arraignment, states:

> The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment

sequent to an arrest based upon the filing of a felony complaint,[133] the *Samuels* Court disregarded the intervening time period.[134] Thus, the Court concluded that, after the felony complaint had been filed against him, the defendant could not have waived his right to counsel in the absence of an attorney and that any statements made by him without the assistance of a lawyer should have been suppressed.[135]

Samuels is another illustration of the Court's continuing effort to achieve parity between the rights of represented and unrepresented defendants.[136] In *People v. Settles*,[137] the Court held that an unrepresented defendant's right to counsel indelibly attached upon the filing of an indictment.[138] The *Settles* Court relied heavily on the statutory link between indictment and arraignment to depart from the traditional view that an indelible right to counsel

---

without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.

This link between arraignment and representation by counsel contributed to the traditional view that arraignment was the "first stage of a criminal proceeding." People v. Stockford, 24 N.Y.2d 146, 149, 247 N.E.2d 141, 142-43, 299 N.Y.S.2d 172, 174 (1969)(quoting People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962)).

[133] The CPL requires prompt arraignment following an arrest by warrant:

Upon arresting a defendant for any offense pursuant to a warrant of arrest . . . or upon so arresting him for a felony . . . a police officer . . . must without unnecessary delay bring the defendant before the local criminal court in which such warrant is returnable.

CPL § 120.90(1)(1971).

The "warrant of arrest" used in § 120.90 is defined in § 120.10(1) as follows:

A warrant of arrest is a process issued by a local criminal court directing a police officer to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument. The sole function of a warrant of arrest is to achieve a defendant's court appearance in a criminal action for the purpose of arraignment upon the accusatory instrument by which such action was commenced.

CPL § 120.10(1)(1971).

[134] 49 N.Y.2d at 223, 400 N.E.2d at 1347, 424 N.Y.S.2d at 895; *see* People v. Settles, 46 N.Y.2d 154, 166, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978); notes 137-139 and accompanying text *infra*.

[135] 49 N.Y.2d at 223, 400 N.E.2d at 1347, 424 N.Y.S.2d at 895.

[136] *See* notes 97-100 and accompanying text *supra*.

[137] 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978).

[138] *Id.* at 159, 385 N.E.2d at 614, 412 N.Y.S.2d at 876; *see* note 100 and accompanying text *supra*.

did not attach until the actual interjection of counsel into the proceedings at arraignment.[139] In *Samuels,* the Court invoked a similar rationale to extend the indelible right to an unrepresented defendant against whom a felony complaint had been filed.[140] Since the Criminal Procedure Law mandates that the filing of all accusatory instruments be followed by prompt arraignment,[141] it is submitted that this "statutory link" reasoning may provide the basis for further expansion of the indelible right to counsel.

An undesirable effect of the *Samuels* decision may be an increase in the number of warrantless arrests. Law enforcement personnel might eschew the use of the felony complaint as a means of obtaining an arrest warrant in order to avoid restrictions on their investigatory activity.[142] Although a felony complaint must be filed "without unnecessary delay" following a warrantless arrest,[143] it is

---

[139] 46 N.Y.2d at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. CPL § 210.10 (Pam. 1972-1979) states in part: "After an indictment has been filed with a superior court, the defendant must be arraigned thereon." The CPL also provides that a defendant is entitled to the assistance of counsel at arraignment and at all subsequent stages of the proceeding. *Id.* § 210.15(2). At the arraignment, the defendant must be given the opportunity to retain an attorney and the court must assign counsel for the indigent defendant upon request. *Id.* § 210.15(2)(c).

Since the CPL creates a right to counsel at arraignment and requires an indictment to be followed by arraignment, the *Settles* Court concluded that:

> [W]here . . . all that stands between the entry of counsel into the proceedings and nonrepresentation is the ministerial act of arraignment, there may be no waiver of the right to counsel unless an attorney is present. Thus, where an indictment has been returned, we equate the indictment with the entry of a lawyer into the proceedings and invoke the requirement of counsel's presence to effectuate a valid waiver.

46 N.Y.2d at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881.

[140] *See* notes 132-134 and accompanying text *supra.*

The CPL does not expressly state that arraignment must follow the filing of a felony complaint. CPL § 180.10 (1971) merely outlines the procedures a court must follow at an "arraignment . . . upon a felony complaint." *Id. But see Id.* § 170.10(1) (Pam. 1972-1979); note 141 *infra.* Apparently recognizing the seemingly unintended omission in the express language of the statute, the *Samuels* Court relied upon the statute requiring prompt arraignment following the issuance of an arrest warrant. *See* 49 N.Y.2d at 222, 400 N.E.2d at 1346, 424 N.Y.S.2d at 895; CPL § 120.90 (1)(1971).

It is suggested that since all other accusatory instruments must be followed by arraignment, *see* CPL § 170.10(1)(Supp. Pam. 1972-1979); CPL § 210.10 (Pam. 1972-1979), the same procedure was intended for felony complaints.

[141] CPL § 170.10(1) (Pam. 1972-1979) states in part: "Following the filing with a local criminal court of an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the defendant must be arraigned thereon." CPL § 210.10 (Pam. 1972-1979) imposes the same requirement when an indictment is filed.

[142] *See also* People v. Stockford, 24 N.Y.2d 146, 149, 247 N.E.2d 141, 142, 299 N.Y.S.2d 172, 174 (1969).

[143] CPL § 140.20(1) (1971) states in part:

suggested that the police might attempt to use the intervening period to question the defendant in the absence of an attorney.[144]

People v. Rogers:[145] *Indelible right extends to an unrelated charge*

The *Taylor* exception to the *Donovan-Arthur* rule generally permitted custodial interrogation of a represented defendant in the absence of his attorney provided the questioning was unrelated to the charge for which he had secured counsel.[146] Recently, however,

---

Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.

[144] *But cf.* People v. Blake, 35 N.Y.2d 331, 340, 320 N.E.2d 625, 632, 361 N.Y.S.2d 881, 891 (1974) (undue delay between warrantless arrest and filing accusatory instrument "is prima facie a suspect circumstance").

The possibility of increased warrantless arrests has been lessened by the United States Supreme Court decision in Payton v. New York, 100 S. Ct. 1371 (1980). In *Payton* the Court held that warrantless arrests made within a defendant's home violate the fourth amendment in the absence of exigent circumstances.

[145] 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

[146] *See* People v. Taylor, 27 N.Y.2d 327, 332, 266 N.E.2d 630, 633, 318 N.Y.S.2d 1, 5 (1971). In *Taylor,* the defendants had been assigned counsel and were being held on a robbery charge. *Id.* at 329-30, 266 N.E.2d at 630, 318 N.Y.S.2d at 3. In the absence of their attorney, the defendants were questioned about an unrelated murder and made incriminating statements. *Id.* at 329, 266 N.E.2d at 630-31, 318 N.Y.S.2d at 2. Appealing their convictions on the murder charge, the defendants claimed that the statements should have been suppressed since they were rendered in violation of their right to counsel. *Id.* at 330, 266 N.E.2d at 631, 318 N.Y.S.2d at 3. The Court, however, held that the statements were admissible notwithstanding the prosecutor's knowledge that the defendants had been assigned counsel on the robbery charge. *Id.* at 331-32, 266 N.E.2d at 632, 318 N.Y.S.2d at 4-5. The Court declared that the *Donovan-Arthur* line of cases, *see* note 99 and accompanying text *supra,* had no application "unless and until the police or prosecutor learn that an attorney has been secured to assist the accused *in defending against the specific charges for which he is held.*" *Id.* at 332, 266 N.E.2d at 633, 318 N.Y.S.2d at 5 (emphasis in original); *see* People v. Hetherington, 27 N.Y.2d 242, 245, 265 N.E.2d 530, 531, 317 N.Y.S.2d 1, 2-3 (1970); People v. Stanley, 15 N.Y.2d 30, 32-33, 203 N.E.2d 475, 477, 255 N.Y.S.2d 74, 76 (1964).

The validity of the *Taylor* exception often has been reacknowledged by the Court of Appeals. *E.g.,* People v. Clark, 41 N.Y.2d 612, 363 N.E.2d 319, 394 N.Y.S.2d 593, *cert. denied,* 434 U.S. 864 (1977); People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976); *cf.* People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (represented defendant has no indelible right to counsel at lineup on unrelated charge). The *Taylor* rule was subject to three major exceptions: first, when the charge for which the defendant had a right to counsel was a sham or pretext to enable the police to question the defendant on another matter, People v. Taylor, 27 N.Y.2d at 331, 266 N.E.2d at 632, 318 N.Y.S.2d at 4; People v. Jackson, 22 N.Y.2d 446, 451, 239 N.E.2d 869, 871-72, 293 N.Y.S.2d 265, 269 (1968); *see* People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422,

in *People v. Rogers*,[147] the Court of Appeals nullified this exception, holding that unless his attorney is present, a represented defendant in custody may not be interrogated by the police on any matter.[148]

In *Rogers*, the defendant was arrested as a suspect in a robbery and taken to a police station for questioning.[149] Rogers stated that he had an attorney but nevertheless agreed to speak to the police in the absence of his lawyer.[150] After a 2-hour interrogation, his attorney contacted the police and directed them to discontinue questioning the defendant.[151] Although the police ceased questioning the defendant on the robbery charge, they continued to interrogate him for an additional 4 hours on an unrelated matter.[152] After the interrogation had terminated,[153] a detective heard Rogers utter an inculpatory statement.[154] The defendant was tried and convicted of robbery in the first degree following an unsuccessful motion to suppress the statement.[155] The Appellate Division, Second Department, affirmed the conviction.[156]

A divided Court of Appeals reversed, finding that the statement should have been suppressed as the product of an illegal custodial interrogation.[157] Writing for the majority, Chief Judge Cooke[158] emphasized the high degree of protection afforded a de-

---

287 N.Y.S.2d 369 (1967), when, in bad faith, the police disregard an attorney's specific instruction not to question the defendant on any matter, thereby indicating the representation extended to the unrelated charge, People v. Ramos, 40 N.Y.2d 610, 616, 357 N.E.2d 955, 959, 389 N.Y.S.2d 299, 303 (1976), and when the police exploit impermissible interrogation concerning a valid charge for which the defendant has a right to counsel in order to advance their investigation of the unrelated charge, People v. Ermo, 47 N.Y.2d 863, 865, 392 N.E.2d 1248, 1249-50, 419 N.Y.S.2d 65, 66 (1979), *aff'g* 61 App. Div. 2d 177, 181-82, 401 N.Y.S.2d 831, 832 (2d Dep't 1978).

[147] 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

[148] *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 21.

[149] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 19. The defendant was handcuffed, given *Miranda* warnings, and taken to the police station where he again received *Miranda* warnings. *Id.*

[150] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 19-20.

[151] *Id.* at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20.

[152] *Id.*

[153] *Id.* The interrogation had lasted approximately 4 hours; during the entire time, the defendant had been handcuffed. *Id.*

[154] *Id.*

[155] *Id.* The motion to suppress the statement was denied on the ground that the statement was spontaneously volunteered. *Id. But see* note 160 *infra*.

[156] 63 App. Div. 2d 867, 404 N.Y.S.2d 935 (2d Dep't 1978)(mem.).

[157] 48 N.Y.2d at 169, 397 N.E.2d at 710-11, 422 N.Y.S.2d at 19.

[158] Chief Judge Cooke was joined in the majority by Judges Jones, Wachtler, Fuchs-

fendant's right to counsel in New York[159] and stated that the *Taylor* exception had been devised when the *Donovan-Arthur* rule was in doubt.[160] Noting the reaffirmance of the *Donovan-Arthur* line of cases[161] and the significant restriction of the scope of the *Taylor* exception,[162] the *Rogers* majority declared *Taylor* incompatible with present right to counsel guarantees.[163] Additionally, the Court observed that most attorneys would seek to safeguard the rights of their clients even in matters unrelated to the subject of their initial retainer or appointment and that it is for the lawyer, not the state, to evaluate the connection between the questioning and the charge.[164] Thus, the Court held that custodial interrogation, on any topic, of a represented defendant outside the presence of his attorney is unlawful.[165]

---

berg, and Meyer. Judge Jasen dissented in an opinion in which Judge Gabrielli concurred.

[159] 48 N.Y.2d at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20. *See generally* notes 97-100 and accompanying text *supra.*

[160] 48 N.Y.2d at 171, 397 N.E.2d at 712, 422 N.Y.S.2d at 20. *See generally* People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied,* 401 U.S. 945 (1971).

[161] 48 N.Y.2d at 171, 397 N.E.2d at 712, 422 N.Y.S.2d at 20 (citing People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)); *see* note 99 *supra.*

[162] 48 N.Y.2d at 171-72, 397 N.E.2d at 712, 422 N.Y.S.2d at 20-21.

[163] *Id.* at 173, 397 N.E.2d at 713, 422 N.Y.S.2d at 21.

[164] *Id.*

[165] *Id.* Rather than according the defendant an unnecessary advantage, the Court stated that "the attorney's presence serves to equalize the positions of the accused and the sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." *Id.; see* note 97 and accompanying text *supra.*

Noting that the defendant had uttered the statement after 6 hours of questioning and that throughout the interrogation he had been "manacled to furniture," the Court also determined that the statement did not fall within the spontaneous declaration exception to the *Donovan-Arthur* rule. 48 N.Y.2d at 174, 397 N.E.2d at 713, 422 N.Y.S.2d at 22. *See generally* People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 421 (1976); note 99 *supra.* Rather, the Court characterized the utterance as the result of the "psychologically coercive influence of the police tactics." 48 N.Y.2d at 174, 397 N.E.2d at 714, 422 N.Y.S.2d at 22. Under the rule of People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969), a spontaneously volunteered statement made by a defendant, not elicited by questions, is admissible notwithstanding that the statement otherwise would be inadmissible. *Id.* at 144-45, 250 N.E.2d at 332, 303 N.Y.S.2d at 46. The *Kaye* Court relied upon Miranda v. Arizona, 384 U.S. 436 (1966), wherein the Court stated, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding." *Id.* at 478; *see* 25 N.Y.2d at 144, 250 N.E.2d at 331, 303 N.Y.S.2d at 45. For a statement to qualify, "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed." People v. Maerling, 46 N.Y.2d 289, 302-03, 385 N.E.2d 1245, 1253, 413 N.Y.S.2d 316, 324 (1978). The spontaneous declaration exception has been interpreted to authorize the admission of spontaneous statements uttered while in custody but prior to the receipt of *Miranda* warnings, People v. Bostic, 97 Misc. 2d 1039, 1045, 412 N.Y.S.2d 948, 952 (Dist. Ct.

Dissenting, Judge Jasen asserted that there was no inconsistency between *Taylor* and the *Donovan-Arthur* right to counsel.[166] The dissent maintained that no impingement on a defendant's rights would result from interrogation on an unrelated charge preceding the commencement of formal proceedings concerning that charge.[167] Judge Jasen also noted that the *Taylor* rule imposes no obligation on the suspect to answer.[168] Finally, the dissent opined that the majority's holding will have a devastating effect upon law enforcement, since it prohibits the questioning of mere witnesses who are represented by counsel in some other criminal matter unless their attorney is present.[169]

Although an attorney had actually entered the proceedings in *Rogers*,[170] it is suggested that the Court's holding could apply with equal force to those actions where the defendant's indelible right to counsel has been triggered by the filing of an indictment[171] or a felony complaint.[172] The court has required the suppression of

---

Nassau County 1978), after the attachment of the *Donovan-Arthur* right to counsel, People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976), after arraignment, People v. Lynes, 49 N.Y.2d 286, 401 N.E.2d 405, 425 N.Y.S.2d 295 (1980), and after a defendant's request for an attorney has triggered his indelible right to counsel, People v. Cunningham, 49 N.Y.2d 203, 210 n.2, 400 N.E.2d 360, 365 n.2, 424 N.Y.S.2d 421, 425 n.2 (1980).

Significantly, the *Rogers* Court noted that while "[m]ere custody exerts some coercive influence on a suspect, . . . generally, such influence alone will not form the predicate for finding a statement nonspontaneous as a matter of law." 48 N.Y.2d at 174, 397 N.E.2d at 714, 422 N.Y.S.2d at 22.

[166] 48 N.Y.2d at 175-76, 397 N.E.2d at 714-15, 422 N.Y.S.2d at 23 (Jasen, J., dissenting).

[167] *Id.* at 176, 397 N.E.2d at 715, 422 N.Y.S.2d at 24 (Jasen, J., dissenting); *see* People v. Stanley, 15 N.Y.2d 30, 32-33, 203 N.E.2d 475, 477, 255 N.Y.S.2d 74, 76 (1964); note 120 *supra*.

[168] 48 N.Y.2d at 176, 397 N.E.2d at 715, 422 N.Y.S.2d at 24 (Jasen, J., dissenting).

[169] *Id.* Judge Jasen argued that, alternatively, the defendant's statement should have been admitted under the spontaneous statement exception to the *Donovan-Arthur* rule. *Id.* at 177-78, 397 N.E.2d 715-16, 422 N.Y.S.2d at 24-25 (Jasen, J., dissenting); *see* note 165 *supra*. Judge Jasen noted that the spontaneity issue is one of fact and that the trial court's conclusion that the defendant's statement was spontaneous was affirmed by the appellate division. 48 N.Y.2d at 177, 397 N.E.2d at 716, 422 N.Y.S.2d at 24-25 (Jasen, J., dissenting). Maintaining that the record supported this determination, the dissent declared that the majority had exceeded the scope of its authority to review questions of fact. *Id.* at 177-78, 397 N.E.2d at 716, 422 N.Y.S.2d at 25 (Jasen, J., dissenting); *see* People v. Wharton, 46 N.Y.2d 924, 388 N.E.2d 341, 415 N.Y.S.2d 204 (1979).

[170] 48 N.Y.2d at 170, 397 N.E.2d at 711, 422 N.Y.S.2d at 20; *see* note 99 and accompanying text *supra*.

[171] *See generally* People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978); note 100 and accompanying text *supra*.

[172] *See generally* People v. Samuels, 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892

statements made by a defendant outside the presence of counsel after the filing of either of these accusatory instruments based on the rationale that the filing of these documents is equivalent to the entry of an attorney into the proceeding[173]—the point at which the indelible right to counsel attaches.[174] The *Rogers* Court expressly stated that right-to-counsel protection for both related and unrelated charges arises "once an attorney has entered the proceeding."[175] It is submitted, therefore, that in the future, statements concerning an unrelated charge, elicited from either an indicted defendant or one against whom a felony complaint has been filed, might also be held inadmissible if made while in custody without the assistance of counsel.[176]

Nevertheless, it is submitted that good faith questioning about a separate matter by investigators ignorant of the defendant's prior retention or assignment of counsel should not trigger the *Rogers* rule.[177] Although police exploitation of the unrelated charge

---

(1980); notes 122-144 and accompanying text *supra*.

[173] People v. Cunningham, 49 N.Y.2d at 218, 400 N.E.2d at 1344, 424 N.Y.S.2d 421 (1980); People v. Settles, 46 N.Y.2d at 166, 385 N.E.2d at 618, 412 N.Y.S.2d at 881. *See* notes 137-140 and accompanying text *supra*.

[174] *See* note 99 and accompanying text *supra*.

[175] 48 N.Y.2d at 169, 397 N.E.2d at 710, 422 N.Y.S.2d at 19.

[176] Indeed, it is conceivable that the *Rogers* rule might also be extended to situations where the right to counsel has been triggered by a defendant's request for counsel. *See generally* People v. Cunningham, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980); notes 101-121 and accompanying text *supra*. If counsel is considered "in the proceeding" once the defendant has invoked his right to the assistance of a lawyer, there would appear to be no reason not to extend the "representation" to any criminal matter.

[177] *See* People v. Clark, 41 N.Y.2d 612, 615, 363 N.E.2d 319, 321, 394 N.Y.S.2d 593, 596, *cert. denied*, 434 U.S. 864 (1977). The *Clark* Court stated:

> [T]he presence of counsel [does not] immunize the defendant from normal, good faith, investigation which occurs after indictment and is unrelated thereto and directed toward other criminal activity . . . .
>
> . . .
>
> The prohibition against custodial interrogation after a lawyer has entered the proceedings absent the presence of counsel or a waiver, is aimed at protecting a defendant from deliberate effots (sic) by law enforcement officials to elicit incriminating statements in disregard of constitutional protections. However, where the police are engaged in no such deliberate attempt but are instead pursuing a good faith investigation, neither the need nor the purpose for the rule is furthered by its application.

Id. (citations omitted). *Rogers* makes but one oblique reference to *Clark*, 48 N.Y.2d at 172, 397 N.E.2d at 714, 422 N.Y.S.2d at 23, and is silent on the issue of good faith. The *Clark* case has spawned several lower court decisions that have allowed a defendant's incriminating statements to be used against the defendant based on the *Clark* test of good faith, rather than on the basis of the *Taylor* rule. *See, e.g.*, People v. Schwimmer, 99 Misc. 2d 980, 417 N.Y.S.2d 659 (Sup. Ct. N.Y. County 1979). *See also* People v. Rolston, 66 App. Div. 2d

exception well may have prompted the *Rogers* Court to abrogate it entirely,[178] a provident solution would be to limit the availability of the *Taylor* exception to those instances where the police did not know, nor could be deemed to have known, that the defendant was represented by an attorney.[179]

CONCLUSION

It is submitted that the *Cunningham, Samuels,* and *Rogers* decisions presage more significant developments in the right-to-counsel area. The cases seem to portend an effort by the Court to eliminate totally any disparity remaining between the right-to-counsel protections afforded the represented defendant and those enjoyed by the unrepresented defendant. It is suggested that the logical terminus of this process would be to hold that the indelible right to counsel attaches at custodial interrogation.[180] By so doing, the Court would necessarily supplant the complex notion of the right to counsel as it exists today with a simple and unified standard. Questions whether the "critical stage"[181] has been reached, or whether an attorney has entered the proceeding,[182] or whether an

---

617, 414 N.Y.S.2d 342 (2d Dep't 1979); People v. Boyd, 94 Misc. 2d 1074, 406 N.Y.S.2d 963 (Sup. Ct. Kings County 1978). Whether *Clark* will survive *Rogers,* however, remains uncertain.

[178] In *Rogers,* the police were fully aware that the defendant had an attorney. *See* note 150 and accompanying text *supra. See also* People v. Ermo, 47 N.Y.2d 863, 865, 392 N.E.2d 1248, 1249, 419 N.Y.S.2d 65, 66, *aff'g* 61 App. Div. 2d 177, 181-82, 401 N.Y.S.2d 831, 832 (2d Dep't 1978).

[179] *See generally* People v. Ermo, 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979); People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977); People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967).

[180] The right to counsel does not apply when the defendant is not in custody. People v. Hobson, 39 N.Y.2d 479, 483, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976); *see* note 99 *supra.* Nor must *Miranda* warnings be given unless the defendant is in custody. Miranda v. Arizona, 384 U.S. 477 (1966).

In perhaps a prophetic statement, Judge Van Voorhis commented in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963): "The inevitable result of this doctrine, if it [is] to be maintained, is to require the police to summon a lawyer before questioning an accused." *Id.* at 162, 193 N.E.2d at 636, 243 N.Y.S.2d at 852 (Van Voorhis, J., dissenting).

[181] *See* People v. Settles, 46 N.Y.2d 154, 165, 385 N.E.2d 612, 618, 412 N.Y.S.2d 874, 881 (1978); People v. Blake, 35 N.Y.2d 331, 339-40, 320 N.E.2d 625, 632, 361 N.Y.S.2d 881, 890-91 (1974); note 100 *supra.*

[182] *See* People v. Hobson, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976); People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968); note 99 and accompanying text *supra.*

affirmative request for counsel had been made,[183] would be rendered largely irrelevant.

The wisdom of such an extension of the indelible right to counsel, however, is open to serious question. The spectre of "station house lawyers"[184] and the concomitant debilitating effect on interrogation as an investigative method compel the conclusion that any further extension would be ill-considered and unnecessary.[185] In any event, should the Court ultimately adopt a rule attaching the indelible right to counsel at custodial interrogation, a strong impetus may thereby be provided to narrow the broad definition of custody currently adhered to by the courts.[186] For exam-

---

[183] *See* People v. Cunningham, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980); notes 101-121 and accompanying text *supra*.

[184] In Miranda v. Arizona, 384 U.S. 436 (1966), the Court stated that its holding did not "mean, . . . that each police station must have a 'station house lawyer' present at all times to advise prisoners." *Id.* at 474.

[185] When counsel enters the proceeding, he normally advises his client to remain silent and not to submit to interrogation. Thus, the court's recent expansion of the indelible right to counsel, to say nothing of further expansion, inevitably will work seriously to limit interrogation as an investigative tool. Commentators have noted that interrogation is the most frequently employed method of investigation. *See* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962). Moreover, many crimes, by their nature, can be solved only by confession. *Id.* at 204. Professor Inbau has commented:

> As a matter of fact, the act of criminal investigation has not developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary proof of his guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself . . . .

Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16, 16 (1961). *See* Parker, *A Lawman's Lament*, 40 L.A. BAR BULL. 603, 642 (1965). *See also* Ashcraft v. Tennessee, 322 U.S. 143, 160 (1943)(Jackson, J., dissenting).

Moreover, extension of the indelible right to counsel to the stage at which constitutional warnings must be given would be, in effect, a statement by the Court that no one can make an informed and volunteered choice to speak with the authorities. In reality, as the majority in People v. Settles, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978), noted: "Prior to indictment, there may be valid reasons why an uncounseled suspect might wish to deal with the police." *Id.* at 163, 385 N.E.2d at 616, 412 N.Y.S.2d at 879. The defendant falsely or precipitously arrested might seek to clarify the error quickly. In the alternative, a criminal suspect "may feel that by getting into the good graces of the police as an informer he might be able to avoid indictment and trial." *Id.* It is submitted, therefore, that a further broadening of the indelible right to counsel will interfere significantly with the criminal process, causing perhaps insurmountable difficulties for both law enforcement authorities and criminal suspects.

[186] In New York, a defendant is deemed "in custody" if his freedom is restricted in a significant way, or if a reasonable man, innocent of any wrongdoing, would have thought his freedom was so restricted. People v. Yukl, 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857

ple, an inculpatory statement elicited at a brief street encounter after *Miranda* warnings have been given may well require suppression under such an expanded right-to-counsel rule. Thus, to mitigate the severe limitation that the rule would impose on police investigations, a narrower definition of custody may be in the offing.

Michael G. Glass
Thomas D. Giordano
Joseph J. Tesoriero

(1969), *cert. denied*, 400 U.S. 851 (1970); People v. Rodney P., 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967); *see* People v. Liccione, 63 App. Div. 2d 305, 407 N.Y.S.2d 753 (4th Dep't 1978). It has been held that a street encounter between the police and a suspect may be deemed a custodial interrogation. *See* People v. Shivers, 21 N.Y.2d 118, 233 N.E.2d 836, 286 N.Y.S.2d 827 (1967); People v. Johnson, 64 App. Div. 2d 907, 408 N.Y.S.2d 519 (2d Dep't 1978). In *Shivers*, the police, with guns drawn, stopped and questioned a suspect who fit the description of the perpetrator of a robbery. The suspect made false exculpatory statements when asked his name and prior whereabouts. The Court suppressed the statements, holding that the questioning of a suspect at gunpoint sufficiently deprives the suspect of his freedom and renders any statement made before the *Miranda* warnings are given inadmissible in evidence. 21 N.Y.2d at 122, 233 N.E.2d at 839, 286 N.Y.S.2d at 830. The Court, however, has formulated an exception to the *Shivers* rule in order to provide law enforcement officials with a reasonable opportunity to investigate criminal conduct. In People v. Huffman, 41 N.Y.2d 29, 359 N.E.2d 353, 390 N.Y.S.2d 843 (1976), the Court held that a police officer could question persons without first administering *Miranda* warnings if he was attempting to "clarify" suspicious behavior to determine whether criminal conduct had occurred. *Id.* at 34, 359 N.E.2d at 356-57, 390 N.Y.S.2d at 846-47. The *Huffman* Court distinguished *Shivers* on the ground that *Shivers* concerned questioning a defendant about a crime that the police knew had occurred. *Id. See* People v. Greer, 42 N.Y.2d 170, 366 N.E.2d 273, 397 N.Y.S.2d 613 (1977).

The New York approach differs from the definition of custody adhered to by the United States Supreme Court, which apparently makes no allowance for a reasonable man's belief in determining whether an accused is in custody. In United States v. Washington, 431 U.S. 181 (1977), the Court stated that custody involves a " 'genuine compulsion of testimony' ". *Id.* at 187 (quoting Michigan v. Tucker, 417 U.S. 433, 440 (1974)). In Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), a parolee, who had complied with a telephoned request to visit the police station, was placed in a closed room for one-half hour after being told he was a suspect. The Court found that the parolee had not been in custody. *Id.* at 495. Additionally, street questioning of an accused generally is not considered custodial under the federal approach. *See* Beckwith v. United States, 425 U.S. 341, 347-48 (1976); United States v. Messina, 388 F.2d 393 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968); Spritzer, *Criminal Waiver, Procedural Default And The Burger Court*, 126 U. PA. L. REV. 473, 482 n.43 (1978). An accused has been deemed in custody, however, where he previously had been arrested and no longer was free to go where he pleased, notwithstanding that he was interrogated in his own home. Orozco v. Texas, 394 U.S. 324 (1969).