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ESCOBEDO—TOWARD ELIMINATING COERCED CONFESSIONS

STANLEY MILLEDGE*

Escobedo v. Illinois[1] may well prove much more significant than *Gideon v. Wainwright*,[2] although the latter had to come first. In *Gideon* a unanimous Court specifically abandoned the due process "special circumstances" approach to dealing with the denial of the right to counsel in favor of the direct approach of making the Sixth Amendment obligatory upon the States by the Fourteenth Amendment. As Justice Harlan observed in a separate concurring opinion, the Supreme Court had already held in a series of cases since *Betts v. Brady*,[3] that due process is denied whenever counsel is denied when the criminal charge is serious. The "vague contours," to use Justice Frankfurter's words, or the "fluid doctrine" to use Justice Robert Roberts' words, of due process had already become fairly definite in contour and solid in content whenever the right to counsel is involved. If this gradual acquisition of definiteness of Supreme Court decisions had been generally noticed and followed in state court practice, perhaps there would have been no occasion for a Gideon decision. In fact, Gideon would have had a lawyer at his trial, or failing that, his case would have been reversed in the Supreme Court of Florida. That case does not seem to have had unusual state court treatment, for the usual state court application of the *Betts* rule was that only in capital cases was the denial of counsel to an indigent a denial of due process. The cases cited by Justice Harlan in his Note Five to his concurring opinion in *Gideon*[4] to illustrate his point that the Supreme Court's post-*Betts* cases were not being followed in the state courts, are obvious denials of due process as applied in the Supreme Court cases between *Betts* and *Gideon*. Justice Harlan's point, and it seems an excellent one, is that although the due process cases had in fact become definite as to the right to counsel, state courts were not generally apprehending this. The matter, therefore, should be restated in terms of the Sixth Amendment rather than in due process terms. This reaches the same result as saying that in every felony case the denial of counsel is a denial of due process. Long before the Supreme Court came around to the view that counsel is indispensable to a fair trial, virtually everyone else had. Few, if any, defendants who had a choice, chose to eschew the assistance of counsel.

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1. 378 U.S. 478 (1963).

2. 372 U.S. 335 (1963).

3. 316 U.S. 455 (1942).

4. 372 U.S. at 350, 351, note 5. One of the cases cited in this Note is Commonwealth, *ex rel.* Simon v. Maroney, 405 Pa. 562, 176 A.2d 94 (1961), in which both trial and Pennsylvania Supreme Court held that a moron with an intelligence quotient of 59, intelligently waived the right to counsel by failing to ask, and that his trial without counsel was not a denial of due process.

Why did not state court practice in according counsel observe and follow the evolution of the *Betts* doctrine? There are three plausible explanations. One, and perhaps the main one, is that it is difficult to evaluate the significance of due process cases unless they can be considered in terms of particular and definite facts. Due process is a nebulous concept. Its existence or non-existence requires consideration of all of the circumstances. It often is a matter of time and place. The factors considered are frequently psychological. The evaluation of all factors is necessarily colored with a high degree of subjectivity. It is inevitable that an ad hoc decision which must speak in terms of "fairness" or whether conduct is "shocking" is a hard one to follow faithfully.

The process of determining the question was described by Justice Frankfurter in *Culombe v. Connecticut*:[5]

> The inquiry whether, in a particular case, a confession was voluntarily or unvoluntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external "phenomenologocical" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal "psychological" fact. Third, there is the application of this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also comprehend both induction from, and anticipation of, factual circumstances.

That trial judges who are not introverts do not follow due process cases assiduously should be understandable. Quite often due process cases can be thought of in terms of the presence of certain specific facts. *Pennoyer v. Neff*[6] is an example. That decision was not inevitable. The Court might well have adopted the dissent of Justice Hunt. It chose the views of Justice Fields and held that a personal judgment entered on constructive service pursuant to Oregon statute was a denial of due process even though the non-resident defendant owned land in Oregon but not attached. In practice *Pennoyer* is followed quite generally but it should be noticed that the principle of the case need not be known to say that although a valid decree may be entered in a mortgage foreclosure on constructive service, a judgment for the deficiency may not be entered. A valid decree of divorce may rest on constructive service but not an award for alimony. It is not necessary that the judge who so holds actually understands *Pennoyer*. The problems can be considered and dealt with on fact combinations. As to whether it is as easy to follow the principle of *Pennoyer* as it is certain familiar rule of thumb applications see

5. 367 U.S. 568, 603 (1960).
6. 95 U.S. 714 (1877).

Burkhart v. Circuit Court.[7] The technique of trial judging utilizes the ear more than the eye. In common with the rest of mankind, judges generally abhor the generalized principle and yearn for the specific rule. Generalization permits the growth of legal ideas but the usual trial preference is for stability and definiteness. From the impossible job of deciding how much alimony to award, for which there is no standard, one turns with relief to deciding whether a statute of limitations has run.

A second possible explanation of why cases on the nebulous standard of due process are not assiduously followed is that, since they involve such subjective ideas as "fairness," state court judges are apt to be more concerned with their own conception of this than they are with that of the Supreme Court of the United States. Such cases seem to be more the voices of judges than the voice of the Constitution. The state court judge who tried Gideon certainly didn't think that he was fundamentally unfair.

A third explanation for the small heed trial judges paid to recent Supreme Court cases dealing with the right to counsel as a matter of special circumstances is the force of habit. Accommodation had been made to appoint counsel in capital cases for indigent defendants, paid at public expense. There was, generally, no legal machinery for affording counsel to indigent defendants in non-capital cases at public expense. It was not customary to appoint counsel in such cases to serve without pay. Trying indigent non-capital criminal defendants without counsel seemed to satisfy most communities. The familiar courtroom procedural safeguards were generally applied such as prohibiting the prosecutor to comment on the failure of the lawyer-less defendant to testify. Judges, like most others, are apt to be creatures of habit. If a procedure is customary it must be right. The present writer recalls, with chagrin, his own slowness, as a trial judge to realize that the purpose of a jury charge is to enable them to apply the rules of law and therefore the judge should eschew the technical expressions of appellate court opinions and speak the common language. Whether the foregoing explanations are good or bad, the fact is obvious that the Supreme Court cases between *Betts* and *Gideon* had little impact on the problem of affording counsel to indigent defendants in non-capital cases.

On the contrary, *Gideon*, holding that the Sixth Amendment is obligatory upon the States by the Fourteenth Amendment, spoke in direct and simple terms. The Constitution says that Gideon is entitled to the assistance of counsel. Gideon had no counsel because he could not hire one. He did not have a fair trial because no felony defendant can have a fair trial without the assistance of counsel, so *Gideon* applies to every felony defendant, solvent or insolvent. If states wish to convict defendants in felony cases, they must make provision for counsel when the defendant is indigent. Nothing could be more simple. The decision is easy to under-

7. 146 Fla. 457, 1 So.2d 872 (1941).

stand. There is nothing of the involved process which Justice Frankfurter described[8] in determining whether the voluntariness of a confession is a denial of due process or in a like manner determining whether the denial of counsel is a denial of due process as it is described by Justice Roberts in *Betts*. A definite clear-cut standard is operable. One does not know whether state reception of *Gideon* was, on the whole, cordial or hostile. One does know that it had an immediate impact. Provision was made for public defenders or provision was made for court-appointed counsel. The same sort of impact was previously noticed by the cases holding that a Negro has been denied equal protection when Negroes are intentionally and systematically excluded from grand and petit juries. In Dade County, Florida, all that was necessary was for the judges to tell the jury commissions to stop the practice.

The same point will hereafter be attempted—to show that the due process decisions of the United States Supreme Court on the admissibility of confessions had limited impact but that *Escobedo* based on the definite standard of the right to counsel will have great impact on the admissibility of confessions.

This definite standard was applied in *Escobedo*. Escobedo was arrested and taken to a police station. He was not taken promptly before a committing magistrate as Illinois law requires, where he would have been told of his constitutional privilege against self-incrimination and his right to counsel. The police did not provide a substitute for this by advising the accused of his rights. They proceeded to subject him to a secret interrogation notwithstanding his demand to see his lawyer; and his lawyer's demanding, at the police station, to see his client. By means not now relevant, the police induced a confession. The trial court admitted the confession and Escobedo was convicted of murdering his brother-in-law. The Illinois Supreme Court first reversed but later affirmed the conviction. The Supreme Court of the United States reversed but not on the due process ground of the admission of a coerced confession. The decision is based on the inadmissibility of the confession because it was obtained during the exclusion of counsel. That the Sixth Amendment is obligatory upon the States had already been decided in *Gideon*, but that case dealt with the right to counsel at trial. The significant aspect of *Escobedo* is that for the first time the Sixth Amendment right to counsel was held to begin when the proceedings become adversary in fact and not merely in theory. The Court was careful to say that its decision did not affect the police right and duty to investigate unsolved crime and to conduct interrogations to this end.

There is no implication in *Escobedo* that police are restricted in interrogation as part of a general investigation of an unsolved crime. The restriction begins when police determination of guilt has been made; and the

8. See note 5 *supra*.

process of convicting the accused begins by the technique of self-incrimination. The observation of Justice White, in dissent, that the *Escobedo* decision cuts off all opportunity for police interrogation misses the point. At the investigative phase there is no right to counsel, for the adversary proceedings have not started.

Escobedo marked the beginning of the adversary proceeding as the time when a particular person, the accused, is arrested, confined and self-incrimination is sought as a means of obtaining a conviction. The Court cited the observation of Justice Black that the "right to use counsel at the formal trial is a very hollow thing [if] for all practical purposes, the conviction is already assured by pre-trial examination."[9]

Gideon recognized the right to counsel quantitatively. It extends to all felony defendants regardless of means. *Escobedo* recognized the right qualitatively; that is, not merely when the proceedings become adversary in form but when they become adversary in fact. It seems to be self-evident that the right to have counsel from the beginning will have a greater affect on police practices than having counsel in every felony at the trial only. At a conference of high law enforcement officials,[10] at which court decisions were viewed with alarm, *Gideon* was not mentioned but *Escobedo* was, although it was then only pending. There were no dissents in *Gideon*; there were four dissenters in *Escobedo* and all dissenting opinions stressed the adverse effect on law enforcement. The effect, of course, is upon the process of obtaining confessions. If one assumes that the technique of obtaining confessions by secret police interrogations is one of coercion then it follows that the presence of counsel at such proceedings either eliminates or greatly reduces the number of coerced confessions. If, on the other hand, one assumes that the coerced confession is the exception rather than the rule, then the presence of counsel can have no appreciable effect upon the number of confessions. The extent to which confessions depend on the ignorance of the accused was stated (with a lack of unctiousness rare in a former prosecutor) by Justice Jackson in *Watts v. Indiana*:[11]

> To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement under any circumstances.

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9. *In re* Groban, 352 U.S. 330 (1956) (Black, J. dissenting).
10. See note 33 *infra*.
11. 338 U.S. 49, 59 (1948).

Counsel at the interrogation can advise his client of his privilege and urge its exercise. He has no other power. He cannot stop the police. If their means are perfectly legitimate, the prosecution has nothing to fear when the "free and voluntary" confession is offered at the trial. The statement of Justice White[12] is hard to understand:

> The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect.

If the presence of counsel who can do nothing but advise and observe is an impenetrable barrier, to what is he being a barrier? Surely he is no barrier to the man who, without coercion of any sort, is willing freely and voluntarily to confess. Unless there is coercion, when a man, knowing that he cannot be so compelled, voluntarily places the noose around his own neck, his interest in self-preservation must have been overcome by some stronger motive, such as a feeling of guilt and desire for expatiation. In those situations it matters not who is present. Such a man would confess to the magistrate or to the judge in open court. The presence of counsel would not matter. Since judges generally agree in saying that only the free and voluntary confession meets the test of due process, a valid objection to counsel's presence should show how his mere presence constitutes this impenetrable barrier to such confessions. None of the dissenting opinions in *Escobedo* contain such an analysis. It is suggested here that there is none. This writer agrees that counsel at the police interrogation is a formidable barrier to confessions for the obvious reason that secret police interrogations produce coerced confessions.

The very circumstances of the secret police interrogation, quite without regard to testimony as to what transpired there, should preclude the use of the word "voluntary" to describe its results. Menachem Begin, who afterward became a member of the Israeli Parliament, speaking of his own subjection to the Soviet technique which excluded the slightest physical coercion, said:

> Not a word of what you say will reach a single person in the world outside. Only those, whose theory permits no doubting, want the outside world to learn, will pierce the prison walls .... Here there is no break in the wall of silence. Nobody will hear or read ....[13]

Speaking of persons subject to secret police interrogation Justice Frankfurter, in *Culombe v. Connecticut*[14] said:

> They are deprived of freedom without a proper judicial tribunal having found them guilty, without a proper judicial tribunal

12. 378 U.S. 478, 496 (1963).
13. Quoted in ROGGE, WHY MEN CONFESS 105.
14. 367 U.S. 568, 573 (1960).

> having found even that there is probable cause to believe that they may be guilty. What actually happens to them behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. The prisoner knows this—knows that no friendly or disinterested witness is present—and the knowledge may itself induce fear. But, in any case, the risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.
>
> In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks.

Ordinarily the law presumes that men act to promote their interests, not to damage them, and that among their interests men value most highly their liberty and their lives. When the issue is the voluntariness of a confession the presumptions are reversed. In this context the most likely thing to expect of a man is supposed to be his voluntary cooperation in his own destruction.

Considered only from the point of view of trustworthiness as evidence, coercion per se does not render a confession so unreliable that it should not be considered at all. The question is whether the coercion is so severe that an innocent person is apt to confess; that is, whether the immediate fear of not confessing overcomes the fear of the confession at the trial. It is commonplace in state appellate court opinions affirming the admission of a confession to demonstrate the guilt of the confessor, to indicate that admissibility of a confession is thought of solely in terms of reliability as evidence.[15] Quite aside from reliability as evidence, a confession must be excluded if coerced to any degree. Even a small degree of coercion is a denial of due process because there is the constitutional privi-

15. See 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

lege against self-incrimination.[16] These separate and independent grounds for exclusion are not mutually exclusive. The fact that a court thinks that coercion was not sufficient to render the confession wholly untrustworthy does not mean that the danger is not inherent in all forms of coercion to induce the innocent to confess.The danger is simply greater in some forms of coercion than it is in others. Entering into the Fifth Amendment privilege is the desirability of eschewing coercion to any degree and the consequent danger of unfettered official action which becomes the police state. At any rate the constitutional privilege against self-incrimination is not a mere rule of evidence; it is a statement of public policy as clear as words can be written, placed in the very foundation of our legal structure.

What has already been said about the obstacles to state court compliance with Supreme Court due process cases dealing with the denial of counsel, applies with special force to due process decisions dealing with confessions claimed to be coerced. To the considerations already mentioned must be added a considerable degree of state court aversion to the privilege against self-incrimination, except when confessions are induced by brutality or by putting the accused in abject fear of mob violence. It seems reasonable to believe that cases of this kind, *Brown v. Mississippi*,[17] *Chambers v. Florida*,[18] and *Moore v. Dempsey*[19] are followed. One should notice that in such cases the confessions should have been rejected solely on the ground that the degree of coercion was quite enough to wring confessions from innocent defendants and without regard to the privilege against self-incrimination. It is in cases where coercion was not of that degree, cases such as *Culombe v. Connecticut*[20] and *Haynes v. Washington*[21] in which the confessions were not rejected because the means of procurement were shocking but because any coercion is a denial of due process, that it is difficult to perceive an authoritative quality. For reasons which should be obvious, state appellate court opinions on the admissibility of confessions are not as revealing of the facts as those dealing with the denial of counsel. Nevertheless a good deal can be learned on the point now under discussion. The twenty-five last volumes of the Southern Reporter were examined for cases in which error was claimed for admitting a coerced confession at the trial. There were twenty such cases. Eighteen were affirmances. In one reversal the evidence of coercion was corroborated by the doctors who administered drugs to the wounded defendant.[22] In the other reversal[23] an officer testified with refreshing frankness, possibly in the expectation that his frankness would not

16. *E.g.*, Rogers v. Richmond, 365 U.S. 534 (1960).
17. 297 U.S. 278 (1935).
18. 309 U.S. 227 (1939).
19. 261 U.S. 86 (1922).
20. 367 U.S. 568 (1960).
21. 373 U.S. 503 (1962).
22. Reddish v. State, 167 So.2d 858 (Fla. 1964).
23. Robinson v. State, 157 So.2d 49 (Miss. 1963).

jeopardize a conviction, as indeed it did not in the trial court. In a recent Florida case,[24] in which the admission of a confession was affirmed, the police conduct which induced the confession seems vastly more coercive than in cases of the *Culombe* and *Haynes* variety. No United States Supreme Court case on voluntariness of confession was discussed or cited.

As abstract theory we may say, if we wish, that neither the trial judge or appellate judge in considering the issue of coercion, is affected by a belief in the truthfulness of the confession, which is immaterial on the constitutional question. One can theorize the same thing about a jury. On the same day that *Escobedo* was decided, the Court decided *Jackson v. Denno*.[25] The conviction was reversed because New York law does not require the judge to make a determination of voluntariness before allowing the jury to consider it as evidence. The Court, speaking through Justice White, held that quite irrespective of a belief in the truthfulness of the confession the defendant was entitled to "a reliable determination on the issue of voluntariness."[26] He observed that the jury's belief in the truth of the confession "generates natural and potent pressures to find it voluntary otherwise the guilty defendant goes free." What judge so compartmentalizes his mind that when passing on voluntariness, he is totally uninfluenced by an aversion to letting a guilty defendant go free? The whole tenor of the *Escobedo* dissents shows a strong aversion to letting defendants go free. No judge likes to see the guilty go free. Elective judges, and especially trial judges, should reasonably be expected to consider community attitudes. As a matter of fact, the same thing, but perhaps to a less marked degree, can be said of appointed judges. Some former prosecutors on the federal bench seem more motivated by the desirability of convictions than by an aversion to self-incrimination. Imagine the position of the trial judge who should reject a confession on the uncorroborated testimony of the defendant contradicted by the police, when the judge, as perhaps does the community, believes the confession to be true. The pressure on the trial judge both internal and external is tremendous.

Quite aside from the philosophy of a particular judge and his willingness to adhere to it regardless of political consequences or his own sociological predelictions, he is in a wretched position to afford the reliable determination of which Justice White spoke in *Jackson*. He is asked to decide the voluntariness of a confession obtained in secrecy. Generally, only the defendant and the police are in a position to testify. Quite aside from the pressure to find admissible a confession believed to be true, is the the matter of credibility. Is the judge to believe the unsupported statement of a man believed to have committed murder in preference to the testimony of officers, even though the latter have admittedly violated a few laws in obtaining the confession, such as failing to take the accused

24. Milton v. Cochran, 147 So.2d 137 (Fla. 1962).
25. 378 U.S. 368 (1963).
26. 378 U.S. 368, 377 (1963).

promptly before a committing magistrate? Escobedo testified that he was promised immunity if he would involve his confederate. He was not believed. If he had been promised immunity as claimed this was quite immaterial. He had small chance of being believed in the face of police denial. Under the circumstances who would believe Escobedo? Another example like *Escobedo* is *State v. Hughes*:[27] "The accused contends that he was beaten by these officers, but his testimony is unsupported." How could it be supported?

The secret police interrogation is designed to coerce the accused and to disable him from proving the coercion after it occurs. The trial judge is actually in the dark. Of course he deals daily with the problem of deciding facts about which his only source of knowledge is the testimony of witnesses. But he does not deal ordinarily with darkness by design, which he is called on to do when deciding what transpired at a proceeding arranged purposely to keep the judge from knowing. If the police think that the mere presence of counsel at their inquisitorial proceedings queers their opportunity to receive voluntary confessions, but they really have nothing to hide, why do they not record their proceedings on sound film? This would be at least some indication of good faith in their claims.

If under circumstances comparable to a secret police interrogation the trial judge were considering the voluntariness of any other kind of document except a confession, he would care little what the participants said. He would simply hold that the proceedings were utterly incompatible with the hypothesis of voluntariness and that the circumstances provided conclusive proof of coercion. Suppose that a hospital committee of leading citizens having difficulty in raising funds abducts a rich bad man to a remote and secret place where he is kept incommunicado until he makes a gift of all his money, which he has with him, to the committee. In a proceeding to regain his money can one imagine the judge saying "The bad man's testimony that he was coerced is unsupported for the good citizens deny this. They say that the bad man was quite willing to part with all he owned. I attach no significance whatever to the abduction for all that really matters is that the hospital get the money. How they get it is of no concern to me so long as I can utter the words 'freely and voluntarily.' These I now utter because the testimony of coercion is unsupported. Unless I do say these words, this wretched man will get his money back and consider also the crippling effect on fund raising if I should hold that to abduct a man unlawfully and hold him incommunicado vitiates the gift"?

A great deal has been written both on and off the bench about balancing the social interest between the freedom of the individual and the security of the state in the matter of admitting confessions.[28] What this

27. 154 So.2d 395 (La. 1963).

28. Clark, J. in Crooker v. California, 357 U.S. 433 (1957); Frankfurter, J. in Culombe v. Connecticut, 367 U.S. 568 (1960); Jackson, J. in Watts v. Indiana, 338 U.S. 49 (1948);

actually means is that coerced confessions are desirable, if not indispensable, as a means of law enforcement, so the problem is to determine the quantity and quality of permissible coercion. Were it not for the Fifth Amendment privilege against self-incrimination this would be a permissible way to consider the admissibility of confessions. If without this specific privilege, the question were examined to see whether due process has been afforded, it would be necessary to consider, in the light of history, experience and the sensibilities of the time, just what means of coercion could be stomached. Confessions procured by the whip might be rejected while confessions procured by exhaustive interrogation might not. So far as the states are concerned they could do this if they wished had the Fourteenth Amendment never have been adopted. Even so, they could so long as the Fourteenth Amendment was not held to make the privilege obligatory upon the states as in *Twining v. New Jersey*[29] but that, happily, is no longer true.[30] The privilege is not merely an historical fact to be considered with all others in determining whether the means of obtaining a confession is a denial of due process; the privilege is as meaningful in a state proceeding as it is in a federal one. The Fifth Amendment privilege made obligatory upon the states by the Fourteenth Amendment has no qualifications. The application of the privilege is not dependent on whether the collective security will not be impaired by allowing it. There is a balancing of the interests of the individual and the interest in security but this balancing is not one to be made by the courts ad hoc. The balancing was done when the Amendment was adopted. In this balancing it was determined that no degree of coercion is admissible. Nevertheless, the coerced confession is the rule, not the exception. The very circumstances of obtaining a confession by the process of a secret police interrogation is necessarily and universally coercive. The custom, however, has been to admit the confession as voluntary if the police deny doing the specific things the accused testifies they did, although the court has no way of knowing what the police did. Appellate courts cannot disagree with the trial court's determination of voluntariness, except to the extent of the controverted part of the evidence, unless the trial judge has made a semantic slip and has articulated the wrong standard for determining voluntariness.[31]

Sometimes the police, when not talking about a particular confession offered in evidence, are quite frank in telling the outside world about their techniques for obtaining "confessions." Why shouldn't they? They hardly are giving away any security secrets to the enemy. Surely the police credit the non-police with a bit of common sense, enough to know that confessions behind closed doors are not the result of cocktail parties. Surely

Harlan, J. in Cicenia v. Lagay, 357 U.S. 504 (1957); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 58 (1958).

29. 211 U.S. 78 (1908).

30. Malloy v. Hogan, 378 U.S. 1 (1963).

31. Rogers v. Richmond, 365 U.S. 534 (1960).

they must credit the rest of us with knowing for what purpose the accused are denied an opportunity to learn their constitutional rights, denied the application of express statutes commanding officers arresting without warrants to take the accused promptly before a committing magistrate, whose duty it is to inform the accused that he cannot be compelled to incriminate himself and that he has a right to counsel. On the other hand, perhaps the police also have good reason to believe that many judges suffer from some sort of legal schizophrenia on the subject of confessions. Judges must be in a position to say that the confession is voluntary in order to square with the Constitution. But they would probably be able to say that about few confessions if the full facts were reliably known. The way to eat the cake and have it too is to call a confession voluntary because the police have arranged things so the courts rarely have reliable means of knowledge. The Constitution gets its lip service; the police get their confessions; and the judges get their hypocrisy.

Escobedo points the way out of this deplorable situation. It is deplorable even if the assertion that confessions are indispensable were a proven sociological fact, which it certainly is not. Justice White thinks that the secret police interrogation is such a finely tuned device that the presence of counsel makes all interrogation futile. This seems to assume that there are no voluntary confessions whatever. There must be some. Nevertheless, it seems reasonable to believe that the presence of counsel will eliminate from consideration the great bulk of coerced confessions so that courts will be relieved of their present unfortunate plight. In those instances in which, despite Justice White's prediction, the police do interrogate in the presence of counsel and the accused do confess, the courts will vastly improve their present opportunity for knowledge. Someone besides the accused and the police will be able to testify.

The literal scope of application of *Escobedo* is to the accused who have counsel and demand to consult him. It is hard to see how the *Escobedo* right to counsel can be denied the accused who has the means but not the opportunity to employ counsel or who lacks both. Such a limitation of the principle could not be squared with *Gideon*. There is good reason to believe that the objective rule of *Escobedo* will receive the same kind of state court acceptance that *Gideon* has received, although the opposition will be greater because the effect on police practices will be greater. As already noted, due process cases have a dubious sort of authority, but cases dealing with objective and definite facts have great authority whether applauded or deplored. There can't be much of a dispute over whether a defendant had counsel at his trial. It would be hard to have a dispute over whether a confession was obtained in the absence of counsel. Here is something any judge can get his teeth into. He is not in the dark. He is not in the position, as he usually is at present, of weighing the testimony of the accused against the testimony of the police,

and all in the context of a perverted sense of "voluntariness." It is far easier to rule that a defendant must have counsel than to rule that the confession of a man believed guilty is involuntary. To follow a decision that an accused is entitled to counsel at a time when the state is seeking convicting evidence from the accused puts no strain on the trial judge. He is accustomed to thinking in these terms. That the object of counsel is to obtain acquittal is not a new idea. That a defendant even in a civil proceeding is entitled to counsel at the discovery stage is a quite familiar doctrine. *Escobedo* simply puts the criminal defendant on a par with the civil defendant.

The definite standard of the right to counsel is vastly preferrable to the alternative of denying or curtailing the right and then coping with the results of such a denial on an ad hoc basis by the vague standards of due process. We are committed to the adversary system. The Sixth Amendment pre-supposes it. None gainsays its shortcomings. Settling judicial problems by contest does not always produce a perfect result, whether the problems are civil or criminal. At least it is in keeping with both the spirit and the letter of our basic concepts of justice, as the inquisitorial system is not. The latter may be more efficient in a narrow sense just as is any aspect of authoritarianism. The secret police interrogation is an anachronism. In effect it is an ex parte secret determination of innocence or guilt. It is difficult to distinguish it from the Soviet practice.[32]

That high police officials consider such interrogation procedures judicial in purpose is indicated by a statement of Police Commissioner Murphy at a conference in New York City on January 31, 1964, sponsored by the District Attorneys' Association of the State of New York.[33] Among a good many other things the Commissioner said, "It may well be that, as Professor Inbau indicated, there is going to come a time when we will not be allowed to question anybody. If that day arrives, it is going to result in more innocent people being charged with crime than ever before." Obviously the Commissioner used the word "innocent" not in the sense of court determined, but of police determined innocence. The necessary implication is that a considerable number of people whom the police have no valid reason to charge are nevertheless being charged with crime even before "that time arrives." After "that time" more innocent people than before will be charged. Apparently, the reason for this is that the police will be unable to acquit the innocent, therefore, they must be charged. The innocent must try to clear themselves before the courts.

The subject of the conference referred to was euphemistically called "The interrogation of the accused; its needs and practices." Among the practices discussed were the techniques of obtaining confessions by the use of drugs, by hypnosis, by trickery and by "psychological techniques."

32. FEIFER, JUSTICE IN MOSCOW 86 (1964).
33. Reported in 49 CORNELL L.Q. 382 (1964).

The report of the conference makes interesting reading for those interested in the science of obtaining confessions. It is not surprising to learn that just anybody cannot record the "free and voluntary" confession. Among the interesting details is the account of one officer who had "tremendous success" with a fake lie detector machine in which he caused colored lights to flash on and off at will. Of this Professor Inbau commented: "I know of that being used too, particularly in a city down South, where the police were dealing with the little less educated type of person as a suspect." How much nicer this sounds than to say that trickery, as with all forms of coercion, is more efficacious with the ignorant than with the educated, with the first offenders rather than the professional criminals. Commissioner McClellan[34] of Canada probably revealed nothing new when he observed that the professional criminals rarely confess because they know their rights. The magnitude of educating police in the techniques of obtaining confessions is not generally appreciated. Commissioner Murphy[35] said that "with the rapidly changing techniques and the rapidly changing legal situation, the police have a tremendous burden of education. . . . Indeed, in many respects we have to reeducate twenty-five thousand men every time a new interpretation or new decision is handed down from the Bench." One perceives that the business of obtaining confessions is not at all as simple as it sounds when one reads transcripts of trials at which confessions are offered in evidence. It there sounds as if there were really nothing to the process at all, the man simply wanted to confess and the police wrote it down. But we see that in reality it isn't like that at all. In one respect this enormous burden of training New York policemen to receive the free and voluntary confessions should be relatively light—education in the content of Section 165 of the New York Criminal Code of Criminal Procedure which provides that "the defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bond at any hour of the day or night," or in the content of Section 188 that "the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." But the burden of training policemen in evading the law and the Constitution must be great.

There is no doubt that the opposition to *Escobedo* is formidable, as it is to any decision which renders more than lip service to fundamental constitutional rights of criminal defendants. While there are other reasons besides giving advice, for according the right to counsel at the police stage when self-incrimination is sought, it is quite clear that the opposition to the *Escobedo* rule is that coerced confessions become virtually impossible to get into evidence. It is the more formidable because expressed in general terms such as Professor Inbau's remark about the "civil liberties binge" the courts are on, and the extent to which this may

34. See note 33 *supra.*
35. See note 33 *supra.*

go "unless there is public resistance to this trend."[36] It is not hard to whip up public resistance, for the short range danger from crime is always easier to perceive than the long range danger of authoritarianism. One reads quite a bit about the latter but nearly always in the context of preserving an economic or social status quo, but these critics rarely point to the dangers to personal liberty in the context of police practices. Few can identify their own interests with those of a man charged with crime, especially if he is believed guilty. Most of what appears in print is the danger to the collective interest, the danger to the law-abiding from the law-violating. The alleged dangers from criminals if police practices are required to obey the Constitution obscures the danger of becoming a police state.

It is not the purpose of this article to argue that the social utility of applying, as literally as is possible, the constitutional privilege against self-incrimination, is greater than the social utility of circumventing the privilege. Nevertheless a few contentions offered as self-evident truths should be noticed. One is that confessions are indispensable to effective law enforcement. Professor Inbau, who styles himself as "police prosecution oriented," at the New York conference already referred to, said that he would like to see some police department try the experiment of "[following] the rules just as the courts have laid them down. In other words the police are not going to vary those rules, they are not going to cheat one bit." Since this project is advanced as a revolutionary idea, it is fair to assume that it has never been tried. The Professor predicts with confidence that chaos would result, but this is hardly proven sociological datum. To the contrary, there is some experience with police work under severe limitations in the use of coerced confessions and other forms of illegally obtained evidence. Federal officers do their work under the McNabb-Mallory rule.[37] The Sixth Amendment has always been applicable in federal courts. It is probably true, but difficult to demonstrate, that trial federal courts feel more bound than do state courts to follow the Supreme Court due process cases on the admissibility of confessions and of evidence obtained by illegal searches and seizures. Nevertheless the Federal Bureau of Investigation and other federal police agencies are quite effective. It seems within the range of possibility that state and municipal police could do as well. Another consideration worthy of attention is that the greatest criminal danger is from the professionals from whom few confessions are presently being obtained. The confession technique is principally efficacious against first offenders and the ignorant or stupid. Successes in obtaining self-incrimination against such defendants provide statistics of convictions which tend to obscure the results in detecting the crime of professionals.

36. See note 33 *supra*.

37. McNabb v. United States, 318 U.S. 332 (1942); Mallory v. United States, 354 U.S. 449 (1956).

If the experiment is tried of giving full accord to Constitutional provisions, these may be found too restrictive to afford collective security. If that be proved true in the future, then the risks of coerced confessions must be assumed. Better that than the hypocritical practice of pretending to observe the privilege against self-incrimination and pretending to adhere to the adversary system of criminal proceedings. Even a rewritten Fifth Amendment would provide some sort of effective judicial control over confessions. There is much to gain and nothing to lose from *Escobedo*.

Escobedo may well be the last major conflict between the Fourteenth Amendment fundamentalists and the relativists. The conflict in views began with the *Slaughter House* cases,[38] the first dealing with the Fourteenth Amendment, which put a narrow construction on the Amendment. Justice Swayne there said that the Amendment was intended to give the same protection from oppression by the states that had previously been afforded against the federal government. This view failed to prevail by the margin of one. From time to time other justices took the same view but this view never commanded the Court. It came again within one vote of doing so in *Adamson v. California*[39] when Justices Douglas, Murphy and Rutledge joined in the dissenting opinion of Justice Black which showed that the Court had never fully examined Congressional debate on the Amendment, at which proponents and opponents argued that the purpose of the Amendment was to put the same restrictions on the states which previously existed as to the federal government, that is, that the whole Bill of Rights was made applicable to the states.

The contrary view prevailed. It held that only such rights guaranteed by the first eight Amendments were applicable to state action as "are of such a nature that they are included in the concept of due process of law." Some parts of the Bill of Rights "are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[40]

The ranking of rights as fundamental or not fundamental, under this doctrine, was a function of the Supreme Court. In the case last quoted from, a man had been acquitted of murder in a Connecticut court. The judgment was reversed and on a new trial the defendant was convicted and sentenced to death notwithstanding his plea of double jeopardy. The United States Supreme Court held that double jeopardy was not applicable to the states since it was not "fundamental." It seemed relevant to the Court that such protection is not afforded in civil law countries. Justice Black, in his *Adamson* dissent, called this formula the use of natural law to determine the scope of due process. The Court in

38. 83 U.S. (16 Wall.) 36 (1872).
39. 332 U.S. 46 (1946).
40. Palko v. Connecticut, 302 U.S. 319 (1937).

Twining had observed that if rights safeguarded against federal action are safeguarded against state action, this is so "not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."

The dominant view was that to qualify as fundamental it was not sufficient for a right to be included in the Bill of Rights, it must also impress the Justices as being fundamental. Over the decades some of these rights managed so to qualify several very lately. Nearly a century after the adoption of the Fourteenth Amendment the wisdom of the Justices agreed with the wisdom of those who drafted and adopted the Bill of Rights that the right to counsel, the freedom from unreasonable searches and seizures, and the privilege against self-incrimination are directly applicable against the states. It requires no clairvoyance to predict that the rights affecting one charged with crime not yet applicable to the states will be carried over against the states, and that finally the wisdom of the Court by natural law concepts will be identical with the wisdom of the authors of the Bill of Rights. The reasons of the latter for believing that persons should not be subject to double jeopardy, that they should have the right to be tried by a jury and to be charged by a grand jury rather than by a single public official, have the same claim to validity and fundamentalism as they had in 1791. Such protections are in the Bill of Rights notwithstanding that civil law countries have not felt the need for them. Flexibility in constitutional interpretation to cope with the changing needs of our society has little to do with marking limits beyond which government, state as well as federal, may not go in trenching on the liberty of the individual. The danger of becoming a police state by the regulation of economic interests is slight as compared with this danger by government unrestrained in its ability to arrest, convict and punish.

In dissenting to upholding a conviction obtained by illegal wire tapping, Justice Brandeis[41] spoke of the terrible consequences of permitting the government to commit a crime in order to punish a criminal. It cannot aid in respect for law for a citizen's right to be fundamental in a federal court and not fundamental in a state court.

In a semantical sense the Fourteenth Amendment fundamentalists have not prevailed. It has not been held that the whole of the Bill of Rights was carried over by the Fourteenth Amendment, lock, stock and barrel. But those provisions which have been carried over, have been carried over intact, not as watered down versions. *Gideon* does not speak in natural law terms but in Sixth Amendment terms. Since *Escobedo* was the case which trenches on established police practice more than it seems possible for any case in the future to do, it seems reasonable to believe that the Bill of Rights will eventually have universal application.

41. Olmstead v. United States, 277 U.S. 438 (1927).