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ESCOBEDO AND BEYOND: THE NEED FOR A FOURTEENTH AMENDMENT CODE OF CRIMINAL PROCEDURE

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On June 22, 1964, the Supreme Court's decision in *Escobedo v. Illinois*¹ became part of the "law of the land". The case focused upon the oblique, many-faceted constitutional problem of modern criminal procedure: incommunicado police interrogation of suspected criminals *versus* the right of persons suspected of crime to assistance of counsel at the police investigation level of a criminal case. Implicit in the problem are at least two others: the requirement that confessions be voluntary and the privilege against self-incrimination.² Beyond those of constitutional dimensions and not always extricable from them are a network of practical, pervasive problems concerning law enforcement techniques, getting convictions, fighting them and equipping defendants with a lawyer at the earliest moment in the adversary system to effectively challenge exertions of governmental power.³

Escobedo provoked national attention, as it should have. Newspapers and other media widely reported the case, often with condemning comments from police, prosecuting officials and others with police-oriented views on "effective" law enforcement. These spokesmen characterized the case as another example of the Court's "turn 'em

loose" philosophy,⁴ a crippling new restriction governing the taking and use of criminal confessions.⁵ They accused the Court of hamstringing law enforcement by bringing defense lawyers into an important police workshop—the interrogation room.

Now that the decision has a toe-hold on our general concept of Due Process of Law, vague though it may be, the criticism and the problems deserve analysis, for it may be, as Mr. Justice White admonished in his dissenting opinion, "another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not."⁶

The issues hereafter discussed, namely the judicial evolution of the *Escobedo* case in terms of the struggle within the Court, identification of some of the issues *Escobedo* spins off (such as doing away with extrajudicial confessions altogether, as Mr. Justice White fears), and the suggestion to employ Supreme Court Rules and to involve the Congress of the United States in state criminal procedure through its enactment of a Title or Code of fourteenth amendment criminal procedure (to resolve not only right to counsel problems but other old, new and future fourteenth amendment problems of state criminal procedure), are best bottomed upon a full understanding of the facts—the "circumstances"—of the *Escobedo* case. For the majority in *Escobedo*, some broad language to the contrary notwithstanding, expressly decided *this* case and

¹ 378 U. S. 478 (1964).

² The right to counsel at the trial itself is intimately related but severable. See Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 BOSTON U. L. REV. 423, 429 (1964).

³ The concept of challenge as a necessary ingredient of the adversary system has been articulated in the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice* (1963). "The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process." *Id.* at 10. The *Report* led to passage of the Criminal Justice Act of 1964, implementing the case of *Johnson v. Zerbst*, 304 U. S. 458 (1938), some 26 years later.

⁴ The phrase belongs to Professor Fred E. Inbau. See Gowran, *Tell How Acts of High Court Impede Police*, Chicago Tribune, Aug. 10, 1964, p. 9, Part 3.

⁵ See Gowran, *How Supreme Court Ruling Puts Straitjacket on Police*, Chicago Tribune, Aug. 11, 1964, p. 27.

⁶ 378 U. S. 478, 495 (1964).

not the next one that will come along under different circumstances.

THE FACTS OF ESCOBEDO

The issue before the Court was stated in the opinion of the majority, written by Mr. Justice Goldberg:

"The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation."

On the night of January 19, 1960, Danny Escobedo's brother-in-law was fatally shot. At 2:30 a.m. on the following morning, Escobedo was arrested by police without a warrant and interrogated about the shooting. He made no statement to the police and was released from custody at 5:00 p.m. that afternoon pursuant to a writ of habeas corpus obtained by a lawyer whom he had earlier retained to prosecute a personal injury action.

Ten days later, on January 30, between 8:00 and 9:00 p.m., Escobedo was arrested again and brought to police headquarters. The second arrest resulted from a statement made earlier that day by one Benedict DiGerlando, who was in custody at Chicago police headquarters in connection with the killing. DiGerlando, who was to become Escobedo's co-defendant, told the police that Escobedo had committed the murder.

At the time of this second arrest Escobedo was handcuffed behind his back. On the way to police headquarters the police told him that DiGerlando had named him as the killer. He was also told that he and DiGerlando were hooked-up with the killing "pretty tight" and that he might as well "admit to this crime." Escobedo responded by saying, "I am sorry, but I would like to have advice from my lawyer."⁷

Shortly after Escobedo was taken into Chicago police headquarters his retained lawyer arrived. The lawyer asked the desk sergeant for permission

to speak to his client. This was between 9:30 and 10:00 p.m. The desk sergeant made a call, found out that Escobedo was in the Homicide Bureau, and told Homicide that a lawyer wanted to see Escobedo. The desk sergeant then turned to the lawyer and told him he could not see Escobedo.

The lawyer went upstairs to the Homicide Bureau where he found several Homicide detectives. He told them that he was Escobedo's lawyer and wanted to see him. The detectives referred him to the Chief. The Chief told him he couldn't see Escobedo because they hadn't finished questioning him. That was at approximately 11:00 p.m. At about that time the lawyer caught a glimpse of his client through an open door in the Homicide Bureau, waved to him, and Escobedo waved back. At the hearing on the motion to suppress the confession Escobedo testified that he took the lawyer's wave as a signal not to say anything.⁹ Then one of the police officers closed that door. The lawyer waited around for another hour or two, repeating his request to see Escobedo. All these requests were denied and the lawyer finally left without an opportunity to speak to his client. Escobedo, meanwhile, behind the closed door in the Homicide Bureau, made repeated requests to see his lawyer, all of which were denied. He was also told by the police that his lawyer did not want to see him.

During the course of the interrogation DiGerlando was brought in and pointed the finger of guilt at Escobedo. Escobedo told DiGerlando that he was "lying" and said "I didn't shoot Manuel, you did it." As the Supreme Court noted, in this way, for the first time, the police succeeded in getting Escobedo to admit some knowledge of the crime. Further incriminating admissions were thereafter made.¹⁰ An assistant State's Attorney was called in. He took a formal statement from Escobedo. Neither the assistant State's Attorney nor the police ever advised Escobedo of his "constitutional rights."¹¹

⁹ *Id.* at 480, n. 1. "Petitioner testified that this ambiguous gesture 'could have meant most anything,' but that he 'took it upon [his] own to think that [the lawyer was telling him] not to say anything,' and the lawyer 'wanted to talk' to him."

¹⁰ *Id.* at 483. It was also noticed by the Court that a police officer, Montejano, was employed to ply Escobedo. They had grown up together in the same neighborhood. Escobedo testified that Montejano promised him he could go home if he pinned the murder on DiGerlando.

¹¹ At the time of the arrest there was a statute in force in Illinois providing that "all public officers . . . having custody of any person . . . for any alleged cause whatever, shall, except in cases of imminent danger of

⁷ *Id.* at 479.

⁸ *Id.*

Escobedo was indicted for murder. His motions to suppress the incriminating statements, made before and during the trial, were denied. The statement was admitted in evidence and the conviction followed. He was sentenced to twenty years in the Illinois penitentiary.¹²

"THE LAW OF THE LAND"

In delivering what Professor Inbau described as the "hardest body blow the court has struck yet against enforcement of law in this nation,"¹³ the Court said:

"We hold, therefore, that where, as here, [1] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, [2] the suspect has been taken into police custody, [3] the police carry out a process of interrogations that lends itself to eliciting incriminatory statements, [4] the suspect has requested and been denied an opportunity to consult with his lawyer, and [5] the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."¹⁴

This is a marathon sentence worth more than one reading. But it is not, in and of itself, the hardest judicial body blow yet struck against law enforcement. The Supreme Court did do some hamstring-

ing. But the relevant question is: shouldn't this ham have been strung? The traditional conflict between judicial protection of individual rights under the fourteenth amendment, on the one hand, and protection of society's legitimate interest in bringing criminals to bar on the other, is inevitably at play here. Also present was the wave of dissatisfaction following any Supreme Court decision newly articulating a fair play rule which operates in favor of the accused, especially an accused charged with murder and, necessarily, convicted of it. When the fires of public zeal start to subside, as they generally do, some analysis and projection of the impact of the case—particularly this case—upon the future administration of the criminal process is in order. The fires ahead, from the projectory of the present, seem more fierce than the one now smoldering from *Escobedo*.

In deciding *Escobedo*, contrary to some popular belief, the Supreme Court did not hold a wake for policemen; it did not bury the confession; nor did it alter basic principles of law enforcement. The decision did take up some of the slack which some police have heretofore enjoyed in the interrogation of criminal suspects.

Taking the decision in its own context, it barred the use in evidence of a statement taken from a man under arrest and held in custody as a suspect for a particular crime while he was denied his request to consult with his lawyer and, at the same time, not effectively warned of his right to remain silent. Hostility to *Escobedo*—as distinct from hostility to what echo *Escobedo* may toll in future decisions—is directly proportional to one's belief that it is fair play to obtain incriminating statements from a prisoner while actively keeping him from his lawyer and failing to warn him of his absolute constitutional right to remain silent. *Escobedo* can be stated quasi-syllogistically: the constitutional right to assistance of counsel under the sixth and fourteenth amendments guarantees a criminal suspect under arrest and police interrogation for a specific crime the opportunity to consult with his lawyer upon request, at least when he has not been effectively warned of his absolute right to remain silent. *Escobedo* was a criminal suspect under arrest and police interrogation for a specific crime who was not effectively warned of his absolute right to remain silent and who was denied the opportunity to consult with his lawyer despite his request. Therefore, *Escobedo* was denied his right to

escape, admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see and consult with such person so imprisoned, alone and in private, at the jail or other place of custody." Ill. Rev. Stat. 1961, Ch. 38, par. 736 (b)-(c). The provision has been replaced by Sec. 103-4 of the Illinois Code of Criminal Procedure of 1963. *Escobedo's* lawyer called the attention of the police to the statute, but they were obviously not impressed. See *People v. Escobedo*, 190 N.E. 2d 825 (Ill. 1963). The New York Court of Appeals gave force to a similar statute, as the Court in *Escobedo* noted, in *People v. Donovan*, 193 N.E. 2d 628 (N. Y. 1963), by holding the confession taken in violation of it to be invalid.

¹² For a comment on *People v. Escobedo*, 190 N.E. 2d 825 (Ill. 1963), written before the decision under discussion, see Note, *Criminal Law—Right to Counsel*, 52 ILL. BAR J. 602 (March, 1963).

¹³ Gowran, *How Supreme Court Ruling Puts Straight-jacket on Police*, Chicago Tribune, Aug. 11, 1964, p. 27.

¹⁴ 378 U. S. 478, 490-491 (1964).

assistance of counsel under the sixth and fourteenth amendments.¹⁵

The foregoing statement of what I believe *Escobedo* held is, to be sure, an attempt to strap down the law of the case. Broader interpretations are possible, but my own experience in arguing *Escobedo* in the Illinois trial courts has led me to settle for the holding as I have stated it and as it has been interpreted by a near score of states, including the Supreme Court of Illinois decision in *People v. Hartgraves*.¹⁶

THE STRUGGLE WITHIN THE COURT

The decision in *Escobedo* extending the right to counsel to the police interrogation room under certain circumstances did not just happen; it followed a tenacious and persistent refusal by minority members of the Court to accept the oft-repeated stand of the majority, as articulated in *Betts v. Brady*¹⁷ in 1942, that the right to counsel was not an absolute constitutional requirement under the due process clause of the fourteenth amendment. The persistence of the old minority (most always Justices Black, Warren, Douglas and Brennan) in cases like *In Re Groban*,¹⁸ *Crooker v. California*,¹⁹ *Cicenia v. Lagay*,²⁰ and the more neutral decision in *Spano v. New York*²¹ was vindicated by a change in the Court's composition and the decision in *Gideon v. Wainwright*²² in 1963. Thereafter the old minority, now joined by Mr. Justice Goldberg, emerged with the decisions in *Massiah v. United States*²³ and *Escobedo v. Illinois*.

¹⁵ The question left open is whether *Escobedo* would be decided the same way if one further fact is introduced—telling the suspect 'effectively' that he has an absolute right to remain silent. I understand that some Assistant State's Attorneys in Cook County, the home of *Escobedo*, are now 'effectively' warning suspects by reading the fifth amendment to them in its original, unexpurgated form. Which goes to another question: is *Escobedo* a self-incrimination case in its import? If so, what constitutes an 'effective' warning? See n. 8, *supra*. In his dissent in *Escobedo* Justice White said: "... Danny Escobedo knew full well that he need not answer and knew full well that his lawyer had advised him not to answer." 378 U. S. 478 at 499.

¹⁶ 202 N.E. 2d 33 (Ill. 1964).

¹⁷ 316 U. S. 455 (1942).

¹⁸ 352 U. S. 330 (1957).

¹⁹ 357 U. S. 433 (1958).

²⁰ 357 U. S. 504 (1958).

²¹ 360 U. S. 315 (1959).

²² 372 U. S. 335 (1959). The decision in *Haynes v. Washington*, 373 U. S. 503 (1963), is also part of the prelude to the *Escobedo* decision. In fact, if the essence of the involuntariness in *Haynes* was the denial of the request to call the wife and the attorney during the uncommunicado police detention, one may say that *Escobedo* is an articulation in sixth amendment terms of what had already been held in *Haynes*.

²³ 377 U. S. 201 (1964).

These decisions are hereafter considered in some detail, not for the purpose of adding to the already formidable body of comment on them,²⁴ but to get across the flavor of the controversy, the deep-rooted issues underlying the controversy, and to lay the groundwork for a suggestion hereinafter made to modernize our machinery for meeting the due process and equal protection challenges of the fourteenth amendment.

The sixth amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense", was brought into play as an ingredient of fourteenth amendment due process for the first time in 1932, in *Powell v. Alabama*.²⁵ In *Powell* a group of young negro boys received the death penalty for raping two white girls. The Court held that in a capital case, where the defendants are unable by reason of illiteracy, feeble mindedness or other circumstances, to conduct their own defense, a state court has a duty, whether requested or not, to assign counsel to defendants unable to employ their own.²⁶ Under such circumstances assignment of counsel was held to be "a necessary requisite of due process of law."²⁷

A decade later, in 1942, the battle lines were drawn within the Supreme Court on the issue of the right to have counsel assigned to an impecunious defendant in a non-capital state criminal prosecution. In *Betts v. Brady*,²⁸ the defendant, tried for robbery in Maryland, was denied an appointed lawyer despite his lack of funds to employ counsel. His conviction was affirmed in a 6-3 decision articulating that the sixth amendment applies only to

²⁴ For the history of right to counsel up to the cases herein discussed, see BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955). See also, *The Right to Counsel: A Symposium*, 45 MINN. L. REV. (1961).

²⁵ 287 U. S. 45 (1932).

²⁶ In *Powell v. Alabama* there were two grounds on which the Court set aside the conviction: first, the trial court failed to give defendants a reasonable time and opportunity to secure counsel; second, "... under the circumstances . . . [the ignorance and illiteracy of defendants, the imprisonment and close surveillance, that they were from another state without friends or family,] the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." 287 U. S. 45, 71. The right to counsel in capital cases became indisputably absolute—if it had not been already—in *Hamilton v. Alabama*, 368 U. S. 52 (1961), where the Court said "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 55.

²⁷ 287 U. S. 45, 71 (1932).

²⁸ 316 U. S. 455 (1942).

federal criminal trials, but a "fundamental fairness" rule was also announced:

"Asserted denial [of due process of law by reason of putting a man on trial without a lawyer] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."²⁹

Mr. Justice Black, joined by Justices Douglas and Murphy, wrote a dissenting opinion in which he said "I believe that the Fourteenth Amendment made the Sixth applicable to the States."³⁰ And he made another point which has since taken deep root as a test of fair criminal procedure—"No man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."³¹

The division within the Court over the issue of the right to have trial counsel assigned to impecunious defendants in state felony prosecutions continued in a number of cases, but until *Gideon v. Wainwright*³² was decided in 1963, the right to counsel cases before the Court between *Betts* and *Gideon* sometimes centered upon different issues.

In a 5-4 decision, *In Re Groban*,³³ the Court held that a witness compelled to testify at a state investigative proceeding conducted by the Ohio State Fire Marshal to investigate the causes of fire had no constitutional right to have his lawyer present. The Court said:

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them, does not mean that they had a constitutional right to the assistance of their counsel. ***When such charges are made in a criminal proceeding, he may then demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination. . . ."³⁴

In support of this holding, the Court drew an analogy to the plight of the grand jury witness who has no right to representation by his counsel before the grand jury.³⁵

²⁹ *Id.* at 462.

³⁰ *Id.* at 474.

³¹ *Id.* at 477.

³² 372 U. S. 335 (1963).

³³ 352 U. S. 330 (1957).

³⁴ *Id.* at 332, 333.

³⁵ The Court relied upon three lower court deci-

Mr. Justice Black wrote a dissenting opinion (joined by Justices Warren, Douglas and Brennan), arguing that the majority opinion was a "complete departure from our traditional methods of law enforcement"³⁶ and in disregard of the principle laid down in *Powell v. Alabama*, that an accused "requires the guiding hand of counsel at every step in the proceeding against him."³⁷ The dissent also reflected a deep distrust of all secret interrogation—the "extraction of 'statements' by one means or another from an individual by officers of the state while he is held incommunicado".³⁸ Justice Black said:

"I . . . firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense."³⁹

In Re Groban was decided in 1957. The next year the first two cases dealing with the *Escobedo* issue, that is, the right to consult an attorney during police interrogation, were decided by the Court, in both instances by a bare majority. *Crooker v. Cali-*

isions in support of this proposition: *In Re Black*, 47 F. 2d 542 (2d Cir. 1931); *United States v. Blaton*, 77 F. Supp. 812 (E.D.Mo. 1948); and *United States v. Scully*, 225 F. 2d 113 (2d Cir. 1955). The dissenters assumed the accuracy of the proposition but argued that the analogy was wrong. They said that a witness before a traditional grand jury of 12-23 members received protection from the grand jurors from official misrepresentations or abuse. 352 U. S. 330, 347.

³⁶ 352 U. S. at 338.

³⁷ The popular statement of Mr. Justice Sutherland in *Powell v. Alabama*, 287 U. S. 45, 68-69 (1932), is as follows: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Mr. Justice Sutherland's statement still has relevance to the misdemeanor cases, where no fourteenth amendment right to counsel for defendants financially unable to employ counsel yet exists. Borrowing from Professor Blum, when it comes to taxes a dollar is a dollar, when it comes to criminal law a day in jail is a day in jail.

³⁸ 352 U. S. 330, 353.

³⁹ *Id.* at 344.

*formia*⁴⁰ involved a 31 year old defendant, a college graduate who had studied a year of law. He had been convicted of murdering his lover and had been sentenced to death. At the time of his arrest Crooker was taken to a Los Angeles police station. He asked the police if he could call a lawyer whom he believed would represent him. His request to contact an attorney was refused until the police completed their investigation. A few hours of police interrogation followed and Crooker fully confessed the crime. The majority, rejecting the claim that use of the confession in evidence violated due process because it was obtained after Crooker's request to contact his attorney, said:

"Petitioner, however, contends that a different rule should determine whether there has been a violation of right to counsel. He would have every state denial of a request to contact counsel be an infringement of the constitutional right *without regard to the circumstances of the case*. In the absence of any confession, plea or waiver, or other event prejudicial to the accused—such a doctrine would create a complete anomaly, since nothing would remain that could be corrected on new trial. Refusal by state authorities to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney. Due process . . . demands no such rule."⁴¹

The same four Justices who dissented in *In Re Groban* also dissented in *Crooker* and again the deep distrust of police practices in obtaining confessions was stated, this time by Mr. Justice Douglas:

"The right to have counsel at the pre-trial stage is often necessary to give meaning and protection to the right to be heard at the trial itself.⁴² It may also be necessary as a restraint on the coercive power of the police. The pattern of the third degree runs through our cases.⁴³ The third degree flourishes only in secrecy. One who feels the need of a lawyer

and asks for one is asking for some protection which the law can give him against a coerced confession.⁴⁴ We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices. The trial on the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion. The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this most critical period of his ordeal. For what takes place in the secret confines of the police station may be more critical than what takes place at the trial.⁴⁵ The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."⁴²

It is apparent, therefore, and of no small significance, that the minority in *Crooker* were advocating the right to counsel at any time after arrest as an absolute constitutional requirement; but when Mr. Justice Goldberg, with this minority, wrote the decision in *Escobedo*, the old "circumstances" rule of *Betts v. Brady* was used, not the "absolute requirement" rule urged by the dissenters in *Crooker*.⁴³

⁴² *Id.* at 443-448.

⁴³ As has been noted, the *Escobedo* decision states the issue in terms of the "circumstances" of the case. The Court defined those circumstances in stating its holding. And in concluding the opinion, the Court said: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, *under the circumstances here*, the accused must be permitted to consult with his lawyer." (378 U. S. 478, 492) (Emphasis added.) In discussing *Crooker v. California*, the Court said: "In that case the Court merely rejected the absolute rule sought by petitioner, that 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case.*'" (Emphasis in original.) The Court also said that *Crooker* "does not compel a contrary result," arguing that among "the critical circumstances which distinguish that case from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to 'say anything' in response to the questions . . ." *Id.* 491-492.

The fact that Crooker had had a year of law school was also noted (and would appear significant in concluding that Crooker had been 'effectively' warned of his absolute right to remain silent.)

Considered in this light—as, indeed, the case must be—it would be erroneous to conclude that *Escobedo* creates an absolute right to counsel during police

⁴⁰ 357 U. S. 433 (1958).

⁴¹ *Id.* at 440, 441.

Cicenia v. Lagay,⁴⁴ the other case that was handed down with *Crooker*, added another dimension to the problem. In place of the year of law school, Cicenia actually had retained a lawyer. After retaining counsel, Cicenia went voluntarily to police headquarters in Orange, New Jersey, having heard that the police sought him for questioning in connection with an unsolved robbery-murder. The police took him to headquarters at Newark and at about 2:00 p.m., some five hours after Cicenia submitted himself to questioning, the retained lawyer appeared at the Newark station and was refused permission to see his client. Throughout the afternoon the police continued to refuse the lawyer's and Cicenia's requests for a conference with one another. By 9:30 p.m., when they were finally allowed to confer, Cicenia had signed a confession to the murder.

The case is strikingly similar to *Escobedo v. Illinois*.⁴⁵ And the issues of *Escobedo*—the requirement that confessions be voluntary, the privilege against self-incrimination, the practical advantages of interrogation as a crime detection tool, the constitutional right to counsel and its proper place in the adversary system—were not at all unknown to the majority when it said:

"The contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker v. California*. . . . Because the present case, in which petitioner was denied an opportunity to confer with the lawyer whom he had already retained, sharply points up the constitutional issue involved, some additional observations are in order. . . .

"A satisfactory formula for reconciling [the competing concerns of right to counsel and the ability of the police to solve crimes] . . . is not to be found in any broad pronouncement that one must yield to the other in all instances. Instead, as we point out in *Crooker v. California* . . . in judging whether state prosecutions meet the requirements of due process, [this Court] has sought to achieve a proper ac-

interrogation of a criminal suspect. "Effective" warning of the right to remain silent may still be open as an alternative to letting in the lawyer pounding at the jailhouse door.

⁴⁴ 357 U. S. 504 (1958).

⁴⁵ Cicenia and Escobedo both had seen their lawyers before the interrogation and therefore had an opportunity to be warned of their absolute right to remain silent. Then, after police interrogation began, both lawyers were refused permission to see their clients at police headquarters, and both clients were denied their requests to see their lawyers.

commodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness. . . .

"In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process. . . . Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel."⁴⁶

Mr. Justice Douglas, dissenting, regretted that the Court did not take this case and *Crooker* "as the occasion to bring our decisions into tune with the constitutional requirement for fair criminal proceedings against the citizen."⁴⁷

I have referred to *Spano v. New York*,⁴⁸ decided in 1959, as a more "neutral" decision because there the Court unanimously held the confession in question involuntary and the case was disposed of on that issue. Spano also confessed to murder after having been repeatedly refused permission to see his lawyer. Here, however, the confession followed the indictment and Spano argued that his absolute right to counsel in a capital case, relying on *Powell v. Alabama*, became operative on the return of the indictment, and on that ground he sought to distinguish *Crooker* and *Cicenia*.⁴⁹ The contention was not reached by the majority because of the Court's finding that the confession was involuntary under traditional fourteenth amendment principles, but Justice Douglas, joined by Justices Black and Brennan, did consider Spano's contention:

"While I join the opinion of the Court, I add what for me is an even more important ground of decision.

⁴⁶ 357 U. S. 504, 508, 509 (1958).

⁴⁷ 357 U. S. 504, 512 (1958).

⁴⁸ 360 U. S. 315 (1959).

⁴⁹ As stated by the Court, "Petitioner's first contention is that his absolute right to counsel in a capital case, *Powell v. Alabama*, 287 U. S. 45, became operative on the return of the indictment against him, for at that time he was in every sense a defendant in a criminal case. . . . He argues accordingly that following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment." (360 U. S. 315, 320.) Assuming that the right to counsel in state cases is co-extensive with the right to counsel in federal cases, the contention would now be valid under *Massiah v. United States*, 377 U. S. 201 (1964). But see *Turner v. State*, 384 S.W. 2d 879 (Tex. 1964); *State v. McLeod*, 203 N.E. 2d 349 (Ohio 1964).

"We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. . . . But here we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he has asked for his lawyer and when his request was denied.***

"We do not have here mere suspects who are being secretly interrogated by the police as in *Crooker v. California*. . . nor witnesses who are being questioned in secret administrative or judicial proceedings as in *In Re Groban*. . . . This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure. . . . They in effect deny him effective representation by counsel. . . .

"[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?"⁵⁰

GIDEON OUTLAWS BETTS

The ascension of Justices Goldberg and White to the Court, succeeding Justices Frankfurter and Whittaker, was followed by the unanimous overruling of *Betts v. Brady*, in 1963, in *Gideon v. Wainwright*,⁵¹ the two cases being "nearly indistinguishable" on their facts. The opinion of the Court was written by Mr. Justice Black, the author of the dissent in *Betts* twenty-one years earlier. Conspicuously absent from Justice Black's opinion in *Gideon*, however, was the notion he had advanced in *Betts* that equal protection of the law demanded equipping impoverished defendants with counsel. Adding to the conspicuousness was the moratorium on "invidious discriminations" Black had talked about in *Griffin v. Illinois*⁵² when he said: "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has."⁵³ But due process of law is a more regulable doctrine than equal protection; it can be cut off where the *a priori* deductions of

equal protection cannot.⁵⁴ Perhaps in recognition of this, perhaps for the sake of unanimity, the new look on the sixth amendment came via the due process clause of the fourteenth:

"We accept *Betts v. Brady's* assumption, based as it was on prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights.***

"The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.*** The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested."⁵⁵

THE EMERGENCE

The persistent right to counsel doctrine of the old minority first emerged a majority doctrine on May 18, 1964, in *Massiah v. United States*.⁵⁶ The "occasion" for bringing the law "into tune with the constitutional requirement for fair criminal proceedings against the citizen" was a federal narcotics case. After *Massiah* had been indicted he retained his own lawyer and was released on bail. Federal narcotics agents, with the aid of a Schmidt kit and *Massiah's* co-defendant-turned

⁵⁴ It is interesting to note that while the cases on right to counsel at and before the trial itself have been decided on due process grounds, right to counsel after the trial, on the first appeal, was decided on equal protection grounds. See *Douglas v. California*, 372 U. S. 353 (1963). Here there is no firm base for the constitutional distinction like there is in the free-transcript cases, *Griffin v. Illinois*, 351 U. S. 12 (1956); *Eskridge v. Washington Prison Board*, 357 U. S. 487 (1958); *Lane v. Brown*, 372 U. S. 477 (1963); *Draper v. Washington*, 372 U. S. 487 (1963); and the filing-fee case, *Smith v. Bennett*, 365 U. S. 708 (1961). In the transcript cases and the filing-fee case, equal protection grounds are rational because one cannot get review—in any way, shape or form—without the transcript or the fee. But in the right-to-counsel-on-appeal case, the appeal was accessible to the indigent, though without a lawyer.

⁵⁵ 372 U. S. 335, 342–345 (1963).

⁵⁶ 377 U. S. 201 (1964).

⁵⁰ 360 U. S. 315, 324–326 (1959).

⁵¹ 372 U. S. 335 (1963).

⁵² 351 U. S. 12, 17 (1956).

⁵³ *Id.* at 19.

informer, then sought to obtain incriminating admissions from him. The agents installed a radio transmitter in the co-defendant's car; the co-defendant picked up Massiah and had a conversation with him in the car; Massiah talked too much; the agents overheard him through their receiving device and testified to what they overheard at the trial. Mr. Justice Stewart, in delivering the opinion of the Court, resurrected and vitalized the separate concurring opinions in *Spano v. New York*, holding that the sixth amendment had been violated. It can be assumed, therefore, that a combination of the *Gideon* and *Massiah* opinions make the *Massiah* rule equally applicable to state criminal cases.⁵⁷

The Court's unanimity in *Gideon*, however, dissipated in *Massiah*. Mr. Justice White wrote a powerful dissenting opinion, joined by Justices Clark and Harlan, in which it was said:

"It is only a sterile syllogism—an unsound one, besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, *Cicenia v. Lagay*. . . *Crooker v. California*. . . and its extension in this case requires some further explanation, so far unarticulated by the Court.***

"This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion . . . would have a severe and unfortunate impact upon the great bulk of criminal cases."⁵⁸

The dissenters in *Massiah* lamented that the Court's "newly fashioned exclusionary principle"⁵⁹ picks up where the fifth amendment ends. And they forecast that the Court's reasoning—the absence of counsel at the time the admissions were made—would be pertinent to an array of future problems such as when the right to counsel at-

taches, the disposition of the "fruits" of admissions obtained in violation of the new rule, its applicability to state criminal cases and its retroactive potential.⁶⁰ That *Massiah* has opened the door to a decade or more of new problems for the state and federal courts does not appear to be subject to dispute.

One month after *Massiah* the *Escobedo* case came down, depositing some fill in the judicial interstices and giving some "further explanation". *Crooker* was distinguished. In that case the defendant had studied criminal law and the police had advised him of his right to remain silent.⁶¹ And *Cicenia*, being disposed of on the basis of *Crooker*, added nothing to it. "In any event," said the opinion in *Escobedo*, "to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling."⁶² The indictment—the formal charge—was not the magic touchstone determining when the right to counsel attaches:

"It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder."⁶³

ASSISTING THE FOURTEENTH AMENDMENT PROLIXUS

Three separate dissenting opinions were written in *Escobedo*. Mr. Justice White, joined by Justices Clark and Harlan, interpreted the Court's action as an "abandoning of the voluntary-involuntary test for admissibility of confessions,"⁶⁴ and therefore an unwarranted usurpation of powers not delegated to the Court. In attacking the decision as a "new American judge's rule"⁶⁵ applicable to both state and federal courts, "a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders,"⁶⁶ Mr. Justice White suggested that it might be appropriate for a legislature, but not the Court, to decide that a suspect should not be consulted during a criminal investigation, for such a rule

⁵⁷ On the theory that the right to counsel in the state courts is co-extensive with the right to counsel in the federal courts. See *Harvey v. Mississippi*, (No. 22005), where the United States Court of Appeals for the Fifth Circuit held that the *Gideon* rule required the logical extension of the right to counsel to state misdemeanor cases.

⁵⁸ 377 U. S. 201, 209 (1964).

⁵⁹ *Id.* at 209.

⁶⁰ *Id.* at 208, 209.

⁶¹ See n. 43, *supra*.

⁶² 378 U. S. 478, 492 (1964).

⁶³ *Id.* at 486.

⁶⁴ *Id.* at 496.

⁶⁵ *Id.* at 498.

⁶⁶ *Id.* at 496.

"can find no home in any of the provisions of the Constitution."⁶⁷

Mr. Justice Harlan, writing separately, dissented on the basis of *Cicenia v. Lagay* and also said: ". . . I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement."⁶⁸

Mr. Justice Stewart, who had written the Court's opinion in *Massiah*, said that this case was different because judicial proceedings had not been initiated at the time of the interrogation. For him this was a decisive factor:

"It is 'that factor', I submit, which makes all the difference. Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary litigative proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial."⁶⁹

I shall not portend solutions to—nor even pretend to raise—all of the myriad problems which will inevitably flow from the case of *Escobedo v. Illinois*, assuming a certain durability to the new look on the sixth amendment, but nevertheless recalling the language of Justice Brandeis, dissenting in *Jaybird Mining Co. v. Weir*,⁷⁰ that "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." The problems which *Escobedo*, *Massiah* and *Gideon* suggest are most easily left for future decisions of the Supreme Court of the United States. But before that, the scholars will have their turn to grapple with them within the covers of the law reviews. The predictable flood of comment has already begun. The cases are well adapted to the "sport" of Supreme Court guessing games over fourteenth amendment requirements for state criminal procedure, not only within the academic world of the legal profession but also for the state courts most directly affected. I do not imply criticism at all of much needed legal scholarship, but I do criticize the ineffective means we now employ to identify and attempt to resolve the quagmire

⁶⁷ *Id.* at 499.

⁶⁸ *Id.* at 493.

⁶⁹ *Id.* at 493, 494.

of problems arising out of the Supreme Court's twentieth-century awakening to the fourteenth amendment as a fountainhead of law applicable inside of the old boundaries of state criminal cases.

At one time there were two distinct kinds of criminal cases prosecuted in the United States: those in the federal courts, governed by federal law, and those in the state courts, governed by state law. But we have progressed a long way towards "federalizing" state criminal procedure since the old days of *Hurtado v. California*,⁷¹ decided in 1884, *Maxwell v. Dow*,⁷² decided in 1900 and *Twining v. New Jersey*,⁷³ decided in 1908. Trying cases in the state courts no longer involves state law, but state-federal law. Before the change came we had relatively effective machinery for developing and administering criminal procedure. In the federal system, still extant, there were judicial decisions, court rules and the legislation of Congress. The state systems had their counterparts, and they administered criminal justice through them. But as the state systems of criminal justice judicially evolved into state-federal systems, legislation and court rules directly applicable to the state-federal criminal trial failed to develop accordingly.

Professor Allen, in *THE BORDERLAND OF CRIMI-*

⁷⁰ 271 U. S. 609, 619 (1925).

⁷¹ 110 U. S. 516 (1884), holding the fifth amendment requirement of grand jury indictments did not apply to the states. This provision, involving the method of charging an offense, will probably never be overruled unless the Bill of Rights some day is held to apply *en toto* to the states via the fourteenth amendment, a view so far held by ten Justices of the Supreme Court, but never by a majority in one case. See the opinion of Mr. Justice Douglas, concurring in *Gideon v. Wainwright*, 372 U. S. 335, 345-347 (1963).

⁷² 176 U. S. 606 (1900), holding the sixth amendment's guarantee of jury trial does not apply to state criminal prosecutions. But the Court has held that when a state does provide a jury trial, the fourteenth amendment demands that it be a fair one. *Irvin v. Dowd*, 366 U. S. 717 (1961), and *Turner v. Louisiana*, 85S.Ct.546 (1965). Apart from innovations in jury trials, the question is probably moot since it appears that every state constitution provides for trial by jury. See *Turner v. Louisiana*, *supra*, at 549, n.9.

⁷³ 211 U. S. 78 (1908). *Twining* and *Adamson v. California*, 332 U. S. 46 (1947), both involving questions as to whether comment upon the failure of a state defendant to testify violated the privilege against self-incrimination, were expressly overruled in *Malloy v. Hogan*, 378 U. S. 1, 6 (1964), holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." And see *Griffin v. California*, 33 U.S.L. WEEK 4382 (U.S. April 28, 1965), holding that comment on failure to testify violates the fifth amendment.

NAL JUSTICE, has addressed himself to the problem I am suggesting, though from a different vantage point:

"In the area of criminal procedure, no development in the recent past is of greater significance than the increasing exercise of judicial supervision over the state systems of criminal justice by the Supreme Court of the United States. The expanding definition of due process of law under the Fourteenth Amendment has imposed on the states a new catalogue of restraints, some of which were scarcely contemplated as recently as a generation ago . . . In the exercise of its supervisory functions the Court has frequently brought to public attention deficiencies in state criminal procedural law and practice and has thereby opened the way to intelligent local legislative response. This is of particular importance because, basically, the problems in the area are legislative in character. It is becoming increasingly evident that, important as the Court's role has been and—one may hope—will continue to be, its function is necessarily a limited one. . . . If we are to make further significant progress toward efficiency and decency, we shall have to achieve it principally through legislative initiative. And we shall have to recognize that the problems are, in the larger part, not those of the limits of constitutional power but of policy and common sense."⁷⁴

And the Supreme Court, as its dissenting members often freely concede, is not our sole repository for common sense—and certainly not for efficiency in the administration of state criminal justice.

The readily traceable reason for the inaction of Congress and the absence of court rules specially promulgated by the Supreme Court for the area of state-federal criminal procedure is the division of powers between the states and the federal government inherent in our history and emphasized in the ninth and tenth amendments. The reason

⁷⁴ At pp. 135-136. As the quotation indicates, Professor Allen is speaking about local legislation. Following the passage quoted, he says, "It is important to recognize that the administration of criminal law is largely a function of local government." (p. 138.) If, by "administration," Professor Allen means conducting and carrying on, I would agree with him. But if he means, to use Webster, "administration"—"In its broadest sense, the activity of the state in the exercise of its political powers, including the action of the legislative, judicial, and executive departments," I would agree with him only as to the "state" part of the state-federal criminal trial the state courts are now administering.

rested on bedrock when that division existed and where it legitimately continues to exist. But when the reservation of powers of the states in the criminal area is brought into the penumbra of the federal system, it is inefficient, foolhardy and contrary to our form of government to permit the federal-fourteenth amendment part of state-federal criminal procedure to drift forward, backward, or stand still, exclusively on the pages of the *Supreme Court Reports*. Moreover, it is a disservice to make state law enforcement officials and state courts flounder in their duties upon a sea of doubt over which they have no navigable control. If the states are to operate the state-federal criminal system, they ought to be allowed to participate in the full panoply of governmental processes which control that system—which means legislative participation as well as judicial imposition. The resolution of the demands and challenges of the fourteenth amendment to afford fair criminal proceedings against the citizen and on behalf of the state should not be exclusively reposed in the Supreme Court.

It is, of course, true that the states are left to their own devices in meeting the dictates of the Supreme Court. But obedience, even when it is willing and eager, can be misguided and—when it comes to operating a system of criminal justice within a state—grossly inefficient. A recent case in point is *Douglas v. California*.⁷⁵ I do not suggest that we need to find a way to curb the Court. On the contrary, as to the Court, I suggest that to supplement its present role in making state-federal criminal law on a case-by-case basis, it be encouraged to perform the further function of promulgating rules which would be helpful to the states and lead to greater efficiency in the administration of the state-federal law. The scope of these rules would be within the range of power

⁷⁵ 372 U. S. 352 (1963). The question in *Douglas* was whether an indigent convict could be denied the assistance of counsel on the first appeal. California set up a procedure under which the District Court of Appeal made an independent investigation of the record to determine, preliminarily, whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. The Supreme Court said: "In spite of California's forward treatment of indigents, under its present practice the type of appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel. If he can, the appellate court passes on the merits of his case after having the full benefit of written briefs and oral arguments by counsel. If he cannot, the appellate court is forced to prejudge the merits before it can determine whether counsel should be provided." *Id.* at 355, 356.

generally conceded to appellate courts administering laws over which they have jurisdiction.

Professor Allen's point is sound that many of the problems of fair and decent criminal procedure are, apart from those of the limits of constitutional power, ones of policy and common sense. And legislative initiative on the local level should not preclude legislation for the local level by a conglomerate legislature representing thousands of localities and fifty states with *common* local problems under the fourteenth amendment. If the Congress is intelligently advised, perhaps through a Committee on State-Federal Criminal Law with local sub-groups, legislation meeting the demands of decency and efficiency to the citizens prosecuted and the state as law-enforcer could be passed and included in a title to the United States code recognizing and implementing the existing, growing body of state-federal case law under the fourteenth amendment.

The relationship of the states to the federal government in this area has understandably, but needlessly, been a touchy subject. Fourteenth amendment doctrine has been developed by the Court under a tip-toe method which the states have found leaves the scuff-marks of the big boot. The Supreme Court, while reassuring the states of exclusive jurisdiction in procedural matters concerning the operation of state systems of criminal justice, at the same time dictates requirements under the fourteenth amendment which generally affect the most important aspects of criminal procedure followed within the states. Consider the then thought to be reassuring language of Mr. Justice Burton in *Bute v. Illinois*, a 1948 decision following the now discarded rule of *Betts v. Brady*:

"The Fourteenth Amendment. . . does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases.*** This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other judicial standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . . This clause in the Fourteenth Amendment leaves room for much of

the freedom which, under our Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts.⁷⁶

One of the questions raised by *Escobedo v. Illinois* is whether a person under police interrogation is entitled to be affirmatively advised that he has a right to counsel, or whether the suspect waives that right by failing to request counsel. The California Supreme Court recently put two decisions (*Escobedo* and *Carnley v. Cochran*⁷⁷) together and voided a confession to murder committed within the walls of San Quentin Prison with an opinion which at least causes one to wonder whether the court based its decision on reasoned judgment or feelings of awesome benevolence resulting from a misconception of its role as a state court in the adjudicative process of federal constitutional rights:

"The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it."⁷⁸

⁷⁶ 333 U. S. 640, 649, 650 (1947). One does better, perhaps, when he catches the Justices speaking off the cuff. Justice Clark recently quoted *Leviticus* 24:22, "Ye shall have one manner of law, as well for the stranger as for one of your own country." Evolving 'one manner of law' from the Sixth Amendment's 'assistance of counsel' clause has been as slow as Job's Tortoise and twice as tough." Clark, *The Sixth Amendment and The Law of The Land*, 8 ST. LOUIS U. L. REV. (1963).

⁷⁷ 369 U. S. 506 (1962), holding in a non-capital felony case, where defendant is entitled to counsel under the *Betts* formula, that waiver of counsel will not be presumed unless the record shows that the defendant was offered counsel and thereafter understandingly rejected the offer.

⁷⁸ *People v. Dorado*, 398 P. 2d 361, 369-370 (Cal. 1965). One might think about the California court's decision in light of the remarks of Mr. Justice Brennan in his address, *Some Aspects of Federalism*, delivered to the Conference of Chief Justices, New York City, Aug. 7, 1964 (unpublished), at 4-5: "Of course, the state courts also have a duty to decide issues of federal law that are raised in cases before them. As our Court has said [*Robb v. Connolly*, 111 U. S. 624, 637,] the obligation rests 'upon the State courts, equally with the courts of the Union . . . to guard, enforce, and protect every right granted or secured by the Constitution of

The Supreme Court of Oregon has also held that the effective warning of both the right to remain silent and the right to counsel is a necessary prerequisite to the validity of a confession.⁷⁹ And the Supreme Court of Rhode Island, following the rationale of the California and Oregon courts, thought that the *Escobedo* decision made it "clear" that a defendant merely requested by police to go to the police station for questioning must be advised, at the time of the request, that he has a right to the assistance of counsel *and* a right to remain silent.⁸⁰

Another view, however, is that taken by the Supreme Court of Illinois, which said:

"We do not . . . read the *Escobedo* case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admission of guilt."⁸¹

And many other state courts have followed the rationale of the Supreme Court of Illinois.⁸²

the United States . . . ' Indeed, state courts have often been notably perceptive and forthright, and have led the way for the federal courts. Some state courts, however, have taken a different approach; they have seemed reluctant to test state authority against the Federal Constitution, apparently feeling that the pronouncement that federal law prevails over state law is not for a state court to make. For the United States Supreme Court, in these cases of federal-state issues that are so often not only important but also controversial and emotion-laden, there is no such easy way out—in President Truman's words, 'The buck stops here'."

⁷⁹ *State v. Neely*, 398 P.2d 482 (Ore. 1965).

⁸⁰ *State v. Dufour*, 206 A.2d 82 (R.I. 1965).

⁸¹ *People v. Hartgraves*, 202 N.E.2d 33, 35 (Ill. 1964). The Illinois court also said, "In the *Escobedo* case, the United States Supreme Court held that a refusal of a request to consult with counsel, coupled with a failure to warn the accused of his right to remain silent, amounted to a denial of the 'Assistance of Counsel' . . . In the present case the trial court considered testimony of the failure to warn the accused, and there is no evidence that the defendant requested the assistance of counsel. Under all the facts and circumstances of this case [note the "facts and circumstances" rule in action] we hold that the failure to warn the accused did not compel a rejection of the confession."

⁸² See *State v. Kitashiro*, 397 P. 2d 558 (Hawaii 1964); *State v. Hall*, 397 P.2d 261 (Idaho 1964); *Hayden v. State*, 201 N.E.2d 329 (Ind. 1964); *State v. Fox*, 131 N.W.2d 684 (Iowa 1964); *Carson v. Commonwealth*, 382 S.W.2d 85 (Ky. 1964); *Anderson v. State*, 205 A.2d 281 (Md. 1964); *Bean v. State*, 398 P.2d 251 (Nev. 1965); *State v. Vigliano*, 203 A. 2d 657 (N. J. 1964); *Pece v. Cox*, 396 P.2d 422 (N.M. 1964); *State v. Stinson*, 139 S.E.2d 558 (N.C. 1965); *Commonwealth v. Coyle*, 203 A.2d 782 (Pa. 1964); *Turner v. State*, 384 S.W.2d 879 (Tex. 1964); *Ward v. Commonwealth*, 138 S.E.2d 293 (Va. 1964); *Browne v. State*, 131 N.W.2d 169 (Wis. 1964).

Perhaps the following statement of a New York trial judge, however, more candidly indicates the friction between the state and federal courts arising out of the "handcuffing" of the states in the new state-federal criminal procedure:

"It may well be that the conclusion of the Supreme Court of the State of California [in *Dorado*] . . . will be the ultimate indisputable determination of the United States Supreme Court if the question reaches that Court, as it is now constituted, but until there has been an appellate ruling to the contrary, which is binding upon the court, I will continue to rule that, unless counsel is requested, a confession or a statement made by a defendant under the circumstances here present is admissible against him, and that he need not be cautioned that anything he says will be used against him."⁸³

And in a recent case from Tennessee, where a confession clearly had to be excluded under direct application of the *Escobedo* rule, we find rancor in addition to candor:

"The trial judge in colloquy between himself and counsel for the defendant at one point, after an objection had been made to the oral confession, among other things said: ' . . . and this court is not going to be bound by what the Federal courts have said about it.' Of course, a statement of this kind is rather unfortunate in a record, and should not have been made, because all of us know that in taking the oath of office to act as a judge we take the oath to abide by the Constitution of the United States as well as the Constitution of the State of Tennessee. . . . The Supreme Court of the United States has passed on questions as here presented and their decisions on such questions is mandatory on us. It is obligatory on all State judges to follow such a directive."⁸⁴

Can it really be said that the problems confronting the California, Oregon, Rhode Island and Illinois Supreme Courts, the New York trial judge, the one from Tennessee and, no doubt, hundreds of other trial judges, are "local" problems? Are there "varieties of processes" open to the state courts to be divined out of their own local, historical or modern settings—the fifty separate precincts—to comport with "this *due* process"

⁸³ *People v. Agar*, 33 U. S. L. WEEK 2247 (N. Y. Sup. Ct., Nov. 12, 1964).

⁸⁴ *Campbell v. State*, 384 S.W.2d 4, 7 (Tenn. 1964).

which, it is said, is not an equivalent for federal process or the process of any given state? Is the question whether a man charged with misdemeanor is entitled to appointment of counsel, a question left over from *Gideon*, a "local" question, assuming the man's indigency? Is whether a man suspected of, say, murder entitled to be provided with a free lawyer if he is poor and wants one during police interrogation, a "local" question? Is whether *Escobedo* should be made to apply retrospectively subject to "local" resolution? Or whether we should do away with the voluntary confession altogether? Or what rights a man ought to be told he has before we elicit a confession from him? Or just how to go about "effectively" telling him about those rights? These questions could be posed for quite some time before one got down to the really "local" issues: how to charge an offense, as long as one is intelligibly charged; how to provide counsel, as long as counsel is provided; how to provide appellate review of convictions, as long as it is open to all; how to conduct a post-conviction hearing, as long as there is a hearing; and how to conduct a criminal trial, as long as it is conducted fairly. The local and the national procedures can be sorted out for quite some time, and this is the hub of what I propose we do; not just by a majority, but by the fifty states through the Congress.

Until the Supreme Court of the United States articulates answers to these questions, law enforcement officials will continue to perform their duties as they see them. There is no mysterious process at arriving at the answers that makes the Supreme Court more fit to articulate them than the Congress. There is nothing inherent in our system, other than Congressional lethargy, some lack of imagination, the force of legislative inertia at rest, and the willingness to pass the buck to judicial interpolation, that restricts Congress from legislating fourteenth amendment requirements for state criminal processes.

We do not have to nationalize the criminal procedure of the several States. But we do have to "fourteenth amendentize" their procedure. And the code of fourteenth amendment criminal procedure that we have to start thinking about cannot be thought about in terms of traditional procedural codes. For the code that will have to be worked out with all of the originality that went into drafting the Constitution does not now exist. To be sure, the Congress will have to draw on the best

talent in this nation to do the sorting-out and, indeed, the drafting. The statesmen will have to be assembled. For until the job is done, with the full participation of the states, we are going to keep hearing statements like the one of the trial judge from Tennessee, and someone is going to feel the pinches of those statements.

We do not have to search very far for the answer to the question: does the Congress have authority to enact legislation for the federal part of the state-federal trial that the states are now administering? Section five of the fourteenth amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Mr. Justice Strong, construing this provision for the Supreme Court of the United States in *Ex Parte Virginia*,⁸⁵ stated:

"It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendment fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view . . . is brought within the domain of congressional power.

"Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact."

That the concept of section five of the fourteenth amendment as stated in *Ex Parte Virginia* still has vitality is borne out by a 1961 decision of the Supreme Court, where Mr. Justice Douglas, speaking for the Court, said:

"There can be no doubt at least since *Ex Parte Virginia* . . . that Congress has the power to enforce provisions of the Fourteenth Amendment."⁸⁶

⁸⁵ 100 U. S. 339, 345-346 (1879).

⁸⁶ *Monroe v. Pape*, 365 U. S. 167, 171-172 (1961).

Assuming Congressional authority to enact a code of fourteenth amendment criminal procedure applicable to state criminal cases, and further assuming a desire on the part of Congress to legislate with a genuine sensitivity to concepts of fairness developed by the Supreme Court and those still being debated in chambers, such a code could contribute substantially to the efficient and sound administration of criminal justice in the United States. Congressional participation potentially offers a greater degree of certainty and predictability for state systems of criminal justice. It offers a wider forum for resolution of important problems confronting the administration of criminal justice, including the opportunity for Congress to solicit the reasoned judgment of members of the state judiciary on important constitutional problems confronting the nation—not just the judiciary.

Justice Walter V. Schaefer of the Supreme Court of Illinois has said that “[s]uperimposed upon the recency of many of our procedural safeguards is the novelty of federal intervention in the field.”⁸⁷ Since Justice Schaefer made that statement in 1956 the “novelty” has begun to wear off. Nevertheless we remain lulled by the sense of transiency that goes with novelty. The Supreme Court, standing at the summit of our constitutional system, will continue to intervene on a case-by-case basis so long as we—through our Congress—continue to default in our responsibilities to provide uniform machinery to meet the ever-evolving demands and challenges of the fourteenth amendment. But if we use it, there is reason to believe the Court will heed our common sense.

⁸⁷ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2 (1956).