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THE SUPREME COURT AND CRIMINAL PROCEDURE*

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Recent United States Supreme Court decisions in the field of criminal procedure[1] have been directed toward correcting a number of injustices previously imposed upon the criminal defendant. In striking down certain procedures, some of which have been long established in many states, the Court has made some critics fear that these decisions are stating new principles to justify the Court's distaste for some of the practices, and that although injustices have occurred, the Court has over-compensated by weighting the scales too heavily in favor of the criminal defendant. It should be noted at the outset, however, that these critics, in voicing their fears, seem to view the process of criminal justice primarily for its deterrent value and neglect the punishment and the rehabilitative goals of the process. The resulting apprehension is felt among prosecuting attorneys, law-enforcement officers, trial and appellate judges, and members of the general public.[2] In the hope of dispelling at least some of the apprehension (or frustration), this article shall comment briefly upon a few of the problems that have been presented as a result of these decisions.

Partially responsible for the problems in this area are divergent views regarding two of the objectives of our Constitution: to "insure domestic Tranquility . . . and [to] secure the Blessings of Liberty. . . ."[3] Much of the recent criticism of the Court seems to reflect a mistaken view that the two goals are mutually exclusive and that the Court has ignored one — domestic tranquility — to highlight the other, rather than having sought to establish harmony between the objectives. While the two goals may be to some extent conflicting,

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1. Although there have been a number of significant decisions in this field in the last few decades, by "recent" I refer primarily to Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); and Mapp v. Ohio, 367 U.S. 643 (1961).

2. Some of the apprehension felt by members of the public may be due to misinterpretations of the decisions by those who gratuitously undertake to "explain" them to the public. These gratuitous explanations are too often biased by the particular commitment of the person offering the explanation to but a single aspect of the process of the administration of criminal justice.

3. U.S. CONST. preamble.

they are not mutually exclusive; the conflict can be resolved so that both objectives receive due attention in law-enforcement procedure.

Perhaps a general re-examination of our goals is necessary, for it may lead not only to the resolution of such conflicts, but also to the realization that in its weighing of the interests, the Court is not enunciating new principles. Whatever "newness" exists is due to the injection of a new vitality into the Constitution, along with a fresh application and a keener awareness of these viable principles. With the present changes in the law and its application, the challenge today facing the bench, the bar, the police, the law school and the public is to understand the nature and significance of the changes. Only from such an understanding can there be an intelligent adaptation to those changes.

I.

Impeding the progress of this adaptation is the knowledge of the fact that crime in the United States has been increasing at an alarming rate. One source states that in the period from 1955 to 1960 the number of reported crimes increased 4 times faster than the population.[4] In that same period there was a nine percent annual increase in arrests of persons under 18 years of age.[5]

Combating this increase in crime has called for highly developed methods of investigation. Today's policeman is armed with a greater array of methods and weapons for scientific crime detection and has at his disposal more advanced means of implementing these weapons than did his counterparts of the 1920's and 1930's. His communications are better, his records more complete. Furthermore, the number and scope of police educational programs have been enlarged greatly over the last few years. Some of these programs for the training of local police are conducted on the local level, while others are conducted through the expanded schools and programs of the F.B.I. The fact that the policemen of today are well equipped with the machinery to apprehend suspects can be attributed largely to these factors.

As the police have become better acquainted with the improved methods for fighting crime, they have, fortunately, gravitated away from those activities which the Supreme Court has criticized for decades. For example, brutality no longer constitutes a common element of police investigation, and we may assume that even in the larger urban centers acts of brutality now occur relatively infrequently.

It would be remiss not to point out that much of the improvement in police practices is due to the prosecuting officers of the states, who have recognized that a large part of their responsibility as the public's lawyers involves translating the dictates of the recent court decisions and legislative enactments into workable standards that can be explained meaningfully to the police. Since the public's attorney still may enter a criminal case as early as the accused's attorney, his presence and increased participation enable him to oversee the various procedures used by the police at all of the critical pretrial stages.

4. 1962 UNIFORM CRIME REP. 1.
5. *Ibid.*

II.

Although it once may have been the case that state-convicted prisoners, allegedly deprived of constitutional rights, had little opportunity to contest their convictions in the state courts, this situation has changed. Many states have enacted post-conviction statutes providing prisoners with more ready access to the state courts.

Maryland was among the first of the states to enact post-conviction legislation.[6] Although as originally interpreted by the state courts, the post-conviction statute limited the types of alleged deprivations reviewable through this procedure, gradually the scope of review has been enlarged so that at present it safely may be said that all alleged deprivations may be considered on collateral attack in the state courts.[7]

That post-conviction procedures are a vital adjunct to our federal system was emphasized by Mr. Justice Brennan, concurring in *Case v. Nebraska*:[8]

> Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective corrective processes, the States assumed this burden, the exhaustion requirement of 28 U.S.C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. . . . Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of Townsend v. Sain were met, prove unnecessary.[9]

In urging that the states accept their responsibility to curtail abridgement of constitutional rights of the accused, Dean Griswold, of the Harvard Law School, addressed the Cleveland Bar Association as follows:

> For, after all, the basic responsibility for the enforcement of the criminal law remains with the States. The States are, or should be, as much concerned with high standards as is the federal government. The State should, in my view, welcome the determinations of the Supreme Court that the high standards prescribed by our Federal Constitution are to be taken seriously and should be enforced. What is needed now is for the States

6. Laws of Md., ch. 44 (1958), MD. CODE ANN. art. 27, §§ 645A–J (Supp. 1965).
7. *Cf.* Hunt v. Warden, 240 Md. 30, 212 A.2d 276 (1965).
8. 381 U.S. 336 (1965).
9. *Id.* at 344–45 (concurring opinion).

> to accept this responsibility, and to adopt means to carry it out. With proper explanation and understanding, this can, I believe, be done without impairing our enforcement of the criminal law. When the States do fully meet this responsibility we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government.[10]

The willingness of the states to examine and correct possible injustices is a healthy sign of the meeting of responsibilities by each of the governments in our system of federalism. It is pleasing that Maryland has been at the fore, and that she has realized that the recent pronouncements by the Court need not cause disruption of the state judicial machinery.

III.

Much of the interest in recent Court decisions results from the changes to which those decisions have led,[11] and from the fact that we are now quite concerned with the increase in crime. To begin with, the author does not believe that there is any causal relationship between decisions providing for fair and decent treatment of the accused and the upsurge in crime. Rather, the increase in crime would appear to be due largely to the increase in urban population and the increased complexity of urban life. Further discussion of this point is left to the sociologists.

Second, the courts have been criticized recently for placing convicted criminals on the streets. This criticism is also unjustified. The recent decisions have not resulted, as is often claimed, in turning loose criminals who have been convicted in the state courts. The figures which are available — the Maryland state courts do not keep such records, so that federal court records must suffice — do not bear out these fears. For example, in the District of Maryland, from July 1, 1964, to June 30, 1965, 214 petitions for habeas corpus were filed. During that same period, 194 petitions were terminated. Of that 194, 162 were terminated without a hearing (3 petitioners receiving relief of some sort), and 32 were terminated after a hearing (6 petitioners

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10. Address given on May 13, 1965; quoted by Mr. Justice Brennan in Case v. Nebraska, 381 U.S. 336, at 344–45 n.7 (1965).

11. A recent article noted that, "To the great distress of law enforcement officials, the Supreme Court will now reverse any conviction . . . which rested on the defendant's confession obtained by uncivilized practices. These need not even involve physical coercion; mere mental tormenting is sufficiently obnoxious." Mueller, *Of Liberalism and Conservatism in American Criminal Law*, 3 DUQUESNE L. REV. 137, 153 (1965).

I do not feel that the prohibition of "uncivilized practices" sparks great distress among today's law-enforcement officials — at least, not among those officials supervising law-enforcement activities. The concern today is with police practices falling short of actual brutality. It is in determining how much latitude the police should be allowed during their interrogations. Also, it is in determining precisely the point at which the various rights afforded the individual attach.

receiving relief of some sort). Thus, of the 194 terminated, relief was granted in only 4.2 percent.[12]

By no means does "relief granted" mean that the successful petitioner walks out of the courtroom a free man. First, relief may consist only of the reduction of an illegally imposed sentence. Second, it merely may upset one of several concurrent or consecutive sentences. Third, where the original trial is found to have been defective, the state has the option to retry the petitioner, and in most cases it does so. For example, three of the six petitioners[13] receiving some relief after a hearing in this district during fiscal 1965 were retried and were re-convicted at the new trial; a fourth is at this time awaiting retrial.[14] The ultimate disposition of the other two has not yet been ascertained, but one should not assume that they have been freed.[15] Thus, even those petitioners who are granted the writ of habeas corpus find that their ultimate release often may be like the fruit of Tantalus — never attained.

If the recent decisions do not cause crime or release convicts, what do they accomplish? If the reader will pardon the trite observation, the decisions give vitality to the proposition that both the public and the accused are entitled to swift, impartial and complete justice. Of course, that proposition is not disputed seriously. The disagreements among judges and lawyers revolve around the *content* of that impartial justice and around the means of attaining it.

In recognizing the interests being balanced and the ends being sought, the observer or critic should become aware of the *overall* development of criminal justice. To the extent that the recent decisions are isolated and viewed outside of their context in the development of criminal justice, the true impact and intent of these decisions are missed. In failing to recognize the relationship of an *Escobedo*,[16] *Griffin*,[17] or *Mapp*[18] to the entire context of criminal justice, and in searching back only as far as the holding of such a case, a judge or a lawyer becomes more likely to misapply a particular recent decision. When this occurs, criticism is justified, although the criticism should be directed against the *application* of the recent decision and not against the decision itself.

In a case arguably calling for the application of *Massiah*,[19] Judge Irving Kaufman of the U.S. Court of Appeals for the Second Circuit did not mechanically apply the holding of *Massiah* to the case under

12. The above figures appear in Table C2 of the fiscal 1965 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. This same table indicates that during fiscal 1965, 4,584 habeas corpus petitions were terminated in all districts, with some relief granted in 154, or 3.1% of the cases.

13. Docket numbers in the United States District Court for the District of Maryland are 14473, 14702, and 14753.

14. Docket number 15636.

15. Nor should it be assumed that the successful petitioner fares better — or even as well — on his sentence at the second trial. See the excellent discussion of the implications of retrials with possibly harsher sentences in Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

16. Escobedo v. Illinois, 378 U.S. 478 (1964).

17. Griffin v. California, 380 U.S. 609 (1965).

18. Mapp v. Ohio, 367 U.S. 643 (1961).

19. Massiah v. United States, 377 U.S. 201 (1964).

review, but instead related it to the interests being balanced and to his view of our system of criminal justice:

> At least from the time of Powell v. Alabama, . . . American courts have recognized that a society which denies the assistance of counsel to a defendant at a crucial stage in a criminal proceeding cannot be assured that fair and impartial justice — the indispensable objective of any judicial system — has truly been achieved. Although the road has not been without its detours, the Supreme Court's decisions in [*Gideon* and *Massiah*] . . . have gone far to redress the balance between an often impoverished and generally untutored defendant and the seemingly all-powerful state, with its battery of trained attorneys and its complement of experienced investigators. But if, at times, society's interest in bringing the guilty to justice has necessarily been subordinated to its concern for protecting the innocent or maintaining the integrity of [its] police, prosecutorial and judicial machinery, that interest has never been — and in a civilized society can never be — entirely forgotten. The day has certainly not come when courts will set a convicted criminal free for no reason other than that some practice of police or prosecution — wholly unrelated to the conviction itself — did not meet with their approval. If that unhappy day should ever arrive, the often-heard criticism that law and lawyers are interested only in "technicalities" will have a ring of truth, and courts may rightfully be accused of exalting form above substance. We cannot believe that the Courts which decided Powell and Gideon and Massiah, decisions which touched at the core of our adversary system, were concerned only with technicalities of form or legal niceties. The opinion in those cases, rather, reflected an intense belief that the rules which they established were vital if the fundamental rights safeguarded by our Constitution were to become a living reality. They were designed to ensure that a defendant unequipped or not permitted to engage counsel would not suffer for that reason; they were not intended merely to provide a defendant . . . , whose interrogation without counsel contributed in no way to his conviction, with a technical means to vitiate a fair trial. If we were mechanically to invoke Massiah to reverse [the particular conviction under consideration] . . . , we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice.[20]

It is submitted that this approach is the correct one and should be recognized by lawyers and laymen as setting forth the real basis of recent Supreme Court pronouncements.

It must be remembered that the Court is trying to *achieve* or *maintain* a balance between individual and societal rights, or as stated earlier, between domestic tranquility and the blessings of liberty.

20. United States v. Guerra, 334 F.2d 138, 146–47 (2d Cir.), *cert. denied*, 379 U.S. 936 (1964).

Concern for that balance has led to an interesting exchange of letters between Chief Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia and Attorney General Katzenbach.[21] Judge Bazelon was critical of certain provisions contained in Preliminary Draft Number 1 of the proposed American Law Institute Model Code of Pre-Arraignment Procedure. The provisions allowing questioning by police for from four to twenty-four hours would, he felt, "primarily affect the poor and, in particular, the poor Negro citizen." He doubted, for example, that the police would arrest the board of directors of a corporation which was suspected of criminal anti-trust activities.

Attorney General Katzenbach found this objection "particularly irrelevant." The differences in treatment between the "poor" and the "directors" are justified in view of the nature of the crimes each is likely to have committed; one who has just committed a burglary or an armed robbery is more likely to flee or to harm others while on the street than is one who has engaged in criminal anti-trust activities. Poverty happens to be a breeding ground for crime. For that reason, police activities are more likely to affect the poor than the rich. The police are more involved with the poor because they must go where the crime is, not because they intentionally discriminate against the poor. The separation of the guilty from the innocent is still a goal of criminal justice, and *this* is the only discrimination that is sought to be made. Fortunately, however, neither Judge Bazelon nor Attorney General Katzenbach foresees a complete breakdown of either domestic tranquility or law and order, although Attorney General Katzenbach does admit to a danger of moving in the direction of a breakdown in enforcement since "absolute equality of result could be achieved in the interrogatory stage . . . only by deliberately foregoing reliable evidence and releasing guilty men."[22]

IV.

In a climate of an increasing rate of crime, the courts, including the Supreme Court, often are at least partially responsible for whatever fear of possible repercussions has been engendered by the recent decisions. Much of that fear exists not because of that which the courts have *said,* but because of what they have left *unsaid.* That is, much of the frustration felt by prosecutors, police, and the lower courts is not so much the result of a changing standard as it is with the failure to articulate a meaningful standard capable of consistent application.

This is not to imply that *all* doubt or uncertainty can be removed, that a decision with the significance of *Escobedo, Gideon, Massiah, Griffin,* or *Mapp* could have been crystal-clear when rendered. But a large part of the uncertainty could have been obviated and many problems could have been anticipated and avoided.

For example, the important question of the retroactivity of *Mapp* was not resolved by the Court in that case. Thus, the lower courts were

21. The full text of those letters appears in the Washington Evening Star, August 4, 1965, § A, pp. 4–5.

22. *Id.* at 4.

without any guidance whatsoever when hearing collateral attacks upon convictions finalized prior to *Mapp*. Having little precedent for such an issue, the courts were forced to rely largely upon conjecture. The conflict among the circuits[23] became marked enough to cast doubt upon the efficacy of the judicial process.

In settling the issue by finding *Mapp* to be prospective only, the Court did much to answer or perhaps placate one fear of Mr. Justice White, who in his dissent in *Escobedo* implied that the Court was predisposed in favor of criminals and that it distrusted police action.[24] The decision in *Linkletter v. Walker*[25] shows clearly that the Court is mindful of the necessity to weigh alternatives rather than to concern itself with only one factor:

> [W]e must look to the purpose of the *Mapp* rule . . . and the effect on the administration of justice of a retrospective application of *Mapp*. . . .
>
> *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrence to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late. . . .
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> * * * * * *
>
> Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced, or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.[26]

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23. "About the only point upon which there was agreement . . . was that our opinion in *Mapp* did not foreclose the question." Linkletter v. Walker, 381 U.S. 618, 620 n.2 (1965). The cases and commentators taking both sides of the retroactivity question are collected in that footnote.

24. "This [decision in *Escobedo*] . . . is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere, ..." Mr. Justice White, dissenting in Escobedo v. Illinois, 378 U.S. 478, at 498 (1964).

25. 381 U.S. 618 (1965).

26. *Id.* at 636–38.

Now that *Linkletter* has been decided, the critics may have reason to realign their thoughts with respect to the Court's position in this area. As it has turned out, some of the criticism was without merit; also, the criticism may have been damaging, for in anticipating the end of effective law enforcement the critics have aroused fears to an intensity difficult for even a *Linkletter* to allay.

The Supreme Court could have avoided the confusion and conflicts which obviously were to follow by determining the retroactivity issue when it rendered the *Mapp* decision. For example, in *Jackson v. Denno*,[27] Mr. Justice White, speaking for the Court, stated:

> It is both practical and desirable that in *cases to be tried hereafter* a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. But as to Jackson, who has already been convicted and now seeks collateral relief, we cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession . . . is fairly determined to be voluntary. . . .[28]

That statement left no running room for judges inclined to extend the mandates of the Court.

The turmoil caused by the *Escobedo* decision is even more severe, for it raises many more questions and leaves them unanswered. For example: (1) Must there be a request for counsel in order for *Escobedo* to apply? (2) Is this issue dependent upon whether the fifth or the sixth amendment applies? (3) Do both of the amendments apply, and if so, in different proportions? (4) If *Escobedo* vindicates a fifth amendment right, does the denial of a request for counsel *ipso facto* characterize any confession thereafter obtained as involuntary, or must consideration be given to the totality of circumstances? (5) When does the investigative process reach the accusatory stage? (6) Assuming that only a sixth amendment right is involved, is the turning point from an investigative process to the accusatory stage to be taken as the first of the "critical stages" at which the sixth amendment rights attach? (7) Do the sixth amendment rights only attach when for all practical purposes formal judicial proceedings have been initiated?[29] (8) Are the points in time described in the last two questions the same? (9) Is the decision to be applied retroactively?[30]

This paper does not purport to answer all of these questions, but will illustrate how, with respect to one or two of them, the Court could have provided more guidance and perhaps avoided much of the criticism and confusion.

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27. 378 U.S. 368 (1964).

28. *Id.* at 395–96 (emphasis added).

29. "Petitioner had, for the all practical purposes, already been charged with murder." Escobedo v. Illinois, 378 U.S. 478, at 486 (1964).

30. The Supreme Court has just granted certiorari in four *Escobedo*-type cases, and these questions soon will receive a definitive answer. Vignera v. New York, 15 N.Y.2d 970, 207 N.E.2d 527 (1965), *cert. granted*, 86 S.Ct. 320 (1965); Johnson v. New Jersey, 43 N.J. 572, 206 A.2d 737 (1965), *cert. granted*, 86 S.Ct. 318 (1965); Westover v. United States, 342 F.2d 684 (9th Cir. 1965), *cert. granted*, 86 S.Ct. 318 (1965); Miranda v. Arizona, 401 P.2d 721 (Ariz. 1965), *cert. granted*, 86 S.Ct. 320 (1965).

On its peculiar facts, *Escobedo* vindicates a sixth amendment right. Indeed, the Court so stated.[31] But the factors resulting in the denial of a sixth amendment right also might have established a violation of the fifth amendment. Where a suspect has requested counsel, it seems that the denial of the request may be viewed as having a coercive effect. Also, the denial serves to illustrate to the court that the suspect is in a hostile environment and that he had better cooperate. Where the request has not been made, this objective indication of hostility — the denial — is lacking.[32] If the request and subsequent denial are crucial to the *Escobedo* holding, an ipso facto test of coercion has been established; but the ipso facto nature of the test is necessary if the case, viewed as involving fifth amendment rights, is to be given efficacy.

But even if the case is viewed only as a sixth amendment case, it would seem that there must still be a request, for the denial of the request indicates to the courts that a critical stage has been reached. The denial of the request for counsel, made by one in custody, is an objective indication that a general investigation has reached the accusatory stage, or that "for all practical purposes, [the suspect has] already been charged with murder."[33] Since the sixth amendment rights serve to protect the innocent, the denial of a request for counsel becomes an important factor; although every moment in police custody will be viewed as part of the accusatory process by one who has actually committed the crime being investigated, the suspect who in actuality is innocent, although understandably indignant at being detained, will more likely feel "accused" when his legitimate request for counsel has been denied. Thus, the request should be made in either case.

The jurisdictions are split on the necessity for a request, just as they had been split on the retroactivity of *Mapp*. For example, the Court of Appeals for the Third Circuit[34] and the Supreme Court of California[35] have decided that a request need not be made for *Escobedo* to apply.[36] While the issue remains unsettled, uniformity will not be

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31. See 378 U.S. at 490–91, where the Court declared:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and 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. . . .

32. Very brief mention should be made of the English practice with respect to the interrogation system. In spite of the Judges' Rules in that country limiting questioning, the fruits of such questioning — namely, confessions — seldom are held inadmissible. See Williams, *Questioning by the Police: Some Practical Considerations*, 1960 CRIM. L. REV. 325, 331–32, cited by Mr. Justice White, dissenting in *Escobedo;* see generally MCCORMICK, EVIDENCE §§ 116, 119 (1954).

33. 378 U.S. at 486.

34. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), *rehearing denied* (Oct. 13, 1965).

35. People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361, *cert. denied,* 381 U.S. 937 (1965).

36. The justification of the cases holding that no request is necessary seems to be that to require a request discriminates against those unaware of their rights and in favor of those who, while possibly knowledgable of their rights, still confess. But

achieved. Witness the situation in Pennsylvania, where the highest court of that state believed that a request was necessary. The Court of Appeals for the Third Circuit disagreed. Faced with the position of the Third Circuit, the Pennsylvania Supreme Court retreated — not because of persuasion, but to foster comity:

> If the Pennsylvania courts refuse to abide by its [the Third Circuit's] conclusions, then the individual to whom we deny relief need only "walk across the street" to gain a different result. Such an unfortunate situation would cause disrespect for the law....
>
> Consequently, in order to alleviate and correct a regrettable situation, the clear indication for this court is to accept and follow the decision of the Third Circuit on this matter until some further word is spoken by the Supreme Court of the United States.[37]

The reaction of the Supreme Court of New Jersey was unlike that of Pennsylvania, and New Jersey will continue to require a request until told differently by the Supreme Court.[38]

Of course, one cannot be certain how the Supreme Court will rule on the request issue. Should the Court rule that a request *is* necessary, it will indeed be unfortunate that the Court did not see fit to indicate this clearly when it decided *Escobedo*. For example, in his excellent dissent, Mr. Justice White was quite disturbed that the effect of *Escobedo* would be to bar *any* admission made to the police unless the accused had waived the right to counsel; his fear was that the voluntariness test had been abandoned.[39] If the Court views the denial as coercive, however, the voluntariness test has *not* been abandoned, and Mr. Justice White's fears are not justified. Had the Court indicated its position, it would have been somewhat safer from attack by Mr. Justice White.

Whether *Escobedo* requires retroactive application has likewise led to disagreement. Although the decision has been applied retroactively in a few instances, since the decision in *Linkletter* no reported case has specifically applied *Escobedo* retroactively. The issue, however, is by no means settled. As the Supreme Court has agreed to decide the issue, comments on what the Court's decision will or should be with respect to the retroactivity of *Escobedo* must await the Court's

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maintaining the requirement for a request also discriminates against the guilty (unless the reliability of the confession is to be challenged). Again, the interests must be balanced. I would point out, however, that the entire process of criminal justice to some extent discriminates against the ignorant or against those unable to employ the best counsel. Should one foolish enough to leave fingerprints at the scene of his crime have that evidence excluded because his smarter counterpart would not have left fingerprints? See Attorney General Katzenbach's response to Judge Bazelon, where he argues that the "informed" gangster who avoids conviction with the help of expensive lawyers should not be set up as our standard.

37. Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965).

38. State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965).

39. "The decision is thus 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. . . ." 378 U.S. at 495.

determination in *Johnson v. New Jersey.*[40] Whatever the determination shall be, it is unfortunate that the original decision did not contain an additional sentence indicating whether the principles announced were to apply in all cases or only with respect to convictions finalized thereafter.

The Court, of course, cannot resolve every issue and foresee every possible implication of each of its decisions. Indeed, a laudable characteristic of Anglo-American jurisprudence is that court decisions apply to the specific facts involved, and peripheral matters must await future cases, so that what would in a given case be *obiter dicta* may become the holding of a subsequent case. But, recognizing that it is the Supreme Court which ultimately must resolve the uncertainty of a *Mapp* or an *Escobedo,* lower courts might still better promote uniformity by applying and not expanding the Supreme Court decisions. For example, until the Court definitely indicates that a certain decision is to be applied retroactively, the lower courts should not apply the decision retroactively.

Of course, there are areas of doubt even when a judge attempts to limit a decision to its facts. There is the often-difficult determination of just which facts in the controlling decision are the operative facts. But disagreements among judges and lawyers over which facts are controlling are less likely to lead to unwarranted expansion, and the concomitant criticism, than trying to "second guess" the Supreme Court.

V.

In concluding, it is suggested that the bar and the law schools might assume even greater responsibility for the protection of society and the accused. The members of the bar can help all of us to operate under the recent decisions by relating these decisions to the larger goals of our society. The collective activities of the bar, through the educational programs of the Associations, are most helpful in this respect.

Finally, the law schools, by expanding their programs, can provide greater participation in the field of criminal law for their students. Presently, in a few states, law students are permitted by court rule to assist practicing attorneys in the defense of indigents.[41] The School of Law of the University of Maryland has sponsored a student organization, working under faculty supervision, that undertakes research of difficult areas of the criminal law when so requested by the attorney involved in the case. Such programs provide the student with an experience in facing the practical problems of the administration of criminal justice at that point in his career when such contact can serve him best.

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40. 43 N.J. 572, 206 A.2d 737, *cert. granted,* 86 S.Ct. 318 (1965).

41. See Silverstein, *The Continuing Impact of Gideon v. Wainwright on the States,* 51 A.B.A.J. 1023 (1965).