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COMMENTS

Linkletter, Shott, and the Retroactivity Problem in Escobedo

I. INTRODUCTION

Prior to the 1964 Supreme Court Term, decisions promulgating new constitutional rules were applied retroactively as a matter of course to final convictions. While dissents occasionally criticized the Court’s failure to discuss the retroactive impact of a new constitutional rule, the potential effect upon final convictions of any single rule was not sufficiently acute to justify a departure from the normal grant of retroactivity. But the Court’s decision in Mapp v. Ohio, which abruptly overturned Wolf v. Colorado and brought into doubt final state convictions resting upon illegally seized evidence admitted in reliance upon Wolf, caused courts and commentators alike to question the necessity for retroactivity in every case. Subsequently, in Linkletter v. Walker, the Court announced a new policy on the issue of retroactivity and refused to give Mapp retroactive effect. “Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively,” stated the Court, “we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question . . . and whether retrospective operation will further or retard its operation.”

In Tehan v. United States ex rel. Shott, handed down this Term, the Court again departed from the normal rule of retroactivity by deciding that Griffin v. California, which held that adverse comment by a state prosecutor upon a defendant’s failure to testify violated the federal privilege against self-incrimination, was entitled to

3. See text following note 65 infra.
7. 381 U.S. 618 (1965).
8. Id. at 629.
prospective effect only. Because courts are reluctant to disturb final convictions, the Supreme Court's pronouncements in \textit{Linkletter} and \textit{Shott} may lead courts to find more generally applicable the considerations underlying the denials of retroactivity for \textit{Mapp} and \textit{Griffin}. In particular, courts may deem these considerations of great, if not dispositive, weight in their resolution of habeas corpus petitions resting on the Supreme Court's decision in \textit{Escobedo v. Illinois};\textsuperscript{11} in \textit{Escobedo}, the Court, in a carefully circumscribed holding, assured an accused person who has not been advised of his absolute privilege to remain silent the right to consult, upon request, with retained counsel after the "focus [of the police investigation] is on the accused and its purpose is to elicit a confession."\textsuperscript{12}

Although \textit{Linkletter} and \textit{Shott} resulted in denials of retrospective operation, the Court affirmed in both cases that \textit{Gideon v. Wainwright},\textsuperscript{13} which guaranteed an accused the right to counsel at trial for a serious criminal offense, deserved retroactive operation.\textsuperscript{14} At first glance, retroactive effect for \textit{Gideon} might seem determinative for \textit{Escobedo} because both decisions turn on the sixth amendment's guarantee of the right to counsel. Hidden is the facile assumption that counsel at trial and counsel at the police interrogation perform similar functions. The precariousness of this assumption has been disclosed by the authors of a major essay on \textit{Escobedo}:

At trial, inequality between the State and the individual will often result in a miscarriage of justice. The innocent defendant who has no tools for investigation, no skills for the organization and presentation of his story or for the cross-examination of his accusers, and who lacks the knowledge of the relevant rules of procedural and substantive law, may quickly find himself unjustly convicted. . . . No such dangers are present during police interrogation, however. Indeed, the presence of counsel at this point may very well result in the suppression of truth rather than its disclosure. This is because counsel, aware of the significance which an accused's admissions may have in building the prosecution's case, would normally tell his client to remain silent as a tactical decision. As a result, not only will coerced confessions be eliminated, but so will voluntary ones which will generally contain the truth. The accused's power is increased, but at the expense of the search for truth.\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{11} 378 U.S. 478 (1964).
  \item \textsuperscript{12} Id. at 492.
  \item \textsuperscript{13} 372 U.S. 335 (1963).
  \item \textsuperscript{14} 381 U.S. at 699 n.20; 86 Sup. Ct. at 465. Before \textit{Linkletter}, this conclusion had been reached by all federal and most state courts. \textit{E.g.}, United States \textit{ex rel. Durocher v. LaVallee}, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1964); \textit{In re Palmer}, 371 Mich. 655, 124 N.W.2d 773 (1963); see Subilosky v. Commonwealth, 209 N.E.2d 316 (Mass. 1965) (post-\textit{Linkletter} decision with thorough review of the authorities).
  \item \textsuperscript{15} Enker \\ & Elsen, \textit{Counsel for the Suspect: Marcus v. United States and Escobedo v. Illinois}, 49 Minn. L. Rev. 47, 65-66 (1965).}
\end{itemize}
If the presence of counsel promotes the search for "truth" at trial but frustrates it at the police station, the argument can then be made that *Gideon* and *Escobedo*, though both sixth amendment cases, effectuate quite different due process values and that, from the standpoint of granting or denying retroactivity, they need not be accorded similar effect. One basic due process objective is to ensure the reliability of guilt-determination, and its vitality would have been seriously eroded by a nonretroactive holding in *Gideon*, since *Gideon* brought into substantial doubt the reliability of all convictions secured without counsel. A second basic due process objective is to ensure respect for the dignity of the individual. If the Court's reasoning in *Linkletter* and *Shott* is accepted, the vitality of this objective is not impaired by a nonretroactive holding. The argument might be made that *Escobedo*, like *Mapp*, focuses on enhancing the dignity of the individual by making effective his privilege against self-incrimination. Accordingly, as with *Mapp*, it would be improper for the Court to grant *Escobedo* retroactive effect.

But *Escobedo* also constitutes a significant aspect of the Supreme Court's attack on the problems associated with the "coerced" confession cases. These cases, which were distinguished in *Linkletter* and *Shott*, have heretofore always been granted retroactive effect. *Escobedo*, in short, is a hybrid, with ingredients of *Gideon, Mapp* and *Griffin*, and the "coerced" confession cases. It is this that makes the retroactivity issue in *Escobedo* at once so interesting and so complex. After the two recent Supreme Court decisions denying retroactive application of constitutional rules, *Linkletter* and *Shott*, it is natural to ask whether the considerations that controlled the disposition of the retroactivity issue in *Mapp* and *Griffin* or those that controlled in *Gideon* should govern the resolution of that issue in *Escobedo*.

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17. See, e.g., *Linkletter* v. *Walker*, 381 U.S. at 639 n.20. See also text accompanying note 31 infra.
19. "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker*, 381 U.S. at 637. "[I]nsofar as strict application of the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' ... any impairment upon those values resulting from a State's application of a variant from the federal standard cannot now be remedied.'" *Tehan* v. United States *ex rel.* *Shott*, 86 Sup. Ct. at 465.
21. For example, the *Shott* and *Linkletter* opinions both distinguish *Reck* v. *Pate*, 367 U.S. 433 (1961). See notes 35 & 37 infra and accompanying text.
22. See *Hall & Kamisar, Modern Criminal Procedure* 293 (1965). The retroactivity issue in *Escobedo* will be heard by the Court in *Johnson* v. *New Jersey*, 48 N.J. 572, 290 A.2d 737, cert. granted, 86 Sup. Ct. 318 (1965).
II. RETROACTIVITY AFTER LINKLETTER AND SHOTT

Although in Linkletter the Court enumerated three grounds for its denial of retroactive effect to Mapp, it primarily stressed that the purpose of Mapp's exclusionary rule would not be effectuated by retroactive application. That purpose, the Court said, was to deter illegal police conduct. This deterrent purpose could not be served, the Court believed, by applying the Mapp rule to police misconduct that had occurred before the rule was announced. Furthermore, pre-Mapp searches and seizures could not result in convictions of the innocent, because the illegally seized evidence itself was indisputably trustworthy. "[T]here is no likelihood of unreliability or coercion present in a search-and-seizure case."

On the one hand, the Linkletter Court distinguished Reck v. Pate, in which the Court in 1961 invalidated a 1936 conviction on the ground that the confession, though corroborated, was involuntary, because a free society will not allow the use of an involuntary confession, regardless of its trustworthiness. On the other hand, the Court distinguished Gideon and other retroactive decisions.

23. See text following note 52 infra.
24. 381 U.S. at 636-37.
25. Ibid. The Linkletter dissenters, Justices Black and Douglas, vigorously contested the Court's interpretation of Mapp's purpose. The dissenters argued that Mapp prohibits convictions based on unconstitutional evidence, and that a conviction cannot withstand direct or collateral attack whenever it rests in whole or in part on illegally obtained evidence. The following passage from Mr. Justice Black's opinion indicates the dissenters' position: "If the exclusionary rule has the high place in our constitutional plan of 'ordered liberty,' which this Court in Mapp and other cases has so frequently said that it does have, what possible valid reason can justify keeping people in jail under convictions by wanton disregard of a constitutional protection which the Court itself in Mapp treated as being one of the 'constitutional rights of the accused'?" 381 U.S. at 650.
26. Id. at 636-37.
27. Id. at 639. That the Mapp rule did not go to the reliability of guilt determination is a point to which the Linkletter opinion often alluded. Thus the Court referred to Mapp prisoners as "guilty victims," id. at 637, and concluded its analysis of the potential impact of a retroactive holding by stating: "To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." Id. at 637-38.
28. Id. at 638.
30. 367 U.S. at 440.
31. In addition to Gideon, the Court distinguished Griffin v. Illinois, 351 U.S. 12 (1956), and Jackson v. Denno, 378 U.S. 368 (1964). In Griffin, the Court said that, although a state is not required to provide appellate review, the due process and equal protection clauses of the fourteenth amendment require that an appeal, if allowed at all, must be extended equally to all persons. Accordingly, the Court held that states are obligated to provide free transcripts for indigents who would otherwise appeal. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. In Linkletter, the Court said that Griffin was entitled to retroactive effect because "precluding an appeal because of inability to pay was analogized [in Griffin] to denying the poor a fair trial."
because "the principle that...[the Court] applied went to the fairness of the trial—the very integrity of the fact-finding process." According to pre-Gideon convictions lacked reliability because innocent defendants, without the aid of counsel, might not have been able to explain away incriminating evidence offered by the state.

The distinctions developed in Linkletter are not completely compatible with the reasoning in either Reck or Gideon. In Linkletter, the Court did not concede that its decision in Reck was retroactive, since the principle prohibiting the introduction of involuntary confessions at trial long antedated Reck's 1936 conviction. However, the Court did not explicitly discuss the fact that Reck's confession was voluntary by standards prevailing in 1936. Indeed, in Reck the Court relied on decisions that had come down years after Reck's conviction. Thus the Court in Reck retroactively applied recently developed standards of voluntariness to upset a conviction based on a confession not only voluntary and trustworthy by 1936 standards but also corroborated and hence unimpeachable in 1961, the year the Court upset Reck's conviction. In Reck, the retroactivity issue was subtle and, curiously, the Court in Linkletter overlooked it. 381 U.S. at 639 n.20. In Jackson, the Court invalidated the New York procedure under which the jury passed on the voluntariness of a confession. In Linkletter, the Court found that the New York procedure affected trial fairness because "the procedural apparatus never assured the defendant a fair determination of a confession's voluntariness." Ibid. See generally Note, 13 U.C.L.A.L. Rev. 422, 429-33 (1966).

32. 381 U.S. at 639. For a discussion of the effect of Shott upon the Linkletter reliability standard, see text accompanying note 48 infra.

33. 381 U.S. at 639 n.20. See note 31 supra.

34. 381 U.S. at 638.

35. In Reck, this point was discussed by the district judge and in the brief for the state of Illinois. The district judge, who denied Reck's habeas corpus petition, made this finding: "When Reck was convicted in 1936, neither the Supreme Court of the United States nor society felt that his rights under the Due Process Clause had been violated. Today, the same circumstances would result in a violation of that Clause." United States ex rel. Reck v. Ragen, 172 F. Supp. 734, 745 (N.D. Ill. 1959). Nonetheless, he held (erroneously) that it was within his discretion to deny the petition. The State of Illinois argued to the Supreme Court, without avail, that Reck's claim of denial of due process must be tested by 1936, not 1961, standards. Brief for Respondent, pp. 23-27, Reck v. Pate, 367 U.S. 433 (1961).

36. For example, the Court "color-matched" Reck with Turner v. Pennsylvania, 338 U.S. 62 (1949), decided thirteen years after Reck's conviction. 381 U.S. at 442. In Linkletter, the Court was aware that Reck was released on the basis of standards developed after his initial conviction. 381 U.S. at 629 n.13.

37. Mr. Justice Clark, who spoke for the Court in Linkletter, dissented in Reck, and in that dissent he wrote: "[T]he Court bases its reversal on psychological or mental coercion. In so doing it goes far beyond the holding of any of the prior cases of this Court." 381 U.S. at 432. Implicit in these words is a recognition that Reck is a retroactive case. It seems that Mr. Justice Clark did not consider his own appraisal of Reck when he insisted in Linkletter that Reck was not a retroactive case. See also note 36 supra.

38. Compare 381 U.S. at 638 with id. at 629 n.13. But perhaps this oversight is not so curious. When the overruling decision, like Mapp or Griffin, is an abrupt break with "well-considered" precedent, the retroactivity issue necessarily arises in stark relief, as in Linkletter and Shott. By contrast, Reck v. Pate is but one in a series of decisions...
But *Reck* and *Linkletter*, considered together, lead to the incongruous result that in a retroactivity case police misconduct vitiates an unimpeachable conviction obtained in violation of the fifth amendment but not an unimpeachable conviction obtained in violation of the fourth amendment. Although the *Linkletter* dissents criticized the Court’s failure to accord a prisoner the same relief under the fourth amendment as under the fifth amendment, the Court did not choose to address itself to this issue. The fact that the Court again distinguished *Reck* in the *Shott* opinion reinforces the belief that retroactivity will be continued in the “coerced” confession cases.

When the Court in *Linkletter* distinguished the retroactive holding in *Gideon* on the basis that the pre-*Gideon* convictions lacked “reliability,” the Court’s hindsight assessment of the purpose of *Gideon* was less than adequate. The “fair trial” concept discussed in *Gideon* is broader, as Professor Currier has remarked, than “intrinsic accuracy in the determination of guilt or innocence” and includes “the integrity of the state criminal law-enforcing institution [which is] impaired by a failure to observe one of the requirements of due process.” Professor Currier further wrote:

The burden of *Gideon*, then, is essentially that prejudice is immaterial. A prosecuting government might conclusively establish the absence of any possibility of prejudice, and prove guilt beyond any shadow of a doubt, yet still the convicted defendant’s fundamental constitutional rights have been violated, and he

which, over the years, have altered legal standards governing the admissibility of confessions, *Reck* was not viewed as a dramatic departure from precedent, and its retroactive implications did not merit expression in the opinion in *Reck*. Similarly, several major pre-*Gideon* decisions, e.g., *Chewning v. Cunningham*, 368 U.S. 443 (1962), *Hudson v. North Carolina*, 368 U.S. 697 (1960), *Palmer v. Ashe*, 342 U.S. 134 (1951), arose out of post-conviction proceedings (as did *Gideon*) and were thus retroactive decisions. Their retroactive consequences were not discussed, although Mr. Justice Clark’s dissenting opinion in *Hudson* did hint at these consequences. “The opinion of the Court,” he wrote, “bids fair to ‘furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land.’ *Foster v. Illinois*, 332 U.S. 134, 139 (1947).” *Hudson* and *Chewning* eroded the underpinnings of the “special circumstances” rule of *Betts v. Brady*, 316 U.S. 455 (1962), by expanding that concept to cover situations where the prejudice resulting from the absence of counsel was indeed slight. See Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 278-81 (1962). Thus, where there is a slow erosion of old precedent, as in the pre-*Gideon* cases and in the confession cases, retroactive application seems to be granted as a matter of course.

39. 381 U.S. at 647-48 (Black, J., dissenting).
40. 86 S. Ct. at 465.
41. For recent discussions of “coerced” confession cases, including what seems to comprise a “coerced” confession, see Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452-58 (1964); Kamisar, *supra* note 20, at 38-39.
42. 381 U.S. at 639 n.20.
must be released and reprosecuted according to the constitutional ritual if punishment is to be imposed.\textsuperscript{46}

It is the refusal to appreciate the role “constitutional ritual” played in Gideon (and in other retroactive decisions) that enabled the Court in Linkletter to take the narrow position that retroactive effect was proper in Gideon because Gideon concerned the “reliability” of the trial.

As a practical matter, the Court’s denial of retroactivity in Linkletter shows that the Court will no longer necessarily require adherence to “constitutional ritual” in cases involving retroactivity issues. Nonetheless, the framing of the Reck and Gideon distinctions underscores the confines of the Linkletter exception to the normal rule of retroactivity. The Linkletter exception permits a nonretroactive holding only if the purpose of the new rule is to deter police misconduct and if, under the discarded rule, there was “no likelihood of unreliability [in the trial] or [police] coercion.”\textsuperscript{49}

The decision in Shott broadens the Linkletter exception in one major respect: the purpose of the new rule need not be only to combat police illegality in order for the rule to be granted solely prospective effect. The Court felt that the purpose of the Griffin rule was “to be found in the whole complex of values that the privilege against self-incrimination itself represents.”\textsuperscript{47} Just as the Mapp rule could not deter illegal acts committed by the police prior to the Mapp decision, the Griffin rule could not remedy impingements upon the values of the fifth amendment privilege prior to the Griffin decision. But again the Court in Shott stressed that the Griffin rule was divorced from issues relating to the “reliability” of the trial: “[T]he Fifth Amendment’s privilege against self-incrimination is not an adjunct to the ascertainment of truth.”\textsuperscript{48}

The Court’s treatment of Griffin in the Shott decision, however, does not squarely come to grips with Griffin’s analysis of the effect of the comment rule upon the trial. In Griffin, Mr. Justice Douglas, writing for the Court, said: “What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite

\textsuperscript{45} Id. at 270. (Emphasis added.) See also note 112 infra. Without defense counsel’s presence, however, the prosecutor cannot demonstrate the “absence of any possibility of prejudice.” At the post-conviction hearing, the trial record will not contain facts that the researches of counsel might have uncovered, nor will the trial record reveal the defenses that an imaginative lawyer might have made, regardless of any merit they might have. See, e.g., Chewning v. Cunningham, 368 U.S. 443, 447 (1962); Palmer v. Ashe, 342 U.S. 134, 137 (1951). See also Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused, 50 U. Chi. L. Rev. 1, 42-67 (1982).

\textsuperscript{46} 381 U.S. at 638.

\textsuperscript{47} 86 Sup. Ct. at 464.

\textsuperscript{48} Id. at 465.
another." The prohibition of comment by the prosecution, he stressed, is a concession to the frailty of those who suffer from "excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character." Such individuals, though they may be innocent of the charge, are incapable of an effective presentation on the stand; their taking the stand may heighten the prejudice against them. In Griffin, therefore, the comment rule was condemned largely because it did affect the reliability of the trial. Nevertheless, the decision in Shott, by emphasizing fifth amendment values and not discussing reliability factors, indicates that a new rule will still be entitled to retroactive effect provided that it can be shown to influence substantially the "ascertainment of truth" or, in the Linkletter language, the "reliability" of the trial.

Two related, supplemental factors in Linkletter and Shott also influenced the Court to deny retroactive effect to Mapp and Griffin. First, the Court was unwilling to ignore reliance by the states on Wolf, in the case of Mapp and Linkletter, and on Twining v. New Jersey, in the case of Griffin and Shott. During the eleven years that the Court refused to reconsider Wolf and the fifty-seven years it refused to reconsider Twining, state tribunals had rendered an unknown number of decisions in reliance upon those cases. The Court concluded in both instances that the decisional history was "an operative fact" which could not "justly be ignored." Second, in Linkletter and Shott the Court was impressed by the burden that a retroactive application of Mapp or Griffin would place on state court dockets. Specifically, the Court cited the difficulty inherent in retrials, especially when a long period has elapsed be-

49. 380 U.S. at 614.
50. Id. at 613 (quoting from Wilson v. United States, 149 U.S. 60, 66 (1893)).
51. See also text accompanying note 72 infra.
52. "The thousands of cases that were finally decided on Wolf cannot be obliterated." 381 U.S. at 636.
53. 211 U.S. 78 (1908).
54. This point was forcefully stated in Shott: "[T]his reliance was not only invited over a much longer period of time, during which the Twining doctrine was repeatedly reaffirmed in this Court, but was of unquestioned legitimacy as compared to the reliance of the States upon the doctrine of Wolf... considered in Linkletter as an important factor militating against the retroactive application of Mapp. During the 11-year period between Wolf v. People of State of Colorado and Mapp v. Ohio, the States were aware that illegal seizure of evidence by state officers violated the Federal Constitution. In the 56 years that elapsed from Twining to Malloy v. Hogan, 378 U.S. 1 (1964), by contrast, the States were repeatedly told that comment upon the failure of an accused to testify in a state criminal trial in no way violated the Federal Constitution." 86 Sup. Ct. at 466. For an intriguing commentary on the aptness of states' reliance on constitutional decisions, see Mishkin, "Foreword: The High Court, The Great Writ, and the Due Process of Time and Law," 79 Harv. L. Rev. 56, 73-74 (1965). See also State v. Johnson, 43 N.J. 572, 589, 206 A.2d 737, 746, cert. granted, 86 Sup. Ct. 318 (1965).
55. See note 54 supra.
56. 381 U.S. at 636; 86 Sup. Ct. at 466. The language is that of Mr. Chief Justice Hughes in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).
tween the initial conviction and the retrial: "To require all of those States [the states which had permitted prosecution comment] now to void the conviction of every person who did not testify at his trial," wrote the majority in Shott, "would have an impact upon the administration of their criminal law so devastating as to need no elaboration."57

Had the Court not been convinced that pre-Mapp and pre-Griffin convictions were wholly reliable and that the purposes of Mapp and Griffin would not be furthered by retroactive application, these two supplemental considerations by themselves probably would not have persuaded the Court to deny retroactive effect to Mapp and Griffin. Jackson v. Denno,68 for example, overruled retroactively an eleven-year-old Supreme Court decision59 on which the states were presumably entitled to rely. In Jackson the Court held that the widely followed New York rule under which a trial jury determined both the voluntariness of a confession and the guilt of the accused was unfair and resulted in unreliable judgments.60 It would seem that the number of post-conviction hearings on the voluntariness issue generated by Jackson would not be significantly less than the number of new trials that would have been generated by a retroactive holding in Mapp.61 However, Jackson would result in few new trials because in most instances the post-conviction hearing conducted on the voluntariness of the confession would probably end with a finding that the confession had been properly admitted.62

On the other hand, retroactive effect in Mapp or in Griffin would require new trials whenever illegal evidence had been used or com-

57. 86 Sup. Ct. at 467. Compare Linkletter v. Walker, 381 U.S. at 637-38 (quoted note 27 supra). For a more sanguine view of the probable retroactive consequences of Mapp, see Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 SUPREME COURT REV. 1, 43 n.204.


60. See note 31 supra.

61. It is impossible, of course, to measure the precise impact. At least fifteen states followed the New York procedure. See Jackson v. Denno, 378 U.S. 368, 403 (1964) (Black, J., dissenting in part and concurring in part). This urged Mr. Justice Black to comment: "The disruptive effect which today's decision will have on the administration of criminal justice throughout the country will undoubtedly be great." Ibid. In Linkletter, the Court stated that over half the states had adopted the exclusionary rule prior to the imposition of that rule on the states in the Mapp decision. 381 U.S. at 634. See also Allen, supra note 57, at 43 n.204.

62. In Jackson, the Court expressly declined to grant new trials automatically where the New York procedure had therefore governed. Rather, the Court required the affected states to grant new trials in the unlikely event that the post-conviction hearing determined that the confession introduced at trial was involuntary. Jackson v. Denno, supra note 61, at 594. The first, fragmentary returns suggest that in most cases the post-conviction hearing will result in the conclusion that the confession was voluntary. See, e.g., People v. Jackson, 46 Misc. 2d 742, 262 N.Y.S.2d 907 (Sup. Ct. 1965) (post-conviction evidentiary hearing for Jackson, as required by the Supreme Court's mandate in Jackson v. Denno); People v. Green, 46 Misc. 2d 812, 260 N.Y.S.2d 941 (Sup. Ct. 1965).
ment had been made. The *Gideon* rule requires new trials, but *Gideon* affected far fewer states than either *Jackson* or *Mapp*.63 Although *Griffin* affected fewer states even than *Gideon*, *Griffin*’s retroactive impact on those states that had theretofore allowed comment would have been intense—more intense than the impact of a retroactive holding for *Mapp*, and certainly more intense than the actual retroactive effect of *Gideon*.64 Successful reprosecution would be most difficult in the *Mapp* situation because important, possibly critical, evidence would have been rendered inadmissible.65 Thus a retroactive holding in *Mapp* not only would have made available post-conviction relief to prisoners in many states but also would have necessitated new trials which, in many instances, the prosecution could not win without the illegal evidence.

Prior to *Linkletter* these three elements—widespread impact, a new trial in each case, and the difficulty of reprosecution—had not converged in any single retroactivity case. Their convergence in *Linkletter* doubtless was a major factor in the Court’s decision to depart from absolute retroactivity and to tailor an exception for *Mapp*. It was essentially these elements that reappeared in *Shott* and persuaded the Court to tailor a second exception, this time for *Griffin*.

Nevertheless, the Court in *Linkletter* was not required to rely upon the foregoing factors in creating an exception for *Mapp* because, in its view, retrospective operation would not have advanced the fundamental purpose of *Mapp* and nonretroactive operation would not operate to foreclose habeas corpus relief to convictions containing any “likelihood of unreliability or coercion.”66 For reasons previously explored,67 it seems that after *Shott* these criteria still retain their vitality. Hence, they comprise the threshold tests for nonretroactivity. If these tests cannot be met, it would appear that retroactive relief should be granted, even though there was reliance by

63. Before *Gideon*, thirteen states did not require the appointment of counsel for indigent defendants in serious felony cases. The practice in most of these states, however, was to appoint counsel, at least when the defendant so requested. Kamisar, supra note 38, at 274-75. See also *In re Palmer*, 371 Mich. 656, 124 N.W.2d 773 (1963) (*Gideon*’s impact in Michigan assessed). For a discussion of the impact of *Jackson* and *Mapp* upon the states, see note 61 supra.

64. “It is not in every criminal trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand—in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years.” 86 Sup. Ct. at 466. The Court’s authority, *inter alia*, for this proposition was the amicus curiae brief submitted in *Shott* by the state of California. *Ibid.* For a discussion of the milder impact of *Gideon*, see note 63 supra.

65. Reconviction was impossible in the reprosecution of *Mapp*.

66. 381 U.S. at 638.

67. See note 50 supra and accompanying text.
the states upon the prior law and the result will bring an increased workload for prosecutors and criminal dockets.

III. What Do Linkletter and Shott Portend for Escobedo?

Most federal and state courts that have confronted the retroactivity issue in the Escobedo context have held that Escobedo is not entitled to retroactive effect.68 The basic premise of these decisions is that the purpose of Escobedo, like Mapp, is to deter illegal police conduct. At this juncture, two slightly different approaches have emerged among the courts denying retroactivity to Escobedo. Some have said that, as in Mapp, a conviction obtained in violation of the Escobedo rule is nonetheless necessarily trustworthy because the admission of the confession at trial presupposes a finding of voluntariness by the trial judge.69 The argument is thus made that Linkletter compels the same result for Escobedo since, as recently expressed by the Court of Appeals for the Seventh Circuit, “in both Escobedo and Mapp . . . the reliability of the evidence was not questioned; the attack was on admissibility of the evidence because it was obtained in violation of a fundamental constitutional right.”70

Other courts, while indicating that concern for trial reliability was a reason for the Escobedo rule, have thought it sufficient that oppressive, pre-Escobedo police procedures “did not necessarily cause the conviction of the innocent.”71 The conclusion is thus reached that the role of Escobedo, like that of Mapp, in deterring police misconduct will not be served by retroactive application.


69. See, e.g., United States ex rel. Walden v. Pate, supra note 68; State v. Johnson, supra note 69, at 585, 296 A.2d at 744.

70. United States ex rel. Walden v. Pate, 350 F.2d 240 at 242 (7th Cir. 1965).

It is not surprising that the courts denying retroactivity to Escobedo have diluted the Linkletter "no likelihood of unreliability" standard by finding it sufficiently satisfied in the Escobedo situation where there is a very high probability that the defendant's confession, determined at trial to be voluntary, is trustworthy. In fact, the Linkletter standard may have been diluted by Shott, where the Supreme Court stated that recent constitutional decisions which have been retroactively applied dealt with proceedings which presented a "clear danger of convicting the innocent." 72

It seems doubtful, nonetheless, that the Court intended to establish a "clear danger" test for future use. For example, in Linkletter and Shott the Court affirmed that Griffin v. Illinois, 73 entitling indigents to free transcripts on automatic appeals in criminal cases, was properly granted retroactive effect. 74 Yet, it might be difficult to maintain that pre-Griffin v. Illinois convictions carried a much greater danger of convicting the innocent than pre-Escobedo decisions. 76 To consider a second example, it would seem that Massiah v. United States, 77 which held inadmissible the defendant's post-indictment statements elicited in the absence of retained counsel by the deliberate.subterfuge of federal agents, would be entitled to retroactive effect. 77 Such spontaneous admissions undoubtedly carry substantially less risk than jailhouse confessions of convicting the innocent. 78 Finally, White v. Maryland, 79 which is presumably entitled to retroactive effect, 80 reversed a trial conviction in which the prosecution entered into evidence an uncounseled prior plea of guilty

72. 86 Sup. Ct. at 465.
73. 351 U.S. 12 (1956). In reaffirming the Griffin principle two years later, the Court did not discuss the position of two dissenting justices that retrospective operation was improper. Eskridge v. Washington State Bd., 357 U.S. 214 (1958) (per curiam) (Harlan & Whittaker, J.J., dissenting). For further discussion, see State v. Welch, 214 A.2d 977, 985 (N.J. 1965) (Griffin applied retroactively).
74. 381 U.S. at 639 n.20; 86 Sup. Ct. at 465. See note 31 supra.
75. Unfortunately, there is no way to measure empirically the risk that pre-Griffin v. Illinois or pre-Escobedo procedures carried for the innocent, indigent defendant. See note 120 infra.
76. 377 U.S. 201 (1964).
77. Since Massiah effectuates "a constitutional principle established as long ago as Powell v. Alabama, 287 U.S. 45 [1923]," 377 U.S. at 205, it seems improbable that the Court would deny Massiah retroactive implementation.
79. 373 U.S. 93 (1963) (per curiam).
80. In White, the Court "limited [certiorari] to the point of law raised in Hamilton v. Alabama, 368 U.S. 52 [1961];" the holding in White rests squarely on Hamilton, 373 U.S. at 60. It is noteworthy that Hamilton is a retroactivity case, since, like Gideon, it rose to the Supreme Court through post-conviction proceedings. Thus, Hamilton would seem to preclude any argument that White should be given prospective effect only. See McWilliams v. Gladden, 407 P.2d 850, 860 (Ore. 1965) (Denecke, J., dissenting). Judge Denecke notes that the majority opinion, without discussion, assumes that Hamilton and White are entitled to retrospective operation. He does not dispute the correctness of that position.
entered by the defendant at his arraignment before he had obtained the services of counsel. It seems evident that, in contrast to the un counselled jailhouse confessions involved in Escobedo situations, the White plea, entered in open court, presents almost no danger of leading to a conviction of the innocent.81

Thus, despite the “clear danger” language in the Shott opinion, the Court, by distinguishing cases affecting “the ascertainment of truth” at trial, seemed to leave unimpaired the Linkletter “no likelihood of unreliability” standard.82 The following discussion will therefore measure Escobedo against this Linkletter standard.

Those who urge that the Court’s primary motive in Escobedo was to improve the reliability of guilt-determination fail to recognize that of equal importance was the Court’s interest in securing constitutional guarantees for the uninformed citizen.83 But one passage in Escobedo reveals the Court’s disenchantment with the influence of confessions upon the reliability of guilt-determination:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the “confession” will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.84

This statement arises, moreover, in a case in which the Court assumed, for the purposes of its opinion, that the confession was trustworthy.85 It indicates dissatisfaction with the actual operation of the voluntary-involuntary test, which, at least until Escobedo, had regulated the admissibility of confessions under the fifth and fourteenth amendments.86

81. See Enker & Elsen, supra note 78, at 50-51.
82. In Shott the Court compared the purposes of Griffin with those of Mapp and contrasted the purposes of Griffin with those of Gideon, Griffin v. Illinois, Jackson v. Denno, and Reck v. Pate. See note 25 supra. It would seem unlikely that the Court intended to draw any distinction regarding the degree of unreliability that must be present before retroactivity results. Rather, there is a determined effort in Shott to show that Griffin, like Mapp, did not involve trial reliability at all.
83. 378 U.S. at 490.
84. Id. at 488-89. (Emphasis added.)
85. In dissent, Mr. Justice White remarked: “Escobedo’s statements were not compelled and the Court does not hold that they were.” Id. at 498. At first, the Illinois Supreme Court reversed Escobedo’s conviction by finding the confession involuntary on the ground that the interrogating officer promised immunity from prosecution and permission to go home. On rehearing, however, the Illinois Supreme Court affirmed Escobedo’s conviction, this time taking note of the interrogating officer’s denials that any promises had been made. This history is traced in Kamasar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in CRIMINAL JUSTICE IN OUR TIME 1, 51-52 (Howard ed. 1965).
86. Mr. Justice White, for example, thought that Escobedo marked the end of the voluntary-involuntary test. 378 U.S. at 496. Writing for the Court, Mr. Justice Goldberg never referred explicitly to that test. Since Escobedo, lower courts have not been hesitant in stating that Escobedo was indeed the Supreme Court’s response to the unsatisfactory operation of the voluntary-involuntary test. “The resolution of the court in
While the voluntary-involuntary test initially stemmed from the need for a standard to separate trustworthy from untrustworthy confessions, it has become in recent years increasingly a ban against police interrogation methods which (a) "offended" the court, regardless of whether they posed a threat to the reliability of the guilt-determining process or (b) created a substantial risk that a person subjected to them would falsely confess, regardless of whether or not this particular defendant did.\textsuperscript{87}

Most confessions proffered in evidence at trial by the prosecution are trustworthy, whether voluntary or involuntary.\textsuperscript{88} Involuntary confessions are condemned largely because the "defendant has . . . been subjected to pressures to which, under our accusatorial system, an accused should not be subjected."\textsuperscript{89} The Court has also drawn upon the voluntary-involuntary test to exclude confessions when its probable aim was to ban offensive police interrogation procedures that did not actually coerce the defendant.\textsuperscript{90} Involuntary confessions are excluded, therefore, under a "complex of values"\textsuperscript{91} of which the chance of untrustworthiness is just one factor.\textsuperscript{93} But the fact that the Court in \textit{Escobedo}—where the confession was assumed to be voluntary—rested its reasoning in part on the broad principle that confessions produce a "less reliable" adjudicative process indicates the Court's awareness that in practice the voluntary-involuntary test does not eliminate all untrustworthy confessions.\textsuperscript{93} The \textit{Escobedo} rule recognizes that in earlier cases with fact-patterns similar to that in

\textit{Escobedo} to sterilize the police antechamber from the use of coercive tactics undoubtedly resulted from the realization of the inadequacy of present methods of dealing with involuntary confessions. The mere rejection of such confessions from evidence has not prevented police overreaching. Studies have shown that questionable tactics to obtain confessions or admissions continue on a widespread basis. The very difficulty of detecting the coercion that might occur during police interrogation and the vagueness of the applicable standards for such determination have been adverse factors necessitating a new approach." In \textit{In re Lopez}, 62 Cal. 2d 368, 374-75, 42 Cal. Rptr. 188, 192-93, 398 P.2d 380, 384-85 (1965). For similar expressions, see, e.g., \textit{United States ex rel. Walden v. Pate}, 350 F.2d 240, 243 (7th Cir. 1965). See also note 93 \textit{infra}.


92. See Mishkin, \textit{supra} note 54, at 83-85. See also note 99 \textit{infra}.

93. As Professor Herman documents, a gulf developed between the result achieved in theory and in practice under the voluntary-involuntary test. Herman, \textit{supra} note 87, at 454-57. He concludes, "thus the result probably is an uneasy compromise in which the operation of the rule lags behind theory and thereby encourages the police to undertake the sort of interrogation that theory prohibits." \textit{Ibid.} at 458. See also note 86 \textit{infra}. 
Escobedo there was a possibility that an innocent man could have been convicted by his untrustworthy confession.94

It is this aspect of Escobedo—that it makes more meaningful the rules against involuntary confessions—that provides the strongest argument in favor of granting it retroactive effect. In situations similar to Escobedo, the habeas corpus court cannot determine the voluntariness of the confession introduced at trial. Indeed, if Escobedo shows dissatisfaction with the voluntary-involuntary test as implemented in the trial court, it would be expecting too much to suppose that the habeas corpus court can make that determination. For both the trial and reviewing courts, the principal stumbling-block is the absence of an independent, objective record of the in camera jailhouse proceedings in which the confession was elicited. To reconstruct what actually happened, therefore, courts must assess against the denials of the interrogating officers the claims by the accused of coercion, promises, or other inducements.95 The difficulty of this task was a factor responsible for the new approach taken in Escobedo.96

Thus, there is no record upon which the habeas corpus court can adequately review the admissibility of a confession under the traditional voluntary-involuntary test. If Escobedo is not granted retroac-

94. See note 86 supra.
96. The Escobedo rule, binding on all courts, thus furthered the ends sought alone in federal courts under the McNabb-Mallory rule. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). The McNabb-Mallory rule's "main thrust . . . is to bypass conflicts over the nature of the secret interrogation and to minimize both the 'temptation' and the 'opportunity' to obtain confessions by impermissible means." Kamisar, supra note 85, at 39-40. According to the Court of Appeals for the District of Columbia, "Were the police version as to the accused's cooperation always to be accepted, the law's restriction on police activity would have little effect. One purpose of the Mallory doctrine was to eliminate swearing contests between police and defendant as to what each said and did, by commanding that the defendant be promptly presented." Greenwell v. United States, 350 F.2d 962, 968 (D.C. Cir. 1964). See also Douglas, supra note 95, at 112; Enker & Elsen, supra note 78, at 52. But even in the District of Columbia, where the McNabb-Mallory rule developed, the arrival of Escobedo has not (at least until now) brought an end to the police interrogation. "My duty is to assist effective law enforcement, and protect the rights of suspects. I believe in the three-hour [confessions] rule and I think the public has a right to threshold statements," the United States Attorney for the District of Columbia recently said. N.Y. Times, Feb. 14, 1966, p. 20, col. 3 (city ed.). But see Alston v. United States, 348 F.2d 72 (D.C. Cir. 1965) (confession elicited within an hour of arrest held inadmissible). For Chief Judge Bazelon, at least, any interrogation prior to the assignment of counsel is probably unlawful. In this area, developments are swift, and a postscript is required: after this Comment was in type, the United States Attorney for the District of Columbia reversed himself. All suspects, he has agreed, will be entitled to talk with a lawyer, free of charge, before they talk to the police. N.Y. Times, Feb. 26, 1966, p. 9, col. 1 (city ed.). Thus, police practice in the District appears to have been brought into accord with the Alston decision, supra.
tive effect, therefore, some prisoners, who may be unjustly incarcerated, will have no effective method of substantiating their claims of innocence. Their predicament is similar to that of post-Betts v. Brady prisoners. In habeas corpus proceedings, most post-Betts prisoners were caught in a paradox: they were supposed to demonstrate from the record "special circumstances," although at trial they had been without the aid of counsel, who alone could develop, in his investigative and legal capacities, a record of special circumstances that would illustrate the need for counsel. This paradox of Betts also faces pre-Escobedo prisoners: they cannot develop for a habeas corpus court the inadmissibility of their confessions at trial because their transcripts will never contain an objective jailhouse record which would show whether their confessions were secured under circumstances raising severe doubts concerning their reliability.

Thus, it may be forcefully argued that the principle applied in Escobedo goes to the "fairness of the trial—the very integrity of the fact-finding process," and hence falls within the category of cases distinguished in Linkletter and Shott as deserving of retrospective treatment. Even assuming that the main purpose of Escobedo is similar to the purpose of Mapp—to deter illegal police conduct—Escobedo is nevertheless different from Mapp in that it cannot be said of Escobedo that there is "no likelihood of unreliability."

In weighing the "merits and demerits" of the retroactivity issue in its Escobedo context, lower courts analyzing the retroactivity issue after Linkletter but before Shott have shown an understandable
desire to hold that *Linkletter* controls *Escobedo*. This result-oriented analysis is indicated by the fact that these courts readily assume that the purpose of *Escobedo* is “identical” with the purpose of *Mapp*.

The Supreme Court candidly stated in *Escobedo* that there would thereafter be less opportunity for police illegality at the interrogation stage than in the past. Yet prevention of police illegality is not the “purpose” in the *Linkletter* sense, of *Escobedo*. *Escobedo* has two dimensions that are broader than the mere deterrence of police illegality: to make meaningful the rules against involuntary confessions, and to make meaningful the presence of counsel at trial by requiring that counsel be present during the police interrogation. Indeed, an underlying theme of *Escobedo* is that if counsel has not been available at the police station, counsel may be of no utility at trial.

Apart from inadequate consideration of the element of unreliability inherent in the *Escobedo* factual pattern, courts denying retroactivity have not inquired whether retroactive effect can logically be denied for *Escobedo* when retroactive operation seems to be automatically accorded closely analogous sixth amendment cases. In particular, it seems difficult to justify a nonretroactive result for *Escobedo* when retroactivity seems assured for cases like *White v. Maryland* and *Massiah v. United States*. In *White*, it will be recalled, the prosecution introduced at trial the defendant’s plea of guilty entered, without the benefit of counsel, at the arraignment. The unavailability of counsel at the time of the arraignment was held to vitiate the subsequent conviction because the arraignment was a critical stage in the proceeding. The jailhouse interrogation in *Escobedo*, however, constituted no less critical a stage, as the *Escobedo* opinion makes clear. Since, as previously discussed, the uncoun-

104. See, e.g., cases cited supra note 103.
105. 378 U.S. at 488-90.
106. See text accompanying note 76 supra.
107. In *Gideon v. Wainwright*, 372 U.S. 335, we held, that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the ‘right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.’ *In re Groban*, 352 U.S. 330, 334 (Black, J. dissenting). ‘One can imagine a cynical prosecutor saying: “Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing that counsel can do for them at the trial.”’ *Ex Parte Sullivan*, 107 F. Supp. 514, 517-18.” 378 U.S. at 487-88; see Herman, supra note 87, at 496.
108. 373 U.S. 59 (1963) (per curiam). See note 80 supra.
110. “The fact that many confessions are obtained during this [interrogation] period points up its critical nature as a ‘stage when legal aid and advice’ are surely needed.
selled plea in White and the spontaneous admissions in Massiah carry virtually no risk of convicting the innocent, it would appear that, in cases viewed primarily as sixth amendment decisions, retroactive operation will be granted even though there is almost no element of unreliability. In these cases, retroactivity seems assured, not because the presence of counsel would have served to enhance the reliability of the judgments, but because the presence of counsel would have furthered another due process goal, one not explicitly articulated: that convictions be obtained only with deference to the dignity of the individual. Thus, in light of White and Massiah, it would be illogical to deny Escobedo retroactive effect.

The foregoing analysis has shown, first, that Escobedo does not fit into the strict Linkletter standard of "no likelihood of unreliability" and, second, that Escobedo, viewed from its sixth amendment perspective, cannot logically be denied retrospective operation. Nonetheless, the practical consequences of a retroactive holding for Escobedo may be momentous enough to persuade the Supreme Court to broaden further the tests by which a nonretroactive result can be reached.

IV. Would Retroactive Effect for Escobedo Empty the Prisons?

It would be of great value, in any case involving a decision whether to apply a constitutional rule retroactively, to be able to measure with a fair degree of accuracy the actual impact of a grant of retroactivity to the rule. But this is always a speculative venture, and is particularly so in the Escobedo situation. Even a speculative assessment of the potential retroactive impact of Escobedo requires some agreement on Escobedo's scope, and there has been a bitter divi-
sion among courts over this issue.113 Most federal courts114 and some state courts115 have construed Escobedo broadly, while most state courts have construed it narrowly.116 Thus, until the Supreme Court delineates the scope of Escobedo,117 its potential retroactive impact must be weighed jurisdiction-by-jurisdiction, the impact turning in each state upon the local courts' construction of Escobedo. Clearly, those states that emphasize the words of limitation that close the Escobedo opinion118 will have few prisoners eligible for post-conviction relief.

It seems predictable that the Supreme Court will not adopt the narrowest reading of the Escobedo rule.119 Accordingly, it would

113. The most publicized is the controversy between the New Jersey Supreme Court and the Court of Appeals for the Third Circuit. After the Third Circuit reversed two New Jersey murder convictions on Escobedo grounds in May 1965 (see United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965)), Chief Justice Weintraub of the New Jersey Supreme Court ordered all state judges to disregard the federal ruling until the United States Supreme Court had acted on the issue. N.Y. Times, Nov. 9, 1965, p. 32, col. 4 (city ed.). In November 1965 the New Jersey Supreme Court reaffirmed its position in State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965), stating that the federal decision was not binding on the state courts.


115. In this regard, California, more than other states, has moved beyond the words of limitation that close the Escobedo opinion. Because the California Supreme Court has closely analyzed many facets of the Escobedo rule, its major decisions on Escobedo's scope are set forth. People v. Chaney, 63 Cal. 2d 803, 48 Cal. Rptr. 188, 403 P.2d 964 (1965) (Peek, J.); People v. Gilbert, 63 Cal. 2d 722, 47 Cal. Rptr. 509, 408 P.2d 365 (1965) (Traynor, C.J.); People v. Marbury, 63 Cal. 2d 601, 47 Cal. Rptr. 491, 407 P.2d 657 (1965) (Traynor, C.J.); People v. Green, 63 Cal. 2d 586, 47 Cal. Rptr. 477, 407 P.2d 653 (1965) (Tobriner, J.); People v. Farris, 63 Cal. 2d 566, 47 Cal. Rptr. 370, 407 P.2d 228 (1965) (Traynor, C.J.); People v. Stockman, 63 Cal. 2d 519, 47 Cal. Rptr. 365, 407 P.2d 277 (1965) (Peters, J.); People v. Aranda, 63 Cal. 2d 542, 47 Cal. Rptr. 353, 407 P.2d 265 (1965) (Traynor, C.J.); People v. Price, 63 Cal. 2d 388, 46 Cal. Rptr. 775, 406 P.2d 55 (1965) (Peek, J.); People v. Cotter, 63 Cal. 2d 494, 46 Cal. Rptr. 622, 405 P.2d 652 (1965) (Burke, J.); People v. Stewart, 62 Cal. 2d 571, 43 Cal. Rptr. 301, 400 P.2d 97 (1965) (Tobriner, J.); People v. Dorado, 62 Cal. 2d 388, 42 Cal. Rptr. 169, 398 P.2d 361 (1965) (Tobriner, J.). California, according to the Wisconsin Supreme Court, represents the "soft approach" to Escobedo. Neuenfeldt v. State, 138 N.W.2d 252 (Wis. 1965).

116. "If today we have all but forgotten the confining language in Powell, in recent months most state courts passing on the matter have only remembered the limiting facts in Escobedo. Counsel isn't outside the interrogation room trying to get in? Counsel hasn't instructed the police to cease questioning his client? Escobedo doesn't apply. The subject hasn't requested counsel? Again, Escobedo doesn't apply—even though the subject has neither been advised of his right to counsel nor of his right to remain silent . . . ." Kamisar, supra note 85, at 57.


118. 378 U.S. at 490-92.

119. See generally Kamisar, supra note 85; The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 217 (1964). It seems improbable, for example, that the Supreme Court will require a request for counsel before the Escobedo rule can be invoked. See Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965), in which the Pennsylvania Supreme Court gracefully acquiesced in the Third Circuit's view that no request is required. See United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965).
seem profitable to assume, when inquiring—speculating—as to the potential retroactive impact of Escobedo, that the Court will read Escobedo expansively and will therefore evaluate the retroactivity problem in that light.

That many state courts have reacted adversely to any extension of Escobedo is some evidence that a grant of retroactivity would affect a substantial number of prisoners in most states. A retroactive holding in Mapp would have been nearly as national in impact; although more than half the states adhered to the exclusionary rule by the time of the Mapp decision, several were recent converts. It appears to be widely—perhaps correctly—assumed that in any single jurisdiction more prisoners would have a claim for post-conviction relief under a retroactive application of Escobedo than of Mapp. For example, the California Supreme Court, in rejecting retroactivity for Escobedo, stated:

[W]e [cannot] overlook the . . . consideration that retroactivity would impose impossible burdens upon the administration of criminal justice. Unlimited retroactive application of Escobedo would result in the reconsideration of countless cases that were correctly decided under the law in force at the time of trial; in many such cases witnesses and evidence would no longer be available. Many hardened and dangerous criminals would glean the greatest profit from unlimited retroactivity; they serve lengthy sentences imposed long ago; their cases thus offer the least likelihood of successful retrial. To require a general release of prisoners of undoubted guilt would be to cripple the orderly administration of the criminal laws.

It may be argued, without attempting to disparage the seriousness of the effect of a retroactive application of Escobedo, that the California court overstated the case. Several factors tend to show that a retroactive application of Escobedo would not result in a “general release” of prisoners. First, a retroactive result would not affect prisoners who entered pleas of guilty upon the advice of counsel, because entering the plea constitutes a waiver of all defenses, including

120. See note 116 supra. “It must be concluded that we have no way of knowing how many un counselled defendants may have been convicted on unreliable confessions unless we accord retrospective application to Escobedo.” Commonwealth v. Negri, 213 A.2d 670, 679 (Pa. 1965) (Roberts, J., concurring and dissenting).
122. In re Lopez, 62 Cal. 2d 368, 381, 42 Cal. Rptr. 188, 198, 398 P.2d 861 (1965). (Emphasis added.) In Lopez, the California court may be proceeding on the assumption that sentences tend to be longer—perhaps much longer—in convictions based on confessions than, for example, on illegally seized evidence. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Supreme Court Rev. 1, 43 n.204. Hence, in the Escobedo situation more prisoners would seek post-conviction relief. Previously, California had reasoned that Escobedo could not be strictly confined to its facts. People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). See note 115 supra.
constitutional defenses. Thus these prisoners would be precluded from raising an *Escobedo* objection, even though in many instances the plea would have been induced by the knowledge that the prosecutor possessed a confession now conceded to be violative of a broad *Escobedo* rule. Since a high percentage of all cases are settled by plea, *Escobedo*'s retroactive impact would be correspondingly diminished. Second, it appears improbable that a retroactive application of *Escobedo* would result in the wholesale release of hardened criminals. Many would have refused to confess, and those who did might well be held by habeas corpus courts to have been aware of, and to have waived, their right to counsel. Third, Justice Sobel's recent survey, although limited to one county, supports the view that confessions are rarely involved in trial convictions. Fourth, al-

123. See Kercheval v. United States, 274 U.S. 220, 223 (1927). See also Note, 112 U. Pa. L. Rev. 865, 871, 888 (1964). Compare Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 50 U. Chi. L. Rev. 1, 29-31 (1962). Admitting that the present state of authority is against him but hopeful that courts might be persuaded to change their positions, Professor Kamisar makes an argument based on the "poisonous tree" doctrine: "After all, a 'voluntary' plea preceded by a coerced confession is not necessarily a reliable plea. If the defendant is under the misapprehension that the prior confession is admissible against him, he may adhere to it even though he knows it is false, since he believes he 'can't win' anyhow and that he might well receive a lighter sentence by not putting the state to the trouble of a trial." *Id.* at 30.

124. See Note, 112 U. Pa. L. Rev. 855-66 (1964). Justice Roberts, analyzing the potential retroactive effect of *Escobedo* in Pennsylvania, stated that the number of retrials would not be very great because nearly three fourths of all convictions were based on pleas of guilty. Under Pennsylvania decisions, he pointed out, post-conviction attack on *Escobedo* grounds was precluded unless counsel at trial had raised a right-to-counsel objection against the admission of the confession. The chance that this particular objection was made in any given case, he believed, would be very slight. But even if it were made, he continued, there remained the possibility that the police did in fact warn the accused of his constitutional right to counsel. "It seems to me . . . fears that wholesale disruption of convictions will attend the Escobedo rule, expressed with frequency in recent times, are grossly exaggerated." Commonwealth v. Negri, 213 A.2d 670, 680 (Pa. 1965) (Roberts, J., concurring and dissenting). Moreover, "it is logical to assume . . . that confessions usually result in pleas rather than trials." Sobel, *The Exclusionary Rules in the Law of Confessions[ :] A Legal Perspective—A Practical Perspective* (p. IV), 154 N.Y.L.J., Nov. 22, 1965, p. 4.

125. Almost by definition, "hardened" criminals do not yield during a police interrogation. "Defendants who confess are the derelicts of society. Anyone with the intelligence to organize a racket presumably would have the intelligence not to confess." Sobel, *supra* note 124, at 4. *But cf.* CAPOTE, *In Cold Blood* 217, 220, 233 (1965). The confessions obtained by detectives from Hickock and Smith, "hardened criminals," were used against them to great advantage. *Id.* at 225-88. In connection with the effect of *Escobedo* upon present police interrogation, the chief trial lawyer of the Philadelphia District Attorney's office has said: "I hate to admit it, but on the basis of our early reports we haven't lost a single confession, except to racket men and hardened criminals who never talk anyway." *N.Y. Times*, Nov. 20, 1965, p. 7, col. 6. For the effect of *Escobedo* in the District of Columbia, see note 46 *supra*.

126. "Experienced judges have known for a long time that confession issues are involved in only a small percentage of cases. They have observed how infrequently 'confessions' are involved in plea discussions. They have observed how very infrequently they are required to charge confession doctrines at trials." Sobel, *supra* note 124, at 4. Justice Sobel studied the first one thousand indictments returned in Kings County,
though Escobedo's retroactive effect would be wider than would have been that of Griffin v. California, Escobedo's would not be as pervasive in any one jurisdiction.\textsuperscript{127} Fifth, at the post-conviction stage, many prisoners would be deterred in some states from seeking habeas corpus relief under a retroactive application of Escobedo for fear of reconviction with its attendant risk of a longer sentence.\textsuperscript{128}

New York, after January 7, 1965. This was a very limited sampling, as he stressed. But the evidence nonetheless supported the finding that confessions were not as essential to convictions as police spokesmen and prosecutors often have claimed: "[Most] serious crimes are cleared by the factor—astonishing to the uninformed—that in nearly all assaults; in 35 per cent of robberies and in 45 per cent of forcible rapes, the protagonists—the victim and the perpetrator—were known to one another prior to the commission of the crime. Even where not known to one another, in a large percentage of these cases there is positive identification. Thus, neither interrogation or even investigation is essential." \textit{Id.} at 5. In homicides, Justice Sobel stated that confessions were not normally essential because "80 per cent of all murders are committed within the family or among and between 'friends' and therefore, the 'killer' is usually known if indeed he does not turn himself in." \textit{Ibid.} During the period surveyed, "nine murder indictments were filed. In not a single instance was a 'confession' involved." \textit{Id.} at 4. The survey into account, however, the extent to which confessions, though not offered in evidence, provide leads which result in the discovery of physical evidence or witnesses. See Kamisar, \textit{Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality, and the Administration of Criminal Justice} (pt. II), 155 N.Y. L.J., Feb. 24, 1966, p. 4. In rebuttal to Justice Sobel, New York District Attorney Frank Hogan disclosed that in 91 homicide cases pending in New York County, confessions would be offered in 62 (68\%) and stated that in 25 cases (27\%) indictments could not have been returned without a confession. Even this estimate was thought to be "considerably below those usually made by prosecutors and police officials." N.Y. Times, Dec. 2, 1965, p. 52, col. 1. See generally Bickel, \textit{After the Arrest}, The New Republic, Feb. 12, 1966, p. 14. In Detroit, Vincent W. Piersante, Chief of Detectives, has said the importance of confessions "varies greatly, depending upon the crime involved." For example, the Chief maintained that the police were "heavily dependent on confessions in burglary investigations" (the number of confessions obtained in such investigations had dropped from 64.5\% in 1961 to 32.4\% in 1965; confessions were deemed "essential" in 24.3\% of the 1965 cases as opposed to 53.2\% in 1961) whereas recent confession-right-to-counsel cases had had "very little impact" on murder investigations, probably because his department's "pre-arrest investigatory procedures were especially effective and thorough with respect to this crime." Kamisar, \textit{supra}, at 4 n.29.

127. Compare note 126 \textit{supra} with note 64 \textit{supra}. Griffin's retroactive impact depends, of course, on how it would have been applied retroactively. It seems to have been assumed that retroactivity would have been granted in all situations. However, its retroactive effect might have been reduced by requiring a showing of prejudice. Thus, those who the record indicated vigorously forwarded their claims of innocence before the jury might have been precluded from arguing that they were coerced into taking the stand through fear of the influence upon the jury of prosecution comment.

128. E.g., State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964). In the first trial, the defendant received a two-year sentence. He invoked \textit{Gideon} to invalidate his initial conviction. Upon retrial, he was again convicted but was given a ten-year sentence, without credit for the six months he had served under the first conviction. See generally Van Alstyne, \textit{In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant}, 74 YALE L.J. 606 (1965). "[H]arsher sentences following reconviction of successful appellants are permissible throughout the federal courts and in the vast majority of the states."
\textit{Id.} at 610. The author details the legal arguments which should ultimately terminate this practice. California, New Jersey, and the Court of Appeals for the Second Circuit appear to be moving toward abandonment of the practice. People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963); State v. Wolf, 34 U.S.L. WEEK 2423 (Gen. Feb. 15, 1966); United States \textit{ex rel. Hetenyi v.
Finally, in many cases where retrials are ordered, the prosecution is able to obtain reconvictions based on evidence other than the confession introduced at the initial trial.\textsuperscript{129} A retroactive application of Escobedo is thus less likely to impede a successful retrial than would have been the case under a retroactive holding in Mapp.\textsuperscript{130}

V. Conclusion

Unless directed otherwise by the United States Supreme Court, most lower courts will not grant retroactive effect to Escobedo, as the post-Linkletter decisions convincingly illustrate.\textsuperscript{131} Indeed, the Linkletter and Shott decisions provide easy avenues by which courts can avoid full analysis of the retroactivity issue in Escobedo. In any event, the Supreme Court will soon resolve the Escobedo retroactivity issue.\textsuperscript{132}

It is, of course, conceivable that the Court will react to the retroactivity problem in Escobedo by ignoring those aspects of the Escobedo opinion indicating that Escobedo affects trial reliability.\textsuperscript{133} This was the approach adopted in Shott, where the Court passed over the Griffin Court's analysis of the impact of the comment rule upon guilt determination by undertaking a discussion of "other values" underlying the privilege against self-incrimination, values that barely received attention in Griffin.\textsuperscript{134} In the Escobedo context, it will be more difficult for the Court to turn to "other values" (principally those behind the privilege against self-incrimination) because Escobedo seems partially aimed at strengthening the rules against involuntary confessions.\textsuperscript{135} If the Court was concerned in Escobedo with the risk of unreliability of confessions, the presentation of the retroactivity issue in Escobedo provides the Court with an opportunity to clarify its rationale and should require the Court to deter-

\textsuperscript{129} In many cases, the confession is "the icing on the cake." See, e.g., Haynes v. Washington, 375 U.S. 505, 519 (1963). In 1962, Professor Ritz surveyed the subsequent history of state convictions, resting on allegedly involuntary confessions, actually reviewed by the Supreme Court. At that time the Court had considered thirty-five cases, reversing in twenty-two instances. "The defendants in exactly half of the [twenty-two] cases were again convicted of the same or a lesser included offense, while the defendants in the other half were eventually released in one way or another." Ritz, State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems, 19 Wash. & Lee L. Rev. 202, 208 (1962). See also Sobel, supra note 124, at 5. Most confessions, Justice Sobel reports, are given by suspects who are already "hooked."

\textsuperscript{130} Compare note 129 supra with text following note 64 supra.

\textsuperscript{131} See note 68 supra.

\textsuperscript{132} The retroactivity issue in Escobedo is presented to the Court in Johnson v. New Jersey, 43 N.J. 572, 200 A.2d 787, cert. granted, 86 Sup. Ct. 318 (1965).

\textsuperscript{133} See text accompanying notes 84 and 93 supra.

\textsuperscript{134} See text following note 48 supra.

\textsuperscript{135} See text at note 93 supra.
mine whether retroactivity can be denied when trial reliability is to some extent at issue.

Thus, should Escobedo be held nonretroactive, the Court will have moved beyond the reasoning of Linkletter and Shott.\(^{136}\) Inevitably, three Supreme Court decisions denying retroactivity, announced in quick succession, will spark lower courts to deny retroactive effect in other contexts.\(^{137}\) Such a development would represent a substantial departure from the twin traditions of the retroactive nature of judicial decision-making and individualized justice in accordance with current constitutional norms. Escobedo gives the Court not only an opportunity to reinvigorate those traditions, but also a forum to make the unequivocal promise that convictions based in some degree on unreliable judgments, however slight the chance of unreliability in any single instance, will always be open to habeas corpus review.

J. Alan Galbraith

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\(^{136}\) Possibly, the Court will be influenced in its disposition of the Escobedo retroactivity issue by the thought that denial of retroactive effect might leave the Court more freedom to broaden the Escobedo holding. See text at notes 11-12 supra.

\(^{137}\) For example, it must soon be decided whether retrospective operation will be granted to Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment's guarantee of a defendant's right "to be confronted with the witness against him" held binding on state courts).