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Linkletter, Shott, and the Retroactivity Problem in *Escobedo*

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COMMENTS

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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.[1] While dissents occasionally criticized the Court's failure to discuss the retroactive impact of a new constitutional rule,[2] the potential effect upon final convictions of any single rule was not sufficiently acute to justify a departure from the normal grant of retroactivity.[3] But the Court's decision in *Mapp v. Ohio*,[4] which abruptly overturned *Wolf v. Colorado*[5] 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.[6] Subsequently, in *Linkletter v. Walker*,[7] 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."[8]

In *Tehan v. United States ex rel. Shott*,[9] handed down this Term, the Court again departed from the normal rule of retroactivity by deciding that *Griffin v. California*,[10] 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

1. Linkletter v. Walker, 381 U.S. 618, 628 (1965).

2. *E.g.*, Jackson v. Denno, 378 U.S. 368, 406 (1964) (Black, J., dissenting in part and concurring in part); Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (per curiam) (Harlan, J., dissenting); Eskridge v. Washington State Bd., 357 U.S. 214, 216 (1958) (per curiam) (Harlan & Whittaker, JJ., dissenting); Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (Frankfurter, J., concurring).

3. See text following note 65 *infra*.

4. 367 U.S. 643 (1961).

5. 338 U.S. 25 (1949).

6. *E.g.*, United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965); United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965); Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

7. 381 U.S. 618 (1965).

8. *Id.* at 629.

9. 86 Sup. Ct. 459 (1966).

10. 380 U.S. 609 (1965).

prospective effect only. Because courts are reluctant to disturb final convictions, the Supreme Court's pronouncements in *Linkletter* and *Shott* may lead courts to find more generally applicable the considerations underlying the denials of retroactivity for *Mapp* and *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 *Escobedo v. Illinois*;[11] in *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."[12]

Although *Linkletter* and *Shott* resulted in denials of retrospective operation, the Court affirmed in both cases that *Gideon v. Wainwright*,[13] which guaranteed an accused the right to counsel at trial for a serious criminal offense, deserved retroactive operation.[14] At first glance, retroactive effect for *Gideon* might seem determinative for *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 *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.[15]

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11. 378 U.S. 478 (1964).

12. *Id.* at 492.

13. 372 U.S. 335 (1963).

14. 381 U.S. at 639 n.20; 86 Sup. Ct. at 465. Before *Linkletter*, this conclusion had been reached by all federal and most state courts. *E.g.*, United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964); *In re* Palmer, 371 Mich. 656, 124 N.W.2d 773 (1963); see Subilosky v. Commonwealth, 209 N.E.2d 316 (Mass. 1965) (post-Linkletter decision with thorough review of the authorities).

15. Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 65-66 (1964).

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,[16] 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.[17] A second basic due process objective is to ensure respect for the dignity of the individual.[18] If the Court's reasoning in *Linkletter* and *Shott* is accepted, the vitality of this objective is not impaired by a nonretroactive holding.[19] 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.[20] These cases, which were distinguished in *Linkletter* and *Shott*, have heretofore always been granted retroactive effect.[21]

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*.[22]

16. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957).

17. See, *e.g.*, Linkletter v. Walker, 381 U.S. at 639 n.20. See also text accompanying note 31 *infra*.

18. Kadish, *supra* note 16, at 347.

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 impingement 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.

20. See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1, 38-49 (Howard ed. 1965).

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, 43 N.J. 572, 200 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*,[23] it primarily stressed that the purpose of *Mapp*'s exclusionary rule would not be effectuated by retroactive application.[24] That purpose, the Court said, was to deter illegal police conduct.[25] 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.[26] Furthermore, pre-*Mapp* searches and seizures could not result in convictions of the innocent, because the illegally seized evidence itself was indisputably trustworthy.[27] "[T]here is no likelihood of unreliability or coercion present in a search-and-seizure case."[28]

On the one hand, the *Linkletter* Court distinguished *Reck v. Pate*,[29] in which the Court in 1961 invalidated a 1936 conviction on the ground that the confession, though corroborated,[30] 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[31]

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.

29. 367 U.S. 433 (1961). The Court also distinguished Fay v. Noia, 372 U.S. 391 (1963). As the Court pointed out, *Fay*, which dealt with the availability of federal habeas corpus relief, has no direct bearing on the retroactivity issue in *Mapp*.

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."[32] Accordingly, 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.[33]

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,[34] 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.[35] Indeed, in *Reck* the Court relied on decisions that had come down years after Reck's conviction.[36] 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.[37] In *Reck*, the retroactivity issue was subtle and, curiously, the Court in *Linkletter* overlooked it.[38]

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. 367 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." 367 U.S. at 452. 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* dissenters criticized the Court's failure to accord a prisoner the same relief under the fourth amendment as under the fifth amendment,[39] the Court did not choose to address itself to this issue. The fact that the Court again distinguished *Reck* in the *Shott* opinion[40] reinforces the belief that retroactivity will be continued in the "coerced" confession cases.[41]

When the Court in *Linkletter* distinguished the retroactive holding in *Gideon* on the basis that the pre-*Gideon* convictions lacked "reliability,"[42] the Court's hindsight assessment of the purpose of *Gideon* was less than adequate. The "fair trial" concept discussed in *Gideon*[43] 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."[44] 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, 363 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 (1942), 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 Sup. 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.

43. 372 U.S. 335, 344-45 (1963).

44. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 271 (1965).

> must be released and reprosecuted according to the *constitutional ritual* if punishment is to be imposed.[45]

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."[46]

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."[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."[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

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*, 30 U. CHI. L. REV. 1, 42-67 (1962).

46. 381 U.S. at 638.

47. 86 Sup. Ct. at 464.

48. *Id.* at 465.

another."[49] 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."[50] 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.[51]

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*,[52] and on *Twining v. New Jersey*,[53] in the case of *Griffin* and *Shott*.[54] During the eleven years that the Court refused to reconsider *Wolf* and the fifty-seven years it refused to reconsider *Twining*,[55] 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."[56]

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 463. 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*,[58] for example, overruled retroactively an eleven-year-old Supreme Court decision[59] 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.

58. 378 U.S. 368 (1964).

59. Stein v. New York, 346 U.S. 156 (1953).

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, 406 (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 theretofore 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 394. 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 nonretrospective 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.

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68. These decisions have denied *Escobedo* retroactive effect: United States *ex rel.* Walden v. Pate, 350 F.2d 240 (7th Cir. 1965); Meyer v. Klinger, 243 F. Supp. 788 (S.D. Cal. 1965); United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965); *In re* Lopez, 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P.2d 380 (1965); Ruark v. People, 405 P.2d 751 (Colo. 1965); Bell v. State, 175 So. 2d 80 (Fla. Dist. Ct. App. 1965); State *ex rel.* Rasmussen v. Tahash, — N.W.2d — (Minn. 1965); State v. Johnson, 43 N.J. 572, 206 A.2d 737, *cert. granted*, 86 Sup. Ct. 318 (1965); People v. Hovnanian, 22 App. Div. 2d 686, 253 N.Y.S.2d 241 (1964); Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965); Sparkman v. State, 27 Wis. 2d 92, 133 N.W.2d 776 (1965). These decisions have given *Escobedo* retroactive effect: United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965) (issue not discussed); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964) (issue not discussed); United States *ex rel.* Rivers v. Myers, 240 F. Supp. 39 (E.D. Pa. 1965) (issue not discussed); Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964) (issue not discussed); *cf.* Delaney v. Gladden, 237 F. Supp. 1010, 1014 (D. Ore. 1965) (suggestion that *Escobedo* necessarily retroactive). It should be emphasized that the decisions applying *Escobedo* retroactively were announced prior to the Supreme Court's decision in *Linkletter*.

69. See, *e.g.*, United States *ex rel.* Walden v. Pate, *supra* note 68; State v. Johnson, *supra* note 68, at 585, 206 A.2d at 744.

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

71. *In re* Lopez, 62 Cal. 2d 368, 377, 42 Cal. Rptr. 188, 195, 398 P.2d 380, 387 (1965). (Emphasis added.) Compare Hall & Kamisar, Modern Criminal Procedure 293 (1965): "Does the absence of counsel at trial *necessarily* cause the conviction of the innocent? Does the unavailability of a transcript on appeal *necessarily* cause the continued incarceration of the innocent?" The latter question is a reference to Griffin v. Illinois, 351 U.S. 12 (1956).

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.[75] To consider a second example, it would seem that *Massiah v. United States*,[76] 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 uncounselled 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, JJ., dissenting). For further discussion, see State v. Welch, 214 A.2d 857, 865 (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 [1932]," 377 U.S. at 205, it seems improbable that the Court would deny *Massiah* retroactive implementation.

78. See Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 53-58 (1964).

79. 373 U.S. 59 (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 833, 840 (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 uncounselled 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]

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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 Kamisar, *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.*[87]

Most confessions proffered in evidence at trial by the prosecution are trustworthy, whether voluntary or involuntary.[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."[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.[90] Involuntary confessions are excluded, therefore, under a "complex of values"[91] of which the chance of untrustworthiness is just one factor.[92] But the fact that the Court in *Escobedo*—where the confession was assumed to be voluntary—rested its reasoning in part on the broad principle that confessions produce a "less reliable" adjucative process indicates the Court's awareness that in practice the voluntary-involuntary test does not eliminate all untrustworthy confessions.[93] The *Escobedo* rule recognizes that in earlier cases with fact-patterns similar to that in

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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 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.*, United States *ex rel.* Walden v. Pate, 350 F.2d 240, 243 (7th Cir. 1965). See also note 93 *infra*.

87. Kamisar, *supra* note 85, at 38-39. See generally Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452-53 (1964). Compare Kamisar, *What Is an "Involuntary Confession"?—Some Comments on Inbau and Reid's "Criminal Interrogation and Confessions,"* 17 RUTGERS L. REV. 728, 753-55 (1963).

88. See Rogers v. Richmond, 365 U.S. 534, 541 (1961).

89. *Ibid.* See, *e.g.*, Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

90. Haynes v. Washington, 373 U.S. 503 (1963). See Herman, note 87 *supra*, at 454-57.

91. 381 U.S. at 638, quoting from Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

92. See Mishkin, *supra* note 54, at 83-85. See also note 99 *infra*.

93. As Professor Herman documents, a gulf developed between the result achieved in theory and in practice under the voluntary-involuntary test. Herman, *supra* note 87, at 456-57. 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." *Id.* at 458. See also note 86 *supra*.

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*.

95. *E.g.*, Haynes v. Washington, 373 U.S. 503, 507 (1963). See Douglas, *The Means and the End*, 1959 WASH. U.L.Q. 103, 113-14; Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 31 (1965). For discussions of police interrogation methods, see, *e.g.*, INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962).

96. The *Escobedo* rule, binding on all courts, thus furthers 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, 336 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*[97] 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.[98] 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.[99]

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,"[100] 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."[101]

In weighing the "merits and demerits"[102] of the retroactivity issue in its *Escobedo* context, lower courts analyzing the retroactivity issue after *Linkletter* but before *Shott* have shown an understandable

97. 316 U.S. 455 (1942).

98. See note 45 *supra*.

99. See HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 293-94 (1965). For an excellent treatment of ways in which the *Escobedo* rule affects the reliability of guilt-determination, see Mishkin, note 54 *supra*, at 95-98. Professor Mishkin feels that the major problem is not to describe these effects, but rather to weigh their significance. *Id.* at 99-100. After pointing out that commentators evidently use the term "unreliable confession" to mean one that is completely false, Professor Herman says that his brief criminal law practice suggests that the greater danger stems from "partial unreliability." "The interrogee who *is* guilty of some wrongdoing may, either through ignorance or in order to end the pressure of the interrogation, accede to a more serious version of the offense. However, the one or two-line inaccuracy or falsity may spell the difference between an aggravated and a mitigated offense." Herman, *supra* note 87, at 454 n.25. This problem was suggested by the recent murder trial of Duane Pope. The defense, which admitted that Pope committed the murders but contended that he was not guilty by reason of insanity, had to overcome a confession signed by Pope containing a statement of premeditated intent. At trial, Pope repudiated that admission. According to the *New York Times*' reporter, "the 22-year-old Kansas farm youth said he had signed a confession about 'planning' the murders not because it was true but because the agent for the Federal Bureau of Investigation who composed the statement 'wanted me to' sign it." N.Y. Times, Nov. 19, 1965, p. 42, col. 4 (city ed.). See generally Sutherland, *supra* note 95.

100. Linkletter v. Walker, 381 U.S. 618, 639 (1965).

101. *Id.* at 638.

102. *Id.* at 629.

desire to hold that *Linkletter* controls *Escobedo*.[103] This result-oriented analysis is indicated by the fact that these courts readily assume that the purpose of *Escobedo* is "identical"[104] 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.[105] 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,[106] 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.[107]

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*[108] and *Massiah v. United States*.[109] 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.[110] Since, as previously discussed,[111] the uncoun-

103. *E.g.*, United States *ex rel.* Walden v. Pate, 350 F.2d 240 (7th Cir. 1965); Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965).

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 486.

108. 373 U.S. 59 (1963) (per curiam). See note 80 *supra*.

109. 377 U.S. 201 (1964). See note 77 *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.[112] 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-

Massiah v. United States, [377 U.S. at 204]; . . . *White v. Maryland*, [373 U.S. 59] . . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained." 378 U.S. at 488.

111. See text accompanying notes 76 and 79 *supra*.

112. "Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide." Powell v. Alabama, 287 U.S. 45, 72 (1932) (Sutherland, J.). Thus, in a capital case it seems offensive to notions of due process for the state to take a man's life, however morally guilty he may be, who has been denied the effective assistance of counsel throughout the accusatory proceedings. See also Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (a capital case). See generally Bazelon, *Law, Morality, and Civil Liberties*, 12 U.C.L.A.L. Rev. 13, 28 (1964). If due process notions are offended in a capital case, they are no less abridged in a noncapital case. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Clark, J. concurring). In this connection it might be remarked that the Supreme Court will consider the retroactivity issue in *Escobedo* in the setting of a capital case, State v. Johnson, 43 N.J. 572, 206 A.2d 737, *cert. granted*, 86 Sup. Ct. 318 (1965).

sion among courts over this issue.[113] Most federal courts[114] and some state courts[115] 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* opinion[118] 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.

114. *E.g.*, United States *ex rel.* Russo v. New Jersey, *supra* note 113. *But cf.* United States v. Drummond, 354 F.2d 132 (2d Cir. 1965).

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, 408 P.2d 964 (1965) (Peek, J.); People v. Gilbert, 63 Cal. 2d 722, 47 Cal. Rptr. 909, 408 P.2d 365 (1965) (Traynor, C.J.); People v. Marbury, 63 Cal. 2d 601, 47 Cal. Rptr. 491, 407 P.2d 667 (1965) (Traynor, C.J.); People v. Green, 63 Cal. 2d 586, 47 Cal. Rptr. 477, 407 P.2d 653 (1965) (Tobriner, J.); People v. Faris, 63 Cal. 2d 566, 47 Cal. Rptr. 370, 407 P.2d 282 (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 404, 46 Cal. Rptr. 622, 405 P.2d 862 (1965) (Burke, J.); People v. Stewart, 62 Cal. 2d 571, 43 Cal. Rptr. 201, 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.

117. The Supreme Court has granted certiorari in five "Escobedo" cases: Westover v. United States, 86 Sup. Ct. 318 (1965); Johnson v. New Jersey, 86 Sup. Ct. 318 (1965); Vignera v. New York, 86 Sup. Ct. 320 (1965); Miranda v. Arizona, 86 Sup. Ct. 320 (1965); California v. Stewart, 86 Sup. Ct. 395 (1965).

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.[120] 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.[121] 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.[122]

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 uncounseled defendants may have been convicted on unreliable confessions unless we accord restrospective application to Escobedo." Commonwealth v. Negri, 213 A.2d 670, 679 (Pa. 1965) (Roberts, J., concurring and dissenting).

121. Mapp v. Ohio, 367 U.S. 643, 651-52 (1961).

122. *In re* Lopez, 62 Cal. 2d 368, 381, 42 Cal. Rptr. 188, 198, 398 P.2d 380, 390 (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.[123] 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.[124] 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,[125] 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.[126] 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*, 30 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. 865-66 (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, 230, 233 (1965). The confessions obtained by detectives from Hickock and Smith, "hardened criminals," were used against them to great advantage. *Id.* at 285-86. 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. 70, 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.[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.[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*." *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." *Ibid.* During the period surveyed, "nine murder indictments were filed. In not a single instance was a 'confession' involved." *Id.* at 4. The survey does not take 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, *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, *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, *supra*, at 4 n.29.

127. *Compare* note 126 *supra with* note 64 *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 *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, *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." *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 *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.[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*.[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.[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.[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.[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*.[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.[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-

Wilkins, 348 F.2d 844 (1965). Competing policies are suggested in Hall & Kamisar, Modern Criminal Procedure 294-95, 490 (1965).

129. In many cases, the confession is "the icing on the cake." See, *e.g.*, Haynes v. Washington, 373 U.S. 503, 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."

130. *Compare* note 129 *supra with* text following note 64 *supra*.

131. See note 68 *supra*.

132. The retroactivity issue in *Escobedo* is presented to the Court in Johnson v. New Jersey, 43 N.J. 572, 200 A.2d 737, *cert. granted*, 86 Sup. Ct. 318 (1965).

133. See text accompanying notes 84 and 93 *supra*.

134. See text following note 48 *supra*.

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

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).