CRIMINAL JUSTICE

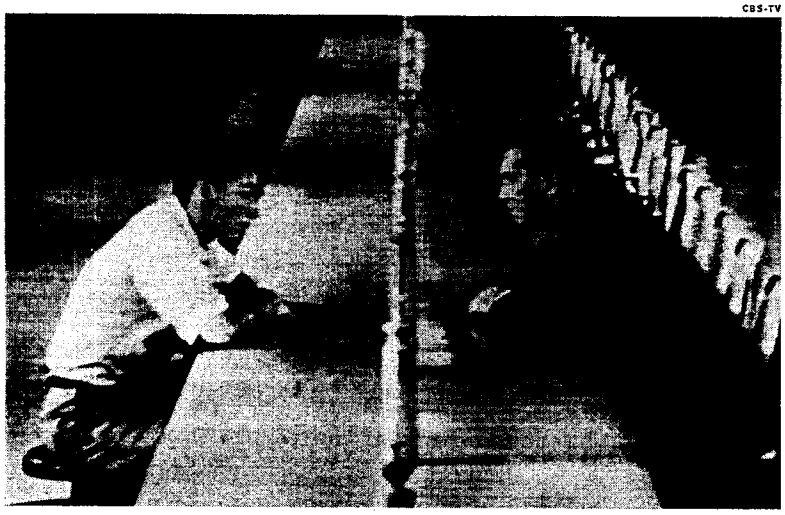
Concern About Confessions

(See Cover)

How does a nation such as the U.S., which professes the Jeffersonian ideal of "equal and exact justice to all men," balance the safety of society against the rights of the individual?

In 1964, the Supreme Court raised that profound issue by hurling a constitutional thunderbolt at the most basic U.S. police method of solving crimes: questioning suspects and extracting confessions. For decades, that system has thrived on the fact that most people are not aware of their constitutional right to silence. By holding that suspects may need lawyers to protect that right not merely in court but in the police station, the court's decision in *Escobedo* v. *Illinois* posed a cop's nightmare—no more confessions.

CBS-TV



CONVICT ESCOBEDO CONSULTING LAWYER FARRUG IN PRISON (1964)
To balance public safety against private rights.

As often happens in great constitutional dramas, the starring player was a nobody: Danny Escobedo, 26, 5 ft. 5 in., 106 lbs., a Chicago laborer serving 20 years for first-degree murder. Like most convicts, Danny was sure he had taken a bum rap. In his case, the Supreme Court agreed. Danny had confessed to complicity in his brother-in-law's murder, but only after Chicago police had refused to let him see his lawyer, who was in the station house trying to see him.* Not only did the court void Danny's confession: it held that every arrested American is now entitled to consult his lawyer as soon as police investigation makes him a prime suspect.

The Vital Issues. Though the 5-to-4 decision, written by Justice Arthur Goldberg before he left the court for the U.N., was clear in Danny's specific case, it was so vague in its general application that it could be interpreted as requiring lawyers throughout some police interrogations. As police see it, this would mean that all suspects would simply stop talking. Out would go the time-honored use of confessions in court, a practice that police claim is vital to conviction in 80% of all criminal cases.

In almost record time the Supreme Court has been forced to face the task of clarifying its own opinion by accepting five new confession cases. They raise six vital issues: 1) When do a suspect's constitutional rights begin? 2) Must police inform him of those rights? 3) Does he need a lawyer to waive them? 4) Are indigents entitled to lawyers in the police station? 5) Does *Escobedo* retroactively threaten pre-1964 confessions? 6) To what extent does it forbid the whole process of U.S. police interrogations?

The court's answers may affect the liberty and the safety of all Americans. As Justice Abe Fortas put it during the oral arguments last month: "We deal not with the criminal against society, but the state and the individual."

Speechless Things. At the heart of the debate is a search for the proper limit on police power in a free society—a society that confronts its cops with fast cars, urban slums, organized crime, street violence, anonymous people, and a crime rate rising five times faster than the rate of population growth. To cope with such conditions, the police argue that they must have all reasonable authority to question any citizen. Investigation alone, they say, cannot solve many crimes, such as burglary, murder and mugging, in which the culprits leave no physical traces. "I defy anyone to find any meaningful evidence at the scene of a purse snatching," says Cincinnati Police Chief Stanley R. Schrotel.

With no clues, how can the police solve a string of burglaries committed by a professional who is never caught in the act? Not by fingerprints, wristwatch radios and brilliant deduction. What it takes is tedious, routine police work—hiring informers, watching known burglars, and questioning suspicious persons. Even then, a prime suspect may not confess and "clear the books" of all those unsolved burglaries until he is offered a deal, such as concurrent sentences equaling the rap for just one burglary. "Despite modern advances in the technology of crime detection," summed up the late Justice Felix Frankfurter, "offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions."

Highest Evidence. The hope is that such questions will lead to voluntary confessions, which have always been highly valued in U.S. courts. Whether it is the spontaneous blurt, the "threshold" confession immediately after the crime or the arrest ("Officer, I just killed my wife"), or the eventual uncoerced admission made by a suspect, the voluntary confession usually needs no corroboration for conviction. It is "the highest form of evidence," the legal analogue of the religious confession, although it may lead to execution rather than absolution.

For all that, added Frankfurter, the confession system has "manifest evils." One is "the threat that a police system which has grown to rely too heavily on interrogation will not pursue or learn other crime-detection methods, and the consequent danger that police will feel themselves under pressure to secure confessions." Only a short step away is the "third degree," which makes a mockery of "natural" confessions and undermines the integrity of the trial itself.

Overreliance on confessions has troubled common-law countries ever since the rise of police forces in the mid-19th century. The drafters of the 1872 India Evidence Act put the problem succinctly: "It is far pleasanter to sit comfortably in the shade rubbing pepper into a poor devil's eyes than to go about in the sun hunting up evidence." Under the Evidence Act, all Indian confessions are inadmissible unless made "in the immediate presence of a magistrate" who has first warned the accused that he need not speak and that anything he does say may be held against him.

In 1912, Britain devised the famous "Judges Rules" requiring police to warn anyone suspected of a crime; questions must stop when police have enough evidence to charge the suspect. Today the rules are said to be widely ignored, and with crime soaring, some eminent Britons argue that the privilege against self-incrimination is outdated. The privilege does have old-fashioned roots. It originated in repugnance for such long-vanished torture methods as the rack and

* The photographs on the cover are from the files of the Chicago police department.

the screw. Now that British police are civilized, say the critics, why forbid them merely to ask questions—thus stacking the odds in favor of criminals?

The Double Standard. But all this assumes that police can be trusted, and lack of such trust underlies the entire U.S. debate over *Escobedo*. In striking contrast to Britain, the U.S. has enshrined the privilege against self-incrimination in its written Constitution for 175 years—but has yet to make police live up to it.

The Fifth Amendment guarantees that "no person shall be compelled in any criminal case to be a witness against himself." It establishes a system of justice based on accusation, not inquisition; it commands the government to prove guilt by independent evidence, not by coercing proof out of the defendant's own mouth. So absolute is the privilege against self-incrimination in a trial that the defendant need not even take the stand. But what of police interrogation —the preliminary stage at which a suspect is pressed to make the very confession that may convict him at his trial?

The answer reveals a strange double standard in U.S. justice. The Bill of Rights—basically, the Constitution's first eight amendments—was written in the 18th century when there were no police forces. At the time, the trial itself was the critical confrontation between the state and the accused. Mindful of the British Star Chamber, the Constitution's framers ringed American trials with safeguards—almost none of which serve to protect the suspect from the time he is picked up by the police until days or even weeks later, when he appears before a judge.

Trial by Police. Clearly, the critical confrontation today is often reached in the station-house "squeal room," where police "make" cases by eliciting presumably voluntary confessions. Although the Fifth Amendment bars the use of any confession that police extract by even the most subtle threats or promises, and though no American need answer a single police question, those facts are generally unknown to the vast majority of arrested Americans—the poor in pocket, mind or spirit. For the Fifth Amendment does not automatically command police to inform anyone of his rights; the suspect himself must know those rights in order to exercise them. Ironically, this is no problem for the big-time crook with an attorney in attendance. For the suspect without a lawyer, however, interrogation is the most crucial phase of his entire case. And 60% of U.S. criminal defendants cannot afford lawyers.

As a result: 90% of U.S. defendants plead guilty and are swiftly sentenced without a trial. In effect, most of them are convicted by the police—not by judges and juries. And since most police insist that interrogation must be secret, the courts have no way of knowing just what led up to the confession. Without tapes, films or neutral witnesses, judges have no way of determining whether a suspect really talked freely or was tricked or bullied into "waiving" his right to silence, or even into confessing falsely—a not unknown reaction to the sinister air of the police station.

Absolute Privacy. The day is just about gone when police used rubber hoses, explained a defendant's suspicious bruises by claiming that "he fell downstairs," or (in New Orleans) made hydrophobic Negroes talk by suspending them over a lake canal at night. Today, the goal is "rapport" with the "subject." Having discovered psychology, the cops induce "truth" by psyching the suspect.

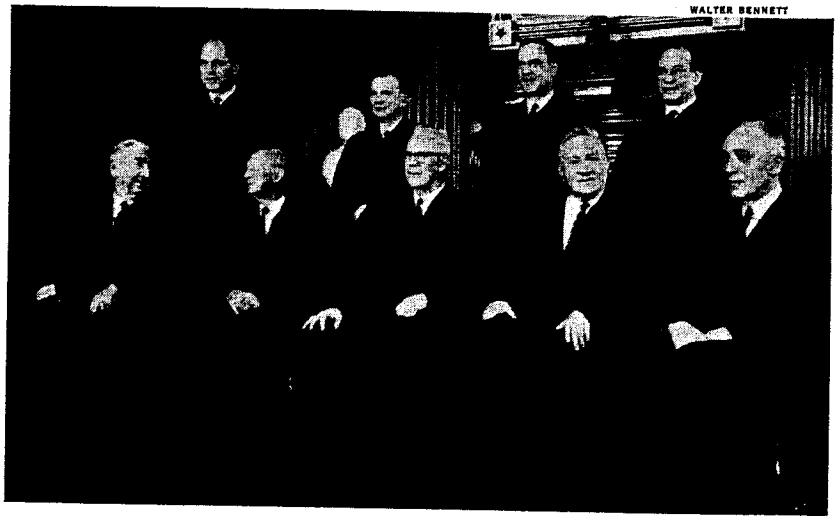
In one leading police manual, *Criminal Interrogation and Confessions*, Northwestern Law Professor Fred E. Inbau and Polygrapher John E. Reid depict the modern interrogator as "a hunter stalking his game." They prescribe absolute privacy in a small, bare, windowless room. "Display an air of confidence in the subject's guilt," they urge. Appear to have "all the time in the world." The interrogator strips the suspect's status away by using his first name—"Joe" rather than "Mister"—and slowly moves his chair "closer, so that, ultimately, one of the subject's knees is just in between the interrogator's two knees." Says he: "Your mouth's very dry, isn't it?"

Inbau recommends the sympathetic pitch that anyone in the same fix "might have done the same thing," that the crime had a "morally acceptable motive." Also helpful: "Condemn the victim." With a rapist, for example, the detective should indignantly exclaim: "Joe, no woman should be on the street alone at night looking as sexy as she did. Even here today she's got on a low-cut dress that makes visible damn near all of her breasts. That's wrong!"

Only the Truth. If Joe refuses to admit statutory rape, for example, the interrogator can always claim that the girl is accusing him of forcible rape. Result: "The subject will usually react immediately by making a denial of any force, while at the same time admitting the act of intercourse itself." If Joe still refuses to talk, "point out the incriminating significance of his refusal." Indeed, the law assumes that failure to deny a serious accusation is unnatural, and therefore a sign of guilt, known as an "adoptive admission." As one judge put it: "If you say anything, it will be held against you. If you don't say anything, that will be held against you."

All of which may indicate how badly a suspect needs a lawyer. But if he demands one, argues Inbau, "the interrogator may suggest that the subject save himself or his family the expense." He should then confidently add: "Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this yourself."

WALTER BENNETT



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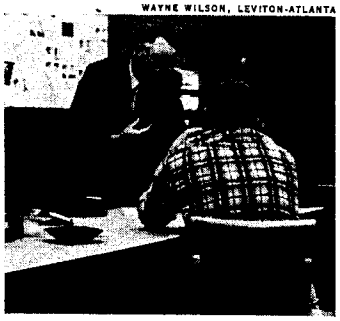
Dominate the Subject. Can he? In Minneapolis in 1962, John F. Biron, 18, admitted mugging an old woman, who later died. Accidentally, his lawyer discovered a police tape that showed how Biron had endured hours of relentless grilling by two hypnotic detectives. ("*You're* the fella's gonna determine how long you're gonna be buried. *You* got the shovel. *You're* diggin' the hole.") Only the tape showed how the detectives had repeatedly lied in promising to send Biron to juvenile court, even though he was legally an adult. When he talked, they charged him with adult murder. After hearing that tape, the Minnesota Supreme Court reversed Biron's conviction. Significantly, he was later reconvicted on other evidence the cops already had.

In *Fundamentals of Criminal Investigation*, former New York City Detective Charles O'Hara goes far beyond the familiar Mutt & Jeff routine in which a suspect is scared witless by a "bad guy"

* From left: Clark, White, Black, Brennan, Warren, Stewart, Douglas, Fortas, Harlan.

detective and is then saved by a "good guy" who coaxes him to shame the baddy by talking freely. O'Hara not only stresses "bluff on a split pair" (falsely claiming an accomplice has talked); he also recommends "pretense of physical evidence," such as a faked lie-detector test or fake lab reports that play on the gullible suspect's "mystical notions of the power of scientific crime detection." Above all, says O'Hara, the interrogator "must dominate his subject and overwhelm him with his inexorable will to obtain the truth."

But is it always the truth? Quite often, the defendant later recants, forcing courts to determine the voluntariness of his confession. The issue becomes a "swearing contest" between the scruffy confessor and three or four detectives who swear they never coerced him. Understandably, most judges and juries prefer to believe policemen; indeed, judges overlook trickery in the squeal room that would shock them in the courtroom.



WAYNE WILSON, LEVITON-ATLANTA

BURGLARY SUSPECT IN ATLANTA

DON UHRBROCK

PROWL-CAR INTERROGATION IN HOUSTON

Also helpful: condemn the victim.

Unseen Son. It was just such a swearing contest that created *Escobedo* v. *Illinois*, but in that case the nation's highest tribunal upheld the defendant —something that still awes Danny Escobedo, now 28 and long familiar with police stations. At his height, Danny hardly seems a threat to any healthy policewoman; yet he has managed to get himself picked up twice for "investigation" and arrested five times on charges ranging from assault to murder, including two arrests since his release for packing a pistol and selling barbiturates. So far, he has beaten every rap.

"I was never the ideal teen-ager," Danny wryly recalls. But he has always been fiercely idealistic about marriage, and often brooded about his sister Grace's troubled marriage to Manuel Valtierra, a key punch operator who was once arrested for stabbing Grace more than a dozen times. Danny himself fell in love with a pretty Irish-German girl of 17, and proudly claims, "I never touched her till we were married." Today, Danny is a father, but his wife has divorced him and disappeared. He has yet to see his son, who was born while Danny was in Statesville Penitentiary for killing Manuel Valtierra.

Handcuffed Client. Grace's husband was shot in the back as he arrived at his slum home on Chicago's West Side one cold January night in 1960. It was a typically clueless crime: no gun was found; there were no witnesses. But 80% of all murders involve friends or relatives, and with no warrant the police nabbed Grace, Danny and two of his friends, Bobby Chan, 17, and Benny Di Gerlando, 18. While detectives questioned them for 14½ hours at the city's ugly grey police headquarters, Chan's mother got in touch with Lawyer Warren Wolfson, who had once represented Danny in a personal-injury case. Because no one talked, Wolfson was finally able to get the whole crew released. By then, though, the cops had a theory: Danny & Co. had done Grace the favor of liquidating a hated husband.

ART SHAY

STREET ARREST IN CHICAGO

But how to prove it? Typically, the police chose more interrogation. Ten days later, they persuaded Di Gerlando to finger Danny as the killer. Rushed back to headquarters along with Grace and Chan, Danny was hustled into an interrogation room with his hands manacled behind his back. No one warned him of his rights to silence and to counsel. Once more, Wolfson hurried to the station house. He and Danny got a brief glimpse of each other through a half-open door, but the police told the lawyer that Danny "doesn't know you," refused to let Danny see Wolfson. In vain, Wolfson cited an Illinois statute that guarantees such consultation "except in cases of imminent danger of escape."

With no lawyer to advise him, Danny fell into a well-laid legal trap. Confronted with Di Gerlando, Danny blurted: "You did it!"—thus indirectly admitting his own complicity. To shut the trap tighter, a detective then allegedly promised Danny that a full statement would free him, Grace and Chan. After several hours, said police, Danny implicated Grace and stated that he had offered Di Gerlando $500 to kill Grace's husband, and that Chan had been the lookout. Di Gerlando later charged that his confession was beaten out of him. The police denied it; he was convicted, is still serving a life sentence.

Far from being freed, as the detective had promised, Danny, Grace and Chan were all indicted for murder. Under Illinois law, Danny's admission made each as culpable as if each had admitted pulling the trigger. Grace was later acquitted for lack of clear links to the crime, and the charges against Chan were dropped. As for Danny, although he recanted his statement, the trial judge ruled it voluntary, dismissed his handcuffing as "ordinary police procedure," and sentenced him to 20 years.

Fair's Fair. After two years in Statesville, which he remembers as all "whistles, bells and men in brown," Danny filed a pauper's appeal to the Illinois Supreme Court, which duly appointed an able young Chicago lawyer named Eugene Farrug to handle his case for no fee. On first meeting his scrawny client, Farrug felt immediate compassion: "He looked so small and helpless. There was the enormity of the prison, the towering guards, the prison clothes a little too big for him." Danny himself could hardly believe the earnest stranger's promise that "you have the whole American tradition of law and justice behind you." From his side of the bars, he could only smile skeptically at one of Farrug's letters: "It's a pretty great thing to live in a society where people will work so hard to ensure that one individual is not taken advantage of."

To his astonishment, Danny soon learned that Lawyer Farrug had told the exact truth. While polishing Danny's petition, Farrug enlisted the best appellate advocate he could find: Barry Kroll, 28, who had joined Farrug's Chicago firm after arguing 300 military appeals cases in the Army. In 1962, "starting the best experience I've ever had," the brilliant young Kroll urged the Illinois Supreme Court to reverse Danny's conviction, which it did on the grounds of false promises by the detective who persuaded Danny to talk.

At a rehearing, though, the state pointed out that the detective had denied the promises, and the court reversed itself. Kroll vainly argued a new

theory: that Danny's statement became *ipso facto* involuntary, and therefore inadmissible, as soon as the police turned away his lawyer. Kroll hoped to end "swearing contests" on the voluntariness of confessions by establishing an objective test: if police violate a specific rule, any confession they elicit is automatically excluded. Kroll's proposed rule was the Illinois statute guaranteeing access to a lawyer. But the court recoiled from enforcing it: such a rule, it said, would entitle lawyers to monitor all police questioning. The result, feared the court, "would effectively preclude all interrogation—fair as well as unfair."

When Kroll appealed Danny's case to the U.S. Supreme Court, his idea for an objective test of police procedure reached friendlier territory. In federal jurisdiction, the FBI routinely warns all suspects of their rights to silence and to counsel; if a federal suspect talks, the prosecution must prove that he "intelligently and knowingly" waived his rights. Moreover, the Supreme Court's 1957 *Mallory* rule bars prolonged federal interrogation. On arrest, a federal defendant must be taken "without unnecessary delay" before the nearest U.S. commissioner, who reiterates his rights and furnishes a lawyer if the suspect cannot afford one. Admissions obtained during excessive delays are excluded.

Overdue & Overborne. It is the question of how to raise state procedures to this standard that has baffled the Supreme Court. The Fifth Amendment was long thought not to apply to states at all. Only one state (Michigan) has adopted *Mallory*, and though nearly all the others have "prompt arraignment" laws, state judges widely tolerate incommunicado police interrogation lasting as long as three days. The Supreme Court did not even attack the use of coerced confession in state courts until the 1936 case of *Brown* v. *Mississippi*, when it voided the "voluntary" murder confessions of three Negroes who had talked only after being beaten with steel-studded belts for five days.

In more than 35 subsequent cases, the Supreme Court worked out new standards under the due-process clause of the 14th Amendment, which is binding on states. A confession is voluntary, said the court, only if it reflects "a free choice to admit, or deny or refuse an answer." It is involuntary, and therefore inadmissible, if the suspect's will to silence was "overborne" by any pressure —mental or physical. The court voided one man's confession because he had not been allowed to call his family, and that of a woman because the police had threatened to take away her children. Indeed, since 1958 the court has not held any confession to be voluntary.

Total Confusion. For all that, the court's voluntariness doctrine lacked any objective test and turned instead on subjective appraisal of the "totality of the circumstances." In each case, the court tried to reconstruct the suspect's ability to resist the forces arrayed against him. The results were confusing. To weigh "totality," the court developed no fewer than 38 criteria, such as whether police conduct "shocked the conscience." In two cases similar to *Escobedo*, police barred the suspects' lawyers; one confession came after seven hours, the other after twelve. While voiding the first, the court upheld the second. All this left lower courts to decide voluntariness almost as they pleased.

In 1963, the Supreme Court started moving inexorably toward a solution in *Gideon* v. *Wainwright*, which discarded "totality" as the test of whether indigents were entitled to free counsel in state criminal trials. By imposing on the states the Sixth Amendment right to counsel, *Gideon* set an objective standard: all indigents get free counsel in the courtroom in felony cases without question. In May 1964, *Massiah* v. *U.S.* moved the right to counsel back to the pretrial stage of indictment. In June of that year, *Malloy* v. *Hogan* made the Fifth Amendment binding on states. A week later *Escobedo* reversed Danny's conviction after he had spent 4½ years in prison—and moved the Constitution, and lawyers, into the police station. The court made it clear that criminal prosecutions actually start in the squeal room. To bar legal aid at that crucial stage, it ruled, "would make the trial no more than an appeal from the interrogation."

JUSTICE GOLDBERG (1962)
Almost at once forced to clarify.

Two-Way Argument. Speaking for the five-man majority, Justice Goldberg acknowledged that a right to counsel during questioning might sharply diminish confessions. He quoted the late Justice Robert Jackson's opinion in a prior case: "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." But, said Goldberg, "this argument cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a stage when legal aid and advice are surely needed. Our Constitution, unlike some, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.

"A system of law enforcement which comes to depend on the confession," continued Goldberg, "will, in the long run, be less reliable than a system which depends on extrinsic evidence independently secured through skillful investigation. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

Despite this manifesto, the basic *Escobedo* rule was actually limited. "We hold only," said the opinion, "that when the process shifts from investigatory to accusatory —when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult his lawyer."

Even that specific rule, with its insistence on the importance of the "focus" point, struck the four dissenters as all wrong. Not only is the rule unworkable "unless police cars are equipped with public defenders," declared Justice Byron White, but it "reflects a deep-seated distrust of law-enforcement officers everywhere." Said Justice John M. Harlan: "I think the rule is most ill-conceived and that it seriously and unjustifiedly fetters perfectly legitimate methods of criminal enforcement."

Court v. Court. Across the country, many lower courts echoed the dissenters' fears by ruling that *Escobedo* voids a confession only if, as in Danny Escobedo's case, the suspect had retained a lawyer and was not allowed to consult him. By contrast, the California Supreme Court went beyond *Escobedo* and ruled last year that a constitutional right to counsel exists even if a suspect does not ask to exercise it. In California, police failure to warn a suspect of his rights to silence and to counsel now voids his confession even though he makes no request for a lawyer.

By last December, two U.S. appellate courts had interpreted *Escobedo* in diametrically opposite ways. Duty-bound to referee such a conflict, the Supreme Court sifted 170 confession appeals and accepted five involving six defendants:

▶ Sylvester Johnson and Stanley Cassidy, now awaiting execution in New Jersey, were implicated by a confederate's coerced confession in the 1958 holdup murder of a toy-shop operator in Camden. Johnson, then 21 and a

schizoid, asked a magistrate for a lawyer, was refused, and confessed after twelve hours. Cassidy, then 25 and "regressed," received no warning and confessed during 20 hours' grilling. Because both convictions were final before *Escobedo*, they pose the retroactivity riddle.

▶ Ernesto Miranda, 23, an "emotionally ill" truck driver, received 25- and 30-year sentences in 1963 for robbing a woman and kidnaping and raping an 18-year-old girl. Miranda was picked up on suspicion: both victims identified him in a line-up. He talked freely, was neither told nor knew of his right to counsel. The Arizona Supreme Court took the "hard" *Escobedo* line, upheld his conviction.

▶ Roy A. Stewart, 28, a sixth-grade dropout, was suspected in 1963 of mugging a number of Los Angeles women, one of whom died. Arrested with his common-law wife, Stewart was grilled 4½ days before admitting that he robbed but did not kill the woman. He was sentenced to death for felony-murder. He did not request counsel, claims he confessed to free his wife. The California Supreme Court said police should have given him a silence warning, reversed his conviction.

▶ Michael Vignera, 31, got a 30- to 60-year rap for holding up a Brooklyn dress shop in 1961. Vignera was fingered by a confederate, linked to stolen goods, and identified by his victims. He confessed after about twelve hours. To clinch the police case, he was then grilled far beyond "focus," and was not taken before a judge until roughly 24 hours after his arrest. He was not advised of his right to counsel; police also ignored New York's prompt-arraignment statute. The state's highest court upheld his conviction on "totality" grounds.

▶ Carl C. Westover, 44, the only federal defendant, was picked up by Kansas City, Mo., police in 1963 after they got FBI word that he was suspected of robbing two federally insured banks in California. The police first questioned him about local robberies; some 14 hours later they turned him over to FBI agents, who got a confession 2½ hours later. Though warned of his right to counsel, Westover was not allowed to exercise it; he was held incommunicado for eleven days before being arraigned. He drew a 30-year sentence. Westover's case raises the issue of FBI collusion with local police to avoid the *Mallory* rule.

Hypocrisy v. Disaster. In choosing these cases, the Supreme Court revealed *Escobedo's* potential dynamite: all but one of the confessions were apparently true and voluntary; most of the defendants probably could not have been convicted without their confessions. Yet the court is being asked to void all the confessions by reading into *Escobedo* a new standard: that police must warn all suspects at focus point that they need not talk, that anything they say may be held against them, and that they have a right to counsel, furnished by the state if necessary.

JOHNSON, CASSIDY & CONFEDERATE
Posing the retroactivity riddle.

As it devoted an unusual three days to oral arguments last month, the court heard the defendants' lawyers declare that the new standard will not affect organized crime, whose members well know their rights, but will simply end the present hypocrisy of hiding the Constitution from the squeal room's main customers—the poor, the ignorant and the mentally limited.

Lawyers for the states and the Justice Department implored the court to the contrary. Don't expand the limited *Escobedo* ruling in ways that handcuff police interrogation, they said. Don't forget society's rights and Benjamin Cardozo's words: "Justice, though due the accused, is due the accuser also." Don't abandon "totality of circumstances" in judging whether confessions are free or coerced. Don't assume that "focus" is workable as an objective test. Don't expect judges to reconstruct just when the focus point was reached or whether the suspect really waived his rights when he talked. Don't add such new confusion that ultimately the only solution will be a truly automatic test: no interrogation without a lawyer.

Supreme Swinger. Indeed, the American Civil Liberties Union, as *amicus curiae* in all of the cases before the Supreme Court, advocates exactly that test. The A.C.L.U. argues that police custody is inherently so coercive that the suspect's privilege against self-incrimination can be protected only by a lawyer, not by mere warnings from the police, who are his adversaries. In this view, the lawyer's function would not be so much to shut up a guilty suspect as to advise him on his best chances—to say nothing of what the presence of lawyers would do to bolster the faith of the public and potential witnesses in police interrogation.

So far, the best guess of Washington lawyers is that the court may simply require police to warn prime suspects of their rights—partly because the court may now be as closely divided as it was in *Escobedo*. When Justice Goldberg departed for the U.N., he left eight Justices who had split 4 to 4 in that case. His successor, Justice Fortas, made eloquently clear during the arguments that he views the court's "vexatious, tormented" decision no differently than he did when he was on the other side of the bench winning the right to counsel for Florida Indigent Clarence Gideon. Apparently, much like Goldberg, he sees the cases in terms of the Magna Carta—in terms of human liberty rather than "just convicting people." While that seemed to leave the Justices split about as before, court watchers also noted that Justice William J. Brennan remained conspicuously silent, often the sign of a "swing man" who hopes to engineer a majority vote on a compromise.

Police Pigeon. No one is more anxious for the court to make up its mind than Danny Escobedo, a prime target of Chicago cops ever since the state dropped its case against him in 1964 for lack of any other evidence except his invalid confession. In prison, Danny wrote poetry, learned plumbing, discovered psychology. He walked out with a high school diploma, dreams of a good job, and hopes of suing the police for denial of his civil rights. Hardly anything has worked out.

Last year a Chicago federal judge shot down Danny's suit, ruling that he was not entitled to damages for violation of a right that did not exist before the Supreme Court ruled in his own case. Plagued by his prison record, Danny has drifted in and out of jobs —clerk, waiter, dock-walloper—with the police ever tagging his footsteps. Danny's first job was arranged by Grace's new husband, Mitsura ("Mits") Wakita, a warmhearted Japanese-American and longtime credit manager for a wholesale drug house. Danny worked in the cosmetics stockroom for $1.65 an hour, quit to find more pay in January 1965. In April, Danny was braced on a street corner by a drug addict who was also a paid police informer. By odd coincidence, the cops swooped down just as the addict shoved a bagful of barbiturates into Danny's hand. Blared Chicago's American: MURDERER NABBED ON DOPE CHARGE.

To Be Alone. Without a warrant, the police broke into the Wakitas' apartment and car, "found" two small bottles of sleeping pills that Mits said he had never seen. The pills were of a type not to be sold without prescription, and

the Wakitas were booked for drug possession. By the time a judge dismissed the charges, Mits and his wife had been fired from their jobs, kicked out of their apartment, ordered to remove Grace's daughters from their school. When Danny argued entrapment and was found not guilty last June, Judge Walter Kowalski denounced the jury for "a travesty of justice."

One night last February, Mits had a flat tire while driving his family home after visiting Grace's relatives. As he got out to fix it, another car drew up and hovered near by. When he opened the door to get back into his car, automatically turning on the inside lights, Mits became an easy target and was shot dead. Danny, who had lived with Mits and "loved him like a brother,"

CHICAGO SUN-TIMES

ESCOBEDO & KROLL LEAVING PRISON (1964)
A nobody for everybody.

was immediately pulled in for questioning by the police.

Grace and Danny claim that they have been constantly threatened since the murder of her first husband. Whatever the connection between those threats and Mits's murder, the police have yet to find Mits's killer. Twice police have stopped and searched Danny's car while he was driving Grace and her children. Last month they stopped him again, found a pistol, arrested him and impounded his car. Facing trial next month, Danny groans: "I just hope that great court in Washington makes a new law greater than mine. Then maybe we'll be left alone."

Sharper Sleuthing. Chicago's is not the only U.S. police department suffering an "Escobedo syndrome"—and

most of the others blame Chicago for their troubles. "Anybody would have known that guy had a right to see his attorney," snorts a Seattle police lieutenant. "If they hadn't messed up, we wouldn't be stuck today." To get unstuck, more and more police are handing out impeccable warnings. "We warn, warn, warn," says Denver D.A. Bert M. Keating. "It may hurt to stop the guy in midsentence," adds Miami Beach Police Chief Rocky Pomerance, "but what's the use if we can't use what he says?"

In Cincinnati, Prosecutor Melvin G. Reuger is lecturing every single cop on the meaning of *Escobedo*, and sharply advising them to "do a more effective job before you start talking to a defendant." Adds Atlanta's Detective Superintendent Clinton Chafin: "People now realize they've got to get out and dig up the evidence." Detroit's Detective Chief Vincent Piersante recently revealed a significant set of statistics. In pre-warning 1961, confessions were "essential" in 20.9% of Detroit's murder cases; in 1965, with warnings, Piersante's men actually got more confessions, and yet they were considered "essential" in only 9.3% of murder cases —all because of sharper sleuthing before arrest.

Eternal Gatemouths. For police, at least, perhaps the most interesting news is that warnings by no means stop confessions. In Philadelphia last October, police began giving verbal warnings as soon as they suspected anyone of being "involved." After that comes a six-question written warning that detectives carefully read aloud and suspects sign. By last month 76% of all felony suspects had nonetheless made voluntary statements; the confessors ranged from 68.8% of robbery defendants to 82.6% of murder defendants. To the Supreme Court, on the other hand, such statistics may suggest that a suspect who waives his rights to silence is obviously in need of a lawyer to tell him precisely what he is waiving.

However it may complicate the solution of some crimes, many experts see *Escobedo* as a spur to better police training, more computerized law-enforcement procedures, and faster development of scientific crime detection. Moreover, no matter how far the Supreme Court goes, a large number of suspects will always be "gatemouths," compulsive confessors who need no encouragement to announce their guilt. "Human nature saves us," says one California prosecutor. "People talk anyway." In Seattle, for example, police insist that a burglar recently emerged from a skylight to be confronted by two waiting cops with drawn guns. Their first words: "You have the right to remain silent; you may consult an attorney before you make a statement; anything you say may be held against you." Astonished, the burglar admitted his guilt and cleared the books then and there.

LETT

Escobedo & The Law 5/6/66

Sir: Much needed light is cast by your penetrating cover story on *Escobedo* [April 29]. It reinforces my contention that we have more to fear from uninformed critics of *Escobedo* and similar decisions, who are tearing down respect for the law, than from the decisions themselves.

JAMES P. NUNNELLEY
L.A. County Deputy Public Defender
Los Angeles

Sir: This story is the most incisive, thoughtful and balanced treatment of an enormously difficult and highly emotive cluster of problems I have ever seen in a magazine of general circulation.

YALE KAMISAR
Professor of Law
University of Michigan
Ann Arbor, Mich.