CRIMINAL JUSTICE

The Confession Controversy

To "make a dollar," Richard Cone mailed eight packages of marijuana home from Panama. When he returned to Manhattan and picked up his parcel, U.S. customs agents arrested him. Minutes later, while walking to a Government car, Cone confessed; he freely gave evidence that helped earn him a five-year sentence for smuggling narcotics. Later he appealed, basing his argument on the Supreme Court's controversial 1964 decision *Escobedo* v. *Illinois*, which ruled that when investigation shifts to accusation, police must tell all suspects of their rights to silence and to counsel—and that any confession made without such warning is invalid and cannot be used against the suspect.

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Escobedo *urgently needs clarification.*

Last week the U.S. Court of Appeals for the Second Circuit (New York, Vermont, Connecticut) rejected Cone's claim that his confession was inadmissible under *Escobedo* because he was not warned of his rights although the arresting customs agents had reached the accusatory stage—in short, the time when they felt they had their man. By a vote of 7 to 1, the court bypassed *Escobedo* and ruled instead that Cone's admissions were purely voluntary.

Speaking for the court, Chief Judge J. Edward Lumbard declared that the U.S. Constitution does not automatically command a warning to suspects. Lumbard called it "highly undesirable to lay down a rule which would deprive police of the opportunity to question suspects and to use such statements as are found to have been given voluntarily and to have been procured fairly." Said Lumbard: "In our country a most valuable right of law-abiding citizens, who make up the great majority of our people, is the right to be protected against lawbreakers and criminal interference with their liberty and property."

Circuit v. Circuit. With those words, the judge unmistakably chose sides in the hottest debate in U.S. criminal law today. To alarmed police and prosecutors, *Escobedo* is a bar to using any confession in court—a practice that former New York Police Commissioner Michael J. Murphy, for example, called "essential to conviction" in 50% of the city's murders. And with no clarifying word from the Supreme Court, *Escobedo* has sharply divided lower courts across the country. Many take the "hard" line that a confession is inadmissible only if the suspect had a lawyer and was not allowed to consult him. By contrast, the California Supreme Court ruled last January that police failure to warn a suspect of his rights to silence and to counsel now voids his confession even though he makes no formal request for a lawyer. In May, the U.S. Court of Appeals for the Third Circuit (New Jersey, Delaware, Pennsylvania) issued a similar opinion—one that sharply conflicts with last week's opinion by the Second Circuit. Now only the Supreme Court can referee the dispute.

At the heart of the argument is the Fifth Amendment guarantee that "no person shall be compelled in any criminal case to be a witness against himself." That guarantee establishes a system of justice based on accusation, not inquisition. In essence, it commands Government to prove guilt by independent evidence, not by coercing the proof out of the defendant's own mouth. So absolute is the privilege against self-incrimination 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 the trial?

The Fifth Amendment bars the use of any confession that police extract from a suspect by brutality. Indeed, it bars any conceivable kind of coercion, including the most subtle threats or promises. But the point where such coercion starts is often difficult to define. As a result, the FBI, which gathers evidence for federal courts in which the Fifth unquestionably applies, routinely warns all suspects of their rights to silence and to counsel. On arrest, a federal prisoner must be arraigned forthwith before the nearest U.S. commissioner and supplied with a lawyer if he cannot afford one—all of which upholds the constitutional guarantee against self-incrimination.

Voluntary v. Involuntary. But state courts, which handle most U.S. criminal cases, have been another matter. The Fifth Amendment was long thought not to apply to them at all. The Supreme Court did not even attack the use of coerced confessions in state courts until the 1936 case of *Brown* v. *Mississippi*, when it reversed the murder convictions of three Negroes who had confessed only after being all but lynched.

In 34 subsequent decisions, the court has slowly forced the states to observe a new standard. A confession is "voluntary," and therefore admissible, said the court, only if it reflects "a free choice to admit, or deny or to refuse an answer." It is involuntary, and inadmissible, if the suspect's will to silence was "overborne" by any pressure—mental as well as 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 under review to be voluntary.

New Safeguards. More recently, two related decisions laid the groundwork for a ruling that even a voluntary confession might be inadmissible in state courts. In *Gideon* v. *Wainwright* (1963), the Sixth Amendment right to counsel was extended to all state criminal courts. In *Malloy* v. *Hogan* (1964), the Fifth Amendment guarantee against self-incrimination was also extended to the states. As a result, the court took the next step—concluding that police interrogation itself is so crucial in prosecution, that at this stage, as well as in the courtroom, an accused's rights to silence and to counsel add up to more than a right not to be "overborne."

In *Escobedo* v. *Illinois*, the court voided Chicago Laborer Danny Escobedo's voluntary murder confession because the police had failed to advise him of his right to silence and, despite his request, had kept him from seeing his lawyer, who was in the station house trying to see him. Basically, the court

believed that most suspects are simply not bright enough to protect themselves without a lawyer. As police see it, however, the very presence of lawyers means that all suspects who are being questioned will simply stop talking.

"Nurtured Nonsense." Chief Judge Lumbard's defense of the police position reflects the majority view in a debate now taking place in the prestigious American Law Institute, which is trying to force-draft a model code of pre-arraignment procedures. At this point, for example, the preliminary draft does not provide lawyers for indigents during interrogation on the ground that there are simply not enough lawyers to do the job.

There is an alternative, however, argues a minority group of drafters. University of Michigan Law Professor Yale Kamisar, for one, is fighting hard for the idea that interrogations should be tape-recorded and even filmed, thus giving judge and jury a clear picture of the suspect's state of mind when he made a confession. At a recent meeting of U.S. public defenders in Arizona, Kamisar played just such a tape of Minneapolis detectives questioning a young murder suspect—a tape conveying emotional nuances in a way that no written statement ever can. Indeed, that very tape persuaded the Minnesota Supreme Court to void the youth's murder conviction on grounds of psychological pressure. Significantly, he was later reconvicted on other evidence that the cops already had.

Perhaps equally significant, Justice Nathan R. Sobel of the New York Supreme Court last week published an extensive study in which he characterized as "carelessly nurtured nonsense" the claim that confessions are the backbone of law enforcement. Of 1,000 Brooklyn indictments from last February through April, said Sobel, fewer than 10% involved confessions. In most serious crimes, he said, the police have a good supply of incriminating evidence because "the victim and the perpetrator were known to one another prior to the commission of the crime." FBI statistics show that 80% of all murders are committed within families, or among "friends." The truth, said Sobel, is that police "overzealousness" in demanding confessions on top of sufficient other evidence "has resulted in many guilty defendants going free."

Amid the hot debate last week, the Supreme Court itself finally acknowledged that *Escobedo* urgently needs clarification. The court accepted four confession cases for review this term—all of them posing vital issues: When exactly does investigation become accusation? Must police warn the suspect of his rights? Are indigents entitled to lawyers in the police station? Does a suspect need a lawyer to waive a lawyer? Does *Escobedo* retroactively threaten pre-1964 confessions?

Few of the court's decisions will be so eagerly awaited.