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THE SUPREME COURT, THE STATE JUDICIARY AND STATE CRIMINAL PROCEDURE: AN EXAMPLE OF UNCREATIVE FEDERALISM

ISIDORE SILVER

When the Supreme Court interprets the United States Constitution, its writ ostensibly becomes "the Law of the Land." Presumably, all state trial and appellate courts take immediate cognizance of Supreme Court decisions, understand their rationales, and apply their principles to litigation before them. Perhaps such a characterization will win an essay contest on the nature of the federal system, but it will, of course, fail to describe the realities inherent in a scheme of government fraught with tension. Since the Supreme Court is a political body, it acts exactly the way any political body does: it attempts to persuade and to use whatever limited powers it possesses to effectuate such persuasion. The task of persuasion is rendered infinitely more complex by the fact that state courts, too, are political bodies and, as with all political bodies, have their own "constituencies." Often, the expectations of their constituencies run counter to, or are thwarted by, Supreme Court pronouncements, so that we discover an unavoidable tension resulting from conflicting pressures from above by the Supreme Court and from below by local interests. Thus, by the time Supreme Court doctrines have "percolated down" to lower state courts, they

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1 In recent years, the role of the Court as an agency of government with shifting relationships with other governmental agencies has been extensively analyzed. See Shapiro, Freedom of Speech (1966).
may be severely distorted. Indeed, the greater the local interest in administrative freedom from constitutional requirements, the greater the distortion. The most obvious example of this process is high court decisions in the area of state criminal procedure.

Law enforcement is local; constitutional rights are national. The purpose of law enforcement is to apprehend criminals without regard for the niceties of their theoretical rights. A local police chief, supported by a local district attorney, functions as the representative of a society which demands that crimes get solved, that suspects be proven guilty, and that "technicalities" not free convicts. The continued functioning of the law enforcement system depends upon the speed and conclusiveness with which these expectations are met. The allegedly soaring crime rate\(^2\) has created substantial burdens for law enforcement agencies. These burdens are psychological as well as physical.

The state judicial machinery is caught in the middle. It is the natural duty and function of trial judges to adjudicate, to apply constitutional and evidentiary rules to accused defendants, and to determine, in the first instance, whether the state can carry its burden of proving them guilty of crimes beyond a reasonable doubt. Yet, common experience in a criminal courtroom demonstrates that trial judges often understand their function to be that of upholding arrests, searches and confessions obtained by police officers. Thus, the trial judge often acts as an appellate review body for police action, and functions as an integral part of law enforcement machinery. One need only cite, as an example, the numerous instances of illegally obtained evidence being admitted into criminal trials on theories such as "consent," "waiver" and "abandonment." The Supreme Court docket is replete with such cases, and the

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\(^2\) Most of the arguments against liberalization of defendant's rights in criminal cases are predicated upon the relationship between judicial decisions and strong law enforcement. See Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L.Q. 436 (1964). Of course, several interlocking issues are involved here. Is the crime rate "soaring" or is the very meaning of the term "crime" in doubt, and are we using better and more comprehensive statistics? See N.Y. Times, Nov. 20, 1965, p. 1, col. 5; N.Y. Times, Oct. 2, 1966, p. 81, col. 1.
number of reversals in criminal cases bears eloquent test-
timony to the divergent rules of the high and the lower
courts. To a trial judge, after all, the evidence of guilt
is there, it is undeniable, and no great harm occurs if he
admits it, despite theoretical problems of violation of the
fourth amendment. Convictions in "drop-see" cases—where
the arresting officer testifies that defendant saw him and
dropped the incriminating packet of heroin or policy slips—
are obtained despite the dubious basis in human affairs
for justifying such conduct. Thus, in these cases, we often
have a system of trial by police officer and acquiescent review
by trial court.

The purpose of this paper is not to discuss compe-
rensively misapplications of Supreme Court rulings in the
area of state criminal procedure (some of which are cor-
rected on certiorari), but to attempt to forecast the probable
consequences of the Court's mandate in *Miranda v. Arizona,*
the latest controversial decision causing paroxysms among
law enforcement officials, and to cite some instances of a
failure of "judicial imagination" within the state system.
This cannot be read as comprehensive either in the analytical
or critical sense. Indeed, it is surprising just how often
Supreme Court mandates have been adhered to by state
appellate courts. Yet, the reluctance to carry a given
decision beyond its facts, to apply certain principles to
novel areas, and even, to anticipate the obvious direction
of Supreme Court decisions is disturbing. If that reluctance
exists on the "higher" levels of the state judicial system,
what can we say of the trial courts? As we shall see,
there, the reluctance often becomes disregard. The
"selection" of cases is not particularly "objective." Rather,
it is designed to provide evidence of a trend which often
becomes a predominant characteristic of our system.

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3 It has been the author's personal experience that since *Mapp v. Ohio,*
367 U.S. 643 (1961), police officers no longer admit that property has been
illegally seized, since, now, such property must be excluded at trial. Rather,
the invariable contention is that defendant "dropped" or "abandoned" the
goods (generally policy slips or narcotics), and that, consequently, warrant-
less arrest was permitted since the dropping of contraband in the presence
of the officer gave probable cause to arrest for the crime of "possession."
The *Miranda* case has received substantial national publicity and its principles are fully known to knowledgeable laymen, as well as to attorneys and law enforcement officials. Indeed, the case has engendered severe criticisms from some notable friends of the Court, as well as from traditional critics. Often, these criticisms are directed at the framework of the Court's decision, as well as at the substance of the holding. Perhaps an analysis of the nature of the frustrations encountered by the Court in previous cases in this controversial area will serve to put *Miranda* in perspective. In addition, it may serve to indicate the possible restrictive state court applications of *Miranda* in the future. Certainly, it will demonstrate that the Supreme Court functions not only as the court of last resort, but often as the only court in which constitutional claims are fully heard.

In order to understand the problem, we must take a closer look at *Miranda*. In general, for many defendants, their "cases" are decided in the crucial period between arrest and arraignment. If the police have obtained a "confession," an "admission," or even an "exculpatory" statement (which often contradicts other evidence in the case), they have often obtained sufficient evidence to convict. Strangely enough, it is this very period of incarceration and interrogation where no records are kept; it is here where the great conflict (in the form of a "swearing contest") between the questioning detectives and the defendant arises.

The Supreme Court first attempted to intervene in the proceedings occurring in this period by holding, as a matter of federal criminal practice, that statements made during a period of illegal detention are inadmissible. Although the Court did not directly intervene in the "squeal room" process, it set outer limits to the length of the proceeding.

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7 Ibid.
In 1964, it took another major step. In *Escobedo v. Illinois*, it held:

[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied ‘the Assistance of Counsel’ in violation of the Sixth Amendment . . . and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The decision posed great difficulties. Did an accused have a right to counsel prior to arraignment? After all, the Court had only decided, one year prior to *Escobedo*, that an accused had a right to counsel at trial in all serious criminal cases. If there is a right to counsel at time of pre-arraignment interrogation, does it exist for a suspect who has no attorney? The Court stated that the sixth amendment was violated when “the suspect has requested and been denied an opportunity to consult with his lawyer,” and the facts clearly showed that Escobedo had an attorney who was trying to see him during the period of interrogation. Other questions remained. What did the Court mean by “custody”? Did a person “invited down” to speak to a district attorney have the right to consult his counsel in the prosecutor’s office? Was it permissible for the police to warn the suspect of his right to remain silent and then continue to question him, even though he demanded to see an attorney (his attorney)? The Court did not mention the necessity of an effective warning that any statement made during interrogation could be used in evidence. Apparently, all the police had to do was warn against self-incrimination—without mentioning the practical effect of such incrimination—and then continue to question.

Clearly, *Escobedo* at first blush appeared to be a confused and confusing decision. Certain portions of the

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holding could be interpreted to mean that, given all the circumstances present in *Escobedo*, the sixth amendment was violated. Since those circumstances were unusual (how many suspects in custody have counsel at the police station demanding access?), it could mean very little. Unless *Escobedo* be read as a "unique" opinion, some could have concluded that the Court meant something more than to void a particular conviction under peculiar circumstances.

Mr. Justice White, in his dissent, recognized certain implications.11

[It] would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel . . . or has asked to consult with counsel in the course of the interrogation . . . . At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.

The Supreme Court of California, in *People v. Dorado*, believed that the "heart" of *Escobedo* lay in the following paragraph:

We hold only that where the process shifts from investigatory to accusatory . . . when its focus is on the accused and its purpose is to elicit a confession . . . the adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.12

Thus, the accusatory stage became the critical stage in the proceedings against a suspect. "After custody the interrogation may become the critical stage in the establishment of the prosecution's case."13 This conclusion was justified, at least to the California Supreme Court, by another statement in *Escobedo*:14

There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.

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13 Id. at 175, 388 P.2d at 367.
Although Escobedo was couched in sixth amendment terms, the California court saw a fifth amendment issue as well. "Escobedo also holds that the accused has the right not to incriminate himself and to remain silent, and that, if any self-incriminatory statements are to be admissible, he must waive that right." 15

Rather than concentrate upon the "circumstances" of the Escobedo facts per se, the court chose to draw the broader inference that such circumstances were indicative of the fact that the accusatory stage had been reached. What else, reasoned the court, could the Supreme Court have meant when it said: 16

When petitioner requested and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of an 'unsolved crime.' . . . Petitioner had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his Constitutional right not to do so.

Although the Dorado court could not see the end of the line, it did look far up the track. "In a long series of cases the [Supreme] Court has been troubled by confessions obtained without protection of counsel." 17 The court rejected the argument that defendant had to demand counsel (as Escobedo had done) by noting that if the proceeding was accusatory and if defendant was being questioned during "a process of interrogation that lent itself to obtaining in-crimating statements," then he had a sixth amendment right to counsel which could not be easily waived. Once the right was established, then any waiver had to be a knowing and intelligent one and, obviously, this could not occur in the absence of knowledge of the right. "The basic reasoning of the Court's opinion in Escobedo will not permit such a formalistic distinction [between a defendant who has asked for counsel and one who has not]." 18

Of course, the California court did not fully analyze the fifth amendment problem and the "back door" revolu-

15 Id. at 178, 398 P.2d at 370.
17 Supra note 12, at 173, 398 P.2d at 365.
18 Id. at 175, 398 P.2d at 367.
tion created in Escobedo. For, assuming that a right to counsel existed, what could counsel do for the accused? Since the fifth amendment traditionally only applied to testimonial compulsion in judicial proceedings, and not to practical compulsion during custodial interrogation (unless that compulsion rendered the confession involuntary), could the attorney legitimately advise his client to remain silent? Or, was his duty merely to tell his client that he did not have to allow himself to be coerced into confessing, but that short of coercive circumstances, the questioning was proper? Or, was the Supreme Court merely interested in giving the accused the moral benefit of an attorney who could only reinforce him in his determination to remain silent? Clearly, the portent of Miranda's pronouncement on the applicability of the fifth amendment lay in Escobedo. Dorado vaguely recognized such portent.

The Dorado court by refusing to limit its decision to the facts in Escobedo believed it was aiding the process of law enforcement.

Law enforcement will be harmed, not helped, by advising police officers, for example, that it is only when the suspect demands counsel that Escobedo applies. . . . In such circumstances any confession that might be obtained would, upon review in the United States Supreme Court, be subject to exclusion, and convictions based upon them, reversible. Meanwhile, before the overturning of such a decision, police officers would continue to follow the wrong practices. As a result, their work would come to naught. We have endeavored here to inform law enforcement officers at what stage of their investigations an accused must be informed of his Constitutional rights in order that any confession he may thereafter make to them will be legally admissible.20

Thus, California held that a confession will not be admitted where: (a) the investigation has already focused on defendant as a suspect; (b) he is in custody; (c) a process of interrogation designed to obtain incriminating statements has commenced; and, (d) he has not been warned

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19 See discussion of the history of the fifth amendment in the opinion of Mr. Justice Harlan in Miranda v. Arizona, 384 U.S. 436, 504 (1966) (dissenting opinion).
20 Supra note 12, at 180, 398 P.2d at 372.
of his rights to remain silent and to counsel. The Supreme Court "having declared the content of a Constitutional right, it is our function to enforce it in situations where it logically applies. To do otherwise would, in effect, be to distort the United States Constitution itself." 21

The California interpretation of Escobedo was not endorsed by other states. 22 Some courts thought that Escobedo was some form of variation of the traditional "voluntariness" test; 23 others felt that any potential application of the decision was rendered unnecessary by other evidence in the case or by the fact that the interrogation time span was short; 24 others took hope in the fact that there might be a different majority on the Supreme Court sometime in the future. 25 Most of the decisions restricted Escobedo to its facts.

The attitude of one lower court is instructive. 26 The judge noted (perhaps with a certain degree of weariness):

21 Id. at 181, 398 P.2d at 373. (Emphasis added.)
23 See People v. Hartgraves, 3 Ill. 2d 375, 202 N.E.2d 33 (1964); State v. Fox, 131 N.W.2d 684 (Iowa 1964).
24 Commonwealth v. Tracy, 207 N.E.2d 16 (Mass. 1965); Marion v. State, 387 S.W.2d 56 (Tex. 1965).
25 See Duncan v. State, 176 So. 2d 840, 863 ( Ala. 1965) (wherein the court spoke of the "so called right to counsel"); People v. Agar, 44 Misc. 2d 396, 253 N.Y.S.2d 761 (Sup. Ct. 1964).
26 People v. Agar, supra note 25.
“Objection to the admission of statements taken from a defendant . . . is being repeatedly made by defense counsel in reliance on Escobedo.” 27 After analyzing the meaning as follows: 28
The nub of Escobedo is contained in the foregoing quotations [those in the case stressing the phrase ‘under the circumstances’], and regardless of what the ultimate determination may be, this Court holds that Escobedo decided only that . . . ‘under the circumstances here, the accused must be permitted to consult with his lawyer,’ to wit, a case in which he requested a lawyer or in which a lawyer was actually present and requested to see him . . . , the Court acknowledged its (negative) judicial role: 29
It may well be that . . . [Dorado] . . . will be the ultimate indisputable determination of the United States Supreme Court if the question reaches that Court, as it is now constituted, but until there has been an appellate ruling to the contrary, which is binding upon this Court, I will continue to rule that . . . [a request is necessary].

Although some of the Supreme Court’s premises in Escobedo were new, its internal logic should not have been that difficult to follow. The Court was trying to do what it has always done in the tender area of state criminal practice—to establish a general proposition and then to give states some leeway in changing their own procedures to bring their practices into line with that proposition. If Betts v. Brady 30 was the opening shot in the war against denial of counsel in important criminal cases, then Gideon v. Wainwright 31 is the end of the war. If Wolf v. Colorado 32

27 Id. at 396, 253 N.Y.S.2d at 762.
28 Id. at 397, 253 N.Y.S.2d at 763.
29 Id. at 398, 253 N.Y.S.2d at 763.
30 316 U.S. 455 (1942).
31 372 U.S. 335 (1963). Mr. Justice Black, speaking for the majority, stated that “twenty-two States, as friends of the Court, argue that Betts was an ‘anachronism when handed down’ and that it should be overruled. We agree.” Id. at 345.
enunciated the Supreme Court's concern with unconstitu-
tional searches, then *Mapp v. Ohio* 33 becomes the logical
conclusion. Of course, the Court had won a significant
degree of public and scholarly support through the years
so that *Mapp* and *Gideon* were palatable in a way that
*Miranda* is not. Why did not the Court follow the processes
of *Mapp* and *Gideon* by slowly applying and broadening its
*Escobedo* principles until, perhaps twenty years from now,
it would reach the *Miranda* stage and have the support of
an "educated" public and judicial opinion? Perhaps the
Court reasoned that the pace of constitutional change has
speeded up so greatly that a twenty-year wait has no
particular virtue; perhaps it felt that the very obduracy
of the state courts insured that there was not going to be
a great revolutionary ferment from below. Whatever the
reason, the majority of the Court was not content to let
*Miranda* lie with all its ambiguities intact.

It is clear, now, in retrospect, that the Court felt that
pre-arraignment statements—at least those elicited by ques-
tioning—clearly came within the protection of the fifth
amendment. 34 A suspect did not have to speak and in-
criminate himself. Indeed, the Court's repugnance for a
procedure which depended upon the use of defendant's state-
ments to convict him of a crime was manifest.

In *Miranda*, 35 the Court alluded to the controversy en-
gendered by *Escobedo*. "This case has been the subject of
judicial interpretation and spirited legal debate since it

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33 *Mapp v. Ohio*, 367 U.S. 643 (1961). The *Mapp* Court was fully aware
of its role in "educating" state tribunals about the fourth amendment. "While
in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed
to the use of the exclusionary rule, now, despite . . . *Wolf*, more than half
of those since passing upon it, by their own legislative or judicial decision,
have wholly or partly adopted or adhered to the *Weeks* [exclusion of illegally
obtained evidence] rule." *Id.* at 651. The Court noted that California had
discovered that other sanctions against flagrant abuse of one's right to privacy
were ineffective and that "the experience of other states" confirms this.
Although appellant had not even raised the possibility of overturning *Wolf*,
the Court obviously felt prepared to do so—and it did.

34 For those portions of *Escobedo* supporting such an interpretation,
see text accompanying notes 12 and 16 supra.

was decided two years ago." Indeed, the Court viewed *Miranda* as, essentially, an amplification of the principle of *Escobedo* and, moreover, as a restatement of the law pertaining to custodial interrogation: "We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an *application of principles long recognized and applied in other settings*."

Of course, this is somewhat fatuous. *Miranda* has little to do with *Escobedo*; its rationale differs and its methodology is, to say the least, unusual. While the Court in *Escobedo* appeared to limit its holding to the facts before it, in *Miranda* it set forth a host of constitutional guidelines in rather meticulous fashion. Why did the Court resort to such hyperbole? Perhaps, as the *Dorado* court recognized, the implications of *Escobedo* were revolutionary.

If *Escobedo* had been a hint, it was one which the state courts resolutely refused to follow. The *Escobedo* problem could have been judicially analyzed in one of three ways. Either future decisions could have gone off on the fact situation, or, as Mr. Justice White suggested, certain portions of the holding could have been extracted and raised to constitutional dimension, or state courts could have "gotten the broader message" behind the specific holding. Most state (and some federal) courts chose the first option.\(^{37}\) Thus, the Court's "invitation" to the states to re-examine their own procedures was not accepted.\(^{38}\)

The Court is clearly aware of the tendency of state courts to minimize the effects of major constitutional de-

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\(^{36}\) Id. at 442. (Emphasis added.)

\(^{37}\) The circuits were also split on the interpretation of *Escobedo*. See United States *ex rel.* Stovall v. Denno, 355 F.2d 731 (2d Cir. 1965); Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965); Stanfield v. United States, 350 F.2d 518 (10th Cir. 1965); Davidson v. United States, 349 F.2d 530 (10th Cir. 1965); Hayes v. United States, 347 F.2d 668 (8th Cir. 1965); United States v. Childress, 347 F.2d 448 (7th Cir. 1965); United States v. Gardner, 347 F.2d 405 (7th Cir. 1965); United States v. Fogliani, 343 F.2d 43 (9th Cir. 1965); Clifton v. United States, 341 F.2d 649 (5th Cir. 1965); Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964); Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964); Cephus v. United States, 324 F.2d 893 (D.C. Cir. 1963).  

\(^{38}\) The term "invitation" was expressly used by Mr. Justice Harlan in dissent in *Miranda*. See *supra* note 35, at 504.
decisions. *Miranda* contains substantial hints that traditional evasive doctrines such as “waiver” will not be sufficient to permit the introduction of statements made in the absence of counsel. Thus, *Miranda* must be read as a federal guide for the use of state court judges in determining whether true waiver has occurred. The Supreme Court unequivocally stated that there is no such concept of pre-warning waiver. Thus, police officials must inform a suspect of his rights to counsel and to remain silent (and of the consequences of making a statement) prior to questioning, whether or not the suspect knows of such rights. Knowledge of such rights “can never be more than speculation.” 39 *Miranda* also clearly states that the suspect may re-assert his privilege against self-incrimination at any time during the interrogation and continued questioning must stop at that point. The state has a “heavy burden” to demonstrate waiver, and the Supreme Court, at least, will be highly suspicious of any statement made after prolonged interrogation.40 *Miranda* is replete with statements such as: “A mere warning given by the interrogator is not alone sufficient to accomplish [the end of insuring that the individual has chosen to speak voluntarily]” 41 and “the requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.” 42 The Court characterized one situation of permissible waiver:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement *could* constitute a waiver.43

Thus, time promises to emerge as a crucial element in determining the issue of waiver. So does setting.

General on-the-scene questioning . . . or other general questioning of citizens in the fact-finding process is not affected by our holding.44

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39 *Supra* note 35, at 469.
40 Id. at 475.
41 Id. at 469-70.
42 Id. at 476.
43 Id. at 475.
44 Id. at 477.
The *Miranda* decision leaves open many questions. Thus, the crucial question of what is custody is left unanswered, except for a hazy generality. What is an "effective warning"? If, as the Court stated, the interrogative process is inherently compulsive and frightening to a suspect, how shall we know whether any "waiver" has been voluntary? Indeed, how shall we know whether there have been warnings and waivers, when a police officer might possibly lie or exaggerate?

If, in the next few years, confessions are allowed because of sworn (though contested) claims of warnings and waivers, will the Supreme Court modify *Miranda*? If one were to look for hints, he need look no further than the following:

The presence of counsel in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]. This presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

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45 *Id. at 444.* Thus, *Miranda* applies where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In State v. Baker, 413 P.2d 965 (Wash. 1966), defendant's car was identified as having been used in a robbery. A police officer found defendant at the home of his ex-wife, and asked him if anybody had driven the car that day. Defendant said "no" and admitted he was the owner; held: (under Escobedo) that there was no arrest or custody and that the questions were "simple, prefatory" ones asked in the course of an unsolved crime investigation. Where defendant was in custody and a "prime suspect," questioning designed to give him a "chance to explain" was proper even without the Escobedo warnings. People v. Luckman, 45 Cal. Rptr. 41 (2d Dist. 1965).

46 In dissent, Mr. Justice Harlan noted:

The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. *Supra* note 35, at 505.

47 *Id. at 466.* See People v. Hudgins, 46 Cal. Rptr. 199, 205 (2d Dist. 1965) where the court upheld the admission of certain statements made by the defendant while riding in a police car where "there was no course of interrogation ... but only a casual conversation between officers and their prisoner on the way to police headquarters." Federal Judge Shelly Wright has said:

Unless the Miranda case produces lawyers in the station house, instead of waivers, the case may turn out to be a pious fraud. ... The chances that a court may accept the testimony of the suspect over that of several policemen as to how the waiver of the confession was obtained are not very good and 'unless trial judges interpret Miranda in the spirit in which it was written, there may be very little change in police practices.' *N.Y. Times*, Oct. 2, 1966, p. 81, col. 1.
Indeed, logically, if defendant has a right to counsel and to remain silent during trial, and if Miranda extends these rights into the station house, and if the presumption against waiver is substantial, could the Court not demand proof of waiver similar to that found in trials? If, at trial, we have a judge and a record, why should we not have some substantial equivalent at interrogation?\(^{48}\) Clearly the concept that a suspect needs counsel to inform him of his rights in the station house before waiver is not foreign to the Court.

There remains about Miranda a tantalizing ambiguity. Much of the decision is cast in terms of compulsion in the station house, and many will agree that the police-dominated atmosphere is compulsive. This is a logical extension of a traditional concept, although Mr. Justice Harlan, speaking for the minority, would argue that some compulsion is inherent every time someone is questioned by the police, and the fifth amendment cannot be extended to the psychic boundaries of understandable fear.

Beyond the practical question of compulsion, there lies the more fundamental one of the role of the fifth amendment itself. After all, Escobedo reflected a distaste for convicting a man by use of his own testimony. Should it make any difference whether he was "compelled" to convict himself or if some other means were used by which testimony was elicited from him? If a man were to make admissions in a thoroughly non-compulsive atmosphere, for instance, to an unknown police informer or to a police officer "plant" on a telephone, the Miranda "compulsion" rationale would be difficult to justify. Future questions may well involve a choice between rationales and, ultimately, between disparate concepts of civilized law enforcement.

Certainly, if compulsion is the touchstone of Miranda, its solutions do not promise to relieve the desperate atmo-

\(^{48}\) Federal courts, at all levels, have not hesitated to demand that the state provide substantial proof in support of a claim of waiver of right to counsel at plea of guilty. Doughty v. Maxwell, 376 U.S. 202 (1964); Carnley v. Cochrane, 369 U.S. 506 (1962); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1965); United States ex rel. Jones v. Fay, 247 F. Supp. 26 (S.D.N.Y. 1965).
sphere. After all, a police officer may not quite sound convincing when he informs a suspect of his rights at the same time that he is trying to elicit a confession. If the meaning of *Miranda* lies in judicial abhorrence of confessions per se, then the system of warnings and waivers might, ultimately, be a way station on the road toward abolition of confessions entirely.

Some of the ambiguities of *Miranda* are already becoming apparent. In *Duffy v. State*, a police officer investigating a stabbing received some information from a bystander and went to see the defendant. He was told that the defendant was staying at his girl friend's house for the evening, went there, was admitted to the premises by the girl friend's sister, entered a third floor bedroom, saw defendant asleep, and noticed a knife protruding from the mattress. He thereupon awoke defendant to ask him whether the knife was the one used in the stabbing. Defendant made certain admissions as a result of such questioning. He had not been apprised of any rights under *Miranda*. The Supreme Court of Maryland held that *Miranda* was inapplicable to an accosted defendant not under arrest.

An accosted suspect need not be advised that he has the right... [to counsel]... Nor must the state prove... that an accosted suspect was first advised that he has a right to remain silent. [*Miranda*] is not applicable to a confession gleaned from a suspect who is merely accosted by the police... 50

If state courts refused to recognize the implications of *Escobedo*, (partially, it is true, because of the Supreme Court's obfuscation of the main point) how have they treated other constitutional arguments where the decision is clear?

Although there are numerous areas of potentially fruitful study (*e.g.*, search and seizure, half-hearted application

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49 221 A.2d 653 (Md. 1966).

50 Id. at 656. In Westfall v. State, 221 A.2d 646 (Md. 1966), a case decided after *Miranda*, defendant made certain admissions after his attorney had advised him not to say anything. The court held *Miranda* not to be retroactive and applied its narrow definition of *Escobedo* in affirming the conviction.
of federal standards of waiver), we need only study one line of decisions—that of prosecutor's comment on defendant's failure to testify at trial—to understand the approach taken by state courts to Supreme Court decisions. Indeed, the choice of this particular area is fruitful since it involves many of the same considerations present in *Escobedo* and *Miranda*. Thus, courts have been confronted with the meaning of "compulsion" in the context of "self-incrimination" for a greater period of time in this situation than in *Miranda*. If the Supreme Court held, for the first time, that station house interrogation is "compulsion" per se, many courts have stated that comment on failure to testify also "compels" the defendant to testify or, if it does not, penalizes him for the exercise of a constitutional privilege. Certainly, the meaning of "compulsion" has been broadened by *Miranda* to include indirect pressure; the meaning of "compulsion" in the "comment" cases has traditionally been defined narrowly. Will *Miranda* force a re-examination? State court decisions under traditional theories and under *Griffin v. California*, the case which held that "comment" violates defendant's rights under the fifth and fourteenth amendments, will be relevant in determining this question.

The "comment" cases are relevant also because they involve many of the same considerations present in all federal conflicts. Balanced against defendant's right to remain silent, is the state's asserted right to call the jury's attention to the nature and quantum of the evidence in a case. Thus, as we shall see, the prosecutor is interested in what might be called "indirect comment" to reinforce the strength of his case, especially to emphasize the lack, or paucity, of evidence favorable to defendant.

The two areas are also relevant, in a practical sense. Often, the same case involves claims of failure to warn defendants and improper comment—indeed, most of the cases referred to in the remainder of this article are "dual" in this sense. Often a trial court's decision to allow into evidence an admission and to permit some comment upon defendant's failure on the stand to explain away such an

admission results in a conviction. Thus, the constitutional claims often coincide. Their disposition can only "double" the available evidence on the issue of state recognition of federal rights.

Most states have either by constitutional provision or statute held that it is not permissible for a prosecutor or trial judge to comment upon, or allude to, the fact that defendant did not testify at trial. Thus, the defendant, under state law, has a right not to testify and most states have traditionally felt that comment would serve to "penalize" the exercise of that right. At one time, there were six states which permitted a limited form of comment either by the prosecutor or trial court, on the theory that such failure is a factor to be logically and properly considered by the jury in assessing guilt. The Supreme Court's holding in *Griffin* terminated that practice. Thus, the fifth amendment forbids overt comment on defendant's silence. Such silence, it should be recognized, is often attributable to reasons other than actual guilt. Indeed, the defendant may request a specific instruction from the judge that his silence may not be deemed to be evidence against him and that it not be considered by the jury at all.

The principle may appear to be simple, but it raises many problems. For instance, let us assume that the state has put in an overwhelming case and defendant has raised no defense and has not testified. May the prosecutor tell the jury that "the evidence in this case is uncontradicted" or that "you have not heard any evidence from anyone challenging the testimony of our witnesses"? Would this constitute a "comment" upon defendant's failure to testify or merely a general statement relating to the evidence actually presented in the case? Would the answer be different if the rebuttal evidence could only have come from defendant himself?

53 In *Griffin* v. Illinois, 380 U.S. 609 (1966), the Supreme Court refused to decide whether a defendant has a constitutional right to demand an instruction to the jury about his failure to testify. Some states have held that such an instruction must be given if defendant so wishes. State v. Osborne, 139 N.W.2d 177 (Iowa 1965).
Clearly, state courts are interested in enforcing defendant's absolute right to remain silent; they are also interested in permitting the prosecution to inform the jury of the weight of the evidence in support of conviction, especially where it has offered "weak" witnesses and wishes to buttress the weight of its case.

Other problems arise. Let us say that defendant is accused of a crime prior to prosecution and says nothing. May this refusal or failure be introduced into evidence on the ground that a man accused of crime naturally objects if he is innocent and that silence is an implied admission? But, should his silence be used against him where defendant knew of his constitutional right to remain silent or some other circumstance compelling silence was present?

In addition, there are many laws which serve the practical effect of "compelling" a defendant to speak or, at least, of making any failure to speak costly. For instance, a judge's reference to statutory inferences that "unexplained" possession of recently stolen goods or "unexplained" presence at a place where a certain crime is being committed may be sufficient to warrant conviction for substantive crimes and may reinforce the likelihood of defendant's guilt to the average jury.

The problem of applying Griffin in unusual but logical contexts can only be analyzed after a determination of the precise boundaries of the decision. At issue in Griffin was the California constitutional authorization for comment on a failure to testify and the following instruction pursuant to such constitutional provision:  

\[4^{4}\] In People v. Modesto, 42 Cal. Rptr. 417, 398 P.2d 753 (1965), the Supreme Court of California reconsidered the constitutionality of the comment rule in light of Malloy v. Hogan, 378 U.S. 1 (1964) and stated:

The California comment rule does not subject the defendant to the trilemma of self-accusation, perjury, or contempt, for he remains free not to testify. . . . [Malloy is only applicable to] more direct penalties or interferences with the unfettered exercise of the defendant's free will than the drawing of reasonable inferences that may flow from silence and comment thereon. . . . The Constitution . . . does not compel the court to instruct the jurors to ignore inferences their reason dictates. Id. at 426, 398 P.2d at 762-63.

Judge Peters, dissenting, cited Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947) for the clear proposition that comment violates the fifth amendment although—at that time—the
As to any evidence or facts . . . which the defendant can reasonably be expected to deny or explain . . . if he does not testify or if, though he does testify, he fails to deny or explain such evidence, . . . [such failure tends to prove the truth of such evidence].


The Supreme Court noted that the fifth amendment was binding upon the states through the fourteenth amendment. In addition, the Supreme Court of California had held that the comment rule did not violate the fifth amendment as so applied. Also, the instruction involved was carefully drawn. Thus, the jury had to first determine whether the defendant did have or could have had knowledge about certain facts before the inference existed. Also, the jury was told that it could not convict because of such failure alone and that such failure does not relieve the prosecution of its burden of proof on any element of the crime charged.

In Griffin, the Court noted that the spirit of the fifth amendment involves a policy preventing incrimination through one's own mouth, and that self-incrimination was a remnant of the "inquisitorial system of criminal justice." The privilege, the Court held, is diluted by permitting comment since assertion of the privilege is made "costly." The Court also noted that innocent people often refuse to take the stand out of fear or other good reason. The Court rejected the argument that the jury would "know" or be aware of defendant's failure to testify irrespective of comment by stating that the prosecution should not help in bringing forth and emphasizing this knowledge.

fifth amendment was not applicable to the states. Since Malloy decided that it was, there was no doubt that the comment rule was unconstitutional. The judge noted that a previous decision had characterized comment as having a "coercive effect" upon the exercise of the privilege against self-incrimination and argued that:

We as a state court, on federal constitutional questions, are bound by the unqualified language of the United States Supreme Court to the effect that where, as here, the privilege against testifying could not have been denied, fair trial precludes 'any comment' thereon or the invitation to draw 'any' inference therefrom. People v. Modesto, id. at 429, 398 P.2d at 765.

56 See ibid.
58 Ibid.
The decision is eminently reasonable. After all, the right to remain silent means little if the prosecutor can convert it into an implied admission. Indeed, what apparently occurs when comment is countenanced is that the prosecutor himself testifies in place of defendant and, moreover, testifies to facts which might not be true.

Clearly, the spirit of *Griffin* requires that silence not be used as evidence to supply to the prosecution what defendant has omitted to state. How have the state courts honored this "spirit"? Treatments of *Griffin* arise in several contexts, and they will be discussed under separate headings.

**Comment on Evidence Cases**

In a Missouri robbery case, *State v. Kennedy*, the prosecutor in summation stated:

'Now, on July 23, 1963, that property was in the home of John Kennedy. There has been no explanation as to how that property got there.'

In addition,

'On one side is the State's evidence, not contradicted. And what is on the defense side? It is empty.... The only evidence produced was the State's evidence.... The defendant knows about things you don't know about. It wasn't our fault. He had as full an opportunity as we did to produce evidence....'  

These comments were upheld on appeal as involving a mere recitation of the evidence in the case.

In *Adams v. State*, a Nevada case, the trial court instructed the jury (in language almost identical to *Griffin*) that a failure to deny or explain facts which defendant could reasonably be expected to deny or explain indicates that such facts are probably true and that an inference harmful to defendant is more probable. The trial judge cautioned, however, that no such inference may be drawn where defendant has no knowledge of the facts. He also

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59 396 S.W.2d 595 (Mo. 1965).
60 Id. at 599.
stated that defendant's failure to testify will not supply proof "so as to support by itself" a determination of any essential element of the prosecution's case. The Supreme Court of Nevada held that the entire comment was only a reference to the evidence: "note, however, that we do not commend this instruction. It flirts with the very dangers put forth in Griffin v. California." 62 To the court, the flirtation never reached the stage of an active love affair.

In Taylor v. State,63 an intermediate appellate court in Alabama condemned the prosecutor's statement that:

'[Y]ou haven't heard anyone say here that the State's evidence wasn't [true] except the attorney who was representing the defendant.'

The Supreme Court of Alabama reversed and held that a general comment on the uncontradicted evidence was proper where there is nothing in the record to indicate that such remark only applied to the defendant himself, since, given the circumstances, the state's evidence could have been refuted by a handwriting expert.64

In a California case, People v. Beghtel,65 the district attorney commented upon defendant's participation in a robbery as the driver of a "get-away" car: "[T]here is] no explanation by him as to how he happened to meet [the other] defendant or drive. . . . An opportunity was given him for explanation; he gave none. . . ." The trial judge chimed in: "he is the only person who could overcome the testimony . . . he is the only person who could penetrate the darkness." 66

The appellate court upheld defendant's conviction and stated:

A reading of the brief argument made by the prosecution as above set forth reveals that it consisted almost entirely of a summary of the direct evidence with emphasis upon its strongly incriminating

62 Id. at 173.
63 185 So. 2d 412, 414 (Ala. 1966).
64 185 So. 2d 414, 416 (Ala. 1966). In other jurisdictions, this form of comment is not permissible even under these circumstances. See note 52 supra. Singleton v. State, 183 So. 2d 245 (Fla. 1966).
65 49 Cal. Rptr. 235 (2d Dist. 1966).
66 Id. at 236.
The trial court was never specifically urged to draw an inference of guilt from appellant's failure to testify at the time of trial. The court put the problem into perspective.

Similarly, the comment of the trial court indicated nothing more than its proper conclusion that the evidence introduced by the prosecution standing alone compelled a determination of guilt . . . therefore, since appellant had exercised his right to produce nothing by way of defense so that there was no evidence before the court tending to overcome the prosecution's case, an adjudication of guilt should be made.

The court went on to state that even if an adverse inference were drawn, it was permissible under Griffin.

In sum, it seems quite clear that the rule enunciated in Griffin was not intended to require that the trier of the fact, whether judge or jury, be immunized against any dictate of plain reason.

Of course, Griffin has been extended by many courts to cover comments similar to those above, and no impartial analysis can fail to note the existence of such cases. As one court noted: "We take this [decision in Griffin] to mean any comment, not just comment comparable to that on the matter before the Supreme Court at that time." Yet, there are many—too many—cases where the spirit of Griffin has not been fully understood or applied, especially where the defendant is designated by name.

Silence as Acquiescence in Charge of Guilt Rule

Many states permit the introduction of evidence that defendant was silent when confronted with an accusation of guilt on the theory that such "demeanor" is probative of guilt by either acquiescence in the statement or an implied adoption of the statement. This is true even after Griffin.

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67 Ibid.
68 Ibid.
69 Id. at 237.
70 Singleton v. State, supra note 64.
In an Iowa case,72 the court held:

Under the law of this State, if a person is accused of the crime at such a time and under such circumstances that a normal and reasonable person of similar age and experience and under such circumstances would deny any guilt, if that person chooses to remain silent upon being so accused, such silence may be considered along with all other evidence in determining the guilt or innocence of the defendant.

Another post-Griffin example of the principle occurred in a California case, People v. Wilson.73 There, defendant was charged with burglary in the first degree. He was out of breath when apprehended near the scene of a burglary, and did not answer when asked what he was doing and where he was going. After being told of the burglary, he said nothing. At trial, defendant testified that he had denied being the burglar and had given the inquiring officer his name.

The appellate court allowed the evidence of defendant's failure to respond and stated that such failure gives rise to an inference of guilt where it occurred under circumstances which call for an explanation.74

Here, failure to respond was deemed not only an “inference of consciousness of guilt, but also an adoptive admission that the charge was true.”75 The court noted that the “natural reaction of an innocent man to an untrue accusation is to enter a prompt denial,”76 and held that the trial court determines when an accusation is made under circumstances calling for a reply, whether defendant understood the statement, and whether his conduct gave rise to an inference of guilty consciousness. Since the questioning had not reached an accusatory stage, and the questions were not being asked for the purpose of attempting to elicit a confession, but rather as a “routine means of commencing an investigation,”77 no prior warning of con-

72 State v. Myers, 140 N.W.2d 891, 896 (Iowa 1966).
73 48 Cal. Rptr. 55 (1st Dist. 1965).
74 Id. at 61.
75 Id., at 61.
76 Id. at 61.
77 People v. Wilson, 48 Cal. Rptr. 55, 63 (1st Dist. 1965), quoting from People v. Cotter, 46 Cal. Rptr. 622, 626, 405 P.2d 862, 866 (1965).
stitutional rights was necessary. Thus, an answer would be admissible—and, the court felt, so would a refusal to answer.

Griffin was distinguished. "Nothing in Griffin requires the rejection of the inference to be drawn from the accused's nonassertive conduct, or from his silence prior to the accusatory stage when it is not rested on constitutional grounds." 78 Other California cases have excluded evidence of such nonassertive conduct when engendered by the advice of an attorney. 79 The problem of course arises where defendant cannot show that his refusal was based on legal advice.

Even where evidence of defendant's "demeanor" has been improperly admitted, reversal often occurs on narrow grounds. In State v. Ripa, 80 a New Jersey case, defendant refused to discuss decedent's disappearance and death while in custody. The court noted that the doctrine of "assenting silence" "is much disputed" and "more difficult to defend" when it occurs during a period of custodial questioning. 81 Although the court refused to reject the doctrine where custodial questioning is concerned, it noted that it would be a "rare situation" where such silence is to be deemed acquiescence. 82 Reversal occurred apparently because (a) questioning was custodial, and (b) defendant was not merely silent but expressly refused to answer.

Statutory Presumptions "Compelling" Defendant to Speak

Since Griffin, some attacks have been made upon statutes that permit a jury to find guilt where defendant does not take the stand to explain his connection with the crime. These statutes are phrased either in terms such as "unexplained presence" (or "unexplained possession" of recently stolen goods) or "failure to show" good reason for possession. It would seem that the spirit and rationale of Griffin are

78 People v. Wilson, 48 Cal. Rptr. 55, 64 (1st Dist. 1965).
79 People v. Cockrell, 47 Cal. Rptr. 788, 408 P.2d 116 (1965) (error not prejudicial per se); People v. Stewart, 45 Cal. Rptr. 712 (2d Dist. 1965).
80 45 N.J. 199, 212 A.2d 22 (1965); see also People v. Ridley, 47 Cal. Rptr. 795, 408 P.2d 124 (1965).
82 Ibid.
violated by such statutes, for here, defendant's failure to take the stand is specifically commented upon by the judge and supplies some evidence contributing to a determination of guilt. Certainly, in lay terms, it imposes a penalty upon the exercise of a constitutional right. The courts do not agree.

The leading case is "significantly enough" a Supreme Court decision, United States v. Gainey. The Court reversed a finding by the fifth circuit that defendant was unconstitutionally convicted of the crime of possessing and carrying on a liquor still without a license because of the lack of rational connection between the fact shown, presence, and the fact presumed, carrying on. Mr. Justice Stewart noted, for the majority, that the inference that one present at a still is carrying on the business is rational, given the "arcane" nature of the crime of illegal still operation. He also stated that the inference was not conclusive so that a jury could find reasonable doubt of guilt, even where defendant fails to explain his presence. He dismissed the fifth amendment argument by noting that an instruction relating to unexplained presence was merely a comment on the evidence as a whole and was not related to defendant's failure to testify.

Mr. Justice Douglas dissented in part and argued that the instruction in this case using the phrase "unless defendant explains such presence" constituted both a compulsion to testify and a comment on failure to do so.

Mr. Justice Black argued that the statute was unconstitutional for various reasons and noted that:

The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion. . . .

83 United States v. Gainey, 380 U.S. 63 (1965). The circuit court held that the relationship between "possession" and "presence" was irrational and unconstitutional. See also People v. De Leon, 46 Cal. Rptr. 241 (2d Dist. 1965).
85 Id. at 87.
He analogized the situation to that where a man is forced to do something with a gun at his head. He is not "free" to do so, in a meaningful sense.

The Gainey rationale has been approved and followed in several jurisdictions. Thus, in People v. De Leon,\textsuperscript{86} the court instructed the jury that possession of recently stolen goods was:

so incriminating that to warrant conviction there need only be, in addition, slight corroboration in the form of conduct of the defendant tending to show his guilt. . . .

On appeal, the conviction was affirmed and the court stated:

While the rule requires that defendant either 'show' that his possession [was honest] . . . or have his failure to do so be considered a strong circumstance tending to show his guilt, it does not compel him to take the stand to explain his possession. . . .\textsuperscript{88}

Recently, some courts have urged that the statutory inference be applied with care. In People v. Moore,\textsuperscript{89} defendant had been convicted of burglary. Certain of the stolen property had been found in a codefendant woman's apartment, and defendant had said that he gave the property to the woman after receiving it as a gift from a stranger. The woman said that the item had been given to her by a relative. The court had instructed the jury that possession of recently stolen property, where defendant had a reasonable opportunity to explain, absent such explanation "tends to show his guilt."\textsuperscript{90}

The case was reversed on other grounds, and the court said that it was better practice to instruct the jury that the inference should only be drawn where the evidence itself provides no satisfactory explanation.

Despite these relatively rare notes of caution, statutory inferences with their inevitable effects of "compelling" de-

\textsuperscript{86} People v. De Leon, \textit{supra} note 83.
\textsuperscript{87} 46 Cal. Rptr. 241, 244 (2d Dist. 1965).
\textsuperscript{88} \textit{Ibid.}
\textsuperscript{89} 48 Cal. Rptr. 475 (4th Dist. 1965); see also State v. Smith, 3 Conn. Cir. 538, 220 A.2d 44 (1965).
\textsuperscript{90} People v. Moore, 48 Cal. Rptr. 475, 476 (4th Dist. 1965).
fendants to testify (or penalizing them for failure) are still permissible, if there is a reasonable relationship between the fact shown and the fact to be proven.

Courts have also tended to argue that a defendant taking the stand to testify on some, but not all, aspects of a case "waives" any claim of invalidity for comment by the prosecution on his failure to discuss the remainder of the evidence, and that a conviction will not be reversed on the basis of Griffin unless prejudice is present.

A few appellate cases have been chosen to illustrate the variety of potential applications of Griffin, and the failure of constitutional imagination among the state courts when confronted with claims resembling those in Griffin. Obviously, not all courts are heedless of defendant's rights. For instance, the Supreme Court of Florida rejected the argument that improper comment on defendant's refusal to testify need not be prejudicial, in the following terms: [T]he injury is such that efforts of the trial judge to explain

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92 State v. Fioravanti, 46 N.J. 109, 215 A.2d 16 (1965). Here, defendant at trial tried on certain trousers allegedly used in a burglary to show that they were not his. This justified comment on his failure to testify with respect to the remainder of the evidence. "Thus, a defendant who undertakes to answer part of the evidence against him is subject to comment as to factual thrusts he does not meet, even though he cannot be ordered on cross-examination to testify with respect to them." Id. at 113, 215 A.2d at 20. The court cited Caminetti v. United States, 242 U.S. 470 (1917), in support, and noted that it has not yet been overruled. See People v. Masterson, 50 Cal. Rptr. 269 (1st Dist. 1966); State v. Schult, 46 N.J. 254, 216 A.2d 372 (1966).

92 People v. Bostick, 44 Cal. Rptr. 649, 402 P.2d 529 (1965), held that automatic reversal is only required where there has been an erroneous admission of a confession (but not of any statement amounting to less than a confession), or where "fundamentally unfair" trials were involved. See also People v. Fontaine, 46 Cal. Rptr. 855 (1st Dist. 1965). One court decided that the Griffin argument should have been raised at trial even before Griffin because "when Malloy v. Hogan . . . was decided there was considerable speculation among lawyers and laymen and in newspapers about the comment rule. Thereafter, any defendant who considered that he had been prejudiced by comment of the prosecutor on his failure to testify should have promptly raised that question." City of Toledo v. Reasonover, 213 N.E.2d 179, 181 (Ohio 1965); see also People v. Bauman, 49 Cal. Rptr. 772 (1st Dist. 1966). The "prejudicial error" doctrine has been severely criticized in Griffin type cases, e.g., State v. Barkin, 140 N.W.2d 886 (Iowa 1965); Singleton v. State, 183 So. 2d 245 (Fla. 1966). The United States Supreme Court has recently granted certiorari on the issue of whether the doctrine violates due process of law. Chapman v. California, 45 Cal. Rptr. 729, 404 P.2d 209 (1965), cert. granted, 383 U.S. 956 (1966).
it away or to caution the jury against its influence will not eradicate its adverse effect.\textsuperscript{93}

In the words of that court (quoting from another case):

Such a prejudice clings to the mind like a tattoo on the epidermis.\textsuperscript{94}

Thus, as prosecutors seek to evade the clear implications of constitutional decisions,\textsuperscript{95} as judges abet their efforts by classifying such errors as merely comments on evidence or non-prejudicial,\textsuperscript{96} and as appellate courts are caught in the no-man's-land between Supreme Court mandates and lower court decisions, we can only conclude that true judicial federalism is lacking in our criminal practice.

Although this study has been limited to those cases that inch through to the appellate level and, with only a representative sampling of even those, we only conclude that much more judicial legerdemain occurs at the lower criminal court levels. The conflict is, to a certain extent, natural, for, often, there is substantial evidence of guilt, and the closer a judge is to the actual processes of justice, the more substantial is the feeling that this one "error" should slip by (or that there is no error at all).

At times, the Supreme Court is responsible for at least some of the tension. Its pronouncements often are not as clear as they could be and the true interests at stake go undiscussed and unanalyzed. Yet, state courts should be

\textsuperscript{93} Burse v. State, 175 So. 2d 586, 587 (Fla. 1965).

\textsuperscript{94} Id. at 588.

\textsuperscript{95} The persistent attempts of prosecutors to inject comment was noted by the Supreme Court of Florida in Singleton v. State, 183 So. 2d 245, 251 n.6 (Fla. 1966):

One would not have to deal in fantasy to assume that the 'varied circumstances' [in which comment requires reversal] were brought about by the ingenious efforts of well-meaning but overzealous prosecuting attorneys in constantly seeking the loophole, the entering wedge, the side door, to get over to the jury indirectly what is forbidden directly.

The court enumerated all of the techniques—and others—already discussed in the text.

\textsuperscript{96} "It is with almost melancholy nostalgia that we recall how only five years ago it was possible to sustain a judgment of conviction entered in such a clear case of unquestionable guilt and to accomplish it without undue strain.” People v. Boyden, 47 Cal. Rptr. 136, 137 (2d Dist. 1965).
alert to these interests for they are, in reality, not truly camouflaged. The Supreme Court, after all, does not accept a case unless it believes that the situation is important. The Court obviously is interested in curbing the more objectionable state police and prosecutorial practices. Does anyone really want to defend a system which depends upon ignorance of a defendant's fundamental rights to obtain criminal convictions? If self-incrimination is antithetical to our concepts of justice, why do courts permit prosecutors to request suspects to furnish examples of their handwriting in forgery cases, without requiring that they be advised of their rights? Indeed, why do not courts recognize that this form of written self-incrimination is as repugnant as testimonial compulsion in a *Miranda* setting? If our legal system is one of laws and men, why do we insist that a policeman's testimony about what went on in a backroom be automatically believed, especially in light of the practices discussed in the police manuals quoted so liberally by the Supreme Court in *Miranda*? Within the bounds of the Constitution, should we not all be concerned with what effect particular instructions have—or are likely to have—on a jury not versed in the niceties of constitutional doctrine?

In *Miranda*, the Supreme Court almost begged the states to discover and apply procedures compatible with constitutional rights. The Court, while demanding that state standards of criminal law enforcement be raised, is perfectly willing to let the state handle matters—at least, in the first instance. If state court judges continue to find waivers and admit confessions, if they blandly refuse to scrutinize substantial constitutional claims, is it not evident that *Miranda* will be superceded by yet harsher restrictions? If the tension is to be diminished—though not necessarily eliminated, for a certain degree of "pull and tug" is

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97 See test at notes 30-34 *supra*.
98 See State v. Fisher, 410 P.2d 216 (Ore. 1966). The majority argued that the handwriting exemplar was "evidence of individual characteristics" similar to fingerprints and photographs. *Id.* at 217. A vigorous dissent stated "that a suspect can be compelled to manufacture the evidence necessary to prove that his hand wrote a forgery," and argued that wherever defendant's cooperation is necessary a potential self-incrimination problem existed. The dissenting judge distinguished between defendant's cooperation to discover what already exists and cooperation to manufacture evidence against himself.
inevitable and even desirable—and if judicial federalism is to be meaningful, then state courts must assume responsibility for protection of constitutional rights. If the decisions interpreting Escobedo, Griffin, and Miranda are indicative, the proper exercise of such responsibility is not readily forthcoming. The Supreme Court has instituted a revolution in the very way in which we understand the Constitution. It is a revolution long overdue and it is one in which the society generally concurs. Unfortunately, its pace is considerably slowed by a noticeable lack of revolutionaries.99

99 "The state courts have an obligation to safeguard the federal rights of an accused. If the state courts fail in that objective, I foresee further intrusion by the federal judiciary into the domain of the state courts." Herbert, J., dissenting in City of Toledo v. Reasonover, 213 N.E.2d 179, 182 (Ohio 1965).