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Prospectivity and Retroactivity of Supreme Court Constitutional Interpretations

NOTE

PROSPECTIVITY AND RETROACTIVITY OF SUPREME COURT CONSTITUTIONAL INTERPRETATIONS

The freedom of a court, state or federal, to define the limits of adherence to precedent has been sanctioned by the Supreme Court in both civil[1] and criminal[2] cases. Accordingly, any decision can be made to apply to future cases or relate back to all past cases. In no other area of the law is such a decision more important than in the field of criminal procedure where the freedom of a convicted man can rest upon a decision to apply a new "rule" retroactively or prospectively. It is not surprising, therefore, that the majority of retroactivity cases involve the rights of a criminal defendant.

Since the United States Constitution "has no voice" [3] on the subject of retroactivity, any court has a wide range of possible limitations it may adopt as to the applicability of a given decision. At one extreme is a completely retroactive rule, which applies the new "rule" to all past as well as future cases. On the other hand, a purely prospective rule does not even apply to the parties before the court, but only to future cases. In between these extremes there are any number of limited retroactive or prospective rules which a court can adopt. The Supreme Court occupies a unique position in regard to retroactivity decisions in that Article III of the United States Constitution requires the Court to decide only cases and controversies. This precludes purely prospective rulings because such decisions would be mere dictum.[4] Therefore, a Supreme Court prospective rule must apply to the parties before the

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[1] Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

[2] Linkletter v. Walker, 381 U.S. 618 (1965).

[3] Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).

[4] *See* Stovall v. Denno, 388 U.S. 293, 301 (1967); Bickel, *Foreward: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 42 (1961); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 930-33 (1962). However, some authorities have reasoned that prospective overruling is permissible under article III because it merely adds a potentially dispositive issue to a justiciable case. Article III just requires federal courts to deal with dispositive issues, which may be potentially dispositive as well as dispositive in fact. *See* Currier, *Time and Change in Judge Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 220 (1965); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.402 [3.-2-3], at 191 (2d ed. 1965).

Court and to all future cases which have not proceeded beyond a point established by the Court.[5]

The wide range of possibilities and the lack of precedent for such decisions demonstrates the arbitrary and pragmatic nature of prospective rulings. The legislative character of the decisions plus an inability to rationalize one case with another has also contributed to criticism of the Court from commentators, as well as members of the Court itself, in its handling of the important problem of the retroactivity of a new criminal "rule."

I. The Historical Setting of Retroactivity

The traditional view adhered to for many centuries was that of Blackstone: a judge's duty is not to "pronounce new law, but to maintain and expound the old one." [6] The court's function, therefore, is to declare what the law has always been and not what it is to be in the future. The latter is the function of a legislative body.

A retreat from traditional retroactive application began with the legislative divorce[7] and municipal bond[8] cases, where the injustice of complete retroactivity is obvious. Even early in the criminal field the retroactivity of certain new decisions was found injudicious.[9] These cases forecast the rise of the realist school which espoused the belief that judges are really makers of law. Contrary to Blackstonian principles, overruled precedents were once valid and were justifiably relied upon for a certain period of time.[10] Despite the popularity of the realist view, retroactivity is far from a dead doctrine and is applied to new rulings in proper cases. Retroactivity has survived attacks that it violates the Con-

[5] For example, in Johnson v. New Jersey, 384 U.S. 719 (1966), it was held that Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), were applicable only to cases where the trial had begun after the latter two decisions were handed down.

[6] 1 W. Blackstone, Commentaries 69 (1769). *See also* Norton v. Shelby County, 118 U.S. 425 (1886).

[7] Bingham v. Miller, 17 Ohio 445 (1848).

[8] Gelpecke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).

[9] State v. Simanton, 100 Mont. 292, 49 P.2d 981 (1935); State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).

[10] *See* Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L.J. 1037 (1961); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960); Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967).

stitution,[11] impairs contractual obligations,[12] or creates an ex post facto law.[13] In addition, retroactivity has been held not to deny due process[14] or equal protection.[15]

Even though the power of a state court to adopt a prospective rule has been sanctioned for almost four decades,[16] the power of a federal court to do the same was not firmly recognized until recently.[17] The expanded rights of the criminal defendant beginning with *Mapp v. Ohio*[18] and the expanded scope of federal habeas corpus relief under *Fay v. Noia*[19] have caused during the last decade[20] an onslaught of cases, mostly habeas corpus, which have succinctly brought the issue before the Court. By far the largest number of cases to raise the question of prospectivity or retroactivity are in the field of criminal procedure.[21]

At the beginning of the last decade, a prisoner on habeas corpus could only raise issues which had been raised previously at his trial and decided adversely to him. Now a habeas petitioner in most cases can attack his final conviction successfully even though the new rule could not have been raised at his trial or on appeal.[22] After *Fay v. Noia* many prisoners sought to take advantage of new constitutional principles laid down, in some instances, many years after their convictions had be-

11 Linkletter v. Walker, 381 U.S. 618 (1965); Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

12 Fleming v. Fleming, 264 U.S. 29 (1924); Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Moore-Mansfield Constr. Co. v. Electrical Installation Co., 234 U.S. 619 (1914); Central Land Co. v. Laidley, 159 U.S. 103 (1895).

13 Fleming v. Fleming, 264 U.S. 29 (1924); Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Frank v. Mangum, 237 U.S. 309 (1915); Ross v. Oregon, 227 U.S. 150 (1913); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

14 Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Central Land Co. v. Laidley, 159 U.S. 103 (1895).

15 Sunray Oil Co. v. Commissioner, 147 F.2d 962 (10th Cir.), *cert. denied*, 325 U.S. 861 (1945).

16 Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932).

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

18 367 U.S. 643 (1961).

19 372 U.S. 391 (1963).

20 Between *Sunburst* and *Linkletter* the Supreme Court expressly dealt with retroactivity in the criminal field only once. James v. United States, 366 U.S. 213 (1961) (embezzled money as taxable income).

21 *See* Annot., 22 L. Ed. 2d 821 (1970).

22 Fay v. Noia, 372 U.S. 391 (1963). *See also* Kaufman v. United States, 394 U.S. 217 (1969).

come final. Accordingly, the Supreme Court was called upon to establish a set of principles to be used in deciding whether or not a new "rule" of criminal procedure deserved retroactive or prospective application.

II. Linkletter to Desist: Retroactive Criteria and Prospective Application

The retroactive application of the new "rules" of criminal procedure was expressly dealt with by the Supreme Court for the first time in *Linkletter v. Walker*.[23] This far reaching opinion laid down the criteria for the determination of the retroactive or prospective application of a given criminal decision. *Linkletter* and subsequent retroactivity cases demonstrate how the Court has chosen to apply its retroactive criteria and how different rules of prospective application have developed.

Linkletter had been convicted in Louisiana for burglary by evidence that would have been excluded under the rule of *Mapp v. Ohio*.[24] However, his conviction had become final[25] before *Mapp* was decided. The Supreme Court ruled that *Mapp* was not entitled to retroactive application and accordingly denied Linkletter habeas corpus relief. Following *Great Northern Ry. v. Sunburst Oil & Refining Co.*,[26] the Court reasoned that the Constitution did not prohibit either a retroactive or a prospective rule,[27] and that there is no distinction between civil and criminal proceedings as to retroactivity.[28] Observing that previously without discussion new constitutional rules had been applied to convictions already final,[29] the Court set forth the threefold criteria to be considered in determining the retroactivity of a given decision:

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[23] 381 U.S. 618 (1965).

[24] 367 U.S. 643 (1961).

[25] "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*." Linkletter v. Walker, 381 U.S. 618, 622 n. 5 (1965).

[26] 287 U.S. 358 (1932).

[27] Linkletter v. Walker, 381 U.S. 618, 626 (1965). *See also* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

[28] *See* James v. United States, 366 U.S. 213 (1961); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

[29] Arthur v. Colorado, 380 U.S. 250 (1965); McNerlin v. Denno, 378 U.S. 575 (1964); Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Rech v. Pate, 367 U.S. 433 (1961); Eskridge v. Washington, 357 U.S. 214 (1958).

> . . . we must look to the *purpose* of the *Mapp* rule; the *reliance* placed upon the *Wolf* doctrine; and the *effect on the administration of justice* of a retrospective application of *Mapp*.[30]

The Court decided that the primary purpose of the Mapp rule was a deterrent to lawless police action.[31] This indicated a prospective rule because the proscribed conduct had already occurred and reparation for the defendant's ruptured privacy came "too late".[32] The strong reliance by the police on *Wolf v. Colorado*,[33] which refused to apply an exclusionary rule for illegally seized evidence in state courts, weighed heavily in the Court's prospective decision. Also a retroactive application of *Mapp* would "tax the administration of justice to the utmost",[34] because evidence may have been lost, witnesses may not be available, or memories may have dimmed. With all three criteria indicating a prospective ruling, the Court held that *Mapp* applied only to prisoners whose convictions were not yet final at the time *Mapp* was decided.[35]

Following the lead of Linkletter, other prisoners sought to have their convictions reviewed on the basis of cases decided after their convictions had become final. In *Tehan v. United States ex rel. Shott*,[36] the petitioner had been convicted for a violation of the Ohio Securities Act at a trial in which the prosecutor commented extensively upon the petitioner's refusal to testify. Such adverse comment was later held to violate the privilege against compulsory self incrimination in *Griffin v. California*,[37] which was decided after Shott's conviction became final. Shott argued that the privilege against self incrimination "went to the fairness of the trial—the very integrity of the fact-finding process," [38] hence a retroactive rule was indicated under the criteria of *Linkletter*. The Court disagreed though it felt *Griffin* had no distinct purpose as *Mapp* had. The basic purposes of *Griffin* relate to the preservation

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[30] Linkletter v. Walker, 381 U.S. 618, 636 (1965) (emphasis added).

[31] *Id.* at 637.

[32] *Id.*

[33] 338 U.S. 25 (1949).

[34] Linkletter v. Walker, 381 U.S. 618, 637 (1965).

[35] It is an established principle that any accused is entitled to the benefit of a new ruling while his case is on appeal. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Therefore, in the context of a prospective ruling, it is logical to deny application of a new "rule" to those prisoners whose convictions have become final.

[36] 382 U.S. 406 (1966).

[37] 380 U.S. 609 (1965).

[38] Linkletter v. Walker, 381 U.S. 618, 639 (1965).

of the integrity of the judicial system and not to the ascertainment of truth. The great reliance by the state on a contrary rule for more than 50 years[39] and the great number of cases that may be retried indicated a prospective ruling. Accordingly, the Court held *Griffin* applied only to convictions not yet final when *Griffin* was decided, therefore Shott was also denied habeas corpus relief.

It was inevitable that the retroactivity of the Supreme Court's two best known decisions in the realm of criminal procedure would come before the Court. In *Johnson v. New Jersey*[40] the convictions of two prisoners based upon confessions which would have been invalid under *Escobedo v. Illionis*[41] and *Miranda v. Arizona*[42] standards had become final four years before the former case was decided. The Court was faced with the problem of a new "rule" that had purposes relating to both the right to counsel and the privilege against self incrimination. Even though not expressly held by the Court, *Gideon v. Wainwright*[43] and other right to counsel cases had been given complete retroactive application,[44] whereas *Tehan* had shown the privilege against self incrimination cases would be given prospective application. *Miranda* and *Escobedo* were held to fall primarily into the second category. A strong

[39] The strong view of Twining v. New Jersey, 211 U.S. 78 (1908), which denied application of the privilege against self-incrimination to the states, had been upheld many times by the Court until expressly overruled in Malloy v. Hogan, 378 U.S. 1 (1964).

[40] 384 U.S. 719 (1966).

[41] 378 U.S. 478 (1964).

[42] 384 U.S. 436 (1966).

[43] 372 U.S. 335 (1963).

[44] *See* Arsenault v. Massachusetts, 383 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968). Many lower federal courts have held *Gideon* retroactive. *See, e.g.*, Rini v. Katzenbach, 403 F.2d 697 (7th Cir. 1968); Davis v. Holman, 354 F.2d 773 (5th Cir. 1965); Shawan v. Cox, 350 F.2d 909 (10th Cir. 1965); Berryhill v. Page, 349 F.2d 984 (10th Cir. 1965); Williams v. Alabama, 341 F.2d 777 (5th Cir. 1965); *In re* Parker. 297 F. Supp. 367 (D.S.D. 1969); Cuevas v. Wilson, 264 F. Supp. 65 (N.D. Cal. 1966); Jedby v. Swenson, 261 F. Supp. 209 (W.D. Mo. 1966); Brown v. Heize, 248 F. Supp. 293 (N.D. Cal. 1965); Bird v. Sigler, 241 F. Supp. 1007 (D. Neb.), *aff'd*, 354 F.2d 694 (8th Cir. 1964). The Supreme Court has also applied *Gideon* retroactively without discussion. Burgett v. Texas, 389 U.S. 109 (1967); Arthur v. Colorado, 380 U.S. 250 (1965); Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

Also, Douglas v. California, 372 U.S. 353 (1963), which upheld the right to counsel on appeal has been applied retroactively. Bosler v. Swenson, 363 F.2d 154 (8th Cir. 1966); *In re* Parker, 297 F. Supp. 367 (D.S.D. 1969); United States *ex rel.* Sliva v. Rundle, 295 F. Supp. 613 (E.D. Pa. 1969); Donnell v. Swenson, 258 F. Supp. 317 (W.D. Mo. 1966); United States *ex rel.* Michell v. Fay, 241 F. Supp. 165 (S.D.N.Y. 1965).

reliance argument, a serious disruptive effect on the administration of justice, the ability of pre-*Escobedo* and pre-*Miranda* prisoners to avail themselves of the voluntariness test caused the Court to apply a prospective rule. Most significant in this ruling was a shift from a finality of conviction criteria for applying the new "rule" to a trial date rule[45] whereby only those defendants whose trials had begun after *Miranda* and *Escobedo* were decided could take advantage of them.

The next major decision in the area of retroactivity of a new criminal "rule" came with the lineup cases, *United States v. Wade*[46] and *Gilbert v. California*.[47] *In Stovall v. Denno*,[48] the right to counsel rule at post-indictment confrontations for identification purposes was held to apply only to lineups or other confrontations occurring after *Wade* and *Gilbert* were decided. Stovall sought review of his final conviction which was based upon a pre trial confrontation in the absence of counsel at which he was identified as the perpetrator of a brutal attack upon an elderly couple. Even though right to counsel cases are usually held retroactive, the Court felt that the reliability of the fact-finding process argument was outweighed in this case by the great reliance on a different rule by the police and the serious disruptive effect a retroactive rule would have on the administration of justice. Accordingly, *Wade* and *Gilbert* were held to apply only to cases involving confrontations for identification purposes conducted in the absence of counsel after the date of the two decisions. Again it is noteworthy that the Court shifted from a trial date rule in *Johnson* to the date of the alleged violation as the criteria for determining who may take advantage of *Wade* and *Gilbert*.

Considering the similar nature of a lineup without counsel and electronic eavesdropping without a warrant, it is not surprising that the Supreme Court applied a violation date rule to *Katz v. United States*,[49] which held such eavesdropping is an intrusion, a search and seizure,

[45] Professor Johnson has designated the three different rules that the Court has used as *trial date* rule, *final judgment* rule, and *violation date* rule. The first applies the new "rule" only to cases where the trial has not yet commenced when the new "rule" is announced. The second allows application of the new "rule" only to cases on direct review. The third holds that only the proscribed conduct occurring after the new "rule" is handed down is affected. Johnson, *Foreword; The Supreme Court of California*, 1967-1968, 56 CALIF. L. REV. 1612, 1613 (1968).

[46] 388 U.S. 218 (1967).

[47] 388 U.S. 263 (1967).

[48] 388 U.S. 293 (1967).

[49] 389 U.S. 347 (1967).

and, therefore, a warrant must first be obtained. In *Desist v. United States*,[50] the defendant had been convicted of conspiring to import and conceal heroin. The incriminating evidence was obtained prior to the *Katz* ruling by federal agents who had, without a warrant, taped a microphone to a door of Desist's hotel room. In failing to overturn the defendant's conviction, *Katz* was held to apply "only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967".[51] A strong reliance by the police on the old trespassory eavesdropping rule and the deterrent effect of *Katz* weighed heavily in the Court's decision. Noting that the retroactivity or prospectivity of *Katz* was an open question, the Court felt it was not bound to adopt a final conviction rule as it had done for *Mapp* and *Griffin* because the latter decisions had been applied to cases on direct review even before the Supreme Court ruled them to be prospective. Considering previous cases, *Desist* is not noteworthy. However, its three vigorous dissents demonstrate the uneasiness of the Court over the present state of the law regarding retroactivity of new "rules" of criminal procedure.

The Supreme Court has dealt with the retroactivity of most of these new "rules" by explicit decisions. However, the landmark right to counsel decision of *Gideon v. Wainwright*[52] has been given complete retroactive application by the Supreme Court without discussion,[53] and its retroactivity has been recognized in dictum in later cases.[54] *Jackson v. Denno*,[55] which held that the question of voluntariness of a confession could not be submitted to a jury, was applied retroactively without discussion by the Supreme Court in *McNerlin v. Denno*.[56] One of the earliest cases setting forth a new criminal "rule," *Griffin v. Illinois*,[57] was applied retroactively again without discussion, in *Eskridge v. Washington Prison Board*.[58] Lower federal court reports are ripe with

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50 394 U.S. 244 (1969).

51 *Id.* at 254.

52 372 U.S. 335 (1963).

53 *See* cases cited note 44 *supra*.

54 *See* Desist v. United States, 394 U.S. 244 (1969); Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

55 378 U.S. 368 (1964).

56 378 U.S. 575 (1964).

57 351 U.S. 12 (1956) (right of indigent to free transcript of his trial for appellate purposes).

58 357 U.S. 214 (1958).

decisions as to the retroactivity or prospectivity of important Supreme Court criminal decisions upon which the Court itself has not ruled, such as *Benton v. Maryland*,[59] *Boykin v. Alabama*,[60] *Chimel v. California*,[61] *North Carolina v. Pearce*,[62] *United States v. Jackson*,[63] and *Massiah v. United States*.[64] The retroactivity of some of these cases is presently pending before the Court and decisions can be expected this term.[65] The retroactivity of a given decision is usually determined by a later case because the Court hesitates in directing itself toward the issue in the case setting down the new "rule". One notable exception is *Witherspoon v. Illinois*,[66] dealing with exclusion of a juror because

[59] 395 U.S. 784 (1969), *held retroactive* in Galloway v. Beto, 421 F.2d 284 (5th Cir. 1970); Booker v. Phillips, 418 F.2d 424 (10th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3280 (U.S. Jan. 14, 1970) (No. 1075), *and* Day v. Copinger, 307 F. Supp. 201 (D. Md. 1969). The Supreme Court last term expressly held *Benton* to be retroactive Ashe v. Swenson, 397 U.S. 436 (1970).

[60] 395 U.S. 238 (1969), *held prospective in* United States *ex rel.* Hughes v. Rundle, 419 F.2d 116 (3d Cir. 1969); United States *ex rel.* Johnson v. Russell, 309 F. Supp. 125 (E.D. Pa. 1970); United States *ex rel.* Beecham v. Rundle, 306 F. Supp. 904 (E.D. Pa. 1969); Arbuckle v. Turner, 306 F. Supp. 825 (D. Utah 1969); Bishop v. Sharkey, 306 F. Supp. 246 (D.R.I. 1969); Quillien v. Leeke, 303 F. Supp. 698 (D.S.C. 1969); United States *ex rel.* Wiggins v Pennsylvania, 302 F Supp. 845 (E.D. Pa. 1969).

[61] 395 U.S. 752 (1969), *held prospective in* Porter v. Ashmore, 421 F.2d 1186 (4th Cir. 1970), *petition for cert. filed*, 38 U.S.L.W. 3357 (U.S. March 12, 1970) (No. 1310); United States v. Blassick, 422 F.2d 652 (7th Cir. 1970); Williams v. United States, 418 F.2d 159 (9th Cir. 1969), *review granted*, 38 U.S.L.W. 3366 (U.S. March 24, 1970) (No. 1125); Lyon v. United States, 416 F.2d 91 (5th Cir. 1969); United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969); Jordan v. United States, 416 F.2d 338 (9th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); United States v. Frazier, 304 F. Supp. 467 (D. Md. 1969); New York *ex rel.* Muhammad v. Mancusi, 301 F. Supp. 1100 (S.D.N.Y. 1969).

[62] 393 U.S. 922 (1968), *held retroactive in* United States v. Coke, 404 F.2d 836 (2d Cir. 1968).

[63] 390 U.S. 570 (1968), *held retroactive in* Shaw v. United States, 299 F. Supp. 824 (S.D. Ga. 1969), *but held prospective in* Pindell v. United States, 296 F. Supp. 751 (D. Conn. 1969) and United States *ex rel.* Buttcher v. Yeager, 288 F. Supp. 906 (D.N.J. 1968).

[64] 377 U.S. 201 (1964), *held prospective in* United States *ex rel.* Long v. Pate, 418 F.2d 1028 (7th Cir. 1969); United States *ex rel.* Allison v. New Jersey, 418 F.2d 332 (3d Cir. 1969); Milton v. Wainwright, 306 F. Supp. 929 (S.D. Fla. 1969).

[65] *See, e.g.*, United States v. White, 405 F.2d 838 (7th Cir.), *cert. granted*, 394 U.S. 957 (1969), *restored to calendar for reargument*, 396 U.S. 1035 (1970) (involving Katz v. United States); Marchese v. United States, 411 F.2d 410 (9th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3078 (U.S. Aug. 8, 1969) (No. 444) (involving Katz v. United States); Moon v. Maryland, 250 Md. 468, 243 A.2d 564 (1968), *cert. granted*, 395 U.S. 975 (1969) (involving Pearce v. North Carolina).

[66] 391 U.S. 510 (1968).

of his beliefs on capital punishment. There the court held the new rule to be retroactive, even though this facet of the decision was only important enough to warrant a footnote.[67]

From a survey of Supreme Court decisions referred to above, several general observations can be made as to the handling of a retroactivity problem by the Court. The purpose to be served by the new "rule" is the foremost consideration of the Court.[68] If the purpose cannot be readily ascertained, then the other two criteria will govern the result[69] with the reliance argument the most persuasive. The disruptive effect on the administration of justice will easily give way if the purpose of the "rule" clearly indicates a retroactive ruling.[70] Passing to the criteria of the Court in establishing who may take advantage of a new "rule", more arbitrariness and less adherence to precedent is evident. Given the criteria established by the Court, it is much easier to predict whether or not a given case will be held prospective or retroactive than to predict whether a trial date, final conviction, violation, or some other new rule will be adopted if prospective application is indicated.[71]

III. Some Observations and Criticism

Assuming arguendo the validity of the criteria adopted by the Supreme Court in *Linkletter* and in subsequent cases, one cannot help but be impressed by the incongruities that are apparent in the application of those rules. Even a brief survey of the problems that are raised show that Justice Harlan was correct when he said, " 'Retroactivity' must be rethought." [72]

A. Retroactivity and Habeas Corpus

The expanded scope and utilization of federal habeas corpus has complicated the question of retroactivity. By virtue of a series of cases from *Fay v. Noia*[73] *to Kaufman v. United States*,[74] a prisoner can now

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[67] *Id.* at 523 n. 22.

[68] *See* Desist v. United States, 394 U.S. 244, 249 (1969); Roberts v. Russell, 392 U.S. 293, 295 (1968); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968).

[69] *See, e.g.*, United States v. Wade, 388 U.S. 218 (1967).

[70] *See* right to counsel cases in note 44 *supra.*

[71] For a discussion of the difficulty experienced by the Supreme Court of California in attempting to predict how the United States Supreme Court would rule on the retroactivity of *Escobedo see* Johnson, *supra* note 45, at 1623.

[72] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

[73] 372 U.S. 391 (1963).

[74] 394 U.S. 217 (1969).

contest his detention on the basis of new "rules" that were handed down long after his conviction became final.[75] Shortly after *Linkletter* was decided, Professor Mishkin attempted to explain how the function of habeas corpus could decide a retroactivity problem.[76] Habeas corpus is used to assure an innocent man against a wrongful conviction.[77] Therefore, Mishkin reasoned that new "rules" could not be used on habeas review unless the reliability of the evidence used for conviction was involved.[78] This view corresponded with the Supreme Court's pronouncement in *Linkletter* that retroactivity was dictated when the new "rule" related to the reliability of the fact-finding process.[79] However, it has been pointed out that habeas corpus is used to attack more than procedural due process. The fact that substantive rules of law can be raised demonstrates the weakness of Mishkin's theory that the function of habeas corpus will decide any retroactivity issue. Similarly, the Supreme Court's purpose determination, which is designed to deal with procedural questions, would be inadequate in deciding a substantive issue.[80] Mishkin's theory causes more problems than a complete retroactive rule, especially if the new "rules" are considered to be mere "reflections of principles of 'ordered liberty' fundamental to our legal system." [81]

Justice Harlan's dissent in *Desist* is a penetrating critique of retroactivity and habeas corpus.[82] The new federal habeas corpus serves two principle functions. First, it insures that no man has been tried under a procedure which created a risk that an innocent person may have been convicted. By logical deduction any new decision that relates to the reliability of the fact-finding process should be used on

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[75] *Id.* at 228. For the history of federal habeas corpus *see* Fay v. Noia, 372 U.S. 391, 399-426, 449-63 (1963); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). *See also* 28 U.S.C. § 2241 (c) (3) (1964).

[76] Mishkin, *Foreward: The High Court, The Great Writ, and the Due Process of Time and Law; The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56 (1965). *See also* Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 VA. L. REV. 1115 (1964).

[77] *See* Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting); Kaufman v. United States, 394 U.S. 217 (1969); Fay v. Noia, 372 U.S. 391 (1963).

[78] Mishkin, *supra* note 76, at 79-86.

[79] W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW 713 (2d. ed. 1967).

[80] Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 723-46 (1966).

[81] *Id.* at 757.

[82] Desist v. United States, 394 U.S. 244, 255-69 (1969) (Harlan, J., dissenting).

habeas corpus review. However, the second function, seeing that all courts follow established constitutional standards in all their proceedings, indicates that it is not necessary to apply all new "rules" retroactively. The reviewing court need only apply the law prevailing at the time the petitioner was convicted.[83]

Determining exactly what the law was at that time is not an easy task. Any "rule" could be genuinely new or it could be just another manifestation of long established constitutional principles. Given the set of facts that prompted the new "rule," no one can be assured that the Court would have ruled differently at the time the petitioner was convicted.[84] This is closely related to the "foreshadowing" principle announced in *Johnson v. New Jersey*:

> As for the standards laid down . . . in *Miranda*, if we were persuaded that they had been fully anticipated by the holding in *Escobedo*, we would measure their prospectivity from the same date.[85]

The "same date" referred to is the date of *Escobedo*. This principle was the main thrust of Justice Fortas' dissent in *Desist*,[86] that is, that *Katz* was foreshadowed at least as far back as *Silverman v. United States*,[87] hence its retroactivity should be measured at least from the date of *Silverman*.

Justice Harlan did not speak so much in terms of "foreshadowing," but more as to the exact state of the law at the time of conviction. For instance, *Wade* and *Gilbert* applied the right to counsel at a lineup, a critical stage of the proceedings. Similarly, custodial interrogations under *Miranda* and *Escobedo* were held to be critical stages. One day after *Escobedo* a Court reading *Escobedo* could have anticipated the same kind of ruling in a lineup case before the Supreme Court.[88] Likewise, a strong argument can be made that any court, after reading *Linkletter*, would have used a final conviction rule in other cases involving one of the guarantees of the Bill of Rights incorporated into the Due Process Clause of the Fourteenth Amendment.[89] Determining

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[83] *Id.* at 263.
[84] *Id.* at 264.
[85] 384 U.S. 719, 734 (1966).
[86] Desist v. United States, 394 U.S. 244, 269-79 (1969) (Fortas, J., dissenting).
[87] 365 U.S. 505 (1961).
[88] Desist v. United States, 394 U.S. 244, 267-68 (1969) (Harlan, J., dissenting).
[89] *Id.* at 266.

the law on habeas corpus at any given time is not as easy as it first appears. Therefore, any solution of a retroactivity problem on the basis of the function of habeas corpus is not free of difficulty.

B. "Similarly Situated Defendants" and Fortuitous Circumstances

Article III of the United States Constitution requires the Supreme Court to "resolve issues solely in concrete cases or controversies." [90] Therefore, any new ruling must be applied to the parties before the Court in order to avoid dictum.[91] This creates situations where some "similarly situated defendants" have the benefit of the new decision while it is denied to others.[92] The most notorious example of such a "pick and choose" [93] technique is *Miranda*, where only four out of eighty similar cases were selected for decision.[94] This meant that the other seventy-six were denied relief under the prospective ruling of *Johnson*. This is a departure from the time honored tradition that all "similarly situated defendants" should be entitled to the same relief unless there is some "principled reason for acting differently." [95]

Whenever the Supreme Court adopts a prospective rule, the availibility of such rule to a convicted pirsoner is a matter of chance. Any lower court system which quickly brings cases to a conclusion hinders a prisoner's chance of success in the future, especially when a final judgment rule applies. Mr. Linkletter was a victim of such a court system. Even though he committed his crime about nine months after Miss Mapp's offense, his Louisiana conviction became final a year before *Mapp* was decided. This, in effect, penalized Linkletter for having committeed a crime in a state which speedily handled its case load. The Constitution gives an accused a right to a speedy trial,[96] but the Supreme Court has by such rulings as *Linkletter* and *Johnson* put a premium on delayed, protracted criminal prosecutions.[97] The Supreme

[90] Stovall v. Denno, 388 U.S. 293, 301 (1967). *See also* Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 930-33 (1962).

[91] Stovall v. Denno, 388 U.S. 293, 301 (1967).

[92] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

[93] *Id.* at 259.

[94] Besides *Miranda v. Arizona*, other cases decided were *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. See Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting); Johnson, *supra* note 71, at 1621.

[95] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

[96] U.S. CONST. amend. VI.

[97] *See* Johnson, *supra* note 45, at 1631.

Court has rationalized this whole situation "as an insignificant cost for adherence to sound principles of decision-making." [98] Chance beneficiaries, according to the Court, are necessary to avoid the cases and controversy sanction of article III and to encourage attorneys to advocate a change in the law.[99] This is thin reasoning, at most, to a habeas corpus petitioner.

C. Judicial Legislation

The *ad hoc* character of retroactivity cases is patently obvious.[100] Line drawing is traditionally a matter for the legislature.[101] Statutes can make certain acts, including police procedure, legitimate one day and illegal the next. When the Supreme Court rules that after a certain date electronic eavesdropping without a warrant is impermissible, it is doing by decision what legislatures do by statute. Much to the dismay of the Blackstonians, it is nowhere more obvious than in retroactivity cases than judges do make law. The legislative nature of such rulings has been severely criticized by members of the Court itself, as in the following comment by Justice Black:

> I think this doctrine of prospective-only application is nothing less than judicial amendment of the Constitution, since it results in the Constitution's meaning one thing the day prior to a particular decision and something entirely different the next day even though the language remains the same. Under our system of government such amendments can not constitutionally be made by judges, but only by the action of Congress and the people.[102]

Justice Harlan has expressed the matter in terms of the difference between legislative and judicial duties:

> . . . it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if each of our decisions can be justified in terms of this fundamental premise

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[98] Stovall v. Denno, 388 U.S. 293, 301 (1967).

[99] *Id.*

[100] *See* Jenkins v. Delaware, 395 U.S. 213, 224 (1969) (Harlan, J., dissenting); Comment, *Constitutional Law-Retroactivity of Constitutional Decisions,* 44 N.C.L. Rev. 1096 (1966).

[101] *See* Currier, *supra* note 4, at 226-28.

[102] DeBacker v. Brainard, 396 U.S. 28, 34 (1969) (Black, J., dissenting).

> that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.[103]

Another expression of the legislative character of the decisions is the arbitrary shifting of the cut-off point.[104] The Court has held that "there are no jurisprudential or constitutional obstacles" [105] to such a change. This is a simple matter of line drawing—a legislative function. Instead of using the purpose criteria just to decide the retroactivity of a new decision, the Court should use this standard in establishing the cut-off point. The final judgment rule set up for *Mapp* by *Linkletter* corresponds to the traditional role of an appellate court in applying the law as it stands on appeal.[106] This role is retreated from in the trial date rules for *Escobedo* and *Miranda*. Retreat is even more pronounced in the violation date rules established for *Wade* and *Katz*. Such rules present incongruities. *Mapp* and *Katz* are both held to be deterrents to illegal police conduct, yet the former has a final judgment rule, the latter, a violation date rule. *Griffin v. California* proscribed adverse comment at trial by judge or prosecutor, and *Miranda* and *Escobedo* sought to defer the obtaining of illegal confessions, but the former has a final judgment rule, the latter, a trial date rule.[107] Any legal officer cannot be sure some conduct will be proscribed by the Supreme Court until it so decides. That conduct is considered a violation of some constitutional principle only after the decision is handed down. Therefore, the act should be emphasized in deciding what cut-off point to apply.[108] Even this view lends itself to difficulty when one tries to decide whether the proscribed conduct in *Escobedo* and *Miranda* was the way the confessions were obtained or the admissibility of them at trial. If the former controlled, then a violation date and not a trial date rule was indicated.[109] It is characteristic of any prospective rule that some deficiency is forthcoming.

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103 Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

104 The *cut-off* point is that point in the proceedings against an accused who is seeking to take advantage of a new "rule," after which he can not avail himself of that ruling.

105 Johnson v. New Jersey, 384 U.S. 719, 733 (1966). *See* Johnson, *supra* note 71, at 1621.

106 *See* note 35 *supra*.

107 W. LOCKHART, *supra* note 79, at 715; Johnson, *supra* note 45, at 1622.

108 *See* Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293 (1967).

109 *See* W. LOCKHART, *supra* note 79, at 715.

Not only is arbitrariness shown in the cut-off points, but also in the criteria used by the Court to decide the purpose of any new rule. The rights of other "similarly situated defendants" will be ignored in order to deter impermissible police conduct or prevent a burden on the administration of justice.[110] It is little solace to the man in prison that reparation for his ruptured privacy by illegal police conduct comes too late.[111] On the other hand, a prisoner has little to worry about if the Court holds that the new rule of which he seeks to take advantage has the purpose of prevention of a chance that an innocent man has been convicted. The label of retroactivity, therefore, has the power to make one constitutional right more valuable than another.[112] A comparison of *Fay v. Noia* and *Linkletter v. Walker* demonstrates how much more valuable the right not to be coerced into a confession is than the right to be protected from unreasonable searches and seizures.

A legislature is free to change the law as it sees fit and is not bound by rules of precedent, as is a court. A court should follow the rules it has laid down previously for determination of a particular type of case. The Supreme Court, in a manner similar to a lawmaking body, has on occasion refused to follow its own rules in determining a retroactivity case. This is strikingly apparent in the "foreshadowing" cases referred to previously. The Court in *Desist* refused to follow such a principle when it applied a prospective rule to *Katz*, a case anticipated as early as 1961. This departure is even more remarkable considering *Berger v. California*,[113] decided two months before *Desist*, where it was held that *Barber v. Page*[114] was fully retroactive. It was found that "California's claim of significant countervailing interest based upon its reliance on previous standards . . . is most unpersuasive. *Barber v. Page* was clearly foreshadowed, if not preordained, by this Court's decision in *Pointer v. Texas*. . . ." [115] Even though *Berger* allowed complete retroactivity, it does show that the Court had very recently considered the "foreshadowing" idea. The Supreme Court should not be

[110] *See* Linkletter v. Walker, 381 U.S. 618, 648 (1965) (Black, J., dissenting).

[111] *Id.* at 652.

[112] *Id.* at 646. The Supreme Court has said, however, that the retroactivity of a new decision "in no way turns on the value of the constitutional guarantee involved" and "is not automatically determined by the provision of the Constitution on which the dictate is based." Johnson v. New Jersey, 384 U.S. 719, 728 (1966).

[113] 393 U.S. 314 (1969).

[114] 390 U.S. 719 (1968).

[115] Berger v. California, 393 U.S. 314, 315 (1969).

any more loathe to establish a partial retroactivity rule than to set up various cut off points in prospective rulings, which it has done.[116] Justice Fortas would have allowed a partially retroactive rule for *Desist* in light of what was said in *Johnson*.[117]

Closely related is the situation in *DeBacker v. Brainard*[118] where the Court hid behind the facade of the prospective ruling to avoid deciding whether or not a jury trial is required in juvenile hearings. *DeStefano v. Woods*[119] held *Duncan v. Louisiana*[120] and *Bloom v. Illinois*[121] to be prospective only. Therefore, since the petitioner's juvenile hearing occurred before the latter two cases were decided, he would not be entitled to a jury trial, even if he were an adult. By a twist of fate DeBacker missed by only two months having an important issue decided that the Court will eventually have to resolve.

The most striking aspect of any prospective ruling is its legislative character. This is the result of no precedent for such decisions. Even though *Linkletter* established certain criteria which are supposed to guide the Court, subsequent cases have shown that the process of resolving a prospectivity problem will be one of line drawing rather than adherence to one uniform rule.

D. The "Deluge" and a "Wrong" without a Remedy

Although the effect of a retroactive rule on the administration of justice has been the least persuasive of the three criteria established by the Court, some authorities consider the basic reason behind a prospective rule to be the prevention of an onslaught of petitions everytime a new rule is handed down.[122] Courts should not refuse retroactivity merely because there is a chance that in the deluge a guilty man may

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[116] The Supreme Court in Fuller v. Alaska, 393 U.S. 80 (1968), noted that the exclusionary rule of wiretap evidence stated in Lee v. Florida, 392 U.S. 378 (1968), hinted that the new rule may be partially retroactive. The *Lee* rule was held applicable to evidence not sought to be introduced until after the new rule was laid down. Therefore, it can be retroactive to certain conduct before *Lee* was decided.

[117] *See* Desist v. United States, 394 U.S. 244, 269 (1969) (Fortas, J., dissenting).

[118] 396 U.S. 28 (1969).

[119] 392 U.S. 631 (1968).

[120] 391 U.S. 145 (1968).

[121] 391 U.S. 194 (1968).

[122] *See* Comment, *Retroactivity of Constitutional Decisions*, 44 N.C.L. REV. 1096, 1106 (1966); Comment, *Retroactivity of Constitutional Decisions*, 41 NOTRE DAME LAW. 206, 213 (1965).

go free.[123] *Fay v. Noia*, the revolutionary case in the field of habeas corpus, did not have a major disruptive effect on the courts.[124] Many prisoners are prohibited from attacking their convictions collaterally because they have served short terms or plead guilty.[125] *Fay v. Noia* opened the gates to collateral attack for more prisoners, but decisions such as *Linkletter*, *Tehan*, and *Johnson*, helped somewhat to shut them.[126] It is hard to comprehend how the public interest in stabilizing judgments and not overcrowding dockets outweighs our time honored ideal that no innocent man shall be convicted.[127]

An unfortunate aspect of any prospective ruling is that it leaves some prisoners without a remedy for "wrongs" that can not be rectified only because of the fortuitous circumstance that it occurred when it did.[128] For example, Linkletter and Tehan were left without a remedy for certain prejudicial conduct that was later held impermissible in another case. On the other hand, pre-*Wade* victims of lineups without the presence of counsel could take advantage of the due process test set out in *Stovall*.[129] Similarly, prisoners whose trials had begun before *Escobedo* or *Miranda* were decided could still take advantage of the voluntariness test.[130] In fact, the Court's explanation of such pre-*Miranda* and pre-*Escobedo* relief questions the real need and possible validity of the two decisions:

> Thus while *Escobedo* and *Miranda* provide *important new safeguards* against the use of unreliable statements at trial, the non-retroactivity of these decisions will not preclude persons whose trials have

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123 *See* Linkletter v. Walker, 381 U.S. 618, 650 (Black, J., dissenting).

124 *Id.* at 652.

125 *See* Comment, *Linkletter, Shott, and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832; Schwartz, *supra* note 80, at 746.

126 *See* Linkletter v. Walker, 381 U.S. 618, 645 (1965) (Black, J., dissenting).

127 *Id.* at 652-53.

128 *See* Johnson, *supra* note 71, at 1624.

129 Stovall v. Denno, 388 U.S. 293 (1967). The Supreme Court itself has used a due process test to decide a pre-*Wade* case. *See* Foster v. California, 394 U.S. 440 (1969).

130 Several interesting cases have come before the Court on different chronological combinations of trial dates and the dates of *Escobedo* and *Miranda*. *See, e.g.*, Jenkins v. Delaware, 395 U.S. 213 (1969) (*Miranda* not applicable on retrial where original trial began before *Miranda* decided); Frazier v. Cupp, 394 U.S. 731 (1969) (trial commenced after *Escobedo*, but before Miranda, therefore only *Escobedo* applicable).

The Supreme Court has on several occasions resorted to the voluntariness test in a pre-*Miranda* case. Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

> already been completed from invoking *the same safeguards* as part of an involuntariness claim.[131]

The unjustified apprehension of a "deluge" of petitions and the inequity of a prospective rule that deprives a "similarly situated defendant" of relief are two more manifestations of the quandary the Court has created. If these were the only two difficulties encountered by the Court, then a retroactive rule would be the remedy because court dockets would not be overcrowded and all defendants would be able to take advantage of the new "rule". However, the solution is not this simple. The considerations discussed previously have shown the difficulty that can be encountered with a pure retroactive rule in all cases.

IV. Conclusion

The problem of retroactivity and prospectivity has just begun to plague not only the Supreme Court but all courts. Any rule that is offensive to the least number of people while at the same time protective of the basic rights of a criminal defendant is most desirable. Neither a purely prospective nor a completely retroactive ruling will provide an adequate remedy. It is characteristic of the problem that any rule will be a detriment to some group—the police, the courts, or the criminal defendants. Careful consideration should be given to a ruling in all cases and a uniform rule adopted. A "pick and choose" method as to the rights to be accorded retroactive application and the defendants who get the advantage to a new "rule" is contrary to the ideals of American justice. More than ever the dictate of Justice Harlan is appropriate. " 'Retroactivity' must be rethought." [132]

J. H. C.

[131] Johnson v. New Jersey, 384 U.S. 719, 730 (1966) (emphasis added).

[132] Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).