Journal of Criminal Law and Criminology

Volume 60 | Issue 4 Article 1

1970

Retroactivity Should be Rethought: A Call for the End of the Linkletter Doctrine

James B. Haddad

The Journal of
CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE

Vol. 60 December 1969 No. 4

"RETROACTIVITY SHOULD BE RETHOUGHT": A CALL FOR THE END OF THE LINKLETTER DOCTRINE

JAMES B. HADDAD

The author is Assistant Professor of Law at Northwestern University. He received his B.A. from the University of Notre Dame and his J.D. and LL.M. from Northwestern University. He formerly served as an Assistant State's Attorney for Cook County, Illinois.

Beginning with Mr. Justice Harlan's suggestion that the principle of non-retroactivity in constitutional criminal procedure cases should be re-examined, the author traces the development of that relatively new concept and concludes that it should now be abandoned.

In 1962, while serving a nine-year sentence in the Louisiana State Penitentiary for a 1958 burglary, Victor Linkletter filed in a federal district court a petition for a writ of habeas corpus, alleging confinement pursuant to a conviction based upon evidence seized in violation of the fourth and fourteenth amendments. His fate was ultimately determined in 1965 by the Supreme Court of the United States, which implicitly agreed that evidence had been admitted against Linkletter in violation of the exclusionary rule of *Mapp v. Ohio*.[1] The Court denied relief solely because Linkletter's conviction had been affirmed upon appeal to the Louisiana Supreme Court and the time for petitioning for certiorari had elapsed before June 19, 1961, the date of the *Mapp* decision.[2] For the first time the Supreme Court had held that it and the courts whose judgments it reviews possess the power to deny the benefit of a constitutional right to a person equipped with a procedural remedy for challenging the lawfulness of present incarceration attributable to a denial of that constitutional right.[3]

Although not unexpected in some circles, the decision was novel and totally without precedent

[1] 367 U.S. 643 (1961). The Linkletter court assumed that the court below correctly determined that the seizure had been unlawful.

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

[3] The remedy here was federal habeas corpus. For a pre-Linkletter view that the federal habeas corpus statute, now 26 U.S.C. §2241 (1964), by its wording prohibits anything but full retroactive application of new decisions, *see generally* Torcia & King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 DICK. L. REV. 269 (1962).

The retroactivity problem is generally not thought of in terms of remedies, although one manner of decreasing the impact of a new constitutional decision would be to limit the use of collateral remedies. *See* Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319, 341–42; *see also In re* Harris, 56 Cal. 2d 879, 880, 366 P.2d 305, 306, 16 Cal. Rptr. 889, 890 (1961) (concurring opinion). Very recently Justice Black, pursuing the same theme, declared that the federal habeas corpus statute should be interpreted to exclude attacks upon convictions unless the alleged constitutional error is related to the reliability of the determination of innocence or guilt. Kaufman v. United States, 394 U.S. 217, 231–42 (1969) (dissenting opinion). Justice Harlan finds this proposal unacceptable because of the "deterrence" value of habeas corpus. See Desist v. United States, 394 U.S. 244, 262–63 (1969) (dissenting opinion). The possibility of review via habeas corpus is said to motivate reviewing courts to faithfully apply even those Supreme Court decisions such as Mapp which are not designed to improve the reliability of the fact-finding process. Because of the great volume of cases, certiorari by itself is not sufficient for this deterrent purpose. Justice Harlan further noted, *supra*, that this deterrent purpose could be served simply by giving a petitioner the benefit of the law as it existed at the time of direct review and not at the time the petition is being heard. His tentative proposal is that only this older law be applied in habeas corpus proceedings, but the proposal is limited to cases where the constitutional right allegedly violated has not the purpose of increasing the reliability of the fact-finding process. As Harlan himself noted, this test would require the federal district judge to make a determination of what the law was on a particular past date, which may have come between the date of a slowly eroded decision and the date of the decision which finally overruled the old decision by name. It would also require him to assess the purpose of the new decision, not always an easy task.

in the United States Reports.[4] Yet the "prospective-only" device[5] quickly became an accepted part of the constitutional criminal procedure scene in America. In *Tehan v. United States ex rel. Shott*[6] the Court in 1966 gave to the constitutional requirement announced in *Griffin v. California*[7] (forbidding non-neutral judicial and prosecutorial comment upon a defendant's decision not to testify) the same treatment it had given to the *Mapp* exclusionary rule. In *Johnson v. New Jersey*[8] the Court denied the constitutional rights recognized in *Escobedo v. Illinois*[9] and in *Miranda v. Arizona*[10] even as much retrospective effect as it had given *Mapp* and *Griffin v. California*. As long as the trial in which the constitutionally inadmissible statement had been used commenced on or prior to the date of the decision in question, the violation could not be urged even on direct appeal.[11] Thus some prisoners were denied relief from the violation of their constitutional rights even though their convictions, to use the *Linkletter* word, had not yet become "final" before the date of the new decision in question.[12]

In 1967 the right to counsel at line-ups and show-ups recognized in *United States v. Wade*[13] and *Gilbert v. California*[14] immediately was made almost wholly prospective in *Stovall v. Denno*.[15] Prosecutors were permitted to use eyewitness identifications obtained in violation of the constitutional right to counsel, except in the prosecutions of Wade and Gilbert themselves, even in future trials, as long as the violation had occurred on or before the date of the *Wade* and *Gilbert* decisions.[16] Thus in each of the cases where the Supreme Court in its opinions considered the issue through the end of the 1966 Term, the Court decided against full retroactivity, even though prior to the 1965 *Linkletter* decision it had never decided against retroactivity for a constitutional criminal procedure decision. Elsewhere the Court lapsed into its old familiar practice of applying retrospectively decisions recognizing for the first time certain constitutional rights, without any discussion of the issue.[17]

In its 1967 Term the Court continued down its new path by holding that decisions which require that the option of a jury trial be available to defendants in state criminal trials for other than petty offenses would be applicable only to trials commencing on or after the date of those decisions.[18] But in two other 1968 decisions the Supreme Court expressly rejected prospective-only application for two other newly recognized rights.[19]

[4] Some commentators, a few federal circuit courts, and many state courts had anticipated and urged such a result. For a full catalogue, *see generally* Linkletter v. Walker, 381 U.S. 618 n.2; Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 n.2 (1966); Comment, *Linkletter, Shott, and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 n.6, 833 n.14 (1966).

[5] The word *retroactive* is disfavored because it suggests the phrase *ex post facto*, which, in turn, is pejorative. The latter phrase is normally inapplicable to judicial decisions. Frank v. Magnum, 237 U.S. 309, 344 (1915). Retroactive application is a normal characteristic of judicial decisions, not an unwholesome extension of judicial power. It is "one of the central principles in our received learning on the common law." Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

[6] 382 U.S. 406 (1966).

[7] 380 U.S. 609 (1965).

[8] 384 U.S. 719 (1966).

[9] 378 U.S. 478 (1964).

[10] 384 U.S. 436 (1966).

[11] In Jenkins v. Delaware, 395 U.S.__, 89 S. Ct. 1677 (1969), the Court held that Escobedo and Miranda do not apply to re-trials of cases tried before the dates of those decisions but retried afterwards following a reversal. Nothing prevents the States from giving full retrospective effect to any constitutional decision which the Supreme Court has not treated so generously. *See, e.g. In Re* Estate of Melody, __ Ill. 2d__, 248 N.E. 2d 104 (1969), applying the "non-retroactive" decision in Bloom v. Illinois, 391 U.S. 145 (1968), retroactively to benefit Bloom's less culpable co-defendant. Such State decisions, however, are rare. It will be interesting to observe whether those States which prior to Jenkins had applied Escobedo and Miranda to re-trials will now abandon that practice.

[12] "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*." 381 U.S. at 622 n.5.

[13] 388 U.S. 218 (1967).

[14] 388 U.S. 263 (1967).

[15] 388 U.S. 293 (1967).

[16] A fully prospective decision would not benefit the defendant in whose case the Court chose to announce, by dictum, a new rule. Although the violation of Gilbert's right to counsel at a line-up was remedied as to his state conviction, he was not so lucky as to his federal conviction, which involved the very same line-up. The Supreme Court denied certiorari in the federal case. Gilbert v. United States, 388 U.S. 922 (1967).

[17] *E.g.*, Brookhart v. Janis, 384 U.S. 1 (1966), gave relief on right-of-confrontation grounds from a state-court judgment which had become final before the Court had extended the confrontation guarantee of the Federal Constitution to state-court defendants in Pointer v. Texas, 380 U.S. 400 (1965).

[18] DeStefano v. Woods, 392 U.S. 631 (1968), denied full retroactivity to Bloom v. Illinois, 391 U.S. 194 (1968), and to Duncan v. Louisiana, 391 U.S. 145 (1968).

[19] Roberts v. Russell, 392 U.S. 293 (1968), declared

In the 1968 Term the Court expressly held retroactive three decisions recognizing the right to counsel at certain critical stages of trial-court proceedings and implementing the right of confrontation.[20] However *Katz v. United States*[21] was held not to prohibit the introductions of conversations seized in violation of *Katz* as long as the evidence was seized on or before the date of that decision.[22] *Lee v. Florida*[23] was held to prohibit the use of unlawfully intercepted communications in state trials held after the date of *Lee* but was held not to affect cases tried on or before that date.[24]

It thus appears that the prospective-only technique, as new as it is, is a permanent fixture, the only dispute being when and to what degree it should be invoked. It is natural, then, for commentators to focus upon the issue of which newly recognized constitutional rights will be or should be applied retrospectively and which merit prospective-only treatment. This is a hazardous business, however, since whatever is written may soon become out-dated with the announcement of a new Supreme Court opinion, holding this decision prospective or that decision retrospective and destroying whatever order the commentator had perceived in the past decisions.[25] What has been lacking is a critical re-examination of the *Linkletter* decision and of the prospective-only doctrine itself. The legitimacy of the principle announced in *Linkletter*—that the Supreme Court has the power to dictate a timetable for the application of constitutional rights—should be re-evaluated. Only very recently Mr. Justice Harlan, who had previously concurred in the prospective-only decisions, reversed his position and called for a re-examination:

> I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. "Retroactivity" must be rethought.[26]

Hopefully this essay is something more than a highly critical evaluation of a short series of decisions which have given birth to an indestructible principle.[27] Justice Harlan's call for re-examination reminds us that Justice Douglas has dissented from every decision denying full retroactive effect to a previous decision recognizing a constitutional right. Justice Black has never recognized the prospective-only device as a legitimate judicial tool in this area of the law.[28] Justice Marshall once rejected its use in a situation where, if ever proper, it should have been used.[29] Former Justice Fortas

---

the full retroactivity of Bruton v. United States, 391 U.S. 123 (1968), which had condemned the admission at a joint trial of a defendant's confession implicating a co-defendant. Footnote 22 of Witherspoon v. Illinois, 391 U.S. 510 (1968), let it be known that Witherspoon would be applied retroactively to all cases where veniremen had been challenged for cause who indicated, without more, conscientious scruples against the death penalty.

[20] Mempa v. Rhay, 389 U.S. 128 (1967), White v. Maryland, 373 U.S. 59 (1963), and Barber v. Page, 390 U.S. 719 (1968), were declared retroactive in McConnell v. Rhay, 393 U.S. 2 (1968), Arsenault v. Massachusetts, 393 U.S. 5 (1968), and Berger v. California, 393 U.S. 314 (1969), respectively.

[21] 389 U.S. 347 (1967).

[22] Desist v. United States, 394 U.S. 244 (1969).

[23] 392 U.S. 378 (1968).

[24] Fuller v. Alaska, 393 U.S. 80 (1968). The Appendix provides a list of the critical dates under the Court's prospective-only rulings.

[25] This fate befell Schwartz, *supra* note 4, although it surely detracted little from his fine essay. Even as the present article is prepared for publication, retroactivity issues are pending before the Court. The Court has requested briefing on the retroactivity of its "double jeopardy" decisions of the 1968 Term. *See* Price v. Georgia, 395 U.S.__, 89 S. Ct. 2138 (1969); Jacques v. New Jersey, 395 U.S.__, 89 S.Ct. 2138 (1969); Moon v. Maryland, 395 U.S.__, 89 S. Ct. 2135 (1969). Retroactive application of Chimel v. California, 395 U.S.__, 89 S.Ct. 2034 (1969), will be at issue in future search and seizure cases. *See* Von Cleef v. New Jersey, 395 U.S.__, __, 89 S.Ct. 2051, 2052 (1969); Shipley v. California, 395 U.S.__, __, 89 S. Ct. 2053, 2055 (dissenting opinion of Justice White).

[26] Desist v. United States, 394 U.S. 244, 258 (1969) (dissenting opinion).

[27] This is so well established that a civil litigant, claiming that a Supreme Court decision, if made to operate retrospectively, would work an economic detriment to it because of its justifiable reliance upon the old law, recently cited the prospective-only cases from the criminal constitutional area to support its position. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968). Just a few short years ago prospective-only decisions were frequent in civil economic disputes but unheard of in criminal constitutional litigation. *See* text accompanying notes 81–93, *infra*.

[28] Justice Douglas has expressly dissented in each such case. Justice Black has either joined him in dissent or, more recently, has concurred with the denial of relief for the reason that he believes the new constitutional decision relied upon is erroneous. *See e.g.*, Desist v. United States, 394 U.S. 244, 254 (1969) (concurring opinion).

[29] It is generally agreed that if any decision should be denied retroactive application it is Mapp. But Mr. Justice Marshall disagreed. *See* United States *ex rel.*

expressed concern over the rewarding of jurisdictions which act only under Supreme Court compulsion, which appears to be an inherent characteristic of its use.[30] The prospective-only technique, the present author claims, facilitates Supreme Court intrusions into state criminal justice administration abhorred by Justice Harlan and often disapproved by Justice White and by Justice Stewart.[31]

On the other hand, it is recognized that if the prospective-only device is abandoned, it will only incidentally mark the triumph of sound reason. For the most part, such an event would reflect the decision of more conservative justices that they can play a more dominant role in criminal procedure decisions by refusing to permit the Court freedom to create constitutional requirements applicable to the future only which, if applied retrospectively, would cause disruption of criminal administration intolerable to conservatives and liberals alike.

Because the author believes that the prospective-only device originated as a concession to the dictates of a rigid system of dual federalism but that that device, ironically, has grown to be one of the greatest enemies of federalism, extensive attention is paid to the historical context in which the prospective-only technique was conceived and which context it eventually altered.

The Decline Of Federalism And A Proposed Concession

The suggestion that United States Supreme Court decisions recognizing "new" constitutional rights need not or should not be applied retroactively was first made in connection with *Griffin v. Illinois*,[32] *Mapp*, and *Gideon v. Wainwright*.[33] In 1956 Mr. Justice Frankfurter made the first such suggestion in his concurring opinion in *Griffin*[34] and in 1958 Justice Harlan and Justice Whittaker renewed the proposal that *Griffin* be denied retrospective effect.[35] In 1963 Justice Harlan proposed that the Court at least consider whether *Gideon* should be applied retroactively.[36] And, of course, in *Linkletter* the Supreme Court in 1965 heeded the call for a non-retroactive application of *Mapp*.[37]

Not coincidentally, *Griffin v. Illinois*, *Mapp*, and *Gideon* can be viewed as the first Supreme Court decisions which had sudden and significant impact upon state criminal justice administration, putting to one side the segregated-jury decisions, which involved an overriding factor not present in other criminal procedure cases.

Before a 1952 decision of narrow applicability,[38] the Court had aided state-court defendants in only two main areas: the right to trial counsel and the exclusion of involuntary confessions. From 1952 to 1960 the areas where relief was granted were extended very little.[39]

Even in the trial-counsel and the confession areas, the expansion of procedural safeguards for state-court defendants was painfully slow. Although the first case in which the Supreme Court granted genuine relief to a state-court defendant on due process grounds in 1932 held that counsel must be afforded a defendant in a capital case if he is being tried in a lynching atmosphere,[40] a quarter of a century later the Supreme Court still had not acknowledged an absolute right to counsel in every state trial where a defendant faced a possible sentence of death. Similarly, the Court advanced slowly in damning the various methods of extracting admissions from a suspect.

The earliest decisions had little impact because they did not involve disputes over proper standards. Alabama law no more permitted the trial of Powell without counsel than did Mississippi law allow the use of confessions extorted by beatings and torture where a timely objection was made at trial.[41] The disputes were limited to issues such as whether real assistance of counsel had been afforded and whether a timely objection had been made.

Even when the Supreme Court in the 1940's

Angelet v. Fay, 333 F.2d 12, 21 (2d Cir. (1964) (dissenting opinion), *aff'd*, 381 U. S. 654 (1965).

[30] *See* Desist v. United States, 394 U.S. 244, 276–77 (1969) (dissenting opinion); *see also* note 202 and accompanying text, *infra*.

[31] These decisions particularly include Miranda and Wade. See text accompanying notes 207–08, *infra*.

[32] 351 U.S. 12 (1956).

[33] 372 U.S. 335 (1963).

[34] 351 U.S. 12, 25–26 (1956) (concurring opinion).

[35] Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (dissenting opinion).

[36] Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (dissenting opinion).

[37] *See generally* the articles and cases cited in the notes referred to in note 4, *supra*.

[38] Rochin v. California, 342 U.S .165 (1952).

[39] For instance, in Napue v. Illinois, 360 U.S. 264 (1959), a state prisoner won a reversal because of the state's knowing use of false testimony. In Thompson v. City of Louisville, 362 U.S. 199 (1960), the Supreme Court created the principle that it is a violation of the Federal Constitution to sustain a conviction where the record is wholly devoid of incriminating evidence—a principle generally limited to the civil rights context in which it arose.

[40] Powell v. Alabama, 287 U.S. 45 (1932).

[41] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

began to differ with the States as to the standards of voluntariness to be used in determining the admissibility of confessions, and as to the nature of the "special circumstances" which required that trial counsel be provided,[42] the Supreme Court decisions had little impact because they were decided on narrow grounds. A reversal here and a reversal there does not have the same sudden and significant impact upon a state as does the setting of precise requirements for the States to meet if they wish to sustain convictions—such as were specified in *Gideon*, *Miranda*, and *Wade*. For instance, up to 1963 five states had not been terrified enough by the prospect of reversals, under the ever-expanding "special circumstances" test, to grant counsel as a matter of right to indigent defendants in all felony trials.[43] That the other states had recognized such a right could be attributed as much to a sense of justice at the state level as to the fear of reversal by the federal courts.[44] Even if the Supreme Court decisions contributed to the gradual uplifting of state standards, the impact of any one decision was never great.

The slowness in the Supreme Court's fashioning of constitutional rules binding upon the States cannot be explained by the failure of counsel to urge that the Court use the Due Process clause for this purpose. Such arguments were advanced at least as long ago as 1887 and with frequency after Powell's conviction was reversed in 1932.[45] Nor can it be attributed to a brooding conservatism in matters of individual rights. Federal-court defendants had been accorded for decades the very rights which the Supreme Court had denied, as a matter of constitutional requirements, to state-court defendants. It was the Supreme Court of the United States which in 1914 fashioned a federal exclusionary rule for the fruits of unlawful searches and the Supreme Court which refused to apply such a rule to the States until 1961.[46] Other rights recognized under the fifth and sixth amendments for federal-court defendants were similarly denied to state-court defendants.[47]

The reluctance of the Supreme Court to intervene in state criminal law administration and the gap between the constitutional or judge-made rights for federal defendants and those under the Federal Constitution for state-court defendants must be explained by the Supreme Court's respect for the principles of a strict dual federalism and for the belief that sound reasons justified Supreme Court restraint in interfering with the freedom of individual states to develop their own systems of criminal justice. Part of the slowness was probably also due to the envisioned impact of the announcement of new standards retroactively applied, for this was one potential source of federal-state friction. As Dean Allen has pointed out, the Court itself acknowledged as much in 1947 in explaining its refusal to adopt a "*Gideon*-type" rule.[48]

Two remarkable decisions reflect the extent to which state independence in matters of criminal procedure was respected by the Supreme Court in this era. In *Wolf v. Colorado*[49] the Supreme Court in 1949 permitted the States to use as evidence in criminal cases the fruits of searches which admittedly violated the fourth and fourteenth amendments. In 1952 the Court permitted transgressions of Section 605 of the Federal Communications Act[50] to occur openly in a state court where intercepted messages were divulged and used as evidence.[51]

The 1956 case of *Griffin v. Illinois* was strikingly different from all its predecessors. It placed a broad obligation upon the States in an area (ap-

[42] The special circumstances doctrine was derived from Betts v. Brady, 316 U.S. 455 (1942).

[43] The five states were Alabama, Florida, Mississippi, North Carolina, and South Carolina. Silverstein, *The Continuing Impact of Gideon v. Wainwright*, 51 A.B.A.J. 1023, 1024 (1965).

[44] Twenty-two states joined in an amicus brief in Gideon urging reversal.

[45] *See* Spies v. Illinois, 123 U.S. 131 (1887). *See generally* Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 194, 200 (1958). For an explanation of this phenomenon which, contrary to Dean Allen's, does emphasize that relatively few state cases actually reached the Supreme Court, *see* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 4 (1956).

[46] *Compare* Weeks v. United States, 232 U.S. 383 (1914), *with* Wolf v. Colorado, 338 U.S. 25 (1949).

[47] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937); Betts v. Brady, 316 U.S. 455 (1942); Adamson v. California, 332 U.S. 46 (1947). In Snyder v. Massachusetts, 291 U.S. 97 (1932), four dissenters apparently believed that the sixth amendment right to confrontation was binding upon the States, while the majority did not reach that issue. Yet it was not until Pointer v. Texas, 380 U.S. 400 (1965), that the Supreme Court so held.

[48] Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L.J. 213, 230 (1959). Justice Frankfurter had spoken of the possibility of "opening wide the prison doors of the land." Foster v. Illinois, 332 U.S. 134, 139 (1947).

[49] 338 U.S. 25 (1949).

[50] 47 U.S.C. §605 (1964).

[51] Schwartz v. Texas, 344 U.S. 199 (1952), was finally overruled by name in Lee v. Florida, 392 U.S. 378 (1968).

pellate review) where the Supreme Court had not previously ventured. In effect, it required Illinois to supply transcripts for at least one appeal by every indigent convicted of a state felony.[52] Besides applying to a large number of states, *Griffin*'s equal-protection rationale suggested that other aspects of appellate review would not remain free from federal control. Retroactively applied, it would create an immediate and severe burden upon the States' appellate systems.[53] In short, it was a sudden and significant intrusion by the Supreme Court of the United States into state criminal-law administration.

The concurring opinion in *Griffin* written by Justice Frankfurter, whose vote was decisive, sharply reflects the tensions between individual rights and state independence. Frankfurter believed that the dictates of federalism should not be ignored even in the face of what he termed "squalid discrimination" against indigents. He suggested that the States would still be free to implement the decision in their own fashion, affording indigents effective appellate review in whatever manner they desired, without having to supply the indigent with opportunities for review identical to those available to more affluent appellants. He also urged, without success, that the States should be spared the impact of a retroactive application of *Griffin*—a suggestion which had no prior analogue in constitutional criminal procedure decisions of the Supreme Court.

[52] A suggestion was made by the majority that different methods of review might be provided for indigents, equal to that obtainable by non-indigents. Griffin v. Illinois, 351 U.S. 12, 20 (1956). In a series of cases down to Anders v. California, 386 U.S. 738 (1967), the Supreme Court has not yet approved any appellate scheme which has not afforded the indigent precisely what a paying client could purchase.

[53] Before the March 1, 1957, deadline under Illinois Supreme Court Rule 65-1, ILL. REV. Stat. ch. 110, §101.65-1 (1957), adopted to open the appellate door for those for whom it had been shut because of indigency prior to Griffin, 548 petitions for transcripts were granted by Cook County courts alone. Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 160 (1957). This in turn required the establishment of an appellate division of the Cook County Public Defender's office to replace the inadequate system of private voluntary appellate programs. With each logical extension of Griffin, the number of indigent appeals grows. *See generally* Doherty, *Wolf! Wolf! The Ramifications of Frivolous Appeals*, 59 J. CRIM. L., C. & P.S. 1 (1968). The chief victims are defendants not on appeal bond serving short sentences and, especially, civil litigants. *See generally* English, *Crisis in Civil Appeals*, 50 CHICAGO B. REC. 231 (1969). Griffin's rationale was extended to misdemeanors in Williams v. Oklahoma City, 395 U.S.___, 89 S.Ct. 1818 (1969).

Judged by the twin standards of suddenness and significance, the next Supreme Court opinion with real impact upon the States was *Mapp v. Ohio*. In 1961 *Mapp* forced a large number of states to change their ways decisively and immediately. At the time of *Mapp* about half of the States still did not employ an exclusionary rule for evidence which had been unlawfully seized.[54] Applied to past convictions this decision would place a heavy burden upon state systems of criminal-law administration. Hearings would have to be held in large numbers. Guilty men would go free either because the States did not have the resources to carry the defense against claims of unlawful seizures to a successful conclusion or because essential evidence *had* been unlawfully seized and offered at trial.

Again the Court in *Mapp* felt compelled to pay tribute to proper state-federal relations. The Court was unusually patient in explaining why it believed *Wolf* must be overruled. The symmetry created by the identity of the exclusionary rules now to be used in both state and federal courts was hailed as a triumph for federalism.[55] Nevertheless, almost immediately a cry went up urging that the States be spared the impact of a retroactive application of *Mapp*.[56]

The *Wolf-Mapp* dispute, more than any other, may itself be viewed as a debate over the extent to which the Supreme Court should dictate federal requirements to remedy wrongs prevalent in the state systems and the extent to which the States should be left to improve their own systems in their own time and according to their own fashions. *Mapp* may be viewed as the final warning to the States that federal standards would be imposed whenever the States failed to provide adequate procedural safeguards in their systems of criminal-law administration. The restraint prior to *Mapp*—for instance, in not applying the *Griffin* equal-protection rationale, as all logic dictated, to require free trial and appellate counsel for indigents in state courts—was remarkable.

After two more years of relative inactivity—from the viewpoint of sudden, significant impact—the warnings ended. In 1963, using a due-process rationale, the Court in *Gideon* established the indigent's right to counsel in all felony cases. Applied retroactively, as *Gideon* was, the decision required

[54] Linkletter v. Walker, 381 U.S. 618, 633 n.17 (1965).
[55] 367 U.S. at 657–58.
[56] *See e.g.*, Traynor, *supra* note 3.

re-trials and releases from prison unparalleled in American history. As to the future, it meant that five states had to take immediate action to provide counsel where they had not previously provided it. No excuses about inadequate resources or about the absence of enabling legislation would be accepted. The concession to federalism urged upon the Court by Gideon's counsel was mere lip service: state courts would now be reversed less often than they had been under the old expanding "special circumstances" test.

A respect for the dictates of federalism was no longer a meaningful restraint upon the Supreme Court in matters of criminal procedure. Individual liberty had too long and too often been slighted by the States and by past Supreme Court decisions which had refused to right the wrongs. On the day of the *Gideon* decision, *Griffin v. Illinois* was applied to establish the indigent's right to appellate counsel in the first of a series of cases which has had significant impact upon state appellate practice.[57] Immediately after this day, the Court ventured into areas where it had never before imposed standards upon the States: wiretapping,[58] self-incrimination,[59] pre-trial publicity,[60] and the *procedure* for determining the voluntariness of a confession.[61] A conviction was upset because the Supreme Court disliked the idea of a sheriff who had custody of a jury testifying as a state witness.[62] States were told what language used by a lawyer in open court could amount to contempt and what language could not be punished.[63] On the day of the *Linkletter* decision the States were also informed that they would be required to adhere to federal standards with respect to the news media's coverage of a trial itself.[64] Moreover, these new rights for state-court defendants had a broader impact because new habeas-corpus decisions had widened the avenues for federal review of state convictions.[65]

The regularity with which the Supreme Court now intervenes in state criminal law administration should not make the modern observer unmindful of the simple historical fact that these recent decisions have been handed down by a court which had not reversed any state-court conviction prior to 1932, which for two decades thereafter had limited its intervention to narrow holdings in two areas of state criminal procedure, and which prior to 1963 had rendered only two decisions which had sudden and important impact upon the States.[66]

From this background, the 1965 *Linkletter* decision emerges as an attempted concession to the interests of federalism, now so readily neglected elsewhere. The States strongly urged that *Mapp* not be applied retroactively and correctly observed that the consequences of a retroactive application would be serious.[67] At the same time, this theory demands an explanation of why the prospective-only doctrine was not applied to *Griffin* in 1956 or to *Gideon* in 1963 or even to *Mapp* much sooner than it was.

In *Griffin* the State of Illinois quite naturally fought against the free-transcript rule and did not concern itself with the retroactivity issue. It is surmised that Justice Frankfurter's suggestion that *Griffin* be denied retroactivity was little more than an afterthought which the full Court may never have considered.[68] Or it was quickly dismissed because of its novelty. After the denial of a petition for rehearing in which Illinois urged that Frankfurter's suggestion be adopted, the Supreme Court of Illinois swiftly and laudably demonstrated a willingness to give the benefit of the decision to all prisoners—however stale their convictions—who had been discriminated against in the manner forbidden by *Griffin* and who were presently incarcerated pursuant to convictions which had not been appealed for want of a transcript.[69] Since Frankfurter's suggestion appeared in his opinion, and since it had not been adopted, the impression

[57] Douglas v. California, 372 U.S. 353 (1953), was followed that same day by Draper v. Washington, 372 U.S. 487 (1963), and by Lane v. Brown, 372 U.S. 477 (1963).

[58] Clinton v. Virginia, 377 U.S. 158 (1964).

[59] Malloy v. Hogan, 378 U.S. 1 (1964).

[60] Rideau v. Louisiana, 373 U.S. 723 (1963).

[61] Jackson v. Denno, 378 U.S. 368 (1964).

[62] Turner v. Louisiana, 379 U.S. 466 (1965).

[63] Holt v. Virginia, 381 U.S. 131 (1965).

[64] Estes v. Texas, 381 U.S. 131 (1965).

[65] Townsend v. Sain, 372 U.S. 293 (1964); Fay v. Noia, 372 U.S. 391 (1963).

[66] An opinion illustrative of the willingness to intervene in state cases is that of three justices in Skinner v. Louisiana, 393 U.S. 473 (1969) (dissenting opinion). The federal question upon which the three would have reversed was whether the trial judge erred in not granting a continuance to an ill attorney who carried on without a noticeable decline in his performance.

[67] The National District Attorneys' Association filed an important brief in the case.

[68] The silence of the dissenter Harlan is more significant than the majority's failure to refer to the Frankfurter suggestion since Harlan later agreed that the suggestion was meritorious. *See* text accompanying note 71, *infra*.

[69] *See* note 53, *supra*.

was that it had been rejected.[70] Either because of this or because of the demonstrated willingness and apparent ability of Illinois to handle a fully retroactive *Griffin*, when prospective-only application was suggested by Justices Harlan and Whittaker in 1958 in connection with an appeal relying on *Griffin*,[71] it was rejected without so much as a comment by the majority of the Court. It may also be true that the Court felt that since the "squalid" discrimination against indigents went to the issue of the reliability of their convictions, this was not an appropriate case in which to adopt a new doctrine to deny retroactive application to one of its important decisions.

In connection with *Gideon* little consideration of the prospective-only possibility is in evidence—even though by 1963 the learned journals were discussing that possibility in connection with *Mapp*, and even though Justice Harlan, without necessarily endorsing prospective-only treatment for *Gideon*, at least urged discussion.[72] Gideon had been a unanimous decision, and unanimous decisions need not be compromised by a limitation of their impact.[73] In addition, *Gideon*, for all its significance, was not an unpopular decision.[74] A promise had been made in *Gideon* to those, like Gideon, whose convictions were final but whose guilt was in doubt because of the denial of the assistance of trial counsel. Almost no one urged that that promise should be broken.

Mapp v. Ohio, by contrast, was the ideal case for the emergence of the prospective-only doctrine. Perhaps the existence of a general power of the Supreme Court to limit constitutional decisions applicable to criminal procedure to prospective-only operation would have been denied on theoretical grounds from the very beginning if the discussion had not occurred in a climate where the *Wolf-Mapp* dispute was a critical factor. At stake was the continued incarceration of prisoners the reliability of whose convictions was not in doubt. At the very least, great administrative problems would result from the large number of hearings which would have to be held to determine whether the rights of those guilty men had been violated. Finally, the States could rightly complain that the Supreme Court had suddenly overturned a clear decision which was little more than a decade old.[75]

The Supreme Court did not determine the *Mapp*-retroactivity issue for four years. It is not beyond belief that the silence was by agreement.[76] This silence has been criticized,[77] but it had the effect of making the *Linkletter* opinion more respectable because *Linkletter* was foreshadowed by the opinions of some commentators and some federal and state judges in the years which immediately followed *Mapp*.[78]

The Linkletter "Precedents"

Mr. Justice Clark, the author of the majority opinion in *Linkletter*, engaged in a quest for precedent for the novel proposition that his court could apply the Constitution according to a judicially-created timetable. Everyone was aware that common-law rules and judicial interpretations of statutes are sometimes changed for the future only.[79] Justice Clark may have felt compelled to write such a lengthy opinion because he realized that such cases were weak precedents for what the Court did in *Linkletter*. Yet, in the end, he was satisfied with the assertion that while his authority dealt with "the effect of a decision overturning long-established common-law rules there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application." [80]

If we acknowledge that we are applying a technique employed in one area of the law to an area

[70] But see United States v. Sanders, 142 F. Supp. 638 (D.D.C. 1956), surely one of the first prospective-only opinions in the area of constitutional criminal procedure.

[71] Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216 (dissenting opinion).

[72] Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (dissenting opinion).

[73] The prospective-only opinions, with the exception of the latest ones, have limited the application of rights recognized by a badly divided court.

[74] *See* note 44, *supra*.

[75] The significance of reliance upon Wolf v. Colorado is discussed in notes 172–73 and the accompanying text, *infra*.

[76] Justice Clark said that Mapp had not foreclosed the issue. 381 U.S. at 620 n.2. Justice Black in dissent did not disagree, although between 1961 and 1965 many commentators tried to divine the Court's intent from a close reading of Mapp. *See* Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. Penn. L. Rev. 650, 668–70 (1962).

[77] *See, e.g.*, Nothrop, *The Supreme Court and Crimina Procedure*, 26 Md. L. Rev. 1, 8, 12 (1966).

[78] *See generally* the articles and cases referred to in the notes mentioned in note 4, *supra*.

[79] *See, e.g.*, Darling v. Charleston Community Memorial Hospital, 33 Ill.2d 326, 211 N.E.2d 253, *cert. denied*, 383 U.S. 946 (1965).

[80] 381 U.S. at 628.

where it has not been used before, our reflections should not be upon its applications in the first area—as were Justice Clark's—but rather upon the similarities and differences between the two areas which will either permit or prohibit the use of the technique in the second area. No such analysis is offered by the *Linkletter* majority. Its opinion is well worth studying as a classic in the misuse of precedent.

Retroactive Application of Past Constitutional Decisions

The *Linkletter* majority opinion acknowledged that the Supreme Court's previous practice had always afforded the benefit of newly recognized higher constitutional standards of criminal procedure to all citizens, whether the claim of a violation was raised at trial, on appeal, or during a collateral attack upon a conviction. Justice Clark wrote: "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule."[81] This fact loses none of its significance simply because it is candidly admitted. Prior to *Linkletter* the Court's practice *always* had been to apply new constitutional decisions retroactively and *never* did a majority opinion even consider that something less would be permissible.

A study of the United States reports, focusing particularly on per curiam opinions, would reveal hundreds of instances of relief granted by virtue of the retrospective operation of at least a dozen newly recognized constitutional rights. In addition to the retroactive application of *Griffin* in *Eskridge*, per curiam reversals of final convictions in right-to-counsel cases after 1963 depended upon the retroactive application not only of *Gideon* but also of *Carnley v. Cochran*,[82] which had placed a greater burden upon the States on the issue of knowing waiver.[83] *Douglas v. California*[84] and *Jackson v. Denno*[85] were both applied retrospectively in subsequent Supreme Court decisions.[86] The newly announced rule of *Massiah v. United States*,[87] after being applied to the States,[88] was quickly applied in a case which had become final before *Massiah* had been decided.[89] The 1957 decision in *Moore v. Michigan*[90] vacated a 1938 guilty plea by invoking constitutional standards which had not evolved until long after 1938. In 1961 the Supreme Court vacated a 1936 conviction because of the admission into evidence of a confession which was involuntary only when measured against constitutional standards undreamed of in 1936.[91]

Many of these decisions represented conscious rejections of suggestions that a prospective-only doctrine be recognized in the area of constitutional criminal procedure. The fact that such suggestions were not deemed worthy of comment by any majority opinion weighs heavily against a suggestion that the Court believed that prospective-only treatment could be accorded some constitutionally required procedural safeguards but not the one involved in the particular case before the Court. For instance, before the Court applied *Griffin v. Illinois* retrospectively, it had the benefit of Frankfurter's suggestion, the Illinois petition for rehearing, the respondent's argument in *Eskridge*, and the plea of the two dissenting justices in *Eskridge*. The prospective-only doctrine was also suggested and silently rejected by a majority of the Court in cases which depended upon the retrospective application of the rights newly announced in *Gideon*, *Jackson v. Denno*, and *Douglas v. California*.[92] In short, the unarticulated premise of Supreme Court

[81] *Id.*

[82] 369 U.S. 506 (1962).

[83] *See e.g.*, Huggins v. Raines, 374 U.S. 105 (1964), *vacating* 372 P.2d 248 (Okla. Crim 1962).

[84] 372 U.S. 353 (1963).

[85] 378 U.S. 368 (1964).

[86] *See e.g.*, Luckman v. Dunbar, 372 U.S. 708 (1963), applying Douglas; Boles v. Stevenson, 379 U.S. 43 (1964), applying Jackson.

[87] 377 U.S. 201 (1964).

[88] McLeod v. Ohio, 378 U.S. 582 (1964).

[89] Lyles v. Beto, 379 U.S. 648 (1965). McLeod and Lyles have been ignored by several courts which have declared Massiah non-retroactive, *e.g.*, Commonwealth v. Coyle, 427 Pa. 72, 233 A.2d 542 (1967), *vacated on other grounds sub nom.* Lopinson v. Pennsylvania, 392 U.S. 647 (1968).

[90] 355 U.S. 155 (1957).

[91] Reck v. Pate, 367 U.S. 433 (1961). Former Professor James R. Thompson has suggested to the present author that Moore and Reck may be viewed as decisions announcing new standards, rather than as decisions which apply retroactively previously announced new standards. The validity of this perceptive observation depends upon how one views the Court's treatment of precedent in Moore and Reck. It is interesting to note that the district judge in Reck declared that under contemporary standards the confession was involuntary but then denied relief by judging the case according to 1936 standards. United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734, 745–47 (1959). Justice Marshall found significance in the Court's failure to even consider the propriety of this ruling in reversing Reck's conviction. *See* United States *ex rel.* Angelet v. Fay, 333 F.2d 12, 24 (2d. Cir. 1964) (dissenting opinion), *aff'd*, 381 U.S. 654 (1965).

[92] See Justice Harlan's dissents in Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963), as regards Gideon; in Jackson v. Denno, 378 U.S. 368, 439–44, as regards Jackson; and in Daegele v. Kansas, 375 U.S. 1 (1963) as regards Douglas.

conduct was, as Judge Hastie stated in applying *Gideon* to reverse a pre-*Powell v. Alabama* conviction: "Our system is not so unenlightened as to require that in attaching present consequences to 1931 occurrences, a judge must ignore all of the insight that men learned in the law and observant of human behaviour have acquired concerning the essentials of tolerable criminal procedure during the past thirty years." [93]

Prospective-Only Precedents From Other Areas of the Law

The *Linkletter* majority opinion was largely devoted to a recital of precedents from other areas of the law where a court sometimes denies its own new decisions retrospective application.[94] *Bingham v. Miller*[95] was chosen as representative of the "legislative divorce" cases. The Ohio court in *Bingham* ruled that the Ohio legislature, under the state constitution, had no power to sever lawful marriages, although it had been exercising that power on occasions for over forty years. The Ohio court refused to deem invalid the legislative divorce decree in the case before it. It reasoned that such a decision would bastardize children born of a marriage contracted by one of the parties after the legislative decree. Since apparently no previous Ohio judicial decision had upheld the legislature's power to grant divorces,[96] the case lacked the element of reliance upon case law which is typical of the prospective-only judicial decisions.[97] Rather, the Ohio decision was based upon a frank expression of sympathy for certain individuals despite the fact that the state constitution, as interpreted in *Bingham*, weighed *against* their claims. Because of this, such a case is not adequate precedent for a holding which continues the incarceration of individuals who have a *valid* constitutional claim which has been recognized in *Mapp* or some other new decision.

Gelpcke v. City of Dubuque[98] exemplified cases where a court holds that a municipality had no authority under state law to issue bonds but then, nevertheless, permits bondholders to enforce bonds issued prior to the date of the decision which overturned prior decisions holding that such issues were lawful. In these cases property rights of individuals are balanced against the principle that municipalities are governments of limited power and the rule that no theory of estoppel can be invoked to circumvent that principle. The triumph of property rights of individuals who, according to the latest decision, have no valid legal claim, does not justify the denial of the right to life or liberty of individuals with a constitutional claim which, according to the latest decision, is valid.

The *Linkletter* majority also cited, as typical of the use of the prospective-only technique, cases in which a surprising judicial decision suddenly makes a crime out of conduct which occurred prior to the decision and which was lawful according to the decisions prevailing at the time the conduct was performed. The New Mexico court in *State v. Jones*[99] construed a statute to make certain conduct unlawful but refused to apply its decision to conduct which occurred prior to that date. The United States Supreme Court in *James v. United States*[100] effectively did the same thing. But the refusal to incarcerate a person who acted unlawfully but in reliance upon a judicial decision that his conduct was lawful is not adequate precedent to justify the continued incarceration of a person

[93] Craig v. Myers, 329 F.2d 856 (3rd Cir. 1964).

[94] The precedents used followed very closely those discussed in the comment written by a Yale student (now a law professor) cited in note 5, *supra*. Unlike the Linkletter majority, the commentator was not employing these precedents to support a legal argument.

[95] 17 Ohio 445 (1848).

[96] The Bingham opinion mentioned no such decision.

[97] *See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968).

[98] 68 U.S. (1 Wall.) 175 (1863). This was an unfortunate example of municipal-bond cases since it was complicated by a federalism issue. The Supreme Court was not choosing to give prospective-only treatment to one of its own decisions. Rather it was deciding not to apply retrospectively an Iowa decision which had interpreted the Iowa law so as to overrule previous Iowa decisions on the municipal-bond question. The Supreme Court denied retroactive application even though the Iowa courts apparently had not done so. *See* 68 U.S. at 208 (dissenting opinion).

[99] 42 N.M. 623, 107 P.2d 324 (1940).

[100] 366 U.S. 213 (1961). The conviction could not have been reversed unless some members of the court accepted the argument that the proscribed conduct could not have been engaged in "wilfully" unless the actor knew that his conduct was forbidden. The refusal in James to use the more straightforward technique of State v. Jones has little significance. In Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964), the court used the prospective-only technique to prevent punishment of a person whom it had just ruled had no right to refuse to testify in a state proceeding in which he had been granted immunity. The Court reasoned that the defendant reasonably believed, because of the Court's past decisions, that the immunity grant would not protect him from a federal charge. Of course his refusal to testify came long before any United States Supreme Court decision declared that the Federal Constitution prohibited the compulsion of testimony in state proceedings whatever might be the state or federal consequences. Hence the finding of "reliance" in Murphy was rather generous.

whose conviction involved a violation of his constitutional rights. Justifiable reliance by state officials that their conduct was lawful, as Justice Black noted in dissent,[101] does not create the same type of vested interest as an individual has in a decision which means freedom or loss of liberty or life. The fact that cases like *James* and *Jones* and cases like *Linkletter* all are criminal cases is of no analytical significance.[102]

The Court also cited a dissenting opinion of Justice Black and used it to support a proposition which Black himself, in his *Linkletter* dissent, quite properly suggested it did not support. Black had proposed that a new rule of trustee liability fashioned by the Supreme Court should not be applied retroactively to a trustee who had had no reason to believe that his conduct would create personal liability.[103] The proposal was fairly typical of cases which refuse to penalize a party economically for his reasonable reliance upon a past judicial decision. As such, it provided no concept of vestedness arising from judicial reliance analogous to the claim by a state that it should be permitted to keep the fruit of its unconstitutional conduct, namely the deprivation of a citizen's liberty or the right to take a citizen's life. The majority's decision in the trustee case, on the other hand, permitted a retroactive application of a new rule which caused one party economic detriment while giving a second party an admittedly deserved economic benefit. If this case has any value as precedent, it is that the majority opinion could be used to support a retroactive application of *Mapp*, giving citizens relief from the violation of their constitutional rights even in the face of a government claim that there was something unfair about this.

In connection with these cases, Justice Cardozo's writings were also cited to support the proposition that courts sometimes give prospective-only treatment to their own decisions. The address from which Justice Clark quoted reveals the kind of cases for which Cardozo was urging the application of this technique.[104] His prime example was the problem faced by the New York Court of Appeals in deciding whether the law of fixtures should be altered in so far as it applied (or did not apply) to gas ranges. This was a problem which clearly involved justifiable reliance by sellers of gas ranges upon past judicial decisions which did not require them to record their security interest in the ranges. It was a problem which had nothing to do with either human freedom or federal constitutional rights. If any of Cardozo's writings suggest that the application of the prospective-only technique could properly be used when the latter elements are present, neither the *Linkletter* majority nor the present author has been able to find them.[105] Cardozo's view of the process whereby a safeguard in criminal procedure is elevated to a constitutional requirement binding upon the States as an almost sacred event[106] indicated that he could not have agreed with Justice Clark's refusal even to consider the differences between the common-law cases and the federal constitutional cases for the purpose of determining whether the prospective-only technique used in the first area might be inappropriate for use in the second area.[107]

[101] Linkletter v. Walker, 381 U.S. 618, 652 (1965) (dissenting opinion).

[102] Justice Clark concluded from James and Jones that there was "no distinction . . . between civil and criminal litigation" with respect to the prospective-only technique. 381 U.S. at 627. But the civil-criminal distinction was much less important than the difference between preserving freedom from incarceration and denying freedom and between denying an individual a constitutional right and aiding an individual even though the law or the constitution as recently interpreted weighs against his claim.

[103] Mosser v. Darrow, 341 U.S. 267, 275 (1951) (dissenting opinion).

[104] 55 REP. N.Y. STATE BAR ASSN. 263 (1932), reprinted in M. L. HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 34–37 (1947).

[105] None of the works cited by Cardozo in his address and none of the works cited in those works speak of the prospective-only technique in connection with the Bill of Rights. Rather that technique is discussed amidst much more humble settings. *See, e.g.*, J. WIGMORE, PROBLEMS OF LAW (1920); Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180 (1931); Freeman, *The Protection Afforded Against The Retrospective Operation of an Overruling Decision*, 18 18 COLUM. L. REV. 230 (1918). For a discussion of Cardozo's thoughts on the use of the prospective-only technique, *see generally* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967).

[106] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937). *See also* Justice Harlan's comment upon Cardozo's would-be reaction to the present manner of elevating procedural safeguards to constitutional rights, Duncan v. Louisiana, 391 U.S. 145, 183 (1968) (dissenting opinion).

[107] Likewise the old dispute over the Blackstonian theory of the "discovery" of law by judges obviously had nothing to do with new interpretations of the United States Constitution. Generally proponents of the prospective only technique seek to force opponents into a Blackstonian stance so that in refuting the claim that judges discover law, the proponents will have justified the use of the technique they propose. Compare the discussion of Blackstone in the respondent's brief in Linkletter with Justice Black's specific refusal

One difference between alteration of common-law rules and fresh interpretations of the Constitution has already been discussed: the notion of vested interests in the common-law cases has no analogue in the constitutional cases. Other differences arise from the fact that judicial overruling of a judge-made law or of a long-standing judicial interpretation of a statute is closely analogous to a legislative determination. When the New York Court of Appeals restructures the law of fixtures to take account of changing conditions or when the Illinois Supreme Court abolishes the tort immunity of school districts, the judges perform a task clearly within the legislature's competence. Often such a court is criticized precisely for this reason,[108] although it seems clear that an active judicial role in an area where the legislature could act is not always to be condemned.[109]

The legislative nature of these new decisions is, of course, heightened when they are accorded prospective-only treatment. Statutes, not judicial decisions, normally operate for the future only. The more a judicial decision is denied effect upon past transactions, the more it comes to resemble a statute. A completely non-retroactive decision is remarkably similar to a legislative enactment.

Two consequences follow from this similarity. In the first place, the prospective-only judicial decision altering a judge-made rule or a long-standing interpretation of a statute is not irrevocable. The Court may reverse itself again if it wishes. An independent body with the resources for a thorough study of the subject, namely the legislature, can, and is often urged to study the whole problem and impose a better solution if it finds one. This means that the sense of freedom with which a court can approach such a problem is quite significant, its decisions affecting only the future and still subject to revision.

Secondly, when a judicial decision is overturned in prospective-only fashion, the party who is denied the benefit of the new rule because his transaction occurred prior to the decision has no more right to complain than does a person who suffers because the legislature was slow in passing a statute which would have benefitted him if it had been enacted more swiftly. So long as the old law did not amount to a violation of his right to substantive due process, he has no standing to complain. This was the precise holding and reasoning of the United States Supreme Court in a case which permitted state courts to use the prospective-only technique and which rejected the argument of a party who claimed that the state could not thus deny it the benefit of its new decision.[110]

On the other hand, when the Supreme Court of the United States elevates a procedural safeguard, to the level of a constitutional right it is not meant to be performing a legislative function. Its decision will probably be irrevocable.[111] Its solution to a problem is certainly not subject to legislative review, to be accepted or rejected depending upon the results of a thorough study. Subsequent legislative solutions are generally made impossible.[112] The Supreme Court, therefore, should not feel the same sense of freedom which a legislature feels, or which a reviewing court feels in announcing the prospective-only overruling of an old common-law precedent. The prospective-only technique, by nullifying the impact of a decision on past transactions and by partially quieting the Court's critics, makes the Court's sense of freedom to forge new law much greater than if the technique did not exist.[113] As is subsequently suggested,[114]

---

to invoke the name of Blackstone to resolve the Linkletter dispute. 381 U.S. at 643.

[108] *See, e.g.*, Haney v. City of Lexington, 386 S.W. 738, 743 (Ky. Ct. App. 1964) (dissenting opinion); *see also* James v. United States, 366 U.S. 213, 222 (1961) (concurring opinion). Black said in James that the Court acts too much like Congress when it overturns a long-standing interpretation of a statute. For this reason, many states have a strong presumption against judicial overruling of a long-standing judicial interpretation of a statute. *See, e.g.*, People v. Williams, 41 Ill.2d 511, 517, 244 N.E.2d 197, 200 (1969).

[109] In fact, it has been argued that courts should act in this fashion as a sort of catalyst for a larger legislative reconsideration of an entire area of the law. *See* Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L. J. 888, 892. Thus, for example, the decision which re-classifies a gas range as a fixture may be viewed as calling for new legislative restructuring of a major segment of the law of secured transactions.

[110] Great Northern Railway Co. v. Sunburst Oil Refining Co., 287 U.S. 358 (1932).

[111] The abolition of the "mere evidence" limitation upon seizures in Warden v. Hayden, 387 U.S. 294 (1967), is one of the very few instances where some protection has been taken away by the Supreme Court, which properly perceives that there is something unseemly about judicial decisions which take away rights previously recognized in decisions interpreting the first eight or the fourteenth amendments.

[112] This is one of the main complaints of some of the Court's critics, who, unlike Congress, have read decisions such as Miranda as not being subject to legislative overruling or revision. *See, e.g.*, Inbau, Editorial, 57 J. CRIM. L., C. & P.S. 377, 378 (1966).

[113] *See* Mishkin, *Forward: The High Court, The Great Writ, and The Due Process of Time and Law*, 79 HARV. L. REV. 56, 70 (1965).

[114] *See* text accompanying notes 207–08, *infra*.

decisions such as *Miranda* and *Wade* would have been totally impossible absent the availability of the prospective-only technique.

When we are speaking of decisions which will be binding upon the States, there is yet another reason for not permitting the technique to increase the Supreme Court's sense of freedom. If dual federalism has any meaning left, it suggests that state legislatures should have a certain freedom to order their own systems of criminal justice and that not every "good idea" which occurs to a majority of the United States Supreme Court should immediately be imposed upon the States.

Secondly, when the Supreme Court holds that a safeguard is constitutionally required but then accords its decision prospective-only treatment, the citizen who remains incarcerated has much more of a standing to complain than if an old common-law rule or statute was altered too late to benefit him. In the latter case he can complain only if the old rule violated his constitutional rights. But in the former case that is precisely the situation—and he has a very recent Supreme Court decision to prove it, namely the overruling decision.

Thirdly, when the Court functions like a legislative body through the use of the prospective-only technique, it degrades the process of constitutional interpretation. In rejecting a theory of the general availability of the technique in the area of constitutional criminal procedure, Professor Mishkin focused his attention upon the damage to the Supreme Court's symbolic role in constitutional interpretation.[115] An analysis in terms of the cheapening of constitutional rights themselves might also be offered.

A new law is not degraded because it operates only prospectively, nor is a judicial rejection of a long-standing common-law rule. In both cases, the promulgating body says that the new rule is better and wiser, not that the old rule violated someone's constitutional rights. No appeal to an authority higher than the sound judgment of the promulgating body is necessary.

But the Supreme Court must damn with vehemence an old rule when it raises a new safeguard to the level of a constitutional right. It is insufficient for the Court to say that the old rule was unwise or inferior to the new rule. The Constitution itself must be interpreted as *compelling* the new rule. If this be a fiction, it is a fiction essential to any rational system of constitutional adjudication, as Mishkin has noted.[116] Having damned the old rule, how can the Court continue to give it effect in cases where a proper remedy exists to correct the wrong? If the rights recognized in *Wade* and *Gilbert* are so important, how can the Court deny relief to prisoners, some under sentences of death, whose constitutional rights were violated in the same manner as Wade's and Gilbert's?[117] If the Supreme Court does not take its decisions any more seriously than that, how can it expect the people and the States to take them seriously?

The heart of this criticism is reflected in the commonly held view advanced by the Court's critics: there are rights, such as the right recognized in *Gideon*, which are truly fundamental to American justice. Then there are rights which are the product of the unrestrained determination by a majority of the present Supreme Court as to what is best, such as the rights recognized in *Miranda*.

If the prospective-only rights must be deemed fundamental because they are of constitutional dimension and made applicable to the States through an invocation of the Due Process clause, then the fully retrospective rights must be deemed "very fundamental." But, as has been remarked in a different context, "There is a certain inelegance in speaking of rights 'very basic to a free society' or in indulging in what appears to be almost a comparison of superlatives."[118] It is surely true that "to label a right 'basic to a free society' is to say as much as can be said."[119]

The Supreme Court, in *Linkletter* and its progeny, has always denied that it has embarked upon the categorization of rights as fundamental and more fundamental by claiming the power to deny some constitutional rights retrospective effect. But nowhere more than in the prospective-only decisions does there appear a clear indication that this is precisely what the Court is doing. Consider, for instance, the majority opinion in *Stovall*, which

[115] Mishkin, *supra* note 113, at 56, 62–63. *But cf.* Miller & Scheflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, 1967 DUKE L.J. 273, 522.

[116] Mishkin, *supra* note 113, at 62–63.

[117] Although the Supreme Court affirmed a death sentence in Stovall, a change in New York law operated to vacate it. Certainly many prisoners now under death sentences would be benefitted by retroactive applications of Wade and Miranda.

[118] Allen, *Federalism and the Fourth Amendment*, in 1961 SUPREME COURT REVIEW 1, 9 (Kurland ed.).

[119] *Id.*

denied retroactive application to the right of counsel at line-up, which right had been recognized in *Wade*. A defendant's right to due process under the fourteenth amendment is violated by a denial of that right to counsel at a line-up, but if that violation occurred before the date of the *Wade* decision, he is not automatically entitled to relief.[120] But if he can show a violation of due process not by pointing to his admitted right to counsel under the fourteenth amendment but rather by showing that "the totality of circumstances" amounted to such a violation, he can win relief.[121] It thus appears that the Court has recognized not only that there are fundamental rights and more fundamental rights, but also that there is due process and "very due process."

On the other hand, perhaps the prospective-only decisions have driven the Court to adopt the position that a right need not be deemed fundamental in order to be raised to the level of a constitutional right under the Due Process clause of the fourteenth amendment. In *Desist v. United States*[122] Justice Stewart, while denying retroactive effect to *Katz v. United States*,[123] seemed to acknowledge as much. He said that this refusal to make *Katz* retroactive did not deny anyone a fundamental constitutional right. Rather, he stated, the Court was simply declining to extend a "court-made exclusionary rule" which has "no bearing on guilt" or on "the fairness of trial."[124] Court made or not, the *Katz* rule was said to be constitutionally compelled and was recognized by Stewart's own decision in *Desist* to be binding upon the States through the Due Process clause of the fourteenth amendment.[125] Yet to justify non-retroactivity it was held *not* to involve "a fundamental constitutional right." At least at this point, if not much earlier, *Palko v. Connecticut*[126] must be read as Justice Cardozo's demand that his name be withdrawn as a would-be supporter of what the Court has done in *Linkletter* and the cases which have followed.

Precedents Not Involving Overrulings of Judicial Decisions

To support the application of the prospective-only technique to the area of constitutional criminal procedure, the *Linkletter* majority also relied upon a few cases which did not involve prospective-only treatment by a court of one of its own new decisions. In *Gelpcke v. City of Dubuque*[127] the issue dividing the Court was whether the United States Supreme Court could give such treatment to a new Iowa decision. *Kuhn v. Fairmont Coal Company*[128] dealt with whether a federal district court in a diversity case was bound by a relevant state decision handed down after the filing of the federal action. *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*[129] decided that the Federal Constitution did not prohibit state courts from using the prospective-only technique. Whether or not a decision declaring a federal statute unconstitutional was to be given retroactive effect was an issue not reached in *Chicot County Drainage District v. Baxter State Bank*[130] because the doctrine of res judicata was held to bar the plaintiff in any case. Because these decisions did not involve prospective-only overrulings by courts of their own prior decisions, they had even less force as precedent for *Linkletter* than had the ones previously discussed. The majority's primary reason for citing them seemed to be that they were decisions of the United States Supreme Court. Decisions from that Court touching upon the prospective-only technique were few. If it was fair to suggest that the Supreme Court was familiar with the technique, it was less than candid to pretend that these decisions had any force as precedent for what was being done in *Linkletter*.

The remaining authority cited in the majority opinion treated the issue of whether the prospective only technique, if employed, must be limited to instances where there had been a final decision or whether the Court could apply it also to deny the effect of the decision on cases pending at the time the new decision came down. It is to this discussion that attention is now turned.

Limitations Upon The Prospective-Only Technique

Having rejected the counsel of dissenters Black and Douglas,[131] and having determined that the Supreme Court could and would decide which newly recognized constitutional safeguards in the criminal process were to be denied retroactive ap-

[120] 388 U.S. at 299–302.
[121] 388 U.S. at 302.
[122] 394 U.S. 244 (1969).
[123] 389 U.S. 347 (1967).
[124] 394 U.S. 244, n.24 (1969).
[125] 394 U.S. 244, (1969).
[126] 302 U.S. 319 (1937).
[127] 68 U.S. (1 Wall.) 175 (1863).
[128] 215 U.S. 349 (1910).
[129] 287 U.S. 358 (1932).
[130] 308 U.S. 371 (1940).
[131] 381 U.S. 618, 640–53.

plication, the majority went on to inquire whether there existed any theoretical limitations upon the exercise of this power. The majority decided that while they could deny retroactive effect to constitutional decisions when a judgment had become final before the date of the new constitutional decision and now was being collaterally attacked, nevertheless "*(u)nder our cases it appears . . . that a change in law will be given effect while a case is on direct review.*" [132] This dictum, when spoken, was extremely significant. The Court had already given the benefit of *Mapp* to parties who had been convicted through the use of unconstitutionally seized evidence in cases which had been tried before the date of the *Mapp* decision but which were still on direct review after that date.[133] The Court had done this without any reference to the prospective-only possibility. Now the Court stated that prior precedent *forbade* any other disposition and that this precedent dictated that the prospective-only technique be used *only* in cases where final convictions had been obtained prior to the date of the new decision.

That a majority of the Supreme Court believed that the power was so limited was demonstrated by its conduct subsequent to *Griffin v. California*.[134] Although the retroactivity issue was apparent from the outset, the Court applied *Griffin* to cases on direct review and considered only whether final decisions should be upset by virtue of the *Griffin* decision. The precise sequence was this: *Griffin* was argued March 9, 1965 and *Linkletter* was argued two days later. The *Griffin* decision was announced April 28, 1965. On May 17, 1965 the Court vacated a decision on direct review on the strength of *Griffin*.[135] On May 24, 1965 it ordered the parties to a habeas corpus case to brief the issue of whether *Griffin* should be available to those attacking final judgments.[136] On December 13, 1965, the Court again gave the benefit of *Griffin* to a petitioner on direct review in *O'Connor v. Ohio*,[137] even though *Linkletter* had been decided the previous June. Finally, in early 1966, the *Shott* opinion was announced. It cited *O'Connor* and stated, "Nor is there any question as to the applicability of the *Griffin* rule as to cases still pending on direct review at the time it was announced." [138]

If the assumption articulated in *Shott* was true,[139] namely that the prosecutor probably commented upon the defendant's failure to take the stand in every jury trial where a defendant did not testify in the six states which had not prohibited such comment prior to *Griffin*, this mean that the Court did not feel free to deny the benefit of *Griffin* to cases on direct review despite the fact that every single case in these six states on direct appeal from a jury trial in which the defendant had not taken the stand was infected with reversible error unless the comment could be deemed "harmless beyond all reasonable doubt." [140] The Supreme Court thus took the "final decision" limitation very seriously.

The proposition that "under our cases" the prospective-only technique was limited to instances where final judgments had been rendered was incredible. It was an exception which, if adhered to, practically swallowed the rule. It contradicted the very cases relied upon to demonstrate that prospective-only overruling was a familiar technique accompanying the judicial abrogation of old common-law rules.

This exception permitted the use of the technique only in such areas where other doctrines, such as res judicata,[141] did not prevent an attack upon a final judgment—that is, chiefly in criminal post-conviction proceedings of one sort or another. But the latter area was precisely where the Supreme Court prior to *Linkletter* had never authorized the technique's use.

The basis of this "limitation" was that a reviewing court must "dispose of (the) case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal." [142] When this proposition is applied to include case law which has changed in the same jurisdiction in which the appeal is brought, it makes impossible the most familiar type of prospective-only overruling. Once sovereign tort immunity is abolished, this "limiting" principle would dictate that all cases which reach finality subsequent to the overruling decision must follow the new rule of no im-

[132] 381 U.S. at 627 (emphasis supplied).
[133] *See* Fahy v. Connecticut, 375 U.S. 85 (1963); Stoner v. California, 376 483 (1964). That Linkletter was applicable on direct review was also the basic assumption of the discussion in Ker v. California, 374 U.S. 23 (1963).
[134] 380 U.S. 609 (1965).
[135] Howell v. Ohio, 381 U.S. 275 (1965).
[136] Tehan v. Shott, 381 U.S. 923 (1965).
[137] 382 U.S. 286 (1965).
[138] Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 409 n.3 (1966).
[139] 382 U.S. at 418.
[140] Chapman v. California, 386 U.S. 18, 24 (1967).
[141] *See* text accompanying note 130, *supra*.
[142] Comment, *supra* note 5, at 912, citing Montague v. Maryland, 54 Md. 481, 483 (1880). *See* note 94, *supra*.

munity, even though the tort occurred prior to the overruling decision. All talk of the need to protect vested rights (with respect to failure to insure) and all discussion of justifiable reliance would be silenced by a limitation which dictates that all matters must be decided according to the law which prevails at the time that the judgment becomes final.

To support this curious limitation, the Court erroneously relied upon cases which did *not* involve a court's confrontation of one of its own overruling decisions in deciding a case which arose prior to the overruling decision.[143] Rather the "precedents" turned upon the duty of a *federal* court to recognize intervening changes brought about by the signing of a treaty, the amending of a statute, or the overruling of a state precedent by a state court. *United States v. Schooner Peggy*[144] held that a treaty which intervened while a prize case was on direct review required that the prize award be vacated, especially since the treaty specifically called for the return of property not "definitively condemned" as of the effective date of the treaty. A second decision held that a stockholder's suit to enjoin certain payments by a corporation was rendered moot by the repeal, pendente lite, of the statute which had required the payments.[145] A third decision held that a statute passed after the filing of a suit and interpreted to remove the availability of the remedy prayed for required that the suit be dismissed.[146] Another case applied a statutory change which altered the rights of various parties in a bankruptcy proceeding to a case pending at the time of the amendment.[147] Finally, a fifth case held that a federal court reviewing a decision in a federal diversity case could not ignore relevant state decisions announced prior to the completion of federal review.[148]

The extent of a federal court's duty to follow the law created by recent state decisions, new treaties, or new statutes is irrelevant to the issue of whether a court may afford its *own* decisions prospective-only treatment. The use of these cases to suggest that there is a significant limitation upon a court's power to make new law for the future only marked the highpoint of the misuse of precedent in the *Linkletter* opinion.[149] This theoretical limitation imposed by "our cases" passed out of existence in *Johnson v. New Jersey*[150] without a word of burial for the precedents which had been invoked to support the proposition that "under our cases it appears . . . that a change in law will be given effect while it is on direct review." Later Mr. Justice Stewart, ignoring the lengthy discussion of these precedents as well as the adherence to this limitation after *Griffin* would say that the Court in *Linkletter* imposed no such limitation upon the prospective-only technique but merely recognized that it had already given the benefit of *Mapp* to certain litigants on direct review before *Linkletter* reached the court.[151] But the discussion of those precedents remain in the *Linkletter* opinion and now serves the limited purpose of reminding the reader of the sort of materials out of which that majority opinion was carved.[152]

Factors for Determining When to Invoke the Prospective-Only Doctrine

Having claimed a general power to refuse the retroactive application of decisions recognizing new constitutional guarantees for citizens confronted by the criminal process, and having limited

[143] By "arose" it is meant that the transaction occurred prior to the date of the new decision, whether or not the action was filed before that date.

[144] 5 U.S. (1 Cranch) 102 (1801).

[145] Dinsmore v. Southern Express Company and Georgia Railroad Commission, 183 U.S. 115 (1901).

[146] Crozier v. Fried. Krupp Aktiengesellschaft, 224 U.S. 290 (1912).

[147] Carpenter v. Wabash Railway Co., 309 U.S. 23 (1940).

[148] Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941).

[149] If the prospective-only technique is adopted for use in constitutional criminal procedure, we may wish to limit its use to cases where a final judgment has been rendered. But that would depend upon a policy choice and not upon any theoretical limitations.

[150] 384 U.S. 719 (1966).

[151] Desist v. United States, 394 U.S. 244, 252 n.20 (1969).

[152] For those interested in history, the mistaken use of precedent may be traced. It began with an error in the analysis of the student Comment, *supra* note 5, at 912–14, was repeated in the respondent's concession "that the (Peggy) case stands for the proposition for which it contends, i.e., that a change in the law will be given effect while a case is on direct review, but cannot necessarily be invoked on collateral attack." 381 U.S. 618, 623 n.8. From there the error was but a short step from incorporation into the Linkletter opinion.

The Yale commentator and the respondent should have noted the irrelevancy of The Peggy to the prospective-only overruling issue. The commentator saw the distinctive feature but thought that the Court in Vandenbark had considered the distinction irrelevant. What the commentator missed was that Vandenbark had a distinguishing feature of its own: the duty of a *federal* court to follow a *state* decision. Hence the Peggy and Vandenbark were similar in so far as they reflected a duty to respect some outside authority and were both distinguishable from the case where a court must decide what scope to give to one of its own overruling decisions.

this power to cases where judgments have become final, the Supreme Court faced the issue of whether it should exercise the power in Linkletter's habeas corpus proceeding, where it was claimed that his conviction should be vacated because of a *Mapp* violation. The majority enunciated some reasonable and useful criteria to guide that determination. Earnest judicial consideration of three factors would yield the answer to whether a particular constitutional decision should be accorded prospective-only treatment, assuming that the Supreme Court can and should make such a determination.

Purpose-Reliability

The first criterion was whether the purpose of the new safeguard was to enhance the reliability of the determination that the defendant had engaged in the alleged criminal conduct. The Court emphasized that the exclusionary rule of *Mapp* has "*no* bearing on guilt." It stated that there was "no likelihood of unreliability" in a search and seizure case. The right under *Mapp* was to be distinguished from rights which were intended to upgrade "the fairness of the trial—the very integrity of the fact-finding process." [153] The opinion did not suggest, as one commentator has speculated,[154] that if the new right bore any real relationship to the reliability of the conviction, the right would be applied retrospectively. It drew a distinction between those rights which go to the very integrity of the fact-finding process and those which have nothing to do with the reliability of the adjudication of guilt, but it did not pause to consider rights whose purpose fell somewhere in between.[155]

Some learned men have argued that a safeguard is an absolute right once it is raised to the level of a constitutional requirement, and that, thereafter, its purpose becomes irrelevant. They contend that it is improper to give more favorable treatment to one right than to another because of differences in purpose.[156] But once it has been decided that some constitutional rights will be treated differently from others in that only some will receive retrospective application, no better distinction exists than one based upon the reliability function of the various constitutional safeguards. As the *amicus* in *Linkletter* suggested,[157] if the administration of criminal justice can afford only a certain amount of retroactivity for new decisions, it is best to give the benefit to persons who may have lost a chance to establish their innocence by virtue of a denial of a right which is related to the reliability of their conviction—for instance those convicted felons who were denied trial counsel before the *Gideon* decision. Recall also that both Justice Black and Chief Justice Traynor have suggested that the absence of a reliability-related violation might always justify denial of relief from a final conviction.[158]

Another objection made against the purpose-reliability test is that the difficulty of applying this standard makes it impossible to predict whether any particular newly announced right will be given prospective-only treatment. It is said that even an expert might have guessed incorrectly what answer would have been yielded by a Supreme Court application of the purpose-reliability test to determine, for instance, whether *Griffin v. California* would be applied retroactively. The simple answer is that predictability is not a crucial factor when the Supreme Court quickly announces whether an important newly announced right shall operate retrospectively. The decision on *Miranda*'s retroactivity was made later in the same month in which *Miranda* had been decided. The non-retroactivity of *Wade* and *Gilbert* and the retroactivity of *Witherspoon* were determined on the same day that those decisions were announced. The Supreme Court did not delay long in resolving the retroactivity issue in connection with *Katz, Duncan v. Louisiana, Bloom v. Illinois, Bruton v. United States, Lee v. Florida, Barber v. Page,* or *Mempa v. Rhay,* but rather decided the issue within a year of each decision, and often

[153] 381 U.S. at 638–39.

[154] Mishkin, *supra* note 113, at 98.

[155] There was a side dispute between the majority and the dissenters over whether it was fair to characterize the purpose of Mapp as solely the deterrence of unlawful police conduct or whether it also included reparation for a particular violation of the victim's constitutional rights. But when the "purpose" of a decision is defined to mean whether the decision's rationale is designed to improve the reliability of the fact-finding process, this whole dispute becomes irrelevant. Judged by this definition Mapp's purpose clearly was not to improve reliability.

[156] "We argee that the underlying policy objective of the doctrine of exclusion is to deter. The doctrine of exclusion is nevertheless a Constitutional privilege of the victim and its status as such as not altered by identification of its purpose." California v. Hurst, 325 F.2d 891, 895 (9th Cir. 1963), *rev'd,* 381 U.S. 760 (1965). For more of this "a right-is-a-right" approach, *see* Hall v. Warden, 313 F.2d 483 (4th Cir. 1963); Schwartz, *supra* note 4, at 747–48.

[157] Brief for National District Attorneys' Association as Amicus Curiae at 20, Linkletter v. Walker, 381 U.S. 618 (1965).

[158] *See* note 3, *supra.*

within a much shorter period.[159] The Supreme Court, if it has not already done so, could adopt a policy of always deciding the more critical retroactivity issues as soon as they arise, allowing time only for briefs and argument.[160]

Further, as more cases in the area are decided, certain patterns should emerge making predictions of Supreme Court action more reliable. For instance, by now it is clear that any decision related to the right to counsel in various phases of judicial proceedings will be given retroactive application.[161]

It is also contended that the purpose-reliability test is too complex to be useful. How, for instance, can the Court say that *Miranda* or *Griffin v. California* have nothing to do with reliability, even though the main value they seek to protect has little to do with the reliability of the determination of guilt? This problem is illusory once it is decided that the new right can be accorded prospective-only treatment even though its purpose is not totally unrelated to the reliability factor. Although the number of unreliable confessions might diminish slightly because of *Miranda*, the warnings creating a slightly less coercive atmosphere, the Supreme Court can quite properly conclude, as it did in *Johnson v. New Jersey*, that this part of the purpose of *Miranda* was not significant enough to justify retroactive application under the purpose-reliability test.

The real objection to the purpose-reliability test is that the Supreme Court has disregarded it where a majority of the Court dislikes the result which its application would yield. In at least three instances the Court has simply chosen to ignore its own articulated rationale for a particular decision when it has been faced with the problem of determining whether that decision should be applied retroactively.[162]

In *Griffin v. California* the Court stated that a significant purpose of the no-comment rule was to prevent a jury from erroneously convicting an innocent man who chooses not to testify.[163] In deciding whether that decision should be applied retrospectively, the Court in *Tehan v. United States ex rel. Shott*, however, totally ignored that purpose which had been articulated as a basis for *Griffin*.[164] Then, in an opinion announced after the *Shott* decision, the Court went back to recognizing that the purpose of *Griffin* was to increase the reliability of the guilt-determining process.[165]

In the case of *Wade* and *Gilbert*, the purpose-reliability function was one-hundred per cent—that is to say, the right to counsel at line-ups was designed to improve the reliability of the fact-finding process and was granted for no other reason.[166] Yet in *Stovall* the Court seemed to reason that since *Wade* and *Gilbert* would not increase reliability by a very great margin, retrospective application should be denied. In this bit of judicial sleight of hand, the Supreme Court ignored the degree to which the purpose of a new decision was the improvement of reliability and substituted the degree to which reliability would be improved by the new decision—something which the Court could just as well have done with *Bruton*, for instance, but did not.

Finally, the requirement of a jury trial in a

[159] *See* notes 18-20 and the accompanying text, *supra*.

[160] The Court has been criticized for its wait-and-see policy following Mapp and Escobedo. *See, e.g.*, Nothrop, *supra* note 77, at 8, 12; Schaefer, *supra* note 105, at 645. *But cf.* Comment, *supra* note 5, at 935. The Yale commentator in urging that lower courts be allowed to grapple with retroactivity issues first was writing in 1962, whereas Justice Schaefer and Judge Nothrop had the benefit of witnessing the division of the federal circuit courts over retroactivity issues and the refusal of state courts to follow federal circuit decisions in favor of retroactivity, creating great uncertainty and confusion. On the other hand, the deciding of critical issues of retroactivity, such as the retroactivity of Bruton v. United States, without the benefit of briefs or argument, as occurred in Roberts v. Russell, is absolutely intolerable to would-be litigants. In Harrington v. California, 395 U.S.__, 89 S.Ct. 1726 (1969), California, joined by more than twenty states as amici, made the modest request that the court listen to arguments and re-consider the retroactivity question as to Bruton. No acknowledgment of this plea is reflected in the Harrington opinions.

[161] *See* McConnell v. Rhay, 393 U.S. 2 (1968).

[162] It is of course the Supreme Court's expressed rationale for a decision which should be determinative of whether the purpose of a particular decision is related to the reliability of the fact-finding process. In Bruton, for instance, the Court clearly indicated that it was seeking to prevent juries from considering unreliable evidence (the out-of-court accusations of a co-defendant). Thus it made no difference that Learned Hand in criticizing the practice condemned in Bruton noted that it was a practice which "probably furthers rather than impedes, the search for truth . . . " Nash v. United States, 54 F.2d 1006, 1007, (2d Cir. 1932), or that the California Supreme Court, which reached the Bruton result before the United States Supreme Court did, has stated: "Our ruling, however, did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants . . . " People v. Charles, 66 Cal. 2d 330, 333, 425 P.2d 545, 547, 57 Cal. Rptr. 745, 747 (1967).

[163] 380 U.S. at 613.

[164] Even those critical of the Griffin decision have criticized the Court for ignoring in Shott the rationale expressed in Griffith. *See* W. SCHAEFER, THE SUSPECT AND SOCIETY 66 (1967).

[165] Johnson v. New Jersey, 384 U.S. 719, 729 (1966).

[166] "Although the Court in *Wade* and *Gilbert* might have stressed the indignities of a lineup which the pres-

serious criminal contempt proceeding was predicated in part upon the assumption that there may be some doubt about a trial judge's ability to render a fair and impartial decision which is not present in the ordinary criminal case. This factor was recognized in both *Bloom*[167] and *DeStefano*.[168] Yet the Court in *DeStanfano* merely paid lip service to this rationale in denying retroactivity to *Bloom*.[169]

Reliance

A second factor suggested by the *Linkletter* majority for determining which decisions should be denied retroactive effect was past "reliance" by the States upon a Supreme Court decision which had just been overruled. Such reliance upon a court's decision was, for the most part, a prerequisite for the invocation of the prospective-only technique in areas where it had been used prior to *Linkletter*. Even today a civil litigant who argues that a new decision should be denied retroactive effect must be prepared to point to a specific decision which had held contrary to the new decision.[170]

On the other hand, *Linkletter* implicitly indicated that such reliance upon a particular decision would be considered justified even though the old rule was under attack for a period of years. *Wolf* was criticized from the day it was decided, and about half of the States had adopted exlusionary rules. A few states had adopted such rules after *Wolf* was decided. Yet those states which did not were still permitted to raise the claim of their reliance upon *Wolf*. This was consonant with the operation of the prospective-only technique in other areas of the law. The doctrine of sovereign tort immunity was under attack for many years, but that did not prevent courts which abolished the doctrine from using the prospective-only technique.[171]

The criticism is misplaced which maintains that *Linkletter* was a bad case in which to speak of reliance since *Wolf* had held that the Fourteenth Amendment forbade state officials from engaging in searches and seizures which, if performed by federal authorities, would violate the Fourth Amendment.[172] It ignores the fact that the rule of *Mapp* is not violated until trial and that it is at this point that reliance by state prosecutors and judges becomes important.[173] State prosecutors did not have to make a record demonstrating the legality of the seizure of the evidence they offered if their state did not employ an exlusionary rule. In these states no hearings were held at the time when the defendant's claim of an unlawful search could best be met, for the Supreme Court in *Wolf* had said no such hearings were necessary. Not subject to federal review, states which had exclusionary rules were free to admit evidence so long as it conformed to state courts' determinations

ence of counsel would serve to avoid, the Court seems to have been interested only in the accuracy of the guilt-determining process." Comment, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 178. (1967). Mr. Justice Harlan recently noted that Stovall was, in fact, a case of denying retroactivity to a decision whose purpose was to improve the reliability of the fact-finding process. Desist v. United States, 394 U.S. 244, 257 (1969) (dissenting opinion).

[167] Bloom v. Illinois, 391 U.S. 194 (1968).

[168] DeStefano v. Woods, 392 U.S. 631 (1968).

[169] Because of this factor, there was a basis for applying Bloom retroactively while denying retroactivity to Duncan v. Louisiana, as the Court in DeStefano implicitly recognized by treating the issues separately. By any standards, the denial of retroactivity for the Bloom decision was the most unnecessary invocation of the prospective-only technique. The number of cases affected would have been a tiny fraction of the number which have been affected by the retroactive application of Bruton v. United States.

[170] *See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 496 (1968).

[171] *See, e.g.*, Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89, *cert. denied*, 362 U.S. 968 (1959). Of course we could adopt a higher standard of justifiable reliance so as to reward those states which anticipate changes in the law rather than those which move only under Supreme Court compulsion, as Justice Fortas suggested in arguing for the retroactivity of Katz. Desist v. United States, 394 U.S. 244, 276–77 (1969) (dissenting opinion). The reasoning of Fortas could just have well been applied in Linkletter since the States which did not anticipate the overthrow of Wolf were the main beneficiaries of Linkletter.

In connection with the position taken by Fortas in Desist, consider Cardozo's statement that the technique of prospective-only overruling should not be extended for the benefit of those who relied upon the old rule as a weapon of deceit or malice and his observation that the instances of honest reliance and genuine disappointment are rarer than they are supposed to be by those who exalt the virtues of stability and certainty. Cardozo, *supra* note 104, reprinted in M. L. HALL, *supra* note 104, at 34–35.

[172] Mishkin, *supra* note 113, at 73, has expressed such criticism.

[173] The National District Attorneys' Association itself misstated the reliance issue: "In the instant case, for instance, a warrant to search the premises easily could have been obtained." Brief for National District Attorneys' Association as Amicus Curiae at 18. Wolf hardly said state officials could engage in warrantless searches of homes and offices in violation of the Fourth Amendment. Where the search was, in fact, illegal, the plea for non-retroactivity was simply a request that the States be permitted to keep the fruits of the conduct which was unlawful even by the standards prevailing when it occurred.

of what constituted a legal search. They did not have to worry about preserving a record by not offering evidence which might later, under a federal standard, be deemed the product of an unlawful search, for there was no federal requirement that such evidence not be introduced in a state trial even if the search was unlawful.

Griffin v. California provides another example of justified reliance. Since prior to 1964 the prevailing decisions of the Supreme Court indicated that the Fifth Amendment privilege against self-incrimination was not binding upon the States, in those states where no state rule prohibited comment upon a defendant's failure to testify, prosecutors undoubtedly did comment frequently.[174] A retroactive application of *Griffin* would mean that in many cases the prosecution would be worse off than if the Supreme Court had forbidden such comment in state courts long ago—for now it had to demonstrate that the comment was harmless beyond a reasonable doubt,[175] in other words, that it could not have affected the verdict. Presumably many or most of the convictions could have been obtained without the comment, but now the state would have to prove this in each individual case.[176]

Duncan v. Louisiana[177] is another case in point. There is nothing to indicate that those few jurisdictions which denied the right of jury trials in certain cases where the possible punishment exceeded six months in jail were able to secure a higher conviction rate because of that denial. Yet a retroactive application of *Duncan* would provide many thousands of defendants with a full-proof claim that their convictions must be vacated because they were denied the right to trial by jury.[178]

[174] Justice Harlan has noted that state prosecutors who commented upon a defendant's failure to testify after Malloy v. Hogan, 378 U.S. 1 (1964), could not claim justifiable reliance since Griffin was inevitable once the self-incrimination clause was applied to the States. Desist v. United States, 394 U.S. 244, 266–67 (1969).

[175] Chapman v. California, 386 U.S. 18, 24 (1967).

[176] Justice Stewart noted that a jury may draw an inference of guilt from the defendant's silence even if no comment is made. Griffin v. California, 380 U.S. 609, 621 (1965) (dissenting opinion).

[177] 391 U.S. 145 (1968).

[178] If Duncan were retroactive, it would hardly be fair to limit its application to cases where a request for a jury trial had been made—since state law did not permit jury trials in these sorts of cases. Almost no one has suggested that the effect of retroactive decisions should be limited by applying a waiver doctrine which would reward only those who anticipated a new decision and asked for something to which under prevailing law they were not entitled. For a good discussion on this point, *see* Torcia & King, *supra* note 3, at 286.

The primary objection to the reliance test outlined in *Linkletter* is that the Court has abandoned it wherever its application would yield an "undesirable" result, just as it has abandoned the purpose-reliability test in certain instances. Desiring to apply *Bruton* retroactively, the Court in *Roberts v. Russell* said that prosecutors could not properly point to reliance upon its 1957 *Delli Paoli v. United States*[179] decision since that decision had been greatly criticized and since some state and federal jurisdictions no longer permitted the practice which *Delli Paoli* had sanctioned but which *Bruton* now condemned.[180] *Linkletter* had made it clear that such attacks and such voluntary abandonments of an old practice by some did not prevent a claim of reliance by others from being entertained any more than had attacks upon old common-law rules. Again after *Bruton* was held retroactive, the Court itself once more recognized that attacks upon the old decisions—and even erosion of those decisions in subsequent Supreme Court cases —have no relevance to the reliance standard announced in *Linkletter*. Even though *Schwartz v. Texas*[181] was severely criticized and even though *Olmstead v. United States*[182] was both attacked and eroded long before the 1967 Term, reliance upon those old cases was held to justify the denial of full retroactive effect for *Fuller v. Alaska* and *Katz v. United States*.[183]

On the other hand, *Wade* and *Gilbert* were questions of first impression. Prosecutors could point to no Supreme Court decision which was overruled by those decisions. There was no decision analogous to *Wolf* or *Delli Paoli* in the line-up area. Hence the talk in *Stovall* about reliance was misplaced.

The *Wade* and *Gilbert* decisions were merely new and unexpected, but this had not been the test articulated in *Linkletter* nor in the cases upon which *Linkletter* had relied as authority. Mere newness is not a standard which can separate those rights which should be applied retroactively from those which should not. In *every* case where such a decision must be made, we will be dealing with a newly announced rule and trying to decide whether it should be applied retrospectively. If in some of these cases we choose to deny retroactive application even though there was no prior decision upon which reliance had been placed, we should honestly

[179] 352 U.S. 232 (1957).

[180] Roberts v. Russell, 392 U.S. 293, 295 (1968).

[181] 344 U.S. 199 (1952).

[182] 277 U.S. 438 (1928).

[183] *See* notes 21–24 and accompanying text, *supra*.

admit that we are abandoning the "reliance" concept as it was expressed in *Linkletter*.

The Orderly Adminstration of Criminal Justice

Finally, the *Linkletter* court noted that there are "interests in the administration of justice and the integrity of judicial administration to consider." [184] The Court was careful to indicate that this third criterion for determining which decisions should be denied retroactive application was more sophisticated than the simple notion that retroactivity must be avoided in cases where such an application of a new decision would free prisoners in large numbers. The majority phrased the problem this way: "Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnessses available at the time of the original trial will not be available or if located their memory will be dim." [185]

Whether witnesses will be available on re-trial is not a helpful standard in determining which new decisions should be applied retroactively since the problem of missing witnesses will always be present when a new trial is ordered and will not vary according to the nature of the violation which was the basis for the order requiring a new trial. The only way to ease the problem of missing witnesses upon re-trial is to set a statute of limitations after which claims about error at the first trial will no longer be entertained. The Supreme Court had already refused to do this in *Fay v. Noia*.[186] The passage of time and anticipated problems upon re-trial provide no basis for denying relief from the violation of a constitutional right under prevailing federal law.

Hence in *Stovall* the Court clarified the shorthand language it had employed in *Linkletter*: if an evidentiary hearing, with the attendant problems of dull memories and missing witnesses, would be necessary to determine if a constitutional right was violated, that fact militates against a retroactive application of a new decision. The Court in *Stovall* said: "Doubtless, too, inquiry (at a hearing) would be handicapped by the unavailability of witnesses and dim memories." [187]

This is a rational standard which could be the basis of separating one decision from another for the purpose of determining which should be given prospective-only application. For instance, if no motion to suppress was made at a state trial before *Mapp* because the state had no exclusionary rule, an evidentiary hearing would be required if *Mapp* were given retroactive application, at least in those cases where the trial record does not reveal the full circumstances of the arrest or search. Similarly, a retroactive application of *Wade* would require "taint" hearings to determine if the in-court identification of the defendant by an eye-witness was the product of an unlawful line-up or whether it had independent origins.[188] On the other hand, to determine whether *Duncan v. Louisiana* had been violated, no evidentiary hearing would be needed. One would merely consult state law to determine if a jury trial, as required by *Duncan*, had been guaranteed by the state at the time of the defendant's trial.[189] Where a state concedes that it has not anticipated *Miranda* (almost every case) or where the per se error condemned in *Gilbert v. California* (the introduction of evidence of an out-of-court identification where the defendant had not been afforded his right to counsel) had occurred, no hearing would be required. The only inquiry would be whether, from the face of the record, the error could be deemed harmless.

There are two problems with this criterion, however. In the first place, the Supreme Court has elsewhere indicated that it is unsympathetic to the administrative difficulties of holding evidentiary hearings in collateral proceedings to determine whether constitutional error was committed at trial.[190]

Secondly, the preceding discussion of *Duncan*, *Miranda*, and *Gilbert* indicates that the Supreme Court has abandoned the "hearing-memory" criterion except in name only. As indicated before, by that standard *Miranda* and *Duncan* should have been applied retroactively since no evidentiary hearings would have been necessary to discover whether error had occurred. As also indicated, if *Gilbert* had been applied retroactively, no hearings would have been necessary.[191] The Court's assertion that *Gilbert* should not be applied retroactively because of the "unavailability of witnesses and dim memories" [192] at the evidentiary hearing

[184] 381 U.S. at 637.
[185] *Id.*
[186] 372 U.S. 391 (1963).
[187] Stovall v. Denno, 388 U.S. 293, 300 (1967).

[188] Presumably law enforcement officers will rarely advance the remarkable claim that they gave the required warnings concerning counsel at a line-up prior to the date of Wade and Gilbert.
[189] *See* note 179 and accompanying text, *supra*.
[190] Fay v. Noia, 372 U.S. 391 (1963).
[191] *See* text following note 189, *supra*.
[192] Stovall v. Denno, 388 U.S. 293, 300 (1967).

to determine if *Gilbert* had been violated marks the summit of the Court's arbitrary invocation of the *Linkletter* criteria to reach a desired result.

The Felt Need for Prospective-Only Overrulings

What has been seen to this point indicates that the Supreme Court has paid a high price for the right to deny retroactive application to certain new decisions. The prospective-only doctrine was born amidst a misuse of precedent and has been nourished with a disregard for the very standards which the Court suggested should guide its use. It has survived the unfounded "direct review" limitation announced in *Linkletter* through the Court's use of the unadmirable pretense that no such limitation was ever announced. Use of the prospective-only technique has rewarded jurisdictions which have declined to upgrade standards of criminal procedure without Supreme Court compulsion and, to use the words of former Justice Fortas, it has placed "dunce caps" upon those jurisdictions which have acted without any such compulsion.[193]

Finally the invocation of the prospective-only technique has been characterized by an arbitrariness toward individual litigants unworthy of the nation's highest court. There is something offensive about the notion that the Supreme Court of the United States, like the sometimes-just, sometimes-generous vineyard owner,[194] can bestow its favors upon whomever it pleases. In calling for a reconsideration of the prospective-only technique recently, Mr. Justice Harlan spoke of the "truism that 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." He further stated that it is only "if each of our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law . . ." [195]

In so speaking, he renewed a thesis which Justice Douglas and Justice Black have advanced consistently beginning with their *Linkletter* dissent. It is arbitrary to give the benefit of a new rule to one petitioner and not to another simply because one case is needed as a vehicle for announcing a new decision, and one is needed as a vehicle for announcing that that first decision will not be applied retroactively. Mr. Justice Douglas pointed out that the rules announced in *Miranda* and its three companion cases could have been announced in any one of a hundred cases in the 1965 Term, but instead certiorari was denied to all but the four, the rest forever being denied relief.[196] In *Stovall*, even though the Court specifically declared that finality was an irrelevant factor in determining who was to get the benefit of *Wade* and *Gilbert*,[197] Stovall, under a sentence of death, was denied relief, unlike Wade and Gilbert, because the Court needed a case in which to declare the counsel-at-line-up requirement non-retroactive.[198] Finality being irrelevant to the issue, there was absolutely no rational basis for giving relief to Wade and denying it to Stovall.

The Court has suggested that someone must be given the benefit of decisions which create new rights lest the creativity of counsel be stifled by the prospect of a prospective-only holding which denies a client the benefit of a new rule which his attorney had suggested.[199] In this era it is difficult to take seriously the suggestion that the creativity of the criminal bar in its petitions to the Supreme Court could ever be stifled. At any rate, the retroactivity cases have never followed a rational pattern of rewarding creativity. Miss Mapp was the beneficiary of a new rule even though she did not even urge that *Wolf* be overruled or focus her attention on the search issue in her case.[200] As the Supreme Court itself noted, hundreds of requests for reconsideration of *Wolf* were turned down before the *Mapp* decision,[201] and these petitioners never did get the benefit of the *Mapp* decision because their convictions had become final before *Mapp* was announced. Shott afforded the Court the opportunity to bar state prosecutors from commenting on a defendant's silence before Griffin posed the issue. Certiorari was denied in Shott's case[202] and he raised the issue in a collateral attack. He won relief, still before *Griffin*, at the Circuit Court level. Then the Supreme Court decided *Griffin*, granted certiorari to the state in Shott's case, and reversed

[193] Desist v. United States, 394 U.S. 244, 277 (1969) (dissenting opinion).
[194] Matthew ch.20, vv. 1–16.
[195] Desist v. United States, 394 U.S. 244, 259 (dissenting opinion).
[196] In Whisman v. Georgia, 384 U.S. 895 (1966) (dissenting opinion) Douglas made his point clear: there is no reason to discriminate against defendants with cases which are of about the same "vintage" as Miranda.
[197] 388 U.S. at 300–01.
[198] *See also* note 16, supra.
[199] Stovall v. Denno, 388 U.S. 293, 301 (1967).
[200] An eleven-line paragraph in an amicus brief suggested the overruling of Wolf. Mapp's brief attacked the Ohio obscenity statute.
[201] Linkletter v. Walker, 381 U.S. 618, 637 (1965).
[202] Shott v. Ohio, 373 U.S. 240 (1963).

the order for a new trial for Shott, declaring that his claim came too late. The Court's method of rewarding creativity in the *Miranda* sequence has already been discussed.[203] Finally, Stovall's counsel was "rewarded" by seeing his client's show-up singled out as one of the most egregious types of unreliable identification procedures which prompted the need for *Wade* and *Gilbert*,[204] but his client's death sentence was affirmed.[205]

This arbitrariness in affirming and reversing prompts an inquiry as to why the Court has been willing to pay such a high price for the use of the prospective-only technique and whether sound reasons justify this payment.

Historically, the prospective-only technique has been used as a means of altering rules of law which are badly in need of change, without causing injustices by disappointing expectations based upon the existence of the old rules. Simply stated, the technique is designed to increase a court's freedom of action.[206]

Liberal champions of the prospective-only technique's application to constitutional criminal procedure, such as former Chief Justice Warren and Justice Brennan,[207] have recognized that the technique permits them to engage in what they sincerely believe is the necessary task of their Court: the upgrading of the safeguards for citizens confronted by the criminal process, particularly state-court defendants, in areas where history, they believe, teaches that lower courts, and particularly state courts, simply will not take action.

At the same time, these liberal justices have been unwilling to ignore the realities of retroactive applications of wide-sweeping decisions such as *Miranda* and *Wade*. Their backgrounds[208] and their good sense make them unwilling to adopt the "so be it" attitude of some commentators.[209] The burden upon state and federal courts, together with the wholesale release of guilty prisoners, which would flow from the retroactive application of such sweeping decisions, however proper those decisions, simply cannot be tolerated.

The alternative to the prospective-only technique is a more conservative approach to constitutional criminal procedure. Deference to varying state practices would be required. Detailed federal standards such as those laid down in *Miranda* would no longer be possible. Adoption of safeguards, such as the right to counsel at line-ups, which not a single state anticipated, would also be impossible. For liberals the choice is clear.

On the other hand, conservatives and prosecutors who urge the use of the prospective-only technique as if it were a concession to their interests surely are not unaware that this technique has increased the Supreme Court's freedom to dictate wide-sweeping and detailed standards made binding upon both the federal and state governments in new decisions of constitutional scope. In advocating the prospective-only technique in *Linkletter*, the National District Attorneys' Association argued that reform in the area of search and seizure and reform in criminal procedure in general would be slowed down unless the technique were adopted.[210] Some skeptics might have expressed the belief that the argument was advanced with tongue-in-cheek by a group unsympathetic to the criminal law revolution. If this criticism be true, the final laugh is at the expense of the District Attorneys. They may, if they wish, boast that their success in *Linkletter* played an important part in making possible the *Miranda* and *Wade* decisions. The difference between the we-hold-only approach of *Escobedo* and the we-dictate-that approach of *Miranda* can be traced to the prospective-only tool made available in the 1965 *Linkletter* decision. Yet even today prosecutors, in urging non-retroactive application of new decisions, still urge, with increasing insincerity, that the prospective-only technique is necessary for the future upgrading of the criminal process.[211]

An explanation of this phenomenon is that prosecutors and the more conservative justices always have occasion to view the problem in the context of deciding whether a *particular* new de-

[203] *See* text accompanying note 196, *supra*.

[204] *See* United States v. Wade, 388 U.S. 218, 229 (1967).

[205] Stovall's death sentence was vacated by the New York legislature's partial abolition of the death penalty, as indicated *supra*, note 117.

[206] *See generally*, Schaefer, *supra* note 105.

[207] Neither Brennan nor Warren has dissented from any of the Court's prospective-only rulings. Brennan wrote the majority opinion in Stovall. The Stovall opinion in many respects follows some suggestions made by Warren in Spencer v. Texas, 385 U.S. 554, 569 (1967) (dissenting opinion).

[208] Administrative difficulties at the trial level can well be appreciated by Brennan, once the chief of a state trial-court system, and by Warren, who has repeatedly expressed concern about the workload of federal district judges. *See, e.g., Warren*, Address, 35 F.R.D. 181 (1964).

[209] *E.g.*, Schwartz, *supra* note 4, at 746.

[210] Brief for National District Attorneys' Association as Amicus Curiae at p. 27, Linkletter v. Walker, 381 U.S. 618 (1965).

[211] Brief for The State of New York as Amicus Curiae at pp. 22–23, Harrington v. California, 395 U.S.___, 89 S. Ct. 1726 (1969).

cision should be applied retroactively. They rarely have occasion to pause to consider the significance of the general availability of the prospective-only technique of overruling old law. A prosecutor who faced the suppression of all confessions in cases awaiting trial on the date of the *Miranda* decision naturally expresses disappointment that the Court did not make *Miranda* completely prospective by making the date of the confession critical rather than the date of the trial. A district attorney who stands to lose the judgments he secured in many and some of his most important and lengthy cases because of the retroactive application of *Bruton* or *Witherspoon* complains bitterly about the Supreme Court's retroactive application of those decisions.[212] One of the nation's most able prosecutors has remarked privately that the Supreme Court could raise to the level of a constitutional requirement the duty of the prosectuor to do headstands at trial in order to secure a conviction as long as this new requirement would be made prospective-only. While understandable, this attitude hardly promotes the kind of restraint in constitutional decisions urged upon the Court by our society's conservatives.

Justices who have opposed the adoption of a new constitutional rule are generally eager to limit its impact by denying the new decision retroactive application. Justice Harlan has specifically acknowledged that this reasoning lay behind his decision to concur in the prospective-only rulings.[213] Until recently, in the major decisions on retroactivity a definite pattern appeared: whenever a justice had voted against a particular decision, he always voted for its prospective-only application. There was but one exception, Justice Black, who held doctrinal reasons for opposing the denial of retroactivity which he valued more than the opportunity to limit the impact of a particular decision which he disfavored.[214]

By voting for non-retroactivity, the conservative justices have merely strengthened the device which has made it much easier for the Court to proclaim broad decisions of constitutional dimension. They have eased the path for frequent Supreme Court intrusions into state criminal procedure. In accepting the "concession" made in *Linkletter* to federalism, its advocates have reached out for a poisonous gift. With their own hand they have clothed federalism to be, like Creon's daughter, "a bride amidst the dead." [215]

A Suggested End for the Prospective-Only Technique

Linkletter v. Walker was an improperly decided departure from the Supreme Court's well established practice of affording the benefit of new constitutional decisions in the criminal-procedure field to all litigants possessed of a proper means for challenging their convictions. Its subsequent history has not enhanced the stature of the Court. Nevertheless, unlike the special circumstances test of *Betts v. Brady*, the prospective-only technique should be afforded a "*respectful* burial." [216]

The prospective-only overrulings of the past four years need not be overturned. The principle of *stare decisis* could properly be invoked as to those cases. A simple declaration that the Court has doubts about *Linkletter* and will not apply its principle to any future decisions will suffice.

Such a declaration would be desirable for many reasons. It would end the misuse of precedent upon which *Linkletter* is founded by recognizing the difference between denying a litigant the benefit of a newly recognized constitutional right and denying him the benefit of a new decision not of constitutional dimension. It would end the Court's unjudicial juggling of the three *Linkletter* criteria for deciding which decisions should be denied retroactive application. It would remove any uncertainty of the lower courts as to whether to apply a decision retroactively before a Supreme Court pronouncement on the subject. It would end the arbitrary treatment toward individuals who all advance the same claim in the same term of court. It would compel the Supreme Court to give earnest consideration to the practices of state courts in deciding whether to render a decision which will have broad retrospective consequences. At the same time it would reward those states which have

[212] Lest it be thought that the author takes lightly the prosecutors' concerns, it should be noted at this time that in his former role as an appellate attorney for a prosecutor's office he was faced with the unpleasant task of trying to sustain pre-Witherspoon death sentences and pre-Bruton judgments of guilty in cases where reversals would severely disappoint the community and, at the very least, would cause the loss of years of trial time.

[213] Desist v. United States, 394 U.S. 244, 258 (1969) (dissenting opinion). *See also* Harlan's terse comments in Johnson v. New Jersey, 384 U.S. 719, 736 (1966) (concurring opinion); Stovall v. Denno, 388 U.S. 293, 303 (1967) (concurring opinion) (1967).

[214] Justice Black dissented from the line-up holding in Wade but then voted to apply it retroactively in Stovall.

[215] Medea 984–85.

[216] Gideon v. Wainwright, 372 U.S. 335, 349 (1963), (concurring opinion). Emphasis supplied.

moved in anticipation of the Court's will rather than under compulsion of a specific decree.

Logically one cannot argue that certain major decisions were made possible because of the prospective-only tool, and at the same time deny that the unavailability of the tool would restrict the Court's freedom to take gigantic new steps in the criminal procedure field. Yet all must recognize that today's Court is not so timid as to abandon all further reform simply because new decisions will have retroactive impact. Both *Gideon* and *Mapp* were decided in an era before there was any indication that the Supreme Court could limit the impact of these decisions by invoking the prospective-only technique. More recently, the retroactive application of *Bruton v. United States* in *Roberts v. Russell* indicates that where the Court believes that one of its past decisions has worked to deprive defendants of rights which are truly fundamental, the Court will not be deterred from announcing a new rule by the prospect that large numbers of convictions will be upset by the retroactive operation of the new rule.

For those who believe that the need for gigantic steps such as *Miranda* has ended, for those who have argued that the Court should function less like a legislative body in setting down detailed requirements in sweeping decisions, and for those who believe that the States should be left, in the first instance, to devise appropriate safeguards in their own systems of criminal justice administration, subject to Supreme Court review rather than Supreme Court requirements of very particularized specificity, the abolition of the prospective-only technique should be welcomed as a blessing. "Non-retroactivity" should be banished from the constitutional criminal procedure scene.

APPENDIX

Timetable for "Non-Retroactive" Constitutional Rights

Mapp v. Ohio	Denied to citizens whose convictions became final before June 19, 1961.
Griffin v. California	Denied to citizens whose convictions became final before April 28, 1965.
Escobedo v. Illinois	Denied to citizens whose trials began on or before June 22, 1964.
Miranda v. Arizona	Denied to citizens whose trials began on or before June 13, 1966.
United States v. Wade and *Gilbert v. California*	Denied to citizens who were deprived of right to counsel at line-up or show-up held on or before June 12, 1967.
Bloom v. Illinois and *Duncan v. Louisiana*	Denied to citizens who were deprived of right to jury trial before May 20, 1968.
Lee v. Florida	Denied to citizens whose trials began on or before June 17, 1968 or perhaps to citizens against whom the unlawfully intercepted communication was offered into evidence on or before June 17, 1968.
Katz v. United States	Denied to citizens who were the victims of unlawful wiretapping which occurred on or before December 18, 1967.