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# PROSPECTIVE LIMITATION OF CONSTITUTIONAL DECISIONS IN CRIMINAL CASES

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In 1965, the Supreme Court was impelled by circumstances of its own making to launch itself on the uncharted course of prospective limitation of its decisions in the field of constitutional rights of the criminal defendant. The evolution of that principle, through the cases that followed its inception in *Linkletter v. Walker*,[1] provides an interesting chapter in the evolution of the Court itself, with serious implications concerning the Court's relative position in a constitutionally constructed system of government. While *Linkletter* gave birth to the device of prospective application of constitutional decisions, it was inevitably conceived some four years earlier in the decision of *Mapp v. Ohio*.[2] An analysis of prospective limitation based only on the criteria discussed in *Linkletter* would be superficial. To understand its actual causes and effects it is necessary to trace a line of cases beginning fifty-one years earlier.

In 1914, the Court ruled in *Weeks v. United States*[3] that evidence seized by federal officers in violation of the fourth amendment guaranty of the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" would not be admissible in a federal criminal trial against a defendant whose right had been violated. The Court reversed the conviction of Weeks because it had been based on evidence unlawfully seized from his home without a search warrant. Because of the accepted doctrine of the supervisory power of the Supreme Court over the lower federal courts in matters of evidence and procedure, there was no question of the power of the Court to fashion such a rule of exclusion. The effect of the rule in opening up prior federal convictions to collateral attack was not considered.

In 1949, the Court in *Wolf v. Colorado*[4] declared for the first time that the fourth amendment right to freedom from arbitrary intrusion by governmental agents was "basic to a free society" and "implicit in the 'concept of ordered liberty,' and as such enforceable against the States through the Due Process Clause" of the fourteenth amendment.[5] The Court in *Wolf* would not, however, take the critical step of applying the exclusionary rule of *Weeks* to the state courts, holding that the remedies to be afforded

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1. 381 U.S. 618 (1965).
2. 367 U.S. 643 (1961).
3. 232 U.S. 383 (1914).
4. 338 U.S. 25 (1949).
5. *Id.* at 27-28.

by the state against violations of the fourth amendment are "not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."[6]

There the matter stood for twelve years. The *federal* exclusionary rule was expanded to include evidence unreasonably seized by state officers,[7] and federal officers were enjoined from bringing such evidence into a state court.[8] The number of states adopting the exclusionary rule rose from eighteen to twenty-six.[9] None of these developments, however, concerned the basic question of whether it was proper for the Supreme Court to impose the exclusionary rule on the states.[10]

In 1961, the Court took the step that plunged it toward such unforeseen consequences as the rule of prospective limitation. In *Mapp v. Ohio*[11] the Court ruled that evidence seized by state officers in violation of the defendant's right to be free from unreasonable searches and seizures must be excluded in a criminal trial in a state court, and reversed the conviction of Miss Mapp. Despite Justice Clark's attempt to categorize this as the mere logical progression of the line of thought on search and seizure begun in *Weeks,* the Court had indiscriminately crossed two fundamental boundaries. It had moved from the safe realm of its broad power over *federal* courts into the precarious terrain of its constitutionally limited power over *state* courts, and had simultaneously brushed aside the delicate barriers between proper judicial and legislative action. The necessity for clear and precise thinking on each of these considerations could not be replaced, without serious side-effects, with eloquent dissertations on the majesty of constitutional rights.

The first consideration was the limited authority of the Supreme Court in matters relating to state law and procedure, which had been clearly delineated since the decision of *Martin v. Hunter's Lessee*[12] in 1816. When deciding a case before it the Court must apply the Constitution as the supreme law of the land, and where it conflicts with state law or procedure the Constitution prevails as the law of the case. The Court, therefore, could properly impose the exclusionary rule on the states only if the Constitution required it.

In *Wolf,* Justice Frankfurter had found that the exclusionary rule was

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6. *Id.* at 28.
7. Elkins v. United States, 364 U.S. 206 (1960), *overruling the doctrine of* Byars v. United States, 273 U.S. 28 (1927).
8. Rea v. United States, 350 U.S. 214 (1956). Note that the Court was expressly exercising its supervisory power over federal officials. *Id.* at 216-17.
9. Elkins v. United States, 364 U.S. 206, 224-25 (1960).
10. With the ultimate determination in *Wolf*—that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents—we are not here directly concerned. *Id.* at 213.
11. Mapp v. Ohio, 367 U.S. 643 (1961).
12. 14 U.S. (1 Wheat.) 304 (1816).

"not derived from the explicit requirements of the Fourth Amendment," and therefore the basic right of privacy did *not* demand the exclusion of logically relevant evidence.[13] While the power of the Court in its supervisory capacity to impose the exclusionary rule on the lower federal courts was unquestioned, the Court had no power to impose its will on the states in the form of an exclusionary rule where no conflict arose between the Constitution and state procedure. Again, in 1954, Justice Jackson, writing for the Court in *Irvine v. California*,[14] characterized the exclusionary rule as one of the "subsidiary procedural and evidentiary doctrines developed by the federal courts,"[15] and not constitutionally required. He drew a precise distinction in that the "petitioner is not invoking the Constitution to prevent or punish a violation of his federal right recognized in *Wolf* or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime."[16] As late as 1960, in *Elkins v. United States*,[17] the Court had spoken of the exclusionary rule as merely a "rule of evidence" imposed on lower federal courts. Justice Frankfurter, in his dissenting opinion in *Elkins* (in which Justice Clark, author of the majority opinion in *Mapp*, joined), spoke of the change in this "rule of evidence" as "not constitutionally compelled."[18]

Justice Clark found support for his majority opinion in *Mapp* in phrases gleaned from opinions dealing with the exclusionary rule in *federal* courts; however, in these cases the issue of whether the rule was constitutionally required or merely judicially devised played no part, and was therefore not critically analyzed.[19] He built the cornerstone of the *Mapp* opinion on the decision originating the exclusionary rule by flatly stating that "the Court in that case [*Weeks*] clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.' "[20] A closer look at the *Weeks* quotation in context reveals that the Court in *Weeks* was indicating that the seizure and retention of certain letters was violative of constitutional rights, not their use in evidence.[21]

Justice Clark also drew an inappropriate comparison between the exclusion of evidence unreasonably seized and the exclusion of coerced confessions. He overlooked the distinction that the flat command of the fifth amendment that "no person . . . shall be compelled in any criminal case to be a witness against himself" is specifically violated at the time of

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13. Wolf v. Colorado, 338 U.S. 25, 28 (1949).
14. 347 U.S. 128 (1954).
15. *Id.* at 132.
16. *Id.* at 136.
17. 364 U.S. 206 (1960).
18. *Id.* at 234 (dissenting opinion in which Justices Harlan and Whittaker also joined).
19. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).
20. Mapp v. Ohio, 367 U.S. 643, 648 (1961), *quoting from* Weeks v. United States, 232 U.S. 383, 398 (1914).
21. Weeks v. United States, 232 U.S. 383, 398 (1914).

introducing a coerced confession into evidence at trial, while the fourth amendment guaranty against unreasonable searches and seizures is violated at the time of the search and seizure. The later exclusion of such evidence at the time of trial is not expressly commanded by the fourth amendment.

The fifth member of the bare majority in *Mapp,* Justice Black, adhered to his earlier view:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.[22]

The conclusion of this analysis is that the Court overreached its legitimate power over the states when it imposed on them a rule that had no substantial claim to the stature of a constitutional dictate.[23]

In the second, more subtle consideration, the Court blithely glided over the boundary of proper judicial activity, with little or no trepidation, and moved unequipped into the field of legislation.

The scheme of the Constitution was to create a unified governing machine by assembling a limited number of parts, each carefully designed to perform its particular function, and to fit smoothly and work in harmony with the others.[24] The powers entrusted to a legislature, as well as its methods, differ greatly from those of the Court; and the tools of each are shaped to the function to be performed. Not only is the balance of the machine thrown off when one part encroaches on the territory of the other, but, in addition, neither is adequately equipped to operate outside of its own sphere.[25]

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22. Mapp v. Ohio, 367 U.S. 643, 661-62 (1961). Justice Black alone among the majority reached his concurrence in result by reading the constitutional requirement of exclusion into the interplay between the fourth and fifth amendments. The inapplicability of the fifth amendment guarantee against compulsory self-incrimination is suggested by the fact that a valid search warrant would justify seizure and use as evidence of the matter taken from Miss Mapp, while no procedure could validate the extraction and use of a coerced confession.

23. Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio,* 110 U. PA. L. REV. 650, 663 (1962).

24. Justice Jackson stated in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949), "The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'" (quoting Hughes, C.J., in Monaco v. Mississippi, 292 U.S. 313, 323 (1934)).

25. This point has special force in the area of constitutional decisions because the Court there encroaches not just on legislative territory, but on the full combination of powers necessary to amend the Constitution, including Congress, state legislatures or conventions, or a national convention. *See* Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201 (1965).

To be more specific, the assigned role of the Court differs sharply from that of a legislature, both in area of responsibility and in method. The Court is primarily responsible for developing principles of law by deciding cases between contesting litigants based on concrete fact situations, while a legislature deals with the broader problems affecting, or potentially affecting, society at large. Furthermore, a court characteristically deals with unicentric problems—problems that involve a choice between two polarized solutions (*e.g.*, guilt or innocence, liability or non-liability, constitutional validity or invalidity)—while a legislature is designed to complement the court system by meeting the polycentric problems of society—problems with more than one acceptable solution. This calls for political judgments of policy in weighing the relative merits and demerits of various solutions. It is no accident that political decisions of the latter kind are entrusted to a body composed of representatives periodically answerable to constituents, while the task of reasoning to *the* legally correct decision of a dispute between litigants is entrusted to judges, who are usually free from popular accountability and appointed, effectively, for life. When judges begin to assume the power of a legislature over political decisions, they exceed the trust and confidence of the governed, on which depend respect for their decisions and obedience to their rulings.

The methods of the two bodies have been fashioned to their roles and differ sharply. A court works with the facts of the case before it, as determined by evidentiary procedures that are severely limited by rules of relevance and materiality. A legislature is equipped with fact-finding procedures that allow it to range over areas as broad as the problems to which it addresses itself. The tools of the Supreme Court are primarily two—the dictates to be found in the words and spirit of the Constitution and enactments of Congress, and the body of broad principles that has evolved out of years of decisional law. The limitations imposed by these "tools" breed a confidence that judicial decisions are shaped by principles of law rather than by the political inclinations of men.[26] A legislature, on the other hand, is expected to bring its own imagination and political proclivities, as well as the advice of experts, to bear on a problem in devising new and imaginative solutions, unrestricted by the principle or spirit of stare decisis. This important distinction is reflected in the fact that legislative rules generally apply only to private transactions taking place *after* they are enacted. They are given purely prospective effect to prevent disruption of past transactions, and to free legislators to apply their imagination and creativity to problems. The stability and predictability of proper judicial decisions, on the other hand, call generally for full retroactive effect, with little fear of unjustified disruption.

Against this background, both the problem to which the Court

26. *See* Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60-62 (1965).

addressed itself in *Mapp* and the exclusionary rule solution were legislative in character and should have been left to the body equipped to deal with it.[27] In *Elkins,* the Court stated, "the [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter . . . ."[28] The problem, in other words, was how to combat the broad social evil of governmental invasions of privacy—not the narrow problem of redeeming rights personal to the defendant by reversing an inherently unconstitutional conviction of Miss Mapp.[29] The proper solution called first for the collection of data well beyond the resources of a court—*i.e.,* the number and seriousness of official breaches of privacy. While the Court might roughly evaluate those intrusions that result ultimately in convictions, it could not even estimate those that produce evidence used in trials that result in "not guilty" verdicts, or evidence used to obtain pleas of guilty, or evidence not directly used at trial. Still further from the Court's sphere of investigation is the number of unreasonable searches that turn up no evidence at all.

Secondly, before indiscriminately firing such a broad barrage across the nation, the law-maker should have the best available basis for believing that the weapon is effective against the quarry. One year before *Mapp,* the Court admitted that

> Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained.[30]

After the rule had been in operation in federal courts for forty years, Justice Jackson expressed the most accurate factual evaluation available to the Court:

> Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks v. United States,* 232 U.S. 383. The extent to which the practice was curtailed, if at all, is doubtful.[31]

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27. This criticism goes not to the value of the exclusionary rule itself, but to its source. If Congress had enacted the rule under its article I power in aid of enforcing fourth and fourteenth amendment rights, or its power under section 5 of the fourteenth amendment, the problem of overstepping the federal-state boundaries would not have arisen. The problem of legislative action by the Court would, of course, also have been eliminated.

28. Elkins v. United States, 364 U.S. 206, 217 (1960). This was no passing, unconscious phrase in *Elkins,* loosely improvised and forgotten. The legislative character of the *Mapp* exclusionary rule lay at the heart of the Court's later opinion in Linkletter v. Walker, 381 U.S. 618 (1965), to be discussed later.

29. *See* Bender, *supra* note 23, at 663-64. Compare areas in which the focus is on the personal right of the defendant deprived of due process in the trial itself—such as the areas of coerced confessions or denial of trial counsel. There, deterrent effect on law enforcement authorities is secondary to redeeming the constitutional rights of the defendant before the Court.

30. Elkins v. United States, 364 U.S. 206, 218 (1960).

31. Irvine v. California, 347 U.S. 128, 135 (1954).

Finally, a legislature would be the proper body to make the policy choice among the many solutions available, which include a wide variety of possible criminal and civil sanctions against offending officials capable of being administered by courts, boards, or administrative agencies. The Constitution expressed no preference for the exclusionary rule over other possible solutions.[32]

At this point, then, the Court had seemingly exceeded the constitutional limits of its power in imposing on state courts an arbitrary rule, neither expressed nor implicit in the Constitution, and had ceased to function in the role of a court when it made a legislative choice for such a rule. While the nature of a Supreme Court ruling is such that it becomes effectively the law of the land in state and federal courts regardless of improprieties in its promulgation,[33] the Court could not avoid the inevitable ill-effects on the system. Understandably, *Mapp* took the state courts by surprise. They had justifiably imagined themselves free to establish their own rules of evidence as long as they violated no dictate of the Constitution. To apply the legislative rule of *Mapp* in the usual retroactive manner of a judicial decision would have produced intolerable disruption. It "would tax the administration of justice to the utmost."[34] Criminal convictions in every state would be affected–some more seriously than others. In 1960, twenty-four states still freely admitted unreasonably seized evidence.[35] Even among the twenty-six states that had adopted an exclusionary rule, an issue could be made of variations between requirements of the previous state standard of unreasonableness of the search and seizure and the new federal standard.[36] In an amicus brief in *Linkletter,* the National District Attorneys' Association estimated that one-third to one-half of the prisoners in custody at the time of *Mapp* (1961) were still in custody at the time of *Linkletter* (1965). In 1962 Judge Sobel, then a New York trial judge, estimated that a search and seizure issue might have been raised in about ten percent of his criminal cases.[37] This percentage has risen with the increase in prosecutions of contraband cases such as those dealing with narcotics offenses. The amicus brief estimated that the number of closed state cases subject to reopening could run well into the thousands. In many of such supposedly "closed" cases the problems of lost or destroyed evidence and unavailable witnesses could be predicted to be serious.

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32. Notice that this choice of methods brings the problem within the definition of a polycentric problem as discussed above. The Court was further handicapped in legislating a solution to the problem because, unlike a legislature, it was severely limited in the methods it could implement to prevent unreasonable searches and seizures.

33. Justice Harlan felt that, in *Mapp,* "our voice becomes only a voice of power, not of reason." Mapp v. Ohio, 367 U.S. 643, 686 (1961) (dissenting opinion).

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

35. Elkins v. United States, 364 U.S. 206, 224-25 (1960).

36. *See* Ker v. California, 374 U.S. 23 (1963).

37. Sobel, *The Law of Search and Seizure,* THE PLEADER (1961) (a publication of the Kings County Criminal Bar Ass'n.).

The Court faced the problem in *Linkletter v. Walker* and was compelled to follow the course it had set for itself to its logical conclusion. It had to make its ruling *completely* legislative in character by declaring it applicable only to cases that had not become final at the time of the *Mapp* decision—June 19, 1961. The rule of prospectivity was illegitimately born as a result of the Court's breach of its limits as a court and its incursion into the province of state authority.

The three considerations listed by the Court in deciding on prospectivity bear on this thesis—the *purpose* of the new rule, the *reliance* on previous law, and the *effect* on the administration of justice. The *purpose* was not to redeem any constitutional right of Miss Mapp violated at the trial, but rather to deter lawless police action generally.[38] *Reliance* by the states on their freedom under the tenth amendment to accept or reject an exclusionary rule in the absence of a constitutional dictate (as confirmed in *Wolf*) was justifiable, and would have led to a seriously disruptive *effect* on the administration of justice if this abrupt shift in the law were given retroactive effect.

If looked at closely, in other words, the three-prong test will classify a rule of law as within or without the proper sphere of activity for the Supreme Court. A broad social purpose that looks well beyond the rights of the particular defendant and those like him, and involves a choice of solutions, flags a legislative decision. Where state court reliance on prior law is truly justified, with due regard for properly evolving interpretations of constitutional requirements, there is an indication that the Supreme Court is operating beyond its limited power over the states. If the disruptive effect of a new rule is great, there is a red flag that indicates the tests of purpose and reliance should be rigorously applied to detect improper judicial activism. When, as in *Mapp,* the three tests indicate an overstepping by the Court in either of the two senses discussed above, the device of prospective limitation will be required to alleviate the imbalance in the system.

This thesis can be tested from two directions. Considering first cases that have been given retroactive effect, *Gideon v. Wainwright*[39] provides an apt comparison with the earlier *Mapp* decision. In *Gideon* the Court dealt with the specific, express guaranty of the sixth amendment that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense," and found as a starting point that the right to counsel was a fundamental right, essential to a fair trial, and as such, applicable to the states through the fourteenth amendment. This parallels the *Wolf* finding that the search and seizure guaranty applies to the states. The Court fulfilled its proper role by comparing the Florida criminal process (which denied counsel to Gideon in his felony trial) with

38. Linkletter v. Walker, 381 U.S. 618, 636 (1965).
39. 372 U.S. 335 (1963).

the direct constitutional mandate; the conflict was resolved by simply applying the Constitution as the supreme law and reversing Gideon's conviction. The direct *purpose* of the decision was to grant the only possible relief to this petitioner from a denial of due process, not to use the case primarily as a club to deter the actions of others not before the court. The rule of decision was not an arbitrary choice among several possible solutions. Given the supremacy of the express constitutional dictate, the Court had but one choice. The decision, therefore, was a proper judicial act.

State court *reliance* on prior law, as stated in the 1942 decision of *Betts v. Brady*,[40] was unjustified in view of its history. In *Betts*, the Court held that "special circumstances" must be shown in each case to elevate the denial of court-appointed counsel to a violation of due process. However, since the case of *Quicksall v. Michigan*[41] in 1950, the Court had never failed to find "special circumstances." Justice Harlan commented in *Gideon* that "In truth the *Betts v. Brady* rule is no longer a reality."[42] *Gideon* had clearly been foreshadowed by the evolution of the principle favoring appointment of counsel for indigents. This, together with the fact that the Court was applying a "flat requirement" of the Constitution[43] and not a derived rule of implementation, indicates that the Court was exercising a legitimate power over state procedure. In contrast to *Mapp*, *Gideon* was applied as any other proper judicial decision—retroactively.[44]

The effect of the *Gideon* decision on the administration of justice was great. The records of the Division of Correction of the State of Florida indicate that on June 30, 1962 approximately 65 percent of the 8000 state prisoners—5200 prisoners—were not represented by counsel at the time of their convictions.[45] In 1962, thirteen states still did not require appointment of counsel without the presence of special circumstances.[46] The enormity of the projected effects on the administration of justice neither prevented the Court's ruling in *Gideon* nor required it to bow to exigencies

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40. 316 U.S. 455 (1942).

41. 339 U.S. 660 (1950).

42. Gideon v. Wainwright, 372 U.S. 335, 351 (1963).

43. *See* Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962). While the particular incidents of the rule are not specifically stated in the Constitution—*e.g.*, to what cases the right extends and at what stage of a prosecution it attaches—the rule itself is flatly stated, and the incidents can be derived from the spirit of the rule without the need for the judicial inventiveness that gave rise to the *Weeks-Mapp* exclusionary rule.

44. Pickelsimer v. Wainwright, 375 U.S. 2 (1963). The Court did not act blindly. The issue of prospectivity was raised by Justice Harlan in dissent. *Id.* at 3, 4.

45. Brief for Respondent at 55-56, Gideon v. Wainwright, 372 U.S. 335 (1963).

46. Kamisar, *supra* note 43, at 274-75. The appointment of counsel on request by many of the states, in cases not required by their rules of law, increased as the time of *Gideon* drew near. The effect of this is impossible to measure mathematically. It appears, however, that such voluntary appointment did not approach the federal standard laid down in *Gideon*, particularly in Alabama, Florida, Mississippi, North Carolina and South Carolina.

by making the rule prospective. The strength of the Court in both regards lay in the fact that it was operating safely within its constitutional power over the states and within its function as a court.[47]

*Griffin v. Illinois*[48] is equally in point. There the Court compared the Illinois practice of effectively denying appellate review of alleged trial errors to defendants who could not afford the cost of a transcript of trial[49] with the constitutional mandates of equal protection and due process.[50] The principle that "all persons . . . should have like access to the courts of the country" had been unquestioned at least since the decision of *Barbier v. Connolly*[51] in 1885. The dictate was as clear as the flat injunction of the fourteenth amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws." In holding that the conflict between Illinois procedure and the fourteenth amendment must be resolved in favor of the latter, the Court exercised a valid power over the state. The Court held carefully to the line of proper judicial conduct in vacating and remanding, and no more. The evil was discrimination. The possibilities for revision of procedure to cure the evil were many, and the court was careful not to make a legislative choice of the one it preferred. That choice was wisely left to the state.[52]

The effect of the decision was recognized as impressive. Justice Harlan noted that the pronouncement would "touch the laws of at least 19 States and will create a host of problems affecting the states of an unknown multitude of indigent convicts."[53] *Griffin* was even cited in *Mapp* as affecting a

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47. Consistently, the rights to counsel at *arraignments* (White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961)), *on appeal* (Douglas v. California, 372 U.S. 353 (1963)), and *at revocation of probation hearings* (Mempa v. Rhay, 389 U.S. 128 (1967)) have all been applied retroactively. Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968).

48. 351 U.S. 12 (1956).

49. The Court assumed for purposes of the decision
that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript. *Id.* at 16.

50. In view of the Court's assumption that Illinois could constitutionally eliminate all appellate review of criminal convictions, although it could not constitutionally grant it discriminatorily, the due process argument is inapposite—only the equal protection issue seems in point.

51. 113 U.S. 27, 31 (1885).

52. We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. . . . The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare. Griffin v. Illinois, 351 U.S. 12, 20 (1956).

53. *Id.* at 33. There could be no justifiable claim of disappointed expectations on the part of the state in view of (1) the overwhelming continuous adherence to the principle of equality of procedural treatment between rich and poor, and (2) absence of any prior *"Betts"* or *"Wolf"* decision condoning the discriminatory practice.

broader class of state convictions than *Mapp*.[54] Nevertheless, the sound constitutional underpinnings of *Griffin* enabled the Court to apply it retroactively in *Eskridge v. Washington State Board of Prison Terms & Paroles*.[55]

Similarly, in *Jackson v. Denno*,[56] (which arose well after *Mapp*) the New York practice of submitting the issue of voluntariness of a confession to the jury with only a preliminary determination by the court that the confession could have been voluntary was found to violate the long-accepted principle that a conviction based on a coerced confession, regardless of its truthfulness, violates the clear dictate of the fifth amendment that no person "shall be compelled in any criminal case to be a witness against himself."[57] Under the New York practice it was impossible to say that the reliable finding of voluntariness to which the defendant was entitled was ever made by the jury, since the only verdict rendered was a simple "guilty" or "not guilty." Even if the jury had decided that the confession was involuntary, the practical impossibility that each of the twelve laymen could totally disregard a substantiated, truthful confession, merely because it had been coerced, in resolving doubts of guilt or innocence,[58] rendered the procedure in direct conflict with the flat mandate of the fifth amendment. The Court properly granted the petitioner no more than the Constitution required or allowed—a determination of the voluntariness of his confession. In spite of prior rulings to the contrary[59] and the severe impact of the *Jackson* decision,[60] the Court had no difficulty in applying *Jackson* retroactively.[61]

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54. Mapp v. Ohio, 367 U.S. 643, 659 n.9 (1961).

55. 357 U.S. 214 (1958). Prospectivity was urged in *Griffin* by Justice Frankfurter. Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (concurring opinion).

The *Griffin* rule was extended to a similar disqualification from bringing a second habeas corpus petition in a state court without establishing preliminary facts that could only be found in a transcript of the first petition. The disqualification would only affect those unable to buy such a transcript. Gardner v. California, 393 U.S. 367 (1969). On application of the present thesis, this case falls within the line of proper judicial decisions that will call for retroactive application. The same holds true for Smith v. Bennett, 365 U.S. 708 (1961), holding invalid an Iowa statute denying the right to file a petition for habeas corpus or an appeal in such a case without first paying a filing fee.

56. 378 U.S. 368 (1964).

57. Rogers v. Richmond, 365 U.S. 534 (1961).

58. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion).

59. Stein v. New York, 346 U.S. 156 (1953). *See also* Spano v. New York, 360 U.S. 315, 324 (1959), and Payne v. Arkansas, 356 U.S. 560, 568 n.15 (1958).

60. A survey of cases indicates that fifteen states and six federal circuits as well as Puerto Rico and the District of Columbia followed the New York rule of allowing juries to settle issues of fact concerning voluntariness without other judicial determination. *See* Jackson v. Denno, 378 U.S. 368, 410 (1964) (Appendix A to opinion of Black, J.)

61. "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." Linkletter v. Walker, 381 U.S. 618, 628 (1965). *Jackson* is cited as an example. *Id.* at 628-29 n.13.

The thesis that the choice of prospective or retroactive application turns on the validity of the Court's ruling in the two senses discussed above[62] has held consistently workable, therefore, on one side of the coin—the retroactivity side.[63] The complementary test of the thesis involves cases on the prospectivity side.

In 1964 the Court again resorted to the exclusionary rule technique in *Escobedo v. Illinois*.[64] There a twenty-two year old Mexican-American was arrested and questioned regarding the murder of his brother-in-law. His requests to speak with his lawyer, who was making similar requests in the next room, were denied. His confession was obtained without benefit of counsel or advice as to his right to remain silent. The confession was introduced in evidence and he was convicted of murder. The issue treated by the Court was the admissibility of the confession under the circumstances, and the Court held

> that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of

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62. (1) Did the Court act as a court or as a legislature?
(2) Did the Court exceed its constitutional power over the states?

63. Other significant decisions after *Mapp*, that are consistent with this thesis, include:

Pointer v. Texas, 380 U.S. 400 (1965), *held retroactive* in Brookhart v. Janis, 384 U.S. 1 (1966). The sixth amendment right of a defendant "to be confronted with the witnesses against him," including the implicit right to cross-examine, is fundamental and obligatory on the states. *Pointer* overruled the contrary holding of Stein v. New York, 346 U.S. 156 (1953), which was based on the defunct theory that no part of the sixth amendment applied to the states. No legislative embroidery was needed in *Pointer* to apply the flat sixth amendment mandate to condemn the Texas procedure of introducing a transcript of a living witness' prior statements against the defendant.

Bruton v. United States, 391 U.S. 123 (1968), *held retroactive* in Roberts v. Russell, 392 U.S. 293 (1968). Introduction of a co-defendant's confession implicating the defendant-petitioner violated his sixth amendment right to confront witnesses. The contrary holding of Delli Paoli v. United States, 352 U.S. 232 (1957), had been submerged by the tide of *Pointer* and *Jackson;* therefore, when it was properly overruled by *Bruton*, there could be no claim of *justified* reliance on *Delli Paoli*. (The Court in *Bruton* made it clear that its ruling applied to federal and state courts alike.)

Witherspoon v. Illinois, 391 U.S. 510 (1968), *held retroactive* in Bumper v. North Carolina, 391 U.S. 543 (1968), and Lopinson v. Pennsylvania, 392 U.S. 647 (1968). *See also* Boulden v. Holman, 394 U.S. 478 (1969). In *Witherspoon*, the Illinois procedure of allowing the prosecution to exclude any potential jurors opposed to capital punishment from the jury deciding on the punishment to be assessed in capital cases was held to violate the clear sixth amendment right to trial "by an impartial jury."

64. 378 U.S. 478 (1964).

> Counsel' . . . and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.[65]

The Court purported to deal solely with the sixth amendment right to counsel (citing *Gideon*), but the reasoning and language of the opinion make it clear that the fifth amendment privilege against self-incrimination was at the bottom of the decision.[66] The need for counsel at this pre-trial stage, as the Court saw it, was to advise the accused of the right to remain silent.[67]

Here the Court has gone considerably beyond the flat dictates of either the fifth or sixth amendment. In *Haynes v. Washington*[68] the Court had honed to a fine edge the criteria reasonably related to detecting coercion that would violate the fifth amendment, including the factor of notification by the authorities of the right to remain silent and to consult an attorney. Through the *Haynes* "totality of circumstances" test the Court could hold the facts of a given case up to the constitutional dictate and properly exercise its reversal power over a state court conviction. In *Escobedo,* the Court short-circuited the *Haynes* test for applying the fifth amendment to the facts and instead implemented a per se exclusionary rule without regard to actual voluntariness of the confession, assumedly to provide an *extra* measure of protection for the right. While it could safely enforce such a rule against the federal courts, it exceeded its valid power over the states.

The Court has, in effect, spun the sixth amendment right to "Assistance of Counsel" in criminal prosecutions into a rule excluding confessions, whether voluntary or involuntary, on little more than the "virtues and morality of a system of criminal law enforcement which does not depend on the 'confession.' "[69] The Court ignores the fact that compulsion does not necessarily flow from the fact that the defendant was not aware of his absolute right to remain silent. It has created rights well beyond the dictates of the Constitution and enforced those rights against the states.[70]

In the second sense, the Court moved beyond the evaluation of state procedures against the yardstick of due process guaranties, and enacted a

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65. *Id.* at 490-91.

66. "Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby." *Id.* at 489, *quoting from* 8 J. WIGMORE, EVIDENCE 309 (3d ed. 1940). "The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed." 378 U.S. at 488.

67. *Id.*

68. 373 U.S. 503 (1963).

69. Escobedo v. Illinois, 378 U.S. 478, 498 (1964) (dissenting opinion of White, J.).

70. While the advice of counsel to remain silent may be an excellent tactical weapon in winning a criminal case, it is not necessarily the *sine qua non* of voluntariness under the fifth amendment. It has been placed more accurately in perspective in Haynes v. Washington, 373 U.S. 503 (1963).

detailed code of criminal procedure that was to culminate in the case of *Miranda v. Arizona*.[71]

Excesses characterized in the opinion of the Court in *Escobedo* were compounded in *Miranda*. There the Court more realistically purported to be dealing with the fifth as well as the sixth amendments. The rule of *Miranda* came down to this:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.[72]

What had been a loose, general code in *Escobedo* flowered into a detailed specific set of rules for the governance of state police precincts as well as state courts, and the club used by the Court to enforce its new code was the exclusionary rule—exclusion of any statement (or tainted evidence) taken in violation of any element of the code.

Rather than interpreting or applying the fifth amendment right not to be compelled to incriminate one's self, or the sixth amendment right to counsel, the five-man majority used them as a springboard to create highly specific duties on the part of state law-enforcement authorities,[73] and reverses or affirms state court decisions depending on whether or not those duties have been carried out. There is no justification in the Constitution for the exertion of such power over the states by the Supreme Court.

The legislative nature of the rules is obvious, not only from their specificity and detail (compared to the generality of the words and principles of the fifth and sixth amendments), but also from the nature of the problem to which the Court addressed itself. The target was "incommunicado interrogation of individuals in a police-dominated atmosphere" and tactics discussed in the Wickersham Report of the 1930s and the Report of the Commission on Civil Rights in 1961 and various police manuals.[74] The rules were aimed at what the Court saw as the broad social problem

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71. 384 U.S. 436 (1966).
72. *Id.* at 444.
73. In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. *Id.* at 457.
74. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. *Id.* at 447.

of restraints needed to be placed on law-enforcement authorities—state as well as federal. They were born out of the Court's frustration in working within the constitutional limits on its function and power over the states. Deciding issues on a case-by-case basis (as, *e.g.*, the three confession cases decided the proceding term; *Townsend v. Sain*,[75] *Lynumn v. Illinois*,[76] and *Haynes v. Washington*[77]) had not provided as rapid or effective a solution as the Court thought desirable.[78]

The Court highlights the legislative nature of its policy choice by indicating it was one of several methods of reaching the same goal:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.[79]

One week after *Miranda* the Court faced the issue of prospectivity, holding that both *Escobedo* and *Miranda* would not be applied retroactively.[80] Here, as in *Mapp*, the Court had exceeded its role as a court and its jurisdiction over state decisions. The states had justifiably relied on prior decisions properly interpreting the Constitution (*e.g., Haynes*), and the Court had to face the fact that "to upset all of the convictions still pending on direct appeal (as well as final convictions) which were obtained in trials preceding *Escobedo* and *Miranda* would impose an *unjustifiable* burden on the administration of justice."[81] The safety valve of prospectivity was again needed to make a legislative decision fully legislative, and to

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75. 372 U.S. 293 (1963).
76. 372 U.S. 528 (1963).
77. 373 U.S. 503 (1963).
78. The Court states, on the fifty-third page of its opinion, after rationalizing and detailing its rules of criminal procedure:
> Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. Miranda v. Arizona, 384 U.S. 436, 491 (1966).

79. *Id.* at 467. By contrast, no one "alternative" legislative enactment could have cured the violations of the direct constitutional mandates properly reversed in Gideon v. Wainwright, 372 U.S. 335 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956).

Note also the inadequacy of the Court's resources for this function of legislation. Justice Clark, in dissent, refers to the "paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority." Miranda v. Arizona, 384 U.S. 436, 501 (1966). The Court was not only limited in the solutions it could implement, but it had no basis for safely predicting the effectivensss, or disruption on law enforcement that its rule would produce. It had merely the raw power to enforce its experiment on the states.

80. Johnson v. New Jersey, 384 U.S. 719 (1966).
81. *Id.* at 733 (emphasis added).

prevent, as far as possible, the disruptive effect of the imbalance between the branches of government.

Equally consistent with this thesis is the case of *Katz v. United States.*[82] There the search and seizure provision of the fourth amendment was used as a basis for extending the exclusionary rule to evidence obtained through electronic eavesdropping, regardless of any physical trespass.[83] The contrary rulings of *Olmstead v. United States*[84] and *Goldman v. United States*[85] were overruled. No lengthy argument is needed to show that the *Katz* exclusionary rule suffered from the same legislative infirmities as the *Mapp* exclusionary rule, and was a similarly excessive exercise of power against the states.[86] It is neither surprising nor inconsistent with this thesis that *Katz* was applied prospectively.[87]

The decision of *Lee v. Florida,*[88] holding that evidence obtained by intercepting telephone communications in violation of section 605 of the Federal Communications Act[89] must be excluded in a state criminal trial, relied on two separate theories—statutory interpretation and deterrence of police misconduct.

Under the first theory, the Court expanded its prior interpretation of the federal statute[90]—that "no person . . . shall intercept . . . and divulge" a telephone communication—to apply to a state officer testifying in a state criminal trial.[91] In applying the statute to a new class, the Court accomplished the same effect as if Congress had enacted a complementary provision to section 605 to take in this new class. With any new legislative rule, such a provision would have to be applied prospectively; and, equally, the Court was bound to make its expansive re-interpretation prospective to preserve balance in the system.[92]

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82. 389 U.S. 347 (1967). Although this case involved a federal conviction, the implications are identical for state and federal procedures.

83. The Court did not refer in this opinion to the effect of any possible violation of section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1964). *See* the discussion of Lee v. Florida, 392 U.S. 378 (1968), notes 88-89 and accompanying text *infra.*

84. 277 U.S. 438 (1928).

85. 316 U.S. 129 (1942).

86. *See* the discussion of the *Mapp* exclusionary rule device, notes 11-21 and accompanying text *supra.*

87. Desist v. United States, 394 U.S. 244 (1969).

88. 392 U.S. 378 (1968).

89. Federal Communications Act of 1934, 47 U.S.C. § 605 (1964) (in part):

> [N]o person not being authorized by the sender shall intercept any communication and divulge . . . the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .

90. The Court had previously held that § 605 did not prevent admission of such testimony in state courts. Schwartz v. Texas, 344 U.S. 199 (1952).

91. No question of fourth or fourteenth amendment rights was raised or considered by the Court. Nor was the *power* of Congress to protect the privacy of telephone communications, by making them inadmissible in Court, disputed. Olmstead v. United States, 277 U.S. 438, 465 (1928).

92. Fuller v. Alaska, 393 U.S. 80 (1968).

Under the second theory, the Court withdrew from pure statutory interpretation and re-entered the field of judicial legislation. Assuming that section 605 does not render a conviction invalid because of the introduction of intercepted telephone communications, the judicially devised exclusionary rule was applied to deter violation of the federal statute. Although *Mapp* is expressly the model for the *Lee* rule, the Court has strayed even further from its home territory in the latter case. In *Mapp* the Court could claim that it was acting in aid of a constitutional amendment. In *Lee* the Court's activism has the less persuasive justification of an act of Congress. While the Court might argue the reluctance of Congress to enter the field of legislating protections for fourth amendment search and seizure rights as in some way justifying the Court in taking up the gauntlet, no such reluctance of Congress to protect its own enactments could be claimed. The result is that if *Mapp* called for prospectivity, then, a fortiori, prospectivity was the necessary fate of its offspring in *Lee*.[93]

The cases discussed above provide well-defined building blocks with which to construct the theory that prospective or retroactive application of a decisional rule is foreordained by the location of that decisional rule on one side or the other of the line marking the outer limits of proper judicial activity. In each case the Court was frank to admit the purpose and scope of the rule it was promulgating; and while it might not agree that it was overreaching its powers or function, it faced up to the ramifications of that purpose and scope honestly when it became necessary to limit the rule to prospective application. The case of *Griffin v. California*[94] presents a more difficult situation because of a rather slippery shift of ground by the Court between that decision and *Tehan v. United States ex rel. Shott*.[95]

In 1964 the Court held for the first time, in *Malloy v. Hogan*,[96] that the fifth amendment privilege against self-incrimination was applicable to the states through the fourteenth amendment. This overruled the contrary holding of *Twining v. New Jersey*.[97] Ten months later, in *Griffin v. California*, the Court decided unequivocably that the fifth amendment per se "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[98] Such a comment is a "penalty" which "cuts down on the privilege by making its assertion costly."[99] The Court recognized the obvious fact that the reliability of the guilt-determining process was involved, since "[i]t is not everyone who can safely venture on the witness stand though entirely in-

93. *Id.*
94. 380 U.S. 609 (1965).
95. 382 U.S. 406 (1966).
96. 378 U.S. 1 (1964).
97. 211 U.S. 78 (1908).
98. Griffin v. California, 380 U.S. 609, 615 (1965).
99. *Id.* at 614.

nocent of the charge against him."[100] Considerations such as fear of the prejudicial effect of having a prior criminal record introduced to "impeach" his testimony might well keep an innocent defendant off the stand. In such a case, a judge's or prosecutor's comment that an inference of guilt is to be drawn from the defendant's silence is completely misleading.[101]

The *Griffin* decision rested on firm constitutional principles. The Court in *Malloy* had recalled that as early as 1947[102] the Court expressly assumed without deciding that such a comment would be a direct violation of the fifth amendment in a federal prosecution.[103] With this in mind, *Malloy* held that

> the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.[104]

In short, the Court reversed Griffin's conviction because the adverse comment of the judge and prosecutor turned the defendant's silence into self-accusation. This required no judicial legislation, nor did the Supreme Court exceed the dictates of the fifth and fourteenth amendments. After the reversals of state Court convictions on grounds of coerced confessions, neither reliance by the states on the ancient doctrine of *Twining* that the privilege against self-incrimination was not a fundamental element of due process, nor reliance without precedent on the imagined validity of the comment rule could be called justified. When it is remembered that *Malloy* and the string of coercion cases through *Haynes* had all been applied retroactively, and that *Griffin* involved the added factor of the danger of convicting an innocent defendant on an erroneous inference of guilt, it seems almost inconceivable that the Court would deny relief to those convicted prior to *Griffin*.[105]

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100. *Id.* at 613, *quoting* Wilson v. United States, 149 U.S. 60, 66 (1893). Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarass him to such a degree as to increase rather than remove prejudices against him. *Id.*

101. In *Griffin*, the judge charged the jury:
As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. *Id.* at 610.

102. Adamson v. California, 332 U.S. 46 (1947).

103. Malloy v. Hogan, 378 U.S. 1, 2 n.1 (1964).

104. *Id.* at 8.

105. *See* the well-reasoned prediction of retroactivity in Mishkin, *supra* note 26, at 92-94, and Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

Then, in the spring of 1966, the Supreme Court produced *Tehan v. United States ex rel. Shott*[106] and the danger of the seductiveness of prospective limitation became clear. In the face of upsetting the convictions of the six states that allowed the comment rule, the Court retrenched from the honest evaluation of the constitutionality of the rule and its effect on individual trials. It held that *Griffin* was to be limited to prospective application.

In place of the sound, practical reasoning of *Griffin,* the Court found it convenient to substitute nebulous dissertations on the majesty of the self-incrimination privileges in general. The purpose of *Griffin* was no longer the reversal of a conviction in which the exercise of the right of a defendant not to incriminate himself was turned into self-incriminating evidence. The purpose was now "to be found in the whole complex of values that the privilege against self-incrimination itself represents," embroidered with quotations favoring the accusatorial system over the inquisitorial.[107]

In justifying prospectivity, the Court resorted to the following sleight-of-hand: "The basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction."[108] Admittedly so, but the Court was not dealing with the general fifth amendment privilege per se. That had already been applied *retroactively* in *Malloy*. The Court was dealing with the *comment* rule, which the *Griffin* opinion had found not only violative of the fifth amendment, but also capable of leading juries to make erroneous inferences of guilt. The Court draws groundless support from the *Mapp* comparison, concluding that in both, violation of the rights of the individual "cannot now be remedied."[109] The Court found it convenient to overlook the fact that: (1) an unreasonable search and seizure is a violation separate from the trial itself so that reversal of the conviction there will not heal the breach of privacy, while it is the trial itself, infected by a judge's or prosecutor's comments, that violates fifth amendment rights, and this *can* be cured by reversal of conviction; (2) that evidence unreasonably seized remains trustworthy, while a judge's or prosecutor's comments can easily lead to erroneous inferences of guilt; and (3) while *Mapp* established a judicially devised rule to deter police lawlessness, *Griffin* reversed a conviction that itself violated the flat command of the fifth amendment.

The lesson of *Griffin* is this: while prospective limitation can be a useful device to mitigate the effects of an improper judicial decision (such as *Mapp* or *Miranda,* discussed above), it can also be abused. It can be a refuge for the Court during lapses of courage in applying proper judicial interpretations of the Constitution to those entitled to relief. While the

106. 382 U.S. 406 (1966).
107. *Id.* at 414.
108. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966).
109. *Id.* at 416.

latter is a serious possibility to be kept in mind, it might best be considered an aberration. In *Griffin* alone, of the nine cases that have been applied prospectively to date,[110] has the Court resorted to the device to avoid the effect of a *proper* decision.

At this point, the factor of reliability—that is, whether a particular constitutional decision affects the accurate determination of guilt or innocence—deserves comment. Some commentators have focused too narrowly on this element, claiming that it is the sole hinge on which the decision of prospectivity or retroactivity turns.[111] This overstates its usefulness as an indicator. First, it leads to inconsistent results, since neither the rule of *Mapp* on unreasonably seized evidence nor that of *Rogers v. Richmond*[112] and *Haynes* on coerced confessions was based on the reliability of the conviction.[113] And yet *Mapp* was applied prospectively,[114] while *Rogers* and *Haynes* have been applied retroactively.

Secondly, the reliability test frequently gives no black-or-white answer. Its presence or absence as a factor in some cases can at best be measured in terms of a hazy gray. One final case of prospectivity is in point here.

In 1967, the Court made its maiden assault on the field of pre-trial identification techniques. In two cases decided on the same day, *United States v. Wade*[115] and *Gilbert v. California*,[116] the Court promulgated a comprehensive code of legislation to govern both federal and state identifications. The ruling, in substance, is this: A criminal suspect has a right to the presence of counsel at any pre-trial line-up or other personal identification procedure; if he is deprived of this right, any reference to the pre-trial identification must be excluded at trial, and no witness will be allowed to identify the defendant in court unless the prosecution proves by "clear and convincing evidence" that the in-court identification is not the fruit of a pre-trial identification made in absence of counsel.[117]

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110. Lee v. Florida, 392 U.S. 378 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Duncan v. Louisiana, 391 U.S. 145 (1968); Katz v. United States, 389 U.S. 347 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Escobedo v. Illinois, 378 U.S. 478 (1964); and Mapp v. Ohio, 367 U.S. 643 (1961).

111. *See, e.g.*, Mishkin, *supra* note 26, at 97-101; Schwartz, *supra* note 105.

112. 365 U.S. 534 (1961).

113. *See* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961), and Haynes v. Washington, 373 U.S. 503, 518 (1963).

114. Note that the *Linkletter* opinion seems not to rely on the reliability factor as a *reason* for applying *Mapp* prospectively—but merely as removing an impediment to such application.

115. 388 U.S. 218 (1967).

116. 388 U.S. 263 (1967).

117. Justices White, Harlan and Stewart, in dissent, point out that the latter places on the prosecution the impossible burden of proving that a witness' recognition of the defendant in court is based on seeing him at the scene of the crime rather than at the more recent line-up. Theoretically, at least, the effect of absence of counsel is to require exclusion of practically all evidence of identification by witnesses present at the pre-trial identification. United States v. Wade, 388 U.S. 218, 251 (1967).

This action was unique, even in the history of the Supreme Court, for the telescoping effect with which the Court analyzed the entire range of substantive evils in this unexplored field of identification and jumped immediately to the drastic exclusionary rule. In the field of confessions, by comparison, the Court gathered its understanding of the methods and effects of the different forms of compulsion through years of examining fact situations in cases before it. Through those years it attempted to meet the problem within its proper bounds by evolving constitutional standards for testing the presence or absence of compulsion. When the Court finally broke the traces and legislated the *Miranda* code, it was at least based on an understanding of the substantive evil involved. In *Wade* and *Gilbert,* the Court gathered its comprehensive knowledge of the types and frequency of suggestive identification techniques from a canvass of treatises on the subject[118] and a review of state court decisions.[119] With that foundation, the Court by-passed the possibility of developing, through case-by-case analysis, criteria for determining when pre-trial procedure deprived a defendant of due process. Rather, in one fell swoop, the Court legislated a comprehensive solution to the problem (as it saw it) by combining a requirement of counsel with an exclusionary rule. Regarding the right to counsel, the Court recognized that local legislation or regulations which would eliminate the "risks of abuse and unintentional suggestion at line-up proceedings and the impediments to meaningful confrontation at trial" may also remove the requirement of counsel at this pre-trial stage.[120] In other words, the right to counsel at this stage is not an absolute dictate of the sixth amendment, as it is at the actual trial stage.[121] It is, rather, a substitute for other legislative regulations governing line-ups. The complementing exclusionary rule reaches a second level of legislation, in that its purpose is to enforce the judicially devised requirement of counsel.

In applying the present thesis to this analysis of the Court's rule, it is no surprise that in *Stovall v. Denno,*[122] decided on the same day, *Wade* and *Gilbert* were limited to prospective application. This case is an excellent example of the ineffectiveness of the reliability factor in predicting prospectivity. The heart of *Wade* was the serious danger of convicting the innocent on mistaken identifications that result from suggestive line-up techniques. The sole purpose in having counsel at the line-up is his influence in eliminating unfair suggestion from the identification process and his ability to observe and make known at the trial any such suggestive elements. The entire thrust is the prevention of mistaken identifications. The reliability theory, then, would point to the necessity of applying *Wade* and *Gilbert* to all possibly erroneous convictions, past or future.

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118. *See Id.* at 228-39 nn.6-9, 11, 12, 14, 17, 24-26, 29 & 30.
119. *See Id.* at 230-33 nn.10, 13, 15, 16 & 18-23.
120. *Id.* at 239.
121. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). No refinement of the process of trial could eliminate the sixth amendment right to counsel at that stage.
122. 388 U.S. 293 (1967).

The Court in *Stovall,* unlike the *Tehan* Court, faced the issue honestly. It recognized that *Wade* and *Gilbert* affected the reliability of trials, but concluded that this factor, like all others, is a matter of degree; that it must be weighed against the reliance by state courts on prior law and the effect of retroactivity on the administration of justice. Since the present rule came out of the blue in an area previously untouched by the Supreme Court, turning what had been an issue of credibility for the jury into a rule of exclusion, reliance by state courts on the prior state of the law had been justified.[123] The effect of making the new rule retroactive would have been overwhelming in each of the fifty states. On balance, therefore, the Court was compelled to choose prospectivity.

There are several conclusions to be drawn from this analysis of prospectivity. While it may be that the Court is "neither required to apply, nor prohibited from applying, a decision retrospectively,"[124] but is actually left to its own discretion, the device of prospectivity can be the subject of both use and abuse. It has been the contention here that the device was properly, and even *necessarily* used in *Linkletter* and *Johnson* to counterbalance the earlier excesses of power that had occurred in *Mapp* and *Miranda.* It can, however, be *abused* in cases such as *Tehan v. United States ex rel. Shott,* discussed above, where the Court withdraws from its responsibility to the Constitution and to the parties before it.

The most serious abuse of the device can only be seen through a time-lapse view of its use by the Court over a number of years. In any given case, such as *Linkletter,* it can be useful and proper; but with repeated use, it can act like a narcotic on the Court's sense of self-discipline, and can easily become habit-forming. It gives instant relief to the more immediate distress that excesses of the Court cause the administration of justice and federal-state relations, and drugs the conscience of the Court to the effects of the more long-range cancer in the system that grows each time the Court seizes unwarranted power. The device of prospectivity is no longer an isolated solution to a particular problem. It is fast becoming a standard weapon in the arsenal of the Court; with its continued use, the Court drifts further and further into the errors that produced *Mapp* and *Miranda.* In future cases, the Court will have the device of prospectivity clearly in mind at the time it is deciding whether or not to take a step beyond its power. The greatest danger lies in the possibility that as the Court becomes more addicted to this easy device, it will cease to hesitate at that threshold question of self-discipline.[125] Supreme Court legislation could easily become more rife than

123. While state courts cannot claim justifiable reliance on a prior law that is in conflict with constitutional dictates and evolved principles, and is therefore properly overruled by the Supreme Court, they cannot be expected to anticipate excursions by the Court into legislative codes, improperly imposed upon them.

124. Linkletter v. Walker, 381 U.S. 618, 629 (1965).

125. If self-restraint in the interest of harmony is appropriate, it should be exercised at the point when it is meaningful . . . , that is, at the point when

it is today; while the system is capable of absorbing a certain amount of imbalance and disruption, the effects could become serious. The Court is not equipped to gather the data necessary to predict what side-effects its thunderbolts will have on law enforcement. It *can* adopt the attitude that the Bill of Rights guaranties are the supreme word and must be extended to their farthest reaches, regardless of any side-effects. But can it do so *safely,* and for how long? There is no possibility in the system for release of any pressure of resentment or lack of confidence in the Court through the polls. The governed class cannot ratify or repudiate the decisions of the Court at election time in any but the most indirect way. The only alternative releases lie in clashes between the legislative and judicial branches such as Title II of the Crime Control Act of 1968[126] or, more seriously, in disrespect and, ultimately, disobedience of the Court's rules. These dangers should be uppermost in the minds of the Justices when they consider smoothing the chafing edges of a new ruling with the salve of prospectivity.

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the Court decides whether or not to change the existing rule. Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201, 230 (1965).

126. Omnibus Crime Control & Safe Streets Act § 701, 18 U.S.C. §§ 3501-02 (Supp. IV, 1968).