CONSTITUTIONAL LAW—EXCLUSIONARY RULE OF *Mapp v. Ohio* HELD NOT TO OPERATE RETROACTIVELY UPON CASES FINALLY DECIDED PRIOR TO MAPP. *Linkletter v. Walker* (U.S. 1965).

The petitioner, whose conviction in a state court had become final prior to *Mapp v. Ohio*,[1] attacked the conviction through habeas corpus proceedings in the federal district court on the ground that evidence obtained by unlawful search and seizure was used against him at his trial in violation of the rule set forth in *Mapp*,[2] which the petitioner contended should be applied retroactively.[3] The district court dismissed the writ and the court of appeals affirmed.[4] The United States Supreme Court granted certiorari[5] to resolve "what has become a most troublesome question in the administration of justice."[6] The Court affirmed, holding that the *Mapp* rule did not operate retroactively upon cases finally decided[7] prior to the *Mapp* case. *Linkletter v. Walker*, 381 U.S. 618 (1965).

The *Linkletter* case sets forth a test[8] by which future cases seeking

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1 367 U.S. 643 (1961).

2 The federal exclusionary rule, set forth in Weeks v. United States, 232 U.S. 383 (1914), made inadmissible in federal courts evidence seized by federal officers in violation of the fourth amendment's protection against unreasonable searches and seizures. Wolf v. Colorado, 338 U.S. 25 (1949), refused to extend the exclusionary rule to proceedings in state courts. Mapp v. Ohio, *supra* note 1, specifically overruled *Wolf* to the extent that *Mapp* held that the exclusion of evidence seized in violation of the search and seizure provisions of the fourth amendment was required of the states by the due process clause of the fourteenth amendment.

3 For articles concerning retroactivity as applied to overruling decisions, see generally Bender, *The Retroactive Effect of an Overruling Decision; Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631 (1964); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 317; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150 (1962). Compare Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Meador, *Habeas Corpus and the "Retroactivity Illusion,"* 50 VA. L. REV. 1115 (1964); Torica & King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 DICK. L. REV. 269 (1962). See also Note, 16 RUTGERS L. REV. 587 (1962); Notes and Comments, 71 YALE L.J. 907 (1962); 62 MICH. L. REV. 1250 (1964).

4 United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963).

5 Linkletter v. Walker, 377 U.S. 930 (1964).

6 Linkletter v. Walker, 381 U.S. 618, 620 (1965).

7 *Id.* at 622 n.5 states: "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.*"

8 Though the Court does not cite the major source of its test, it includes much contained in a thorough study made in Notes and Comments, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 940-51 (1962) and incorporated in the court of appeal's opinion, United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963). Before the Court applied the test, it determined that there were no constitutional nor philosophical impediments to a purely prospective ap-

retroactive application of a new constitutional rule can expect to be evaluated. The Court decided it must:

> [W]eigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[9]

Accordingly, the circumstances in *Linkletter* required that the Court look to "[1] the purpose of the *Mapp* rule; [2] the reliance placed upon the *Wolf*[10] doctrine; and [3] the effect on the administration of justice of a retrospective application of *Mapp*."[11]

The reasoning of the Court, in essence, was that (1) *Mapp's* purpose was "the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights . . ."[12] because this was the only effective deterrent against illegal seizure of evidence by law enforcement officers;[13] (2) the prior history of *Wolf*, though modified by several extensions,[14] had been one of reliance by both the accused and the states;[15] and (3) retroactive

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plication of a new constitutional rule. *Id.* at 628. The Court recognized a suggestion that it might be prevented by U.S. CONST. art. III from adopting the technique of purely prospective overruling. But it summarily dismissed this argument by saying that no doubt of its power was expressed in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). The Court also cited Griffin v. Illinois, 351 U.S. 12, 20-26 (1956) (concurring opinion of Frankfurter, J.). In addition, the Court considered the academic debate involving the nature of a judicial decision: Blackstone holding that the judge is but the discoverer of the law as it always was; Austin, Cardozo, and the "legal realists" arguing that the judge is the creator of the law. A modern resolution of this debate came in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940), where Hughes, C.J., found that the actual existence of the law prior to the determination of unconstitutionality "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." Therefore, the Court is not obliged to apply its new constitutional rule retroactively. It must, however, take into consideration the existence of the former rule. The Court had first recognized the legal realists' theory in Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) and allowed the states to choose between the two approaches in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). See generally Annot., 85 A.L.R. 262.

[9] 381 U.S. at 629.

[10] Wolf v. Colorado, 338 U.S. 25 (1949); see note 2 *supra.*

[11] 381 U.S. at 636.

[12] *Ibid.*

[13] *Ibid.* Elkins v. United States, 364 U.S. 206, 217 (1960) (function of the exclusionary rule is to deter).

[14] Elkins v. United States, *supra* note 13 (illegally seized evidence transferred by state authorities to federal agents held inadmissible in federal prosecutions); Rea v. United States, 350 U.S. 214 (1956) (illegally seized evidence transferred by federal agents to state authorities held inadmissible in state court prosecutions); Rochin v. California, 342 U.S. 165 (1952) (evidence obtained by pumping the stomach of the accused was excluded on the ground that such police methods shocked the conscience of the Court).

[15] Linkletter v. Walker, 381 U.S. at 637. Under *Wolf*, the victim of illegally seized evidence could seek damages for invasion of privacy but the state courts could admit the evidence even though it was the product of an illegal search and seizure.

application of *Mapp* would overtax the administration of justice and retard criminal law enforcement because of the difficulty in holding hearings on the excludability of evidence which had been destroyed or misplaced and the unavailability in many cases of witnesses at such hearings.[16] On the basis of these findings, the Court determined there was no justification for applying the *Mapp* rule retroactively.[17]

Does the *Linkletter* test provide the courts with a workable standard with which to decide whether new constitutional interpretations should be applied retroactively? For example, inextricably connected with the constitutional rights of the accused is the fairness of the trial.[18] The Court, in *Linkletter*, does not specifically undertake a discussion of the fair trial question, but the opinion does distinguish the *Mapp* rule from other new constitutional rules[19] which were applied retroactively on the basis that they went to the fairness of the trial. However, it is implicit in the Court's holding that if the rule in question (*i.e.*, the rule sought to be applied retroactively) has been promulgated to provide guarantees for the fairness of the

[16] *Ibid.* The Court concluded: "to thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

[17] The dissent, written by Mr. Justice Black and joined by Mr. Justice Douglas, would grant the petitioner a retrial because: (1) Miss Mapp's offense was committed May 23, 1957, while Linkletter's offense occurred August 16, 1958, and "there is no experience of the past that justifies a new Court-made rule to perpetuate a grossly invidious and unfair discrimination against Linkletter simply because he happened to be prosecuted in a State that was evidently well up with its criminal court docket." *Id.* at 642; (2) there was a constitutional right involved rather than a mere effort to deter police officers; (3) Fay v. Noia, 372 U.S. 391 (1963), opened up to collateral attack in federal courts all unconstitutional state convictions even though "final."

[18] In *Linkletter* the Court equates "fair trial" with ensuring the "integrity of the fact-finding process." 381 U.S. at 639. Thus, as *Linkletter* points out, the admission into evidence of a coerced confession, because of its inherent unreliability and untrustworthiness, infringes upon the integrity of the fact-finding process, denying the accused a fair trial. As opposed to the coerced confession, illegally seized tangible evidence is not untrustworthy, and its admission into evidence does not contaminate the fact-finding process. Admission of this tangible evidence *is* prejudicial in the sense that it constitutes *more* evidence against the accused, but it is *not* prejudicial in the sense that it is nonetheless reliable. Therefore, because of the trustworthiness of this kind of evidence, the accused has not been denied a fair trial when the criteria for defining "fair trial" are limited to those elements affecting the integrity of the fact-finding process.

[19] In Jackson v. Denno, 378 U.S. 368 (1964), where the New York procedure concerning voluntariness of a confession had left the ultimate determination to the jury regardless of the circumstances, the Court stated it failed to assure the defendant a fair determination of voluntariness and contaminated the whole trial. In Gideon v. Wainwright, 372 U.S. 335 (1963), where the indigent defendant had been refused counsel, the Court stated it rendered the judgment unreliable because the layman could not possibly provide an adequate defense. In Griffin v. Illinois, 351 U.S. 12 (1956), where the defendant had been precluded from taking an appeal because of his inability to pay for a transcript of the trial, the Court stated it was tantamount to denying a fair trial to the poor.

trial, the courts should apply the rule retroactively.[20] If the issue of fair trial is not inherent in the rule in question, then the *Linkletter* test should be applied, by weighing the merits and demerits of the three elements in order to arrive at a conclusion as to retroactive application.

The viability of the *Linkletter* test will become manifest in the near future. At present the retroactivity of *Escobedo v. Illinois*[21] and *Griffin v. California*[22] is being determined by several courts.[23] The *Escobedo* rule requires a suspect to be informed of his right to counsel and his right to remain silent at the accusatory stage of the criminal investigation.[24] The *Griffin* rule would make it reversible error

[20] Cases cited note 19 *supra.* These cases and the subsequent cases applying their rules retroactively, all decided prior to *Linkletter*, seem to suggest that as soon as the Court finds that the defendant has been denied a fair trial, the rule in question should be applied retroactively.

[21] 378 U.S. 478 (1964).

[22] 380 U.S. 609 (1965).

[23] United States *ex rel.* Walden v. Pate, 350 F.2d 240 (7th Cir. 1965); Carrizosa v. Wilson, 244 F. Supp. 120 (N.D. Cal. 1965); Hayes v. United States, 236 F. Supp. 225 (E.D. Mo. 1964); *In re* Lopez, 62 Cal. 2d 368, 398 P.2d 380, 42 Cal. Rptr. 188 (1965); Ruark v. People, 34 U.S.L. WEEK 2213-14 (Colo. Sept. 13, 1965); Bell v. State, Fla. 175 So. 2d 80 (1965); Commonwealth v. Negri, 34 U.S.L. WEEK 2186 (Pa. Sept. 29, 1965); State v. Johnson, 43 N.J. 572, 206 A.2d 737 (1964); People v. Honanian, 22 App. Div. 2d 686, 253 N.Y.S.2d 241 (1964) (*Escobedo* rule applied prospectively). United States *ex rel.* Walker v. Fogliani, 343 F.2d 43 (9th Cir. 1965); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964) (dicta); Fugate v. Ellenson, 237 F. Supp. 44 (Neb. 1964); Galara Cruz v. Delgado, 233 F. Supp. 944 (P.R. 1964) (*Escobedo* rule applied retroactively).

In re Gaines, 63 Adv. Cal. 235, 404 P.2d 473, 45 Cal. Rptr. 865 (1965); Pinch v. Maxwell, 34 U.S.L. WEEK 2190 (Ohio Sept. 29, 1965) (*Griffin* rule applied prospectively).

[24] The holding in Escobedo v. Illinois, 378 U.S. at 490-91, is as follows: "We hold, therefore, 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 counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." The problem of retroactive application of the *Escobedo* rule is compounded by the vexing question as to whether right to counsel at the accusatory stage depends on a request for counsel. In the *Escobedo* case the accused made the request; therefore, that opinion affords no certain guide. In addition, authority is split as to whether the request is necessary. United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965) (request not necessary); United States v. Childress, 347 F.2d 448 (7th Cir. 1965) (request necessary). Further confusion resulted when the Supreme Court denied certiorari in a case where the state court had held request necessary, People v. Hargraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961 (1965), and also in a case where the state court had held request unnecessary, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), *cert. denied*, 381 U.S. 946 (1965).

for the prosecutor to comment or the judge to instruct the jury regarding the defendant's refusal to testify.[25]

In assessing the merit of the *Linkletter* test it is imperative to determine how the Court will dispose of the fair trial question in cases urging the retroactive application of the *Escobedo* and *Griffin* rules. When the *Escobedo* rule is sought to be applied retroactively,[26] the Court could possibly conclude that providing the defendant a fair trial was not inherent in the rule.[27] It is strongly argued that the purpose of *Escobedo* is to "discourage oppressive police practices,"[28] rather than to provide a fair trial, and therefore the rule should not be applied retroactively.[29] However, it could be argued that the purpose of the *Escobedo* rule is to eliminate pretrial incriminating statements which otherwise might be used to impeach or prejudice the defendant at trial and this would go directly to the

25 The retroactive application of the *Griffin* rule currently is up for argument. United States *ex rel.* Shott v. Tehan, 337 F.2d 990 (6th Cir. 1964), *cert. granted*, 381 U.S. 923 (1965).

26 The retroactive application of the *Escobedo* rule currently is up for argument. State v. Johnson, 43 N.J. 572, 206 A.2d 737 (1964), *cert. granted*, 34 U.S.L. WEEK 3183 (U.S. Nov. 23, 1965).

27 If "fair trial" is equated with ensuring the "integrity of the fact-finding process," then in the *Escobedo* situation the question becomes whether the admission (or confession) at the accusatory stage without advice of counsel or without being told of the right to remain silent is so untrustworthy or unreliable that its admission into evidence impinges upon the integrity of the fact-finding process. In United States *ex rel.* Walden v. Pate, 350 F.2d 240, 242 (7th Cir. 1965), an answer was given: "Where the rule in question goes to the fairness of the trial, 'the very integrity of the fact-finding process,' as the Supreme Court said in *Linkletter*, retrospective application is called for, since doubt is cast on the question of the defendant's guilt. In both *Escobedo* and *Mapp*, however, the reliability of the evidence was not questioned; the attack was on the admissibility of the evidence because it was obtained in violation of a fundamental constitutional right." This statement suggests that a violation of a fundamental constitutional right does not necessarily discredit the integrity of the fact-finding process. The admission (or confession) obtained in an *Escobedo* situation, even though the defendant's fundamental rights have been violated, is not necessarily unreliable. Therefore, the defendant is not being denied a fair trial.

28 *In re* Lopez, 62 Cal. 2d 368, 377, 398 P.2d 380, 386-87, 42 Cal. Rptr. 188, 194-95 (1965), contends that the *Escobedo* rule was promulgated not "to undo the procedures of yesterday, which despite their undesirability did not necessarily cause the conviction of the innocent," but only "to discourage oppressive police practices" in the future.

29 Carrizosa v. Wilson, 244 F. Supp. 120 (N.D. Cal. 1965), admits that lack of counsel at the accusatory stage allows an atmosphere in which confessions or admissions may be elicited by police officers, and the court conceded that the defendant is, in effect, on "trial" at this stage; consequently, the fairness of the subsequent trial may be impinged upon. However, the court dismissed the fair trial issue by finding that although the prohibition against the denial of counsel at the trial stage in Gideon v. Wainwright, note 19 *supra*, was designed to afford the protection of a fair trial, the *Escobedo* case could be distinguished in the following manner: "Since it is unlikely that the mere denial of counsel at the accusatory stage, without more, was intended to have the same effect as denial in a *Gideon* situation, whether *Escobedo* should be applied retroactively depends on the applicability of the rationale of *Linkletter* to the purposes underlying the *Escobedo* decision." Carrizosa v. Wilson, *supra* at 124.

fundamental fairness of the criminal prosecution.[30] In the event that the Court decides that the *Escobedo* rule does not affect the fairness of the trial, then the disposition of a collateral attack will rest largely on an application of the *Linkletter* elements.

Assuming that the purpose of the *Escobedo* rule is determined to be a deterrence of lawless police action in the interrogation room,[31] then this element will have little weight toward applying the rule retroactively. As pointed out in *Linkletter*, the police misconduct will have already occurred and will not be corrected by releasing the prisoners involved.[32] Thus, the final determination should not depend upon the purpose of the rule but upon a consideration of the prior history and the ramifications which retroactive application will have on the administration of justice.

The rule set forth in *Escobedo* was completely novel in that it had not been voluntarily adopted by either the federal or state authorities.[33] However, the *Escobedo* rule could not be considered unforeseeable, owing to recent cases extending the protection of the sixth amendment to the states.[34] Prior to *Escobedo*, no jurisdiction required that the suspect be advised at the accusatory stage of his right to remain silent or his right to have counsel,[35] and it was standard prac-

30 Roberts and Musmanno, JJ., dissenting in Commonwealth v. Negri, 34 U.S.L. WEEK at 2187, recognized that the *Escobedo* rule was aimed at more than mere deterrence of police officials: "I must respectfully disagree that *Escobedo* is not entitled to retrospective application . . . The *Escobedo* principle may indeed act as a protecting deterrent against excesses in interrogations. But that, in my view, is not the sole purpose of the rule. The rule seems to recognize—indeed seems to be particularly premised upon—the possibility that in the absence of such a rule a coerced and unreliable confession may be secured and may result in the conviction of an innocent defendant. That possibility is not inherent in the *Linkletter* situation where the evidence is unquestionably credible."

31 Carrizosa v. Wilson, 244 F. Supp. at 125, states that the *Escobedo* rule was designed as a "prophylactic against coercion in the interrogation room."

32 381 U.S. at 637.

33 The Court in *Escobedo* recognizes that New York has a judicial rule excluding a confession taken from a defendant during the investigative stages, after a specific request from his attorney to consult with the accused has been denied. People v. Donovan, 13 N.Y.S.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). The *Escobedo* rule, however, is broader, requiring police to *advise* the defendant of his rights. Escobedo v. Illinois, 378 U.S. at 486-87, 490-91.

34 Gideon v. Wainwright, 372 U.S. 335 (1963), which extended the right of counsel to indigent defendants in state criminal trials, and Massiah v. United States, 377 U.S. 201 (1964), where an *indicted* defendant under interrogation was given the right to be advised of his rights to counsel and silence. See Winters, *Counsel for the Indigent Accused in Wisconsin*, 49 MARQ. L. REV. 1 (1965), for a thorough review of right to counsel decisions, a discussion of the problems solved and problems raised by those decisions, and a consideration of the available alternatives in supplying counsel for the indigent accused.

35 Compare Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. Lagay, 357 U.S. 504 (1958) (companion case).

tice not to advise the defendant of his rights until arraignment,[36] the preliminary hearing,[37] or indictment.[38] Thus, the reliance placed upon the former state procedural rules by both the state courts and the local law enforcement officers should weigh heavily in considering retroactive application.[39]

The effect on the administration of justice also points to a limitation of the *Escobedo* rule to a prospective application. In view of prior standard practices, the number of convictions obtained under now wrongful procedures is left to the imagination, and it seems safe to predict that retroactive application of the *Escobedo* rule would result in a deluge[40] of challenged convictions by habeas corpus or other appropriate applications. The ultimate result may often be the release of the applicants, since retrials in many cases would not be feasible.[41]

Contrary to the *Escobedo* rule, the *Griffin* rule will more than likely be evaluated in light of fundamental fair trial standards and, consequently, may be applied retroactively. The grounds upon which *Griffin* was argued encompassed the denial of the petitioner's right to a fair fact-finding procedure.[42] The purpose of the *Griffin* rule was to prevent the prosecutor's comment from becoming a particle

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[36] Hamilton v. Alabama, 368 U.S. 52 (1961).

[37] White v. Maryland, 373 U.S. 59 (1963).

[38] Massiah v. United States, 377 U.S. 201 (1964).

[39] Carrizosa v. Wilson, 244 F. Supp. at 126, states: "To apply Escobedo retroactively 'does nothing to punish the wrong-doing official [who at the time had no reason to think his conduct was illegal] while it may, and likely will, release the wrong-doing defendant.' " (Citing Irvine v. California, 347 U.S. 128 (1954).)

[40] Those defendants represented by counsel who plead guilty, however, are precluded from collaterally attacking their conviction because the plea itself is a conviction. Thomas v. United States, 290 F.2d 696 (9th Cir. 1961); United States v. Morin, 265 F.2d 241 (3d Cir. 1959); Gonzales v. United States, 210 F.2d 825 (1st Cir. 1954); United States v. Sturm, 180 F.2d 413 (7th Cir. 1950), *cert. denied*, 339 U.S. 986 (1950).

[41] See Linkletter v. Walker, 381 U.S. at 637-38.

[42] 380 U.S. at 614, the Court stated that permitting comment on defendant's refusal to testify was equivalent to self-incrimination: "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws." Self-incrimination is regarded as part and parcel of a fair trial in Holtzoff, *The Relation Between the Right to a Fair Trial and the Right of Freedom of the Press*, 1 SYRACUSE L. REV. 369 (1950): "The principal private rights guaranteed to the individual by the Constitution may be enumerated as follows: . . . and finally, the right to a fair trial. The last mentioned right has two aspects . . . . The second aspect . . . comprehends specific privileges in respect to judicial procedure in criminal cases. . . . He may not be compelled to incriminate himself." Thus, comment on the defendant's refusal to testify should be regarded as a denial of a fair trial in the sense that it impairs the integrity of the fact-finding process.

of evidence,[43] relieving the prosecution's burden of producing evidence and influencing the jury's determination. Also the petitioner in *United States ex rel. Shott v. Tehan*,[44] now before the Supreme Court, alleges that the prosecutor's comment constituted a violation of the fifth amendment privilege against self-incrimination.[45] It appears, then, that the Court will undertake to determine the fair trial issue at the outset, and if it finds in fact that the integrity of the fact-finding process has been contaminated, it will apply the *Griffin* rule retroactively,[46] thereby eliminating the need to apply the *Linkletter* test.

Should the Court decide that the *Griffin* rule does not go to assuring the defendant a fair trial, an application of the *Linkletter* test would raise a close question as to retroactive application. Although it is difficult to determine what purpose the *Griffin* rule would have, other than the protection of a fair trial, the California Supreme Court commented on this element in the following manner:

> Although the purpose of *Griffin* was not solely to deter *future* comment or instructions in violation of the Fifth Amendment, neither was *Griffin* directed to the correction of *past* errors to the same degree as those cases which have been retroactively applied. Certainly, the comment rule has not infected trials to the same degree as those errors that the Supreme Court has cured retroactively . . . .
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> The error is not of the type that pervades the entire trial so as to

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[43] Griffin v. California, 380 U.S. at 613 states: "It [comment rule] is in substance a rule of evidence that allows the States the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."

[44] 337 F.2d 990 (6th Cir. 1964), *cert. granted*, 381 U.S. 923 (1965) (seeking retroactive application of the *Griffin* rule).

[45] 33 U.S.L. WEEK at 3373.

[46] The Court in *In re* Gaines, 63 Adv. Cal. 235, 240, 404 P.2d 473, 476, 45 Cal. Rptr. 865, 868 (1965), held that it would not apply the *Griffin* rule retroactively, even though the prosecutor's comment does affect the fairness of the trial, unless the comment has infected the trial to the same degree as those errors for which the Supreme Court has already allowed retrospective application. Apparently the court in *In re* Gaines did not believe that the prosecutor's comment went to the essence of the fact-finding process although the defendant's constitutional right against self-incrimination was violated. In connection with this argument, the same court in People v. Modesto, 62 Cal. 2d 436, 452-53, 398 P.2d 753, 762-63, 42 Cal. Rptr. 417, 426-27, stated that the jury draws adverse reference from the defendant's failure to testify even though there is no comment; therefore, any comment is merely harmless error, not requiring reversal. In light of Mr. Justice Douglas' statement in *Griffin*, the California court's argument does not appear to be persuasive: "What the jury may infer given no help from the court is one thing. What they may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 380 U.S. at 614.

> deny due process and a fair trial such as was involved in *Gideon v. Wainwright* . . . and similar cases.[47]

Applying the other elements of the *Linkletter* test, one finds that the prior history reveals a justifiable reliance on limited comment rules by some states,[48] but one also finds a foreshadowing of the *Griffin* rule.[49] Furthermore, the justifiable reliance element is not as substantial a contention as in *Mapp* or *Escobedo* because the six states[50] which permitted comment did not agree as to the extent of allowable comment[51] and, therefore, no common foundation existed to which the states could point in reliance. Thus, in applying the *Linkletter* test, the prior history and reliance element should be given little weight in the final determination of whether the *Griffin* rule should be limited to a prospective application.

In regard to the administration of justice, there is little doubt that a retroactive application of *Griffin* would affect many convictions in states such as California where comment has been a routine procedure.[52] The six states which have allowed comment may be faced with a flood of habeas corpus applications. Though not determinative, this factor will probably influence the Court since it is usually

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[47] *In re* Gaines, 63 Adv. Cal. at 238-40. Apparently, the court is making a distinction between a violation of the accused's constitutional right which may offend our sense of justice but does *not* affect the integrity of the fact-finding process.

[48] *E.g.*, People v. Adamson, 27 Cal. 2d 478, 165 P.2d 3 (1946).

[49] Malloy v. Hogan, 378 U.S. 1 (1964), held that the self-incrimination clause of the fifth amendment is applicable to the states through the fourteenth amendment. *Malloy*, decided only last year, overruled Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 78 (1908).

[50] At the time *Griffin* was decided, 44 states had already adopted a "no comment" rule. Griffin v. California, 380 U.S. at 611-12 n.3.

[51] *Ibid.* "Of the six states which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the privilege against self-incrimination. CAL. CONST., art. I, § 13; OHIO CONST., art. I, § 10. New Jersey permits comment, *State v. Corby*, 28 N.J. 106, 145 A.2d 289; *cf. State v. Garvin*, 44 N.J. 268, 208 A.2d 402; but its constitution contains no provision embodying the privilege against self-incrimination (see *Laba v. Newark Bd. of Educ.*, 23 N.J. 364, 389, 129 A.2d 273, 287; *State v. White*, 27 N.J. 158, 168-69, 142 A.2d 65, 70). The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. See *State v. Ferguson*, 226 Iowa 361, 372-73, 283 N.W. 217, 223. Connecticut permits comment by the judge but not the prosecutor. *State v. Heno*, 119 Conn. 29, 174 A. 181. New Mexico permits comment by the prosecutor but holds that the accused is then entitled to an instruction that 'the jury shall indulge no presumption against the accused because of his failure to testify.' N.M. STAT. ANN. § 41-12-19; *State v. Sandoval*, 59 N.M. 85, 279 P.2d 850."

[52] Adamson v. California, 332 U.S. 46 (1947), affirming People v. Adamson, 27 Cal. 2d 478, 165 P.2d 3 (1946), which upheld CAL. CONST., art. I, § 13, which provides: "[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

not feasible to have retrials of long-standing convictions and the Court has indicated that it has no desire to effect the "wholesale release" of prisoners where their guilt is not in question.[53] Mr. Justice Black's statement in *Linkletter*, however, is a reminder that the Court should not and will not minimize the rights of the individual:

> No State should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials . . . . It certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time.[54]

How the Court will utilize the *Linkletter* test remains to be seen. The *Linkletter* test does have its advantages. It has elaborated upon a rather vague 1940 standard for retroactivity which was suggested in *Chicot County Drainage Dist. v. Baxter State Bank*.[55] The elements of the new test enable the Court to take cognizance of the real procedural problems facing the courts and law enforcement officers. The major disadvantage of the *Linkletter* decision is that the courts may be too quick to apply its test without first evaluating the effect the rule in question has on the fairness of the trial.

D. BROWNELL MOON, JR.

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[53] Linkletter v. Walker, 381 U.S. at 637.

[54] *Id.* at 652-53 (dissenting opinion).

[55] 308 U.S. 371, 374 (1940). That test was restated in Linkletter v. Walker, 381 U.S. at 626: "Under our cases it appears . . . that the effect of the invalidity attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . ; of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' "