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THE MIRAGE OF RETROACTIVITY AND CHANGING CONSTITUTIONAL CONCEPTS

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During recent times, the Supreme Court of the United States has seen fit to confer upon the individual broader constitutional protection. *Mapp v. Ohio*,[1] decided in 1961, is illustrative of this modern movement. There, it was held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[2] However, in the course of such constitutional extensions,[3] one challenging question with far-reaching consequences has been left virtually unanswered: shall these new protections be given retroactive effect?[4] While attention has not been focused on this question, it is one which has been "crying out" for an answer. Even now, both federal and state courts are expressing their need for guidance.[5] As Chief Judge Thomsen of the Federal District Court in Maryland recently observed: "Until the Supreme Court itself clarifies the point, it is impossible for any other court or judge to be certain whether and to what extent the Supreme Court intended the decision in *Mapp v. Ohio* to be retrospective."[6] In light of this pressing problem and because the question undoubtedly will arise in related areas in the future, it is imperative that the state of the law be clarified and that the problem be

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1. 367 U.S. 643 (1961).

2. *Id.* at 665.

3. Within the past several decades a number of new constitutional protections have evolved: Powell v. Alabama, 287 U.S. 45 (1932) (Due process requires that a state, in a capital case, provide counsel for an indigent accused); Brown v. Miss., 297 U.S. 278 (1936) (Confessions extorted by brutality and violence are inconsistent with due process required by the fourteenth amendment); Johnson v. Zerbst, 304 U.S. 458 (1938) (assignment of counsel in federal criminal proceedings even in non-capital cases); Malinski v. New York, 324 U.S. 401 (1945) (Conviction resting in part upon a coerced confession will be set aside); Rochin v. California, 342 U.S. 165 (1951) (Illegally violating the privacy of an individual's body in order to obtain evidence offends those personal immunities which due process guarantees). Surprisingly, the United States Supreme Court was not faced with deciding the question of retroactivity following these landmark cases. A careful study of the cases following the above decisions indicates that when the courts have been confronted with the question of applying these decisions to prior factual settings, retroactivity was generally not even mentioned and other grounds were used to dispose of such cases.

4. The authors of this article are using the term "retroactive" in its broadest sense—the application of new constitutional concepts to prior factual settings.

5. See p. 276 *infra*.

6. Hall v. Warden, Maryland Penitentiary, Civil No. 13450, D. Md., January 23, 1962.

squarely faced. It is the view of the writers, as will be demonstrated herein, that *the problem of retroactivity is an illusory one.*

Development of Retroactivity

The development of law by the Supreme Court concerning the retroactive application of expanded constitutional rights of the individual is relatively modern. While it is true that the Supreme Court has devoted some attention to retroactivity in other areas,[7] it is only within the last decade that the Court has addressed itself to the problem in the area of newly enunciated constitutional safeguards.

In 1956, the decision in *Griffin v. Illinois*,[8] holding that a state must, under the Federal Constitution, afford indigent defendants adequate appellate review, set the stage for the Court's discussion of the retroactivity problem. Justice Black, joined by Chief Justice Warren, and Justices Douglas and Clark, declared their confidence that Illinois would "provide corrective rules to meet the problem which this case lays bare."[9] Nevertheless, they did not expressly deal with the question of retroactive application of their decision.

Justice Frankfurter, however, in a portion of his concurring opinion, dealt explicitly with the retroactivity problem. He observed that "there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution."[10] As he saw it, "for sound reasons, law generally speaks prospectively" and, "in arriving at a new principle, the judicial process is not impotent to define its scope and limits."[11] Accordingly, he felt that "the rule of law announced this day should be delimited as indicated."[12]

According to the dissenting opinion of Justices Burton and Minton, with whom Justices Reed and Harlan joined, the opinion of Justice Black "is not limited to the future. It holds that a past as well as a future conviction of crime in a state court is invalid where the state has failed to furnish a free transcript to an indigent defendant who has sought, as petitioner did here, to obtain a review of a ruling that was dependent upon the evidence in his case."[13] The giving of retroactive effect, they felt, would be "an interference

7. See p. 290 *infra.*
8. 351 U.S. 12 (1956).
9. *Id.* at 20.
10. *Id.* at 25.
11. *Id.* at 26.
12. *Ibid.*
13. *Supra* note 8, at 29.

with state power for what may be a desirable result, but which we believe to be within the field of local option."[14]

Justice Harlan, in a separate dissenting opinion, after indicating that "the sweeping constitutional pronouncement made by the Court today will touch the laws of at least 19 states and will create a host of problems affecting the status of an unknown multitude of indigent convicts,"[15] felt that "a decision having such wide impact should not be made upon a record as obscure as this."[16]

Thus the Court in *Griffin* did not settle the question of retroactivity: four of the members of the majority did not expressly deal with the question; the fifth member of the majority felt that only prospective effect should be given and that the majority opinion should have been so delimited; and the four dissenting Justices construed the majority opinion as giving retroactive effect and evinced their opposition to such a principle. In light of these varying views, the area of retroactivity remained a clouded one.

Nevertheless, some states saw fit to give retroactive effect to *Griffin*.[17] Illinois, through the rule-making power of its supreme court, gave effect to *Griffin* by providing "for a full transcript to any appellant requesting it, found indigent by the trial judge."[18] Prisoners who had been convicted prior to *Griffin* were given until March 1, 1957, to apply for free transcripts. In Cook County alone, which concerns itself with about one-half of the state's litigation, it appears that over 500 *pre-Griffin* petitions were granted.[19]

The next Supreme Court case to shed light on the problem of retroactivity was *Eskridge v. Washington State Bd. of Prison Terms & Paroles*,[20] decided in 1958. In a state court of Washington, in 1935, the accused had been convicted of murder and sentenced to life imprisonment. "Alleging substantial errors in his trial petitioner moved for a free transcript,"[21] in order to take an appeal to the state supreme court. This motion was denied by the trial judge in accordance with a Washington statute which provided for an indigent defendant to be furnished with a free transcript if, in the opinion of the trial judge, "justice [would] thereby be promoted."[22] In

14. *Ibid.*
15. *Supra* note 8, at 33.
16. *Ibid.*
17. Barber v. Gladden, 210 Ore. 46, 298 P.2d 986 (1956); People v. Jackson, 2 Misc. 2d 521, 152 N.Y.S.2d 893 (1956).
18. WILKES, POST-CONVICTION CONSTITUTIONAL RIGHTS OF INDIGENT CRIMINAL DEFENDANTS: STATE INTERPRETATIONS OF GRIFFIN V. ILLINOIS, INSTITUTE OF JUDICIAL ADMINISTRATION, App. I-4 (1959). See Note, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161 (1957).
19. *Ibid.*; see Note, *Effect of Overruling Prior Judgments on Constitutional Issues*, 43 VA. L. REV. 1279, 1293 (1957).
20. 357 U.S. 214 (1958).
21. *Id.* at 215.
22. *Ibid.*

1956, the prisoner by way of habeas corpus claimed that the refusal of a free transcript constituted a violation of his rights under the fourteenth amendment. The Washington Supreme Court denied his petition without opinion and the Supreme Court granted certiorari.[23] In a per curiam opinion, the majority declared: "In Griffin . . . we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here."[24] The majority further stated that it was not holding that "a State must furnish a transcript in every case involving an indigent defendant. But here, as in the Griffin case, we do hold that, '[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' "[25] Noting that the reporter's transcript from the 1935 trial was still available,[26] the court reversed and remanded.

A single-sentence dissent noted that Justices Harlan and Whittaker, "believing that on this record the Griffin case, decided in 1956, should not be applied to this conviction occurring in 1935, would affirm the judgment."[27] Justice Frankfurter, who did not hear the argument, took no part in the disposition of the case.

There is no doubt but that the question of whether *Griffin* should be given retroactive effect was squarely raised and presented to the United States Supreme Court:

> (1) In his application for habeas corpus to the Washington state court, the prisoner "called attention to the decision . . . in Griffin v. Illinois."[28]
>
> (2) The prisoner's petition to the United States Supreme Court for certiorari contained the following: "There is involved here petitioner's rights under Article I, Section 22 . . . of the Constitution of the State of Washington; Section 1 of the Fourteenth Amendment of the Constitution of the United States; and by the recent ruling of this Honorable Court in the case of Judson Griffin and James Crenshaw v. The People of the State of Illinois, No. 95—October Term, 1955."[29]

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23. Eskridge v. Washington State Bd. of Prison Terms & Paroles, 353 U.S. 922 (1957).

24. Eskridge v. Washington State Bd. of Prison Terms & Paroles, *supra* note 20, at 216.

25. *Ibid.*

26. *Ibid.*

27. *Ibid.* Note here that Justice Burton, who sided with the dissent in *Griffin,* has joined the ranks of the majority of the Court in this case.

28. Brief for Petitioner, p. 12, Eskridge v. Washington State Bd. of Prison Terms & Paroles, *supra* note 20.

29. *Id.* at 13.

(3) Interspersed throughout the prisoner's brief before the Supreme Court is reference to and reliance upon the recent *Griffin* decision.[30]

(4) The first point in the brief of the State of Washington was: "THE DECISION IN GRIFFIN V. ILLINOIS SHOULD BE LIMITED TO A PROSPECTIVE APPLICATION."[31] This position is reiterated in the first sentence of the "Summary of Argument,"[32] and in the "Conclusion" where the following language appears: "The social consequences of a retroactive application of the *Griffin* decision would be serious. The limitation we propose is therefore strongly indicated."[33]

(5) The dissenting position of Justices Harlan and Whittaker certainly indicates that some kind of a controversy concerning retroactivity existed among the members of the Court.[34]

It is clear that the majority in *Eskridge*, in 1958, held that the denial of a free transcript to the prisoner in 1935 was violative of his rights under the fourteenth amendment—viewed in light of *Griffin*.[35] It is not clear, however, from the language employed in the majority opinion in *Eskridge* whether the Court's rationale is (1) a requirement that the State of Washington give retroactive application to the *Griffin* decision, or (2) simply a use of *Griffin* as a precedent for its disposition of a new and independent, though closely related, case. The former would seem to be a more direct "front door" approach to retroactivity; the latter, an elusive "back door" approach. For, in either event, it is obvious that the result is the same: *a contemporary constitutional concept is being applied to an earlier factual setting.*

Onto this stage[36] was thrown, in June 1961, *Mapp v. Ohio*.[37] A majority of the Supreme Court held that the admission in a state court of

30. *Id.* at pp. 12, 13, 15, 27n., 28, 30, 31, 34n., 35, 43, 46, 48n.

31. Brief for Respondent, p. 13, Eskridge v. Washington State Bd. of Prison Terms & Paroles, *supra* note 20.

32. *Id.* at 11.

33. *Id.* at 35.

34. Eskridge v. Washington State Bd. of Prison Terms & Paroles, *supra* note 20, at 216.

35. By way of a reinforcement of the *Eskridge* decision and an apparent application of the retroactive feature, see Ross v. Schneckloth, 357 U.S. 575 (1958); Woods v. Rhay, 357 U.S. 575 (1958).

36. Another case which is worthy of note is Burns v. Ohio, 360 U.S. 252 (1959). In 1953, in an Ohio state court, petitioner had been convicted of burglary and sentenced to life imprisonment. An intermediate appellate court affirmed the conviction. He filed a notice of appeal, "but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme Court of Ohio." *Id.* at 253. Since he was unable to pay the docket fee required by the Ohio statute, his motion was not entertained. The United States Supreme Court, feeling that the *Griffin* decision was not distinguishable, vacated the judgment below. It should be emphasized, however, that the petitioner's attempt to appeal in 1957 was, "despite the passage of years," regarded by the court as "timely." *Ibid.*

37. *Supra* note 1.

evidence obtained as a result of an illegal search and seizure was violative of the fourteenth amendment.[38] This enunciation of a new constitutional right necessitated the Court's overruling *Wolf v. Colorado*,[39] decided in 1949. Curiously, in light of the impact of its decision, neither the majority nor the other members of the Court expressly dealt with the problem of retroactivity. Indeed, in light of the controversy among the members of the Court relating to retroactivity in the *Griffin* setting, and its aftermath in *Eskridge*, this is especially astounding. Nevertheless, it should be noted that there may be a clue to the Court's attitude in one of the footnotes in the majority opinion. The pertinent portion of the text of the majority opinion read:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." . . . In some cases this will undoubtedly be the result.[40]

The footnote referable to that part of the text read:

> As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with Burns v. State of Ohio, 360 U. S. 252, . . . Griffin v. People of State of Illinois, 351 U. S. 12, . . . and Commonwealth of Pennsylvania ex rel. Herman v. Claudy, 350 U. S. 116. . . . In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.[41]

This footnote may be interpreted by some to mean that the Court intends retroactive effect to be given to its decision.[42] In support of such a view it might be reasoned that the "illegal search and seizure" class of convictions which would be affected by retroactivity would be narrower than the class of indigent prisoners who were denied appellate review under

38. *Ibid.* The holding of the Court in *Mapp* does not concern itself merely with a rule of evidence but rather with actual rights guaranteed by the Constitution. "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, Constitutional in origin, we can no longer permit that right to remain an empty promise. . . . Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him." *Supra* note 1, at 660.

39. 338 U.S. 25 (1949).

40. Mapp v. Ohio, *supra* note 1, at 659.

41. *Id.* n.9.

42. For a brief discussion of this possible "hint," see Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 432 (1961).

Griffin, which of course would involve any and all kinds of convictions. Further, the latter portion of the footnote might be construed as referring to the "unfounded" contention that too many criminals would go free, and that "further delay" would only "compound the difficulties" by increasing the number of prisoners who would be affected by retroactivity. It is noteworthy, however, that in the footnote the Court did not expressly mention "retroactivity" or its equivalent, nor did it cite the very pertinent and recent *Eskridge* case. In the opinion of the writers, the footnote alone does not give rise to a reasonable inference upon which any fair opinion can be grounded.[43]

It is readily understandable, since the Court did not expressly mention retroactivity or discuss the problem, why learned judges in both the federal and state courts have been experiencing difficulty in determining the intention of the Court in *Mapp*.[44] This void in the opinion, however, may have significant and far-reaching implications which are not apparent on the surface. In *Griffin*, it will be recalled, the majority opinion did not expressly deal with the question of retroactive effect. The four dissenting Justices, noting that the majority opinion was "not limited to the future," concluded that the "majority" Justices intended that their decision should be referable to "a past as well as a future conviction."[45] Justice Frankfurter, in his concurring opinion, observed that many *pre-Griffin* prisoners "will find justification in this opinion, unless properly qualified."[46] Accordingly, after noting his opposition to retroactive application, he urged that "the rule of law announced this day should be delimited."[47] Hence, five Justices (a majority) were of the view that if the decision were not expressly limited to the future, that meant that retroactive effect was intended or might be viewed as having been intended. In the *Mapp* case, as in *Griffin*, the majority of the Court did not limit the newly enunciated constitutional right to the future. Some of the "*Mapp*" Justices participated in the *Griffin* decision, and hence, it would seem, should have been painfully aware of the above-described view.[48]

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43. While some might assert that retroactivity is not warranted because of the gradual development of the law culminating in the *Mapp* case, it should be noted that individual rights outweigh state policies of reliance (see p. 288 *infra*) and that individual rights are not the proper object of experimentation by courts. Certainly, if the experiment malfunctions everything possible should be done to remedy constitutional wrongs to the individual affected.

44. See discussion on p. 276 *infra*.

45. Griffin v. Illinois, *supra* note 8, at 29.

46. *Id.* at 25.

47. *Id.* at 26.

48. In *Griffin* the majority consisted of Chief Justice Warren and Justices Black, Douglas and Clark. Justice Frankfurter concurred with the majority. The dissent was composed of Justices Burton, Minton, Reed and Harlan. In *Eskridge*, the majority consisted of Chief Justice Warren, and Justices Black, Douglas, Clark, Brennan and Burton; the minority of Justices Harlan and Whittaker. In the *Mapp* case the line-up of the Court was as follows: majority—Justice Clark, Chief Justice Warren; con-

Indeed, it would seem that even the *post-Griffin* Justices should not have been unaware of the approach taken in *Griffin*. Therefore, it may be argued with a good deal of force that, since the Supreme Court in *Mapp* did not expressly limit its new constitutional position to the future only, retroactive effect was intended or might be viewed as having been intended.

Nevertheless, the Supreme Court may well feel impelled, in the relatively near future, to address itself sharply to the problem of retroactivity and, instead of leaving it to elusive inference, to commit itself on the perplexing problem with which, for example, many *post-Mapp* courts have been confronted. The following cases are illustrative.

In *United States ex rel. Gregory v. New York*,[49] the petitioner, a state prisoner, applied in a Federal District Court for a writ of habeas corpus. Petitioner had originally been convicted of grand larceny and sentenced to seven and one-half to ten years as a second felony offender. The conviction had been affirmed by the various appellate courts and certiorari had been denied by the Supreme Court. In his application for a writ of habeas corpus, petitioner raised the question of illegally seized evidence. The court observed: "In the *Mapp* majority opinion, it is not clear whether or not such ruling is to have prospective or retroactive effect."[50] Keeping in mind the footnote of Justice Clark in the *Mapp* opinion, the court concluded:

> It is not evident from the petition whether the question of alleged search and seizure as claimed was presented to and reviewed by the Courts of New York. In courtesy to the Courts of New York, it would seem recanvass of these situations should be made by them or state appellate reargument sought, before petitions with this challenge should be entertained in this district court.[51]

The court thereupon dismissed the petition.

That the scope of the *Mapp* decision is unclear in several respects was brought out by Judge Clark of the Second Circuit Court of Appeals, speaking for the majority in *Bolger v. Cleary*,[52] wherein the plaintiff had attempted to enjoin state officials from testifying in state proceedings against him as to statements made by the plaintiff during his illegal detention by federal officers. He had also sought to block state officials from introducing property which he claimed was illegally seized during an unlawful search of his home. In discussing *Mapp*, the court declared:

> If it were clear that Mapp barred all use by the State of the illegally obtained evidence here involved, the injunction below could

curring—Justices Douglas, Black and Stewart; dissenting—Justices Harlan, Frankfurter and Whittaker.

49. 195 F. Supp. 527 (S.D.N.Y. 1961).
50. *Id.* at 528.
51. *Ibid.*
52. 293 F.2d 368 (2d Cir. 1961).

> properly be dissolved . . . . The scope of Mapp is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional prohibitions or to state administrative proceedings . . . .[53]

It appears by way of dicta that the courts of Pennsylvania may well give retroactive effect to the *Mapp* decision. The superior court in *Commonwealth v. Campbell*[54] affirmed a conviction of defendant Campbell on charges of committing an abortion. In the course of argument the defendant contended that his constitutional rights had been denied because of the lower court's refusal to permit counsel to cross-examine on the question of probable cause for the issuance of a search warrant. The court observed that at the time of the trial evidence was admissible even though it was the product of an illegally issued warrant. Consequently, it was said, the lower court did not err in denying counsel the right to cross-examine. The defendant admitted this was the law as it then existed, but in light of the complete change brought about by *Mapp* he pressed error. The court replied: "This contention *would* be meritorious if illegality in obtaining the search warrant had been shown. However, there is nothing in the record to show illegality. . . . Therefore, *the change in the law* effected by *Mapp v. Ohio* . . . is not applicable."[55] (Emphasis added.)

The superior court of New Jersey recently dismissed[56] a prisoner's attempt to use *Mapp* to gain his freedom under a writ of habeas corpus. The petitioner had been convicted in February 1959, on a charge of possessing heroin. At the time of petitioner's trial he failed to take the stand and did not raise the question of illegally obtained evidence or a possible violation of his constitutional rights. The court said:

> The recent decision in Mapp v. Ohio has aroused the petitioner's desire to gain his freedom . . . .[57]
>
> The petitioner has been incarcerated for the past two years and apparently has had a reading acquaintance with those federal decisions which have construed illegal search and seizure . . . . The petitioner's testimony lacks trustworthiness, although if it had been given at the time of the trial it might have justified some consideration to justify the position he now takes.[58]

In *People v. Bertrand*[59] the defendant, who had pleaded guilty prior to the *Mapp* decision, sought to withdraw his plea on the day of sentencing be-

53. *Id.* at 370.
54. 196 Pa. Super. 380, 175 A.2d 324 (1961).
55. *Id.* at 387, 175 A.2d at 328.
56. Application of Bogish, 69 N.J. Super. 146, 173 A.2d 906 (Law Div. 1961).
57. *Id.* at —, 173 A.2d at 908.
58. *Id.* at —, 173 A.2d at 909.
59. 28 Misc. 2d 1084, 216 N.Y.S.2d 790 (1961).

cause of the *Mapp* decision. The defendant tried to show that the state's evidence had been acquired through an illegal search and seizure. In dismissing the motion, the court held that such a matter was addressed to the discretion of the court, and that the defendant had not advanced convincing grounds to support his motion for the withdrawal of his plea of guilty. The court pointed up the essence of defendant's argument thus: "I admit that I am guilty and that I pleaded guilty voluntarily. However, since then, I discovered that if I had not pleaded guilty the People could not have established a case."[60]

In *State v. Long*[61] a New Jersey county court decided that the *Mapp* decision should not be applied retroactively. The defendant, who was convicted on January 22, 1960, of bookmaking and keeping a gambling resort, moved for a new trial on the grounds that (1) the *Mapp* decision constitutes newly discovered evidence and (2) the *Mapp* decision should be given retroactive effect. The court ruled that a subsequent decision is not newly discovered evidence. Further, in light of Justice Clark's footnote in the *Mapp* decision concerning state procedural requirements governing challenges to criminal prosecutions, the court held that the defendant's motion must be denied on the ground that he failed to make a timely motion pursuant to a New Jersey rule of court. The court added: "Though the question of application of Mapp need not be decided in light of the defendant's failure to make timely objection, this court nevertheless finds that Mapp should not be applied retroactively."[62]

Six days after the decision in the *Long* case, the Superior Court of New Jersey decided *State v. Masi*.[63] The matter came before the court upon a motion by the defendant to suppress evidence seized by detectives without a search warrant. Oral testimony was taken upon the hearing of the motion to suppress prior to the decision of the United States Supreme Court in

60. *Id.* at —, 216 N.Y.S.2d at 792.

61. — N.J. —, 177 A.2d 609 (1962).

62. *Id.* at —, 177 A.2d at 610. The court in arriving at its decision seized upon the language of Justice Clark, in the *Mapp* opinion, to the effect that "we can *no longer* permit that right to remain an empty promise. . . .we can *no longer* permit it to be revocable at the whim of any police officer." *Ibid.* (Emphasis the court's.) This, the court reasoned, indicated "that the rule of Mapp should be applied prospectively." *Ibid.* A careful reading of the pertinent area of the *Mapp* opinion will disclose that the Supreme Court was speaking there in terms of individual constitutional rights, rather than of prospective application of its decision. Further, the court felt that the retroactivity question did not have to be resolved because the defendant had failed to make a timely objection at the time of his trial. It noted, however, that "the evidence obtained from the search and seizure complained of, was legally admissible at that time." State v. Long, *supra* note 61, at —, 177 A.2d at 611. It would seem inconsistent to conclude that one should have objected to a procedure which at the time was fully recognized by the courts. See pp. 284-86 *infra*.

63. — N.J. Super. —, 177 A.2d 773 (Law Div. 1962).

Mapp v. Ohio.[64] After some discussion the court decided that the evidence had been obtained illegally, and proceeded to discuss the issue of prospective application versus retrospective application in light of the *Mapp* doctrine. The prosecutor argued that even if the search and seizure were unreasonable under *Mapp* the evidence should not be suppressed. He asserted that the *Mapp* doctrine should only be applied prospectively. To this the court said:

> The United States Supreme Court held that the evidence seized should be suppressed and the conviction was reversed. Their decision was retrospectively applied in that case. This court is bound to apply the rule of Mapp v. Ohio to every case in which *the issue* is properly raised. . . . The case must be decided upon the basis of the law as it presently exists, in spite of the fact that the law was otherwise at the time of the seizure.[65] (Emphasis added.)

People ex rel. White v. La Vallee[66] involved a prisoner's application for a writ of habeas corpus seeking release from a sentence imposed on October 8, 1957. At that time he had pleaded guilty to a charge of possession of narcotics. Petitioner contended that his conviction was illegal because the heroin, for the possession of which he had been indicted, had been illegally seized. The petitioner relied heavily upon *Mapp*, contending that even though he had originally pleaded guilty he could not have waived a constitutional right. The court stated: "I believe that the objection which defendant may have had to the use of such evidence against him could have been and was waived by the plea of guilty . . . ."[67] The court further decided that since a writ of habeas corpus goes to the jurisdiction of the court, it would not lie in the instance. Petitioner's remedy, if any, the court concluded, should be by way of an application in the nature of a writ of error coram nobis. In dealing with retroactivity, the court observed:

> Although the rule expressed in the Mapp case may apply to appeals presently pending in our appellate courts from convictions obtained prior to that decision, I would hesitate to apply it to a conviction obtained in the year 1957, at which time the well-recognized rule of evidence was to the contrary . . . .[68]

The New York Court of Appeals considered the question of retroactivity in *People v. Loria*.[69] The defendant was convicted of violating the narcotic laws, and his conviction was affirmed by the Appellate Division. Relying upon the *Mapp* decision, defendant took an appeal to the highest court of New

64. 367 U.S. 643 (1961).
65. *Supra* note 63, at —, 177 A.2d at 776.
66. — Misc. 2d —, 223 N.Y.S.2d 135 (Sup. Ct. Clinton Cty. 1961).
67. *Id.* at —, 223 N.Y.S.2d at 136.
68. *Id.* at —, 223 N.Y.S.2d at 137.
69. 10 N.Y.2d 368, 223 N.Y.S.2d 462 (1961).

York. In discussing the applicability of the *Mapp* decision on the state court level, the court declared:

> There can be no doubt that it is the duty of State courts to follow the Mapp holding in all trials taking place after June 19, 1961. However, whether we are commanded to, and if not whether we should, apply it in pending appeals . . . where, as here, the trial was completed and an intermediate appellate court has affirmed before Mapp was decided, is a threshold question in this case. To do so would likely result in the reversal of many convictions in pending cases . . . .[70]

The court held that "the Mapp rule is to be applied in our review of pending appeals from pre-Mapp convictions."[71] Finding that the narcotics introduced into evidence at defendant's trial were obtained as the result of an illegal search and seizure, the court reversed and remanded for a new trial.[72]

In addition to the *Mapp* setting, the question of whether retroactive effect should be given to developing constitutional rights may present itself in other areas in the future. For example, the Court may decide cases in the next few years relating to right to counsel, double jeopardy, juvenile defendants, and sentencing. Confusion in the lower federal and state courts will again ensue unless the question of retroactivity is faced and answered.

Analysis

Unfortunately, the area of retroactivity is one which has lent itself to the vice of generalization. Much unnecessary confusion has thus been engendered. In order to avoid that pitfall, the writers, in pointing up the development of retroactivity by the Supreme Court in recent years—by way of *Griffin* and *Eskridge*—have made a concerted effort to be meticulous in setting forth the precise language of the Court. In light of that development, it is the writers' view that the problem of retroactivity is an illusory one. In the area of newly enunciated constitutional rights—such as that epitomized by the *Mapp* decision—the "time" factor should play no part. The following hypotheticals, if carefully analyzed and studied in light of the earlier-described development of retroactivity, will demonstrate the view of the writers that the only sensible course of action is that *Mapp* relief should be made available to *pre-Mapp* prisoners. That the Supreme Court will adopt this course

70. *Id.* at —, 223 N.Y.S.2d at 464.

71. *Id.* at —, 223 N.Y.S.2d at 465.

72. In the case of Hall v. Warden, Maryland Penitentiary, *supra* note 6, the court expressly acknowledged the impossibility of ascertaining the intention of the Supreme Court in *Mapp* regarding retroactivity. However, after noting that no case had been cited or found holding that *pre-Mapp* prisoners were entitled to the benefits of *Mapp*, the court concluded that "such extreme construction appears unwarranted." *Id.* at —. The opinion, similar to that in State v. Long, *supra* note 61, also relied, *inter alia*, upon terminology such as "no longer" in *Mapp*.

of action is evidenced by the position it took in *Eskridge*. It is important to emphasize that this course of action does not mean necessarily that "retroactive" effect is being given to *Mapp*. For, as in *Eskridge*, the earlier-convicted prisoner might very well be using the new decision simply as useful precedent. It is in this sense that the problem of retroactivity is regarded by the writers as only a mirage.

> (1) Mr. E, convicted of murder and sentenced in the X State Court in 1935 to life imprisonment, could not afford to purchase a transcript and hence was unable to take an appeal. In 1958, he petitioned the X State Court for habeas corpus, urging that the denial of a free transcript violated the fourteenth amendment. Upon dismissal of his petition, the United States Supreme Court granted certiorari and held that a violation of the fourteenth amendment had been demonstrated. Accordingly, it reversed and remanded with a direction that Mr. E be given a free transcript for the purpose of taking his appeal.
>
> (2) Mr. E, convicted in the X State Court in 1935 and sentenced to life imprisonment, was unable to afford an appeal. In 1956, in the Y State Court, Mr. G, who had been convicted of robbery and sentenced to ten years, was unable, because of indigence, to purchase the required transcript in order to take an appeal. By way of a post-conviction remedy available in State Y, Mr. G urged that the denial of a free transcript violated the fourteenth amendment. After the highest court in State Y affirmed a dismissal of the petition, the United States Supreme Court granted certiorari and held that Mr. G's rights under the fourteenth amendment had been violated. Accordingly, it reversed and remanded. In 1958, Mr. E, by habeas corpus, petitioned the X State Court, urging that the denial of a free transcript violated his rights under the fourteenth amendment. The dismissal was affirmed by the highest court of State X and certiorari was granted by the United States Supreme Court.

Suppose that the United States Supreme Court denied relief to Mr. E, in the second hypothetical, on the ground that it was opposed to giving retroactive effect to the G decision. Would this be sound in light of the fact that if the G case had not been decided in 1956, Mr. E, as in the first hypothetical, would have succeeded? Should relief to Mr. E turn on whether he was able to win the race to the United States Supreme Court? Further, would it not seem that with the G decision as a precedent, Mr. E's rights should be stronger and more certain? Or, should Mr. E be prejudiced by the fact that Mr. G happened to outrace him to the court?

Should Mr. E, in the second hypothetical, in order to avoid a "retroactivity" problem, claim that he does not want the G decision to be applied directly to his case, and urge that the Court use it (the G case) only for purposes of guidance? In other words, would not Mr. E be well advised to

argue that the G case is *different* from his, but *similar enough* for the Court to use it as helpful precedent? Indeed, in order to be certain that no "retroactive" controversy is stirred up, might not Mr. E be inclined in his brief and argument to omit any mention of the G decision? Should the problem of the "race to the courthouse" be compounded by the labels that might be assigned to the runners?

Suppose that the United States Supreme Court, anticipating, and seeking to avoid, some of the problems raised by the above questions, ruled in the G case that its decision was applicable only to future convictions (thus excluding Mr. G himself from relief). Clearly, then, neither G nor E, in the second hypothetical, would be entitled to relief. Would this approach be sound? Would it not fail to encourage prisoners to vindicate their constitutional rights? Since, of course, the Court requires a "controversy" in order to act, would not this discouragement stand in the way of constitutional progress?

Variations of the foregoing hypotheticals may be helpful in comprehending the view of the writers:

> (3) Mr. E was convicted in 1935 in the X State Court. In 1958, he reached the United States Supreme Court and obtained a determination that his rights under the fourteenth amendment had been violated. Mr. G, who had been convicted in 1956 in the Y State Court, reached the United States Supreme Court in 1959.

Should Mr. G be denied relief on the ground that this would be a retroactive application of the E decision?

> (4) Mr. E had been convicted in 1935 in the X State Court. Mr. G had been convicted in 1935 in the Y State Court. In 1956, Mr. G reached the United States Supreme Court which held that the fourteenth amendment had been violated. In 1958, Mr. E reached the United States Supreme Court.

Should the Court deny relief to Mr. E (convicted in the same year as Mr. G) on the ground that it is opposed to giving retroactive effect to the G decision? Would the result be different if the parties had been convicted in the same state court, but in separate trials, in 1935? Would it be different if they had been convicted on the same day in 1935? On the other hand, suppose Mr. E had reached the United States Supreme Court before Mr. G?

To illustrate more sharply the writers' position in the *Mapp* setting, keeping in mind the *Griffin-Eskridge* hypotheticals just described, the following situations may be considered:

> (1) Mrs. P, convicted in the X State Court in 1935 on the basis of evidence obtained as a result of an illegal search and seizure, reached the United States Supreme Court in 1961. The Court, not

having previously dealt with this question, held for the first time that this use of evidence constituted a violation of the fourteenth amendment. Accordingly, it reversed and remanded.

(2) Mrs. P was convicted in the X State Court in 1935 as a result of the admission of illegally seized evidence. Mrs. M, convicted in 1961 in the Y State Court on the basis of illegally obtained evidence, appealed, and ultimately reached the United States Supreme Court later in the same year. The Court, speaking for the first time on the subject, held that the fourteenth amendment had been violated. In 1962, Mrs. P reached the United States Supreme Court.

(3) Mrs. W, convicted in the X State Court in 1949 on the basis of illegally obtained evidence, reached the United States Supreme Court. It held that the use of such evidence in a state court was not a violation of the fourteenth amendment. Mrs. M, convicted in the Y State Court in 1961 as a result of illegally seized evidence, reached the United States Supreme Court later in the same year. The Court held that the use of such evidence violated the fourteenth amendment and expressly overruled the W decision. In 1962, Mrs. W again reached the United States Supreme Court and asked for relief similar to that accorded Mrs. M.

(4) Mrs. W, convicted in a state court in 1949, appealed and ultimately the United States Supreme Court held that the fourteenth amendment had not been violated. In 1955, Mrs. C (a friend of Mrs. W) was likewise convicted on the basis of illegally obtained evidence and sent to prison. Mrs. M, convicted in 1961, reached the United States Supreme Court which held that the use of such evidence violated the fourteenth amendment. In 1962, Mrs. C reached the United States Supreme Court and asked for similar relief.

(5) Mrs. D was convicted in 1953 and went to prison for a twenty-year term. In 1959, Mrs. M was convicted, sentenced to ten years, and became a cellmate of Mrs. D. In 1961, Mrs. M reached the United States Supreme Court, which held that her rights under the fourteenth amendment had been violated. Her cellmate, Mrs. D, in 1962, reached the United States Supreme Court and asked for similar relief.

(6) Assume the same facts as in hypothetical (5) except that, in 1961, Mrs. D (rather than Mrs. M) reached the United States Supreme Court and obtained the ruling that enunciated the new constitutional concept. In 1964, Mrs. M reached the United States Supreme Court and asked for similar relief.

One other hypothetical along a slightly different vein may serve to illustrate the curious consequences that might ensue if retroactivity were regarded as a serious problem:

(7) Mrs. C committed a crime in 1958. Mrs. D also committed a crime during the same year. Mrs. C, in 1959, feeling that she

> should discharge her debt to society, surrendered to the police, was tried and convicted on the basis of illegally seized evidence. Mrs. M, who committed a crime in 1961, was tried and convicted as a result of illegally obtained evidence. She reached the United States Supreme Court which held that the fourteenth amendment had been violated. Mrs. D, who had long eluded the police, was finally apprehended in 1962.

Should Mrs. C, who surrendered and was convicted before the M decision, be denied the new constitutional right; whereas, Mrs. D, who avoided apprehension until after the M decision, receives the benefit of the new right?

While a careful study of the hypotheticals themselves may serve to indicate to the reader the only sensible approach that can be taken to the problem of "retroactivity," it may be well to emphasize briefly their import. This problem, in the opinion of the writers, should present no monstrous obstacle to a court. "Retroactvity" has become a terminological mirage which vanishes when confronted by the acid test of careful analysis. Where a prisoner, several years after his conviction, has urged that he had been deprived of a constitutional right, the courts invariably have been sympathetic to his plight. Generally, they have permitted him to obtain relief even though this may entail the birth of a new constitutional right. Certainly, if, in the interim, the Supreme Court has had occasion to confer the new constitutional right upon another, the prisoner should not be prejudiced by that decision. If anything, it should strengthen his position because he now has Supreme Court precedent upon which to rely. It is ludicrous to place the granting or withholding of a constitutional protection under the pivotal inquiry: "Which prisoner has won the race to the courthouse?"[73]

Waiver

Some may urge that the bar of waiver precludes the assertion of a constitutional right years later. Placing the waiver theory in the setting of a key hypothetical, it might be contended that a party convicted in 1935 should not be permitted to assert, for the first time, a denial of his constitutional rights in 1958. It would not seem, however, that the withholding

73. It is clear that, for purposes of considering retroactivity, *Mapp* and *Griffin* are substantially the same. In both *Mapp* and *Griffin* (and *Eskridge*), a new right under the fourteenth amendment had been espoused by the United States Supreme Court. It would appear to be incidental only, and a distinction without substance, that *Mapp* overruled an earlier decision. For, so far as a given prisoner is concerned, why should it matter that the Supreme Court at an earlier time had spoken or had not spoken? Were it otherwise, a *pre-Wolf* prisoner would be treated more favorably than a *post-Wolf* (but *pre-Mapp*) prisoner. And, in the *Griffin* setting, had the Supreme Court held (say in 1945) that an indigent could be denied a right to appeal, would the *Eskridge* case have been decided differently? Just as a race to the courthouse should not be determinative of an individual's constitutional rights, so also a prior running on the same track should not be determinative.

of constitutional protection should turn on the "passage of time." Indeed, in several cases, delay has not been viewed by the Court as a bar. *Pennsylvania ex rel. Herman v. Claudy*[74] is illustrative of that approach. There, the petitioner, in a Pennsylvania court in 1945, pleaded guilty to various charges sounding in theft and was sentenced to 17½ to 35 years in the penitentiary. In 1953, some eight years later, he petitioned for habeas corpus in the Pennsylvania Supreme Court, urging that his conviction should be invalidated as in violation of the fourteenth amendment. He asserted: "(1) that his pleas of guilty were the result of coercion and threats by state officers and (2) that at no stage of the proceedings was he either advised of his right to or given the benefit of counsel."[75]

The United States Supreme Court granted certiorari. In its brief before the Court, the state argued that the petitioner was "guilty of laches by filing his petition for a writ of habeas corpus about 8½ years after sentence."[76] It further contended that "a judgment of conviction by a court carried with it a presumption of regularity. The longer the judgment of conviction stands, the stronger the presumption of regularity becomes."[77] Rejecting the state's position, the Supreme Court found that "under the allegations here petitioner is entitled to relief if he can prove his charges."[78] Accordingly, in reversing, it directed that petitioner be granted a hearing. In reaching this result, a unanimous Supreme Court had this to say:

> In Uveges v. Pennsylvania, 335 U.S. 437 . . . where the facts were strikingly similar to those presented here, we held that representation by counsel was required by the Due Process Clause. Nor was petitioner barred from presenting his challenge to the conviction because 8 years had passed before this action was commenced. Uveges did not challenge his conviction for 7 years . . . . And in a later case we held that a prisoner could challenge the validity of his conviction 18 years after he had been convicted. Palmer v. Ashe, 342 U.S. 134 . . . . *The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy.*[79] (Emphasis added.)

It is noteworthy that in the *Eskridge* case the Supreme Court was apparently not troubled by the bar of waiver. For, in 1958, it saw fit to apply a newly enunciated constitutional concept to a 1935 conviction.[80]

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74. 350 U.S. 116 (1956).

75. *Id.* at 117.

76. Brief for Respondent, p. —, Pennsylvania ex rel. Herman v. Claudy, *supra* note 74 (100 L. Ed. at 128).

77. *Ibid.*

78. Pennsylvania ex rel. Herman v. Claudy, *supra* note 74, at 123.

79. *Ibid.* See also Moore v. Michigan, 355 U.S. 155 (1957). Further, it should be recognized that prisoners, in many cases, do not have access to law books in order to determine whether or not their rights may have been violated.

80. In addition to the above discussion on waiver, it may be pointed out that a

There is, of course, another sense in which the term "waiver" may be employed: a prisoner who would seek to take advantage of a newly enunciated constitutional protection would be barred by his failure to take appropriate objection at the time of his earlier trial and conviction. For example, a man convicted in 1955 on the basis of illegally obtained evidence in a state where such evidence is admissible, might, after becoming apprised of the *Mapp* decision, seek relief. At that time, the state might argue that he is barred because he failed at his trial to object to the tainted evidence.

Certainly, this waiver argument falls when subjected to realistic appraisal. In light of the *Wolf* decision of 1949—which permitted a state to admit tainted evidence in a criminal proceeding—the issue of the illegality of the search and seizure would have been entirely irrelevant in the 1955 trial. That being so, competent counsel would have no occasion to offer an objection. Indeed, were he to do so, it might be considered detrimental to his client's interests, for the trial judge may regard the objection as frivolous, unwarranted, unduly time-consuming and temerous, and the jurors themselves may become impatient and perhaps antagonistic. Since, then, such an objection would be not only futile but also, perhaps, hurtful, it would be incredible to hold that a defendant seeking *Mapp* relief should be deemed to have effected a waiver by virtue of his failure to make such an objection. Indeed, it would appear that a *pre-Wolf* defendant, under a parity of reasoning, should also not be required to make such an objection. This rejection of a waiver argument would also seem to be supported by language of Justice Frankfurter in the *Griffin* case, where he said:

> Candor compels the further acknowledgment that it would not be unreasonable for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negatived.[81]

Policy Considerations

In order to appraise intelligently the operation and impact of retroactivity in the area of newly enunciated constitutional rights of the individual, a number of policy considerations should be recognized. The *Mapp* situation affords a contemporary and typical setting which will be pursued for purposes

prisoner should not be prejudiced by his failure to take an appeal earlier since it may have seemed futile under existing law or his counsel may not have been acute enough to recognize the potential possibility of persuading the court of an expanded constitutional right.

81. Griffin v. Illinois, 351 U.S. 12, 25 (1956).

of illustration. It is recent, having been decided in 1961. It is typical, in that a new constitutional concept under the fourteenth amendment is involved.

Administrative Inconvenience

If retroactive effect were to be given, some might argue that great stress would thereby be placed upon existing judicial machinery.[82] Innumerable hearings would have to be held, crowded court calendars would become more crowded, and re-prosecution would be necessary in some instances.[83] Difficult as this may seem, it would be a sad day when mere expense and inconvenience were allowed to prevail over personal liberty. Further, it may well be that the hue and cry of the "inconvenience" has been exaggerated.[84] For example, the State of Illinois, in providing appropriate procedures for *pre-Griffin* prisoners, has demonstrated that a retroactive plan is feasible.[85]

Protection of Society

It is generally acknowledged that the criminal law exists to protect society. Hence, broadly speaking, if one, by committing a crime, has demonstrated that he is a menace to the community, his incarceration is deemed warranted. Upon the expiration of his sentence, in theory at least, he is no longer to be regarded as a menace. Some may urge, therefore, that if retroactive effect were given, the release of prisoners before their time would be inimical to the interests of the community.[86] In this connection it is

82. See Morris, *supra* note 42, at 432.

83. See pp. 296-98 *infra*.

84. Morris, *supra* note 42, at 433.

85. Note, *Effect of Overruling Prior Judgments on Constitutional Issues*, 43 VA. L. REV. 1279, 1293 (1957); Note, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161 (1957).

86. In Commonwealth ex rel. McGlenn v. Smith, 344 Pa. 41, 24 A.2d 1 (1942), the petitioner, serving a 10 to 20 year prison sentence for robbery, urged, by way of a writ of habeas corpus, that he was being unlawfully detained because at his trial he had not been accorded the right to counsel. In discussing the writ the court said:

> If this petition presents a case of "apparent need for" the "extraordinary remedy" of habeas corpus, it is reasonable to expect that our courts will soon be flooded with like petitions. In this State during the years 1939-1940 there were in our criminal courts 37,221 pleas of guilty, 10,755 convictions in which a jury trial was waived, and 6,104 convictions after a jury trial. In the same period there were 3,703 defendants sentenced to state prisons or reformatories and 18,449 sentenced to local jails. If even 20% of the defendants who are here annually sentenced to prison were "without benefit of counsel" and seek their discharge by writs of habeas corpus issuing out of the appellate courts, these two courts will annually have to hear and dispose of 1,107 such cases. Our courts should not for the reasons offered in this petition turn loose upon society the hundreds of convicts who were sent to prison after pleading guilty or being adjudged guilty by a jury, unless the law imperatively requires them to do so, and there is no such requirement. *Id.* at 51, 24 A.2d at 6.

If given prisoners are deemed entitled to their freedom on the ground that they have been deprived of a constitutional right, it is to be remembered that it is the Constitution (our form of government) that authorizes such relief. It is therefore no answer that the community will be flooded with dangerous men. In any event, a "flood" would not necessarily ensue. In order to be deemed entitled to a new constitutional right, a

noteworthy, however, that absolute discharge of prisoners would not necessarily ensue. It would seem, for example, that a *pre-Mapp* prisoner would first have to show in an appropriate hearing that the evidence used against him had been illegally seized and, if so, he would then have to be re-tried.[87]

Estoppel

In 1949, the United States Supreme Court, in *Wolf v. Colorado*,[88] held that the admission in a state court of illegally obtained evidence was not a violation of the fourteenth amendment. Relying upon the *Wolf* decision, some prosecutors in states where such tainted evidence was considered admissible might well have utilized this evidence rather than other available untainted evidence. Indeed, some prosecutors may have felt it unnecessary even to spend additional time and resources searching for other evidence. If retroactive effect were given to the *Mapp* decision, it might, because of the passage of time, render it difficult or impossible to secure this former evidence.[89] Hence, some states might argue that in light of its pronouncement in *Wolf*, the United States Supreme Court should now be estopped from giving retroactive effect to *Mapp*. Curiously, if this argument were accepted, retroactive effect would be given to *pre-Wolf* prisoners but not to those convicted after *Wolf*. In any event, the validity of this estoppel theory becomes questionable when it is recognized that the real effect is not to visit hurt upon the Supreme Court, but rather to detach prisoners, who had nothing to do with the *Wolf* decision, from their constitutional rights.[90]

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prisoner would have to establish that he was deprived of such a right and, if the showing is made, a new trial would ordinarily ensue.

87. See pp. 296-98 *infra*.

88. 338 U.S. 25 (1949).

89. *Cf.* Commonwealth ex rel. Murray v. Keenan, 186 Pa. Super. 107, 109, 140 A.2d 361, 362 (1958), *cert. denied*, 358 U.S. 868 (1958), where the court said:

> A writ of habeas corpus is not a substitute for an appeal, or for a writ of error, or for a motion for a new trial, or for the correction of trial errors. [This rule] . . . is not only designed to bring about orderly practice in the courts (although it does this), but it is also designed to promote justice by requiring that the trial be examined for errors within a time when witnesses and participants in the trial are available, and their recollections of both the trial and the offense charged are not dimmed by the passing of time. An accused should not be allowed to wait until the Commonwealth's witnesses have vanished or become ineffective through fading memories before challenging the fairness of his trial.

Of course, the passage of time may also operate against the accused. See pp. 296-97 *infra*. Also, such "waiting" in prison seems to be unrealistic.

90. It should be noted that an illegal "seizure," as of and after the *Wolf* decision was considered a violation of the fourteenth amendment. The state which has violated a provision of the Constitution should not be heard to assert that estoppel should be visited upon another court. One who would ask for consideration in the way of estoppel should have "clean hands." In any event, it would seem that prosecutors, who are charged with *upholding* the law, should not utilize such evidence.

Liberty and Equality

In the system of government that prevails in this country, the high value placed upon individual liberty should not be minimized. Indeed, the underlying philosophy is that the government exists for the individual—not the individual for the government.[91] Hence, it is of the utmost importance that the individual enjoy all of the fruits of liberty irrespective of the time when they may ripen. The giving of retroactive effect to newly enunciated constitutional concepts would certainly be in line with this basic philosophy.

Another fundamental concept that is built into the American system of government is that all persons shall have equal rights under the Constitution—both in principle and in the enjoyment of their benefits. Consistency with this principle would seem to demand that the factor of "time" should have no bearing. The following example is illustrative: A is convicted one year before a decision espousing a new constitutional right. B is convicted one day before this decision. C is placed on trial one day after the decision. If retroactive effect is not given, C would enjoy the expanded constitutional right but A would not. B might enjoy it if the Court holds that the new decision is applicable because his appeal was pending at the time of the decision, or he may not receive its benefit if the Court holds that the time of trial is the determinative factor. Thus, individuals, separated quite fortuitously by only a few hours, days or months, would have very different, and unequal, constitutional rights. Such an inequality would be magnified on a "geographical" basis since, in the absence of a Supreme Court requirement, some states might choose to give retroactive effect while others might refuse.[92]

Federal-State Relationship

If the United States Supreme Court were to require that retroactive effect be given to *Mapp*, some might urge that this constituted an interference with the function of the states. For example, the four dissenting Justices in *Griffin* felt that a requirement of retroactivity would be "an interference with state power for what may be a desirable result, but which we believe to be within the field of local option."[93] Along a similar vein, the State of Washington, in *Eskridge*, argued in its brief that a requirement of retroactivity would be violative of the tenth amendment which reserves to the states all undelegated powers.[94] A majority of the Supreme Court,

91. See Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion).

92. In light of the extreme inequality on both a "time" and "geographical" basis and the arbitrary and capricious results (see pp. 280-84 *supra*) created by a failure to apply newly enunciated constitutional rights to past factual settings, such a failure would seem inconsistent with the concept of equal protection.

93. Griffin v. Illinois, *supra* note 81, at 29.

94. Brief for Respondent, pp. 19, 20, Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958).

however, in both cases was apparently not troubled by such an argument. While traditionally the area of criminal law enforcement has been left mainly in the sphere of state control, the Supreme Court has given effect to personal constitutional rights arising out of that field, without serious difficulty.[95] If this federal power were not available, rights under the Constitution would become empty forms. Granted, a healthy balance ought to be struck between federal and state power; however, the maintenance of the balance should never require as its price the denial of an individual's constitutional rights. While this area of the law is an evolving one, it would seem clear that the Court in recent times has taken cognizance of the great interests of the individual.[96]

Incentive

It is noteworthy that a requirement of retroactivity may have another salutary effect. Were the Supreme Court to adopt a practice of retroactivity in the area of personal constitutional rights, states might be encouraged in advance of the event to give fuller expression to such rights. Thus, since individual rights would be promoted on both a state and federal level contemporaneously, the Bill of Rights would thereby become a more effective and meaningful instrument.

Thus it would appear that in the area of personal constitutional rights, "policy" itself dictates that new decisions—such as *Mapp*—should be applied to prior cases by the courts.[97]

Comparative Areas

It may be well to look briefly at the manner in which courts have treated retroactivity in other areas of the law.[98] Several significant considerations

95. See note 85 *supra.*

96. See note 3 *supra.* The *Mapp* decision itself indicates a shift of emphasis by the Court. In Wolf v. Colorado, *supra* note 88, the Court, noting the experience and interest of the states, relegated individual constitutional rights to the realm of state protection. An apparent shift of emphasis, however, culminating in the *Mapp* case, has taken place and the majority of the Court has shown greater concern with individual rights and less with assertions that the federal-state relationship will be strained. The precise impact of this shift on various aspects of constitutional rights is one which will become more clear, however, only through further case development.

97. While there is little authority or writing on the subject, it appears that courts have the inherent power to give retroactive effect to a decision or to limit it to the future. Griffin v. Illinois, *supra* note 81 (concurring opinion); Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). See generally, Arkadelphia Milling Co. v. St. Louis Southwestern Ry., 249 U.S. 134, 146 (1918); Northwestern Fuel Co. v. Brock, 139 U.S. 216, 219 (1890); Gumbel v. Pitkin, 124 U.S. 131, 145 (1887); Krippendorf v. Hyde, 110 U.S. 276, 283 (1883). It should, however, be noted that considerations of "equal protection" may have some bearing on this "choice." See note 92 *supra.*

98. Snyder, *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121 (1940); Stimson, *Retroactive Application of Law—A Problem in Constitutional Law,*

should be noted: first, the policies involved generally differ greatly from those found in the area of personal constitutional rights; and second, even though the policy considerations in the comparative areas differ, the courts, in deciding whether to give retroactive effect, have generally acted in a manner consistent with the protection of the individual.

In situations involving contract or property rights, the courts do not usually give retroactive effect to their new interpretations of the law.[99] Such a policy is a sound one, since retroactivity here would serve to "clog business transactions"[100] and "unsettle titles."[101] The business community needs stability and a set of standards upon which reliance may be placed. Courts, in dealing with these cases, have frequently observed that to give retroactive effect here would be violative of fundamental "principles of justice."[102] Clearly, the policies centering around reliance and business certainly are not the same as those involved in the area of personal constitutional rights.

In the area of criminal law, a distinction should be noted between new decisions which, if applied retroactively, would operate to the detriment of a given accused, and those which would confer a benefit. In the former situation, the courts generally refuse to accord retroactive effect.[103] As one court has aptly stated:

> We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect . . . . This rule applies the same principle as the constitutional prohibition of *ex post facto* legislation. It will prevent cruel and unusual punishment.[104]

Another court has noted that respect for the law "is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law."[105] It is noteworthy that the courts in this setting deny retroactivity in order to protect the individual.

Where, on the other hand, a new decision, if applied retroactively, would

38 MICH. L. REV. 30 (1939); Seeman, *The Retroactive Effect of Repeal Legislation*, 27 KY. L.J. 75 (1938); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592 (1935); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924); Freeman, *Retroactive Operation of Decisions*, 18 COLUM. L. REV. 230 (1918); Smith, *Retroactive Income Taxation*, 33 YALE L.J. 35 (1923); Notes, 43 VA. L. REV. 1279 (1957), 60 HARV. L. REV. 437 (1947), 47 HARV. L. REV. 1403 (1934).

99. Snyder, *supra* note 98, at 131.
100. *Id.* at 140.
101. *Ibid.*
102. *Ibid.*
103. Snyder, *supra* note 98, at 131.
104. State v. Longino, 109 Miss. 125, —, 67 So. 902, 903 (1915).
105. State v. O'Neil, 147 Iowa 527, —, 126 N.W. 454, 456 (1910).

confer a benefit upon an individual, different policy considerations are present. As a Pennsylvania court has said, in giving retroactive effect to a criminal law theory:

> When our court inadvertently promulgates law, which at a later date they or the appellate courts consider to be unfair, unjust or improper, the courts have the power to correct their earlier error. In releasing petitioner, we believe error is being corrected. We feel strongly that the responsibility of our courts should not end with the conviction and sentencing of criminal offenders, thereafter ignoring circumstances and facts that would indicate a different sentence, or as in this case, no sentence, should have been imposed.[106]

Since the above reasoning is consistent with basic principles of liberty and equality and takes cognizance of the individual's interest, the approach is a sound one.[107]

However, there are other decisions in the same area which have refused to give retroactivity. *Warring v. Colpoys*[108] is typical of this line of cases.[109] There, a Circuit Court of Appeals refused to give retroactive effect to a United States Supreme Court decision[110] which interpreted a contempt statute differently than the court that had earlier convicted Warring. The Circuit Court of Appeals, holding that the prisoner was "not entitled to discharge upon the habeas corpus writ,"[111] rejected "the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction and that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939."[112] A more sensible approach, in the opinion of the writers, could have been taken. The District Court had the power at the time to convict on the basis of its interpretation of the statute. A subsequent United States Supreme Court decision demonstrated that it had erred. Hence,

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106. Commonwealth ex rel. Leaks v. Myers, 139 Legal Intell. No. 55, p. 1, col. 1 (Phila. C.P., Sept. 8, 1958). See Notes, 20 U. PITT. L. REV. 703 (1959); 2 STAN. L. REV. 769 (1959).

107. It should be noted, however, that a recent Pennsylvania Supreme Court decision, Commonwealth ex rel. Hough v. Maroney, 402 Pa. 262, 168 A.2d 732 (1961), without assigning any reason, appears to have denied retroactive effect in a setting similar to that of the *Leaks* case.

108. 122 F.2d 642 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 678 (1941).

109. See Meyers v. United States, 181 F.2d 802 (D.C. Cir. 1950) (dictum), *cert. denied*, 339 U.S. 983 (1950); Meyers v. Welch, 179 F.2d 707 (4th Cir. 1950) (dictum); State ex rel. Gosnell v. Edwards, 198 Tenn. 83, 277 S.W.2d 444 (1955); *accord*, United States v. Gandia, 255 F.2d 454 (2d Cir. 1958); Collins v. Webb, 133 F. Supp. 877 (N.D. Cal. 1955).

110. Nye v. United States, 313 U.S. 33 (1941). Indeed, in this case the Court noted that a geographical interpretation should be placed on a statute in order to effect clarity.

111. Warring v. Colpoys, *supra* note 108.

112. *Ibid.*

imprisonment was no longer justified. Apparently feeling itself caught in the abstract dilemma relating to court "power" and bound to a narrow view of the relief obtainable by habeas corpus, the Circuit Court of Appeals failed to look at the practical result. Despite the fact that a person was in prison who should not have been under its own interpretation of the contempt statute, the Supreme Court failed to grant certiorari.[113] The injustice of *Warring v. Colpoys*[114] is obvious, and the case merits no further comment.

Along similar lines, the famous *Durham*[115] case also precluded retroactive effect. In this case, however, the court in its opinion setting forth the new criminal law concept relating to insanity limited it to prospective application.[116] This limitation was apparently designed to prevent any administrative inconvenience which might be caused by requests for relief from prisoners convicted under the old standard.[117] Yet if the new standard was an enlightened one that was more in accord with reality, it would seem that all persons should benefit from it. Indeed, some persons may be serving sentences who were "insane" at the time they committed crimes under the tests subsequently developed. As indicated previously, policies of liberty and equality far outweigh the often-exaggerated considerations of administrative inconvenience.[118]

While considerations relating to the finality of judgments or res judicata seem important in the civil area where disputes must be settled and predictability must be attained, they should not be significant in the area of criminal law.[119] The only finality which would seem to be promoted would be that of the prison records and routine. Nevertheless, it should be pointed out that changing criminal law concepts differ from constitutional rights, and are left more in the sphere of state control.

Before leaving the comparative area, it may be well to note that some judges have applied cases or situations involving retroactivity in one area to others without recognizing that the policy considerations differ.[120] For example, Justice Frankfurter in his concurring opinion in the *Griffin* case, supported his argument for limiting the decision prospectively by pointing out that "more than a hundred years ago . . . the Supreme Court of Ohio, confronted with a problem not unlike the one before us, found no difficulty in doing so when it concluded that legislative divorces were unconstitu-

113. 314 U.S. 678 (1941).
114. *Supra* note 108.
115. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
116. *Ibid.*
117. See Notes, 43 VA. L. REV. 1279 (1957); 20 U. PITT. L. REV. 703 (1959).
118. See pp. 287-89 *infra.*
119. Of course, an exception exists where one, who has been acquitted of a crime, should not be subjected to the fear of again being placed in jeopardy.
120. See Warring v. Colpoys, *supra* note 111; Griffin v. Illinois, *supra* note 81 (concurring opinion, Frankfurter).

tional."[121] The policy, however, behind such a prospective limitation is obviously to protect those individuals who relied on the apparent legality of legislative divorces. Indeed, to grant retroactivity in such a situation would create problems of void second marriages and illegitimacy. Clearly, these policy considerations differ from those in the *Griffin* case. Maximum protection of the interests of the individual in the legislative divorce context is achieved by not permitting retroactive effect, while in the *Griffin* case it is best effectuated by requiring retroactive application. Justice Frankfurter also stated that the "sound reason"[122] set forth by Justice Cardozo in the case of *Great Northen Ry. v. Sunburst Oil & Refining Co.*[123] supported a prospective limitation of the *Griffin* doctrine. It should be noted, however, that very different policy considerations were present there. The *Sunburst* case involved the question of whether new rates for shipping applied retroactively. As one commentator has pointed out, there was,

> [N]otice to the parties at the time that the shipments were made that the rates were tentative and subject to retroactive alteration. It follows that neither party could have changed its position in reliance upon an unalterable rate, so that the retroactive application of the new rate was in no way unfair or unjust.[124]

He also noted that if the rate had not been tentative and a new rate were applied it would have been unjust.[125] Thus, in *Sunburst*, policies which affect the business world are involved, not the very different policies which relate to personal constitutional rights.

An analysis of comparative areas indicates that in many cases dealing with retroactivity, courts are concerned with *protecting the rights of the individual*—a fortiori, such concern should prevail in the area of personal constitutional rights.

Philosophical Aspects

In appraising the problem of retroactivity, some may be inclined to look at it from a philosophical viewpoint. "Natural Law" adherents, for example, believing that the courts merely "discover" what has always been the law, would feel that retroactive effect should be given to constitutional rights as and when discovered.[126] Those tending toward the "positivistic" school, on the other hand, viewing changes in the law as "new" law, might urge that retroactive effect ought not to be given.[127] What is not often recognized, how-

121. Griffin v. Illinois, *supra* note 120.
122. *Ibid.*
123. *Supra* note 97.
124. Stimson, *supra* note 98, at 55.
125. *Ibid.*
126. Great Northern Ry. v. Sunburst Oil & Refining Co., *supra* note 97; Stimson, *supra* note 98.
127. *Ibid.*

ever, is that either philosophical position may constitute a two-edged sword. If a newly enunciated right has always existed and is merely being discovered, it could be argued that there had been a waiver of such a right by those who had been convicted before the new decision and are now serving prison terms. Similarly, the sword of the positivist can cut two ways. If it is decided that retroactivity should be accorded, it would be inconsistent for a person of this philosophy to urge a waiver. For, since the new right never before existed, there could have been no occasion to raise an objection at an earlier time. Unfortunately, legal philosophy has often been far removed from the affairs of men and hence from the "law in action." Justice Cardozo, in discussing the problem of retroactivity and the variety of philosophies in which courts might indulge, declared that the Supreme Court was not concerned with "the wisdom of their philosophies, but the legality of their acts."[128] Justice Frankfurter, in *Griffin*, put it well when he remarked: "The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma."[129] In the opinion of the writers the "law in action," and its real effects upon individual human beings, is the important item to consider—not how neatly given philosophies seem to work. Indeed, the great and sobering crises of modern times have emphasized the need for flexibility in legal philosophy today.[130]

However, for those who feel strongly that philosophy should play a part in resolving the problem of retroactivity, it is suggested that the application of newly enunciated constitutional protections to earlier fact settings is compatible with either philosophy. Thus, if retroactivity is granted on "natural law" grounds, it may be argued philosophically that there was no waiver because the individual had no knowledge of, or insight into, the "existing law" which was later discovered by an evolving and more enlightened society. Likewise, from a "positivistic" standpoint, if the law is regarded as having been changed, it would not be inconsistent to view the imprisonment prior to the new decision as valid (in accordance with the law as it then existed), and to regard continued imprisonment after the decision as illegal. In other words, a valid imprisonment may become an illegal one as of and after the birth of a new constitutional right.[131]

128. Great Northern Ry. v. Sunburst Oil & Refining Co., *supra* note 97, at 365.

129. Griffin v. Illinois, *supra* note 81, at 25.

130. Too often, legal philosophy is used as a rationalization and does not really explain results. The Nuremberg Trials have pointed up the inadequacy of some of the main currents of philosophical thought. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

131. If it were argued that a "change in times" may have accounted for the birth of a new constitutional right and hence one who had been convicted before that

RELIEF

Once it has been determined that a newly enunciated constitutional concept must be given retroactive effect, it is important to consider how this can be accomplished. It would not, as some have feared, result in the wholesale release of prisoners.[132] A given prisoner at a preliminary hearing would have to establish the denial of a constitutional right and, if he succeeded, he would then have to be retried. The *Mapp* setting may be availed of for purposes of illustration: a *pre-Mapp* prisoner, convicted on the basis of alleged illegally obtained evidence would, at a preliminary hearing, have the burden of establishing the fact of illegality. This allocation of burden would seem necessary to prevent frivolous claims. If the transcript of his trial was still available, he might utilize it to the extent that it might be helpful. Unfortunately, however, this may accord him little aid, since the question of the legality of the seizure would have been entirely irrelevant at the time of his trial. Further, it may well be that the former prosecutor is no longer in office and is not now available, and the officers who participated in the arrest and seizure of the evidence, likewise, may no longer be available. Even if they are available, their memories may have faded or their obvious interest may color their testimony. In light of these practical difficulties, it would not be unfair to require the state to assist the prisoner in whatever respects that it can—such as free and easy access to records. If, at this hearing, then, the prisoner is unable to make a satisfactory showing of the fact of illegality, he of course would be returned to prison. If he sustains the burden, a new trial would have to follow. In fairness to the state, in light of the passage of time, the transcript of the first trial should be available for use in this new trial if it is necessary. It might be necessary if important witnesses have died or are otherwise not available. Of course, the prisoner himself, because of the passage of time, may be unable to defend himself effectively. Where many years have elapsed, some may argue that the giving of retroactive effect is tantamount to outright discharge—on the theory that the prosecution would have an impossible task of proving guilt beyond a reasonable doubt. This argument fails, however, to take an important factor into account. If many years have elapsed, it may well be that the prisoner would be unable to prove satisfactorily that his conviction was based on illegally seized evidence. In such a case, the new trial stage would not even be reached. In the relatively rare case where the prisoner is able to prove the fact of illegality at the preliminary hearing, but the prosecution has insufficient proof for purposes

"change in times" should not be permitted to share in the new right, under a parity of reasoning it could be countered consistently that the conviction and imprisonment prior to the enunciation of the new right were valid, but that continued imprisonment thereafter would be illegal.

132. See note 86 *supra*.

of the new trial, the prisoner should be discharged. For, he has served many years in prison; he has proved illegality and hence entitlement to the new constitutional protection; and he is ready and willing to stand a new trial. Just as the prisoner is entitled to the benefit of a new constitutional right and a new trial only if he has first proven the fact of illegality, the state is permitted to reincarcerate the prisoner only if it is able to prove guilt upon the new trial.

If it appears that the giving of retroactivity would place an undue strain on existing judicial machinery, several courses of action suggest themselves. Additional special judges could be appointed. Indeed, a separate hearing tribunal might be created to keep the prisoners' applications out of the flow of normal court business. While this would undoubtedly be burdensome upon a given state, it could be made a temporary affair. That is to say, by court rule, it could be provided that applications for *Mapp* relief must be made within a given period of time, such as one or two years, or be forever barred.[133] While it is true that this would involve expense, it should be enough to say that the granting of a constitutional right is worth the price. The state may spend its citizenry's money to put a criminal in prison; the state may and should spend money to keep out of prison one who under the Constitution does not belong there.

The specific procedural vehicles whereby *pre-Mapp* prisoners may seek to take advantage of that decision vary greatly from jurisdiction to jurisdiction. The gamut is run from state and federal habeas corpus to other comparable post-conviction remedies. Many of these remedies are of such a complex and evolving nature that an intelligent exploration of them within the bounds of this paper would be impossible. Some states, perhaps, under the guise of "lack of remedy," may refuse to accord retroactivity.[134] Others may feel, and with this the writers agree, that a state must provide the procedural machinery whereby a right under the Federal Constitution is given effect.[135] It may well be that greater strain will be placed on the delicate balance of power between the state and lower federal courts in the area of habeas corpus if some states refuse to provide a remedy by which retroactive effect may be given. For, in such cases, since a federal constitutional right is involved, the aggrieved state prisoner may find his way by habeas corpus to a lower federal court.[136] Of course, it would be ideal if each state provided

133. If such limitation were set up, prisoners should be apprised of their rights and provided access at least to Supreme Court reports.

134. *Cf.* Dowd v. Grayer, 233 Ind. 68, 116 N.E.2d 108 (1953).

135. *Cf.* Ex Parte Bell, 19 Cal.2d 488, 122 P.2d 22 (1942).

136. See generally, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Reitz, *Federal Habeas Corpus: Impact on an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Hart, *Foreward:*

special machinery for a limited period of time to handle retroactivity business. In that event, existing state procedures could be kept intact for ordinary judicial business.[137]

CONCLUSION

In the area of personal constitutional rights, it would appear that there is no sound course of action other than to accord relief to individuals convicted before the birth of such rights. It has been shown that the courts generally accord individuals their constitutional rights even though their original trials ensued in the distant past. The mirage of retroactivity arises only when one individual reaches the courthouse before another. Certainly, the granting or withholding of relief should not turn on the pivotal question of which individual was the faster runner. The loser of the race should not be prejudiced by the existence of a decision enunciating a new constitutional right. If anything, his position should be strengthened by the fact that helpful precedent is now available. Had he won the race to the courthouse, he would have received his just due. He should not be entitled to less simply because he had run and lost. While on the surface retroactivity may appear to pose a problem, careful scrutiny may unmask it and reveal it for what it is—a mirage.

As has been shown, the application of changing constitutional concepts to prior fact settings is consistent with modern legal development, sound analysis, policy, comparative areas, and philosophy. Unfortunately, however, there is a natural tendency on the part of some not to disturb the status quo. Their inclination, rather, is to battle on "more current" fronts. Yet individuals in prison should not become "forgotten men," relegated to a second class citizenship that does not include an expanded Bill of Rights. Nor should the task of effectuating constitutional rights be left solely to the option of the states. The *Eskridge* case stands as a bleak monument to the failure of at least one state to extend constitutional protection to individuals behind prison bars.

The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 HARV. L. REV. 84, 122 (1959).

137. Other kinds of relief that might be sought should be noted:
(1) Those who had been convicted without benefit of their constitutional rights as now envisioned, and who had served their prison terms, might seek restoration of their civil rights.
(2) Those presently on parole might seek to have their paroles discharged.
(3) Those who had been convicted and sentenced under habitual offender statutes might seek the reduction of their prison terms by showing that an earlier conviction was brought about through the denial of constitutional rights subsequently recognized. Thus, if retroactive effect were given to *Mapp*, a person whose sentence as an habitual offender rested partially on a conviction obtained through the use of illegally obtained evidence would be entitled to a new trial and, if successful, a recomputation of his sentence.

The course of action for the United States Supreme Court is a clear one. It should speak decisively to assure that all individuals, in the *Mapp* setting and in comparable areas, are given the benefit of changing constitutional concepts. Further, the Court may continue to expand personal constitutional rights undaunted by the illusion of retroactivity.

Engaged as it is in a world-wide struggle for the hearts and minds of men, this nation must not—indeed, it dare not—permit the mirage of retroactivity to result in the denial of liberty and equality to any individual. All must have the opportunity to partake of the "fruits of liberty." For by the abundance or lack of such fruit, this great nation shall be judged.