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law, he is entitled to most of the procedural advantages accorded the rich. This does not accord with the values of a society which is vitally concerned about deprivation of civil rights. Moreover, the judiciary has expressed disatisfaction with the definition of "criminal cases," by extending it to include proceedings, traditionally civil in nature,[75] where a defendant's liberty is threatened.

Allowing a right to free transcript in civil cases would increase the financial burden on a county. But some of the cost may be recovered. If an indigent were successful in securing and collecting a monetary judgment, the expense of a transcript could be charged as part of his court costs.[76] In any case, the legislature should re-evaluate its determination of who is entitled to the full and adequate appeal which often only a transcript can provide.

*Ronald E. Mallen**

[75] See Justice Edmonds' dissents in Gross v. Superior Court, 42 Cal. 2d 816, 270 P.2d 1025 (1954) (sexual psychopathy hearing) and in *In re* Paiva, 31 Cal. 2d 503, 190 P.2d 604 (1948) (coram nobis hearing).

[76] This is done in New York. N.Y. CIV. PRAC. LAW § 1102(d).

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RETROACTIVITY OF CONSTITUTIONAL DECISIONS

Within the last few years the Supreme Court has greatly expanded the concept of the rights guaranteed by the Constitution to a person accused of crime. Extending established federal rules to proceedings in state courts, the Court has said: that evidence obtained by illegal search and seizure is not admissible;[1] that the privilege against self-incrimination is now available;[2] and, as a corollary of this privilege, that neither the judge nor the prosecutor may comment on the defendant's failure to testify.[3] The Court has also applied the sixth amendment's guarantee of counsel to the states and broadened the right, holding that an accused is entitled to counsel not only at his trial but, on request, as soon as the proceedings focus upon him as a suspect.[4] In spite of public protest that the criminal is being protected at the expense of public safety, the Supreme Court has deemed it necessary for the assurance of due process of law that these protections be accorded to every accused.

These new decisions raise the question of whether they are to be applied to cases finally decided[5] before the new extensions were announced. An indication as to retroactive application in the majority opinion itself would be controlling, but

[1] Mapp v. Ohio, 367 U.S. 643 (1961).

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

[3] Griffin v. California, 380 U.S. 609 (1965).

[4] Escobedo v. Illinois, 378 U.S. 478 (1964).

[5] A conviction has become "final" when the judgment has been rendered, availability of appeal has been exhausted, and time for petition for certiorari has elapsed. Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

usually such indication does not appear, leaving it to the lower courts to determine the intention of the Supreme Court.[6]

At one time in our judicial history, the question of retroactive application presented little problem to the courts. Following Blackstone's view that the judge was not the creator of the law but only its discoverer, the courts saw an overruled decision as a failure at discovering the true law, while an overruling decision was not new law but a statement of what had always been the law.[7] Under this concept, every new decision was "retroactive," since it had always been the law. Blackstone's view has since been discarded by many of our courts, which are now of the opinion that an overruled decision should be recognized as governing for the period it was in effect.[8] This view would normally preclude retroactive application of a new decision.

Linkletter v. Walker

Somewhere between these two views is that taken by the Supreme Court in *Linkletter v. Walker*,[9] that the Court is "neither required to apply, nor prohibited from applying a decision retrospectively . . . [but] must . . . weigh the merits and demerits in each case . . . ."[10]

The problem of determining whether a decision is to have prospective or retroactive effect is illustrated by *Mapp v. Ohio*,[11] which applied to state courts the rule excluding evidence obtained by illegal search and seizure. For four years after this decision, neither the courts[12] nor writers[13] could agree on its retroactivity.

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[6] See, *e.g.*, United States *ex rel.* Linkletter v. Walker, 323 F.2d 11, 15 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965); Bender, *The Retroactive Effect of an Overruling Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 668-71 (1962).

[7] See 1 BLACKSTONE, COMMENTARIES* 69-70; GRAY, NATURE AND SOURCE OF THE LAW 222 (2d ed. 1921).

[8] See, *e.g.*, Linkletter v. Walker, 381 U.S. 618, 624-25 (1965); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940); United States *ex rel.* Angelet v. Fay, 333 F.2d 12, 16 (2d Cir. 1964), *aff'd*, 311 U.S. 654 (1965); Gaitan v. United States, 317 F.2d 494, 497-98 (10th Cir. 1963). See generally Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 909, 916-21 (1962).

[9] 381 U.S. 618 (1965). This is the first case in which the Supreme Court has refused to apply a constitutional decision retroactively. *Id.* at 628.

[10] *Id.* at 629.

[11] 367 U.S. 643 (1961).

[12] Cases holding *Mapp* retroactive: Hall v. Warden, 313 F.2d 483 (4th Cir. 1963); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); California v. Hurst, 325 F.2d 891 (9th Cir. 1963), *rev'd*, 381 U.S. 760 (1965). Cases holding *Mapp* not to be retroactive: Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964), *petition for cert. dismissed*, 380 U.S. 959 (1965); United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963); United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965).

[13] Articles concluding that *Mapp* is retroactive: 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); Torcia & King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 DICK. L. REV. 269 (1962). Articles concluding that *Mapp* is not retroactive: Bender, *The Retroactive*

In *Linkletter*, the Supreme Court settled the controversy, declaring that *Mapp* was not retroactive, and, in answering that question, applied guidelines which may be useful in determining the retroactivity of other decisions.

In addition to these guidelines, the Court also considered whether *Mapp* was concerned with the fairness of the trial and decided that it was not.[14] It compared *Mapp* to decisions to which retroactive application had been given and said:

> [I]n each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All the petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned . . . . In Griffin v. People of State of Illinois, [351 U.S. 12] . . . the appeal which was denied because of lack of funds was "an integral part of the [State's] trial system for finally adjudicating the guilt or innocence of a defendant." . . . Precluding an appeal because of inability to pay was analogized to *denying* the poor *a fair trial.* In Gideon v. Wainwright . . . [372 U.S. 335] . . . we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly forward his claims of innocence, and violation of previously declared rights adequately. Because of this the *judgment lacked reliability.* In Jackson v. Denno . . . [387 U.S. 368] . . . the *holding went to the basis of fair hearing and trial* because the procedural apparatus *never assured* the defendant a *fair determination of voluntariness.*[15]

The implication is that if the fairness of the trial had been in question, *Mapp* would have been applied retroactively. The tone of the opinion makes it clear, though it does not expressly so state, that reliability of the guilt-determining process must be assured before the Court will look at the possibility of purely prospective application of a constitutional decision.

The guidelines to be applied, once the question of fairness is settled, are: the prior history of the rule in question; the reliance placed on the old doctrine; the purpose of the new rule and the effect retroactive application would have on this purpose; and the effect it would have on the administration of justice.[16]

Prior History. In 1949, the Supreme Court had specifically refused to make the rule excluding illegally obtained evidence binding upon the states[17] and had since refused to change this position.[18]

Reliance on the Old Rule. Relying on the fact that the Supreme Court had consistently refused to overrule its position, the states continued to use illegally-

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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. 319; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices,* 34 ROCKY MT. L. REV. 150 (1962); Note, *Collateral Attack of Pre-Mapp v. Ohio Convictions Based on Illegally Obtained Evidence in State Courts,* 16 RUTGERS L. REV. 587 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L.J. 907 (1962).

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

[15] Linkletter v. Walker, 381 U.S. 618, 639 & n.20 (1965). (Emphasis added.)

[16] *Id.* at 629, 636.

[17] Wolf v. Colorado, 338 U.S. 25 (1949).

[18] See Irvine v. California, 347 U.S. 128 (1954); Stefanelli v. Minard, 342 U.S. 117 (1951).

obtained evidence in their courts and secured countless convictions on the basis of such evidence.[19]

Purpose and Effectuation of Purpose. The purpose of the exclusionary rule is that of deterrence—to discourage the police from violating an individual's constitutional rights in order to obtain evidence.[20] If the evidence so obtained is excluded from the courts, the incentive for the violation no longer exists.[21] This deterrent purpose would in no way be served by releasing guilty prisoners convicted before the rule became effective.[22]

Effect on the Administration of Justice. Because only twenty-six states followed the exclusionary rule at the time of the *Mapp* decision,[23] retroactive application would presumably result in retrial of a large number of prisoners, placing a great burden on the courts and seriously disrupting the judicial system.

The Court decided, on the basis of these tests, that *Mapp* would not be applied retroactively.

The dissent urged that the court should not have ignored the inequality resulting from discrimination between prisoners whose convictions had become final before the *Mapp* rule was announced and those whose convictions had not then become final.[24] However, to use this standard is to return to the days of Blackstone's "automatic retroactivity," for the only way to attain equality of application is to make every decision retroactive.

The Supreme Court has yet to decide the retroactivity of the rules of *Escobedo v. Illinois*[25] and *Griffin v. California*,[26] but, in *Linkletter*, it has provided the tools needed to construct the likely result.[27]

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[19] See Linkletter v. Walker, 381 U.S. 618, 637 (1965). At the time of the *Mapp* decision, twenty-four states did not follow the exclusionary rule. Elkins v. United States, 364 U.S. 206, Appendix, 224-32 (1960). Some states, California included, did adopt the exclusionary rule between 1949, the time of the *Wolf* decision, and 1961, the time of the *Mapp* decision. See, *e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[20] See, *e.g.*, Mapp v. Ohio, 367 U.S. 643, 651-52 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 942 (1962).

[21] Elkins v. United States, 364 U.S. 206, 217 (1960).

[22] See Bender, *supra* note 13, at 661; Traynor, *supra* note 13, at 341; Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 942 (1962).

[23] Elkins v. United States, 364 U.S. 206, Appendix, 224-32 (1960).

[24] 381 U.S. at 641-42 (1965). The discrimination was particularly striking here, as Linkletter's offense actually was committed more than a year after Miss Mapp's. *Ibid.* See also California v. Hurst, 325 F.2d 891, 895 (9th Cir. 1963), *rev'd*, 381 U.S. 760 (1965); Hall v. Warden, 313 F.2d 483, 496 (4th Cir. 1963); Bender, *supra* note 13, at 675-77; Currier, *supra* note 13, at 237; Torcia & King, *supra* note 13.

[25] 378 U.S. 478 (1964). Other courts have considered *Escobedo's* retroactivity. Cases holding or asserting that *Escobedo* is retroactive are: United States *ex rel.* Walker v. Fogliani, 343 F.2d 43 (9th Cir. 1965) (dictum); Fugate v. Ellenson, 237 F. Supp. 44 (D. Neb. 1964). Cases holding that *Escobedo* is not retroactive are: United States *ex rel.* Walden v. Pate (7th Cir., July 27, 1965); Carrizosa v. Wilson, 244 F. Supp. 120 (N.D. Cal. 1965), *appeal docketed*, No. 20304, 9th Cir., Aug. 12, 1965; United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237 (N.D. Ill. 1965); State v. Johnson, 43 N.J. 572, 206 A.2d 737 (1965).

[26] 380 U.S. 609 (1965).

[27] These guidelines have already been utilized in Carrizosa v. Wilson, 244 F. Supp.

Escobedo v. Illinois

In *Escobedo*, the Supreme Court held that a person in custody is entitled to counsel upon request as soon as the proceeding becomes accusatory and focuses upon him as a suspect, and the police have begun a process of interrogation. A confession elicited from him after denial of his request for counsel is inadmissible.[28]

Like *Mapp*, *Escobedo* is not aimed at making trial procedure more reliable.[29] The prohibition is against the use of voluntary confessions and incriminating statements—the use of involuntary confessions has long been prohibited.[30] Like the illegally seized evidence of the *Mapp* case, the voluntary confessions proscribed by *Escobedo* were in all probability true. With few exceptions, an innocent person does not voluntarily confess to a crime he did not commit. Since the truthfulness of the confession is not involved, the beneficiaries of retroactivity would be guilty prisoners. The compelling reason for retroactivity—questionable reliability of the guilt-determining process—being absent, it is necessary to apply the tests evolved in *Linkletter*.

Prior History. The extension of the right to counsel announced by *Escobedo* was a completely new rule—a provision which went beyond any such protections given in the past in either state or federal courts.[31]

Reliance on the Old Rule. There is an even stronger case for reliance of state officials here than in the *Mapp* situation. State officials were aware that the illegal searches and seizures were not condoned in federal courts, but the Supreme Court had given no hint that refusal to allow an accused to see a

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120 (N.D. Cal. 1965), *appeal docketed*, No. 20304, 9th Cir., Aug. 12, 1965, and *In re* Gaines, 63 A.C. 235, 45 Cal. Rptr. 865, 404 P.2d 473 (1965).

[28] People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 *cert. denied*, 381 U.S. 937 (1965), extended the rule of *Escobedo* by a holding that the accused need not request counsel; the police must advise him of his right to counsel and to remain silent, or a confession subsequently elicited will not be admissible. *In re* Lopez, 62 Cal. 2d 368, 42 Cal. Rptr. 188, 398 P.2d 380 (1965), held that *Dorado* was not retroactive. Since the California Supreme Court, in *Dorado*, regarded the result there reached as required by the language of *Escobedo*, *Lopez* amounts to a holding that *Escobedo* is not retroactive.

[29] Carrizosa v. Wilson, 244 F. Supp. 120, 124 (N.D. Cal. 1965), *appeal docketed*, No. 20304, 9th Cir., Aug. 12, 1965; United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237, 240 (N.D. Ill. 1965); *In re* Lopez, 62 Cal. 2d 368, 377, 42 Cal. Rptr. 188, 194, 398 P.2d 380, 386 (1965); State v. Johnson, 43 N.J. 572, 585-87, 206 A.2d 737, 744-45 (1965).

[30] Lisenba v. California, 314 U.S. 219 (1941) (involuntary confession); Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confession).

[31] Carrizosa v. Wilson, 244 F. Supp. 120, 124 (N.D. Cal. 1965), *appeal docketed*, No. 20304, 9th Cir., Aug. 12, 1965. *But see* the following cases which indicate a trend toward this new extension: Powell v. Alabama, 287 U.S. 45 (1932) (guidance of counsel necessary at every step of proceedings); Spano v. New York, 360 U.S. 315 (1959) (right to counsel during interrogation after indictment in state proceeding); Hamilton v. Alabama, 368 U.S. 52 (1961) (accused entitled to counsel at arraignment); Massiah v. United States, 377 U.S. 201 (1964) (applied *Spano* rule to any interrogation after indictment).

lawyer at this point in the proceedings was unconstitutional, and the police consequently felt free to make such a refusal.[32]

Purpose and Effectuation of Purpose. The purpose of the *Escobedo* rule is deterrence—to prevent police from procuring voluntary confessions by denying the accused the right to have an attorney present.[33] This purpose of deterrence will not be furthered by the release of guilty prisoners.[34]

Effect on the Administration of Justice. It is probable that relatively few prisoners would be released by retroactive application of *Escobedo* because few suspects being interrogated request counsel—and if suspects have requested counsel at this point, it is possible that police have granted their requests. If, however, the Court should accept the California extension of the *Escobedo* rule, to the effect that police officers must inform a suspect of his right to counsel at this point,[35] retroactive application would cause a flood of retrials, because this is a new requirement seldom practiced by the police before.

Although retroactive application of *Escobedo*, without further extension, would probably not upset the administration of justice, the combination of the other factors—a completely new rule, justified reliance on the old rule, and a deterrent purpose which would not be served by retroactive application—leads to the conclusion that *Escobedo* should not be applied retroactively.

Griffin v. California

Since 1934, California has had a constitutional provision which says, in part: "[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny 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."[36] In the recent case of *Griffin v. California*[37] the Supreme Court held that such comment on a defendant's failure to testify was a violation of the privilege against self-incrimination guaranteed by the fifth amendment.[38]

Unlike *Mapp* and *Escobedo*, *Griffin* is concerned with a rule which directly involves the reliability of the fact-finding process. "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for

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[32] Carrizosa v. Wilson, *supra* note 31, at 125; State v. Johnson, 43 N.J. 572, 589, 206 A.2d 737, 746 (1965).

[33] See Escobedo v. Illinois, 378 U.S. 478, 488-90 (1964); United States *ex rel.* Conroy v. Pate, 240 F. Supp. 237, 240 (N.D. Ill. 1965); Carrizosa v. Wilson, *supra* note 31, at 124-25; *In re* Lopez, 62 Cal. 2d 368, 372-73, 42 Cal. Rptr. 188, 191, 398 P.2d 380, 383, 388 (1965). *But see* Fugate v. Ellenson, 237 F. Supp. 44, 45 (D. Neb. 1964).

[34] See Carrizosa v. Wilson, *supra* note 31, at 126; United States *ex rel.* Conroy v. Pate, *supra* note 33, at 240.

[35] People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361, *cert. denied*, 381 U.S. 937 (1965).

[36] CAL. CONST., art. 1, § 13 (initiative amendment adopted Nov. 6, 1934). Six states (Cal., Conn., Iowa, N.J., N.M., Ohio) permitted such comment at the time of the *Griffin* decision. Griffin v. California, 380 U.S. 609, 611 n.3 (1965); 8 WIGMORE, EVIDENCE § 2272 n.1 (McNaughton rev. 1961, Supp. 1964).

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

[38] *Id.* at 613.

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."[39] The law presumes a defendant innocent until proven guilty[40] and the effect of such comment is to induce the jury to ignore that presumption.[41] There are reasons other than guilt that may cause a defendant to choose not to take the stand. For example, he may have a record of past convictions which he does not wish to be brought to the attention of the jury on cross-examination.[42] Or he may be extremely nervous and fears his demeanor on the witness stand would be damaging to his case.[43] The jury should not assume the defendant's guilt from his failure to testify, but comment by the prosecutor and the court, solemnizing the silence of the accused into evidence against him,[44] certainly will lead to this result. The unfairness of such comment can perhaps best be illustrated by the instructions to the jury in the *Griffin* case:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.[45]

It is evident that the Court in *Griffin* felt that such a practice led to an unfair trial and the result that an innocent person might be convicted under it. Since the reliability of the guilt-determining process when comment is allowed is questionable, *Griffin* should be applied retroactively.

Retroactive application will certainly receive a cool reception in California, where prosecutors and judges have been routinely making such comment for the last thirty years. Undoubtedly, there are countless people in California prisons who were convicted in trials which were infected by such comment. Although retroactive application will put a tremendous burden on the courts of the states which have allowed comment, this practical consideration cannot be allowed

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[39] *Id.* at 613.

[40] CAL. PEN. CODE § 1096.

[41] Wilson v. United States, 149 U.S. 60, 66 (1893).

[42] Evidence of other crimes committed by defendant is obviously prejudicial to him and, with certain exceptions, is irrelevant to the question of whether he committed the offense charged in the indictment under which he is being tried. Therefore, it is normally inadmissible on that issue. However, when defendant takes the stand, he subjects himself to cross-examination, giving the prosecutor an opportunity to impeach his credibility. Like that of any other witness, his credibility may be impeached by showing that he has been convicted of crimes which cast doubt on his veracity as a witness. The danger is that the jury, even if given a cautionary instruction, will not consider defendant's record merely as bearing on his credibility, but will improperly regard it as showing a propensity to commit crimes—including the crime for which he is being tried. 3 WIGMORE, EVIDENCE §§ 889-91 (3d ed. 1941).

[43] See Wilson v. United States, 149 U.S. 60, 66 (1893); 8 WIGMORE, EVIDENCE § 2272 n.1 (McNaughton rev. 1961).

[44] Griffin v. California, 380 U.S. 609, 614 (1965).

[45] *Id.* at 610.

to overshadow the fact that the fairness of these prisoners' trials is in question and that some of them may have been wrongly convicted.[46] In indicating that decisions which deal directly with the fairness of the trial must be applied retroactively, the Supreme Court has not balked at the prospect of overcrowded courts, and the other problems, such as availability of witnesses, inherent in retrying cases after many years have elapsed. Consider the case of *Gideon v. Wainwright*,[47] retroactive application of which has resulted in retrials for thousands of prisoners, with the prospect of many more retrials still to come.

Perhaps the spectre of retrying countless prisoners caused the California Supreme Court to ignore the aspect of the fairness of the trial and to decide, *In re Gaines*,[48] that *Griffin* is not retroactive.

The California court in *In re Lopez* stated:

> [N]ew interpretations of constitutional rights have been and should be applied retroactively only in those situations in which such new rules protect the defendant against the possibility of conviction of a crime he did not commit . . . . Without discussion, the United States Supreme Court has applied retroactively on collateral attack its decisions requiring procedural fairness at criminal proceedings . . . . To reject the retroactivity of [these] . . . constitutional rights would be to sanction the continued incarceration of a defendant despite errors at the trial which, upon correction, could well establish his innocence.[49]

It is difficult to see how the California court, faced with the Supreme Court decision that the California comment rule resulted in an unfair trial, and with its own statement that if fairness of trial is in issue a decision must be retroactive, could have dismissed the fairness issue in one sentence in its determination of retroactivity.[50] Its abrupt statement that the comment does not affect the fairness of the trial is directly contrary to constitutional interpretation by the Supreme Court. At one point in the *Gaines* decision, the court said that the jury's inference of guilt from failure to testify is natural and is not magnified by comment[51]—completely ignoring the fact that *Griffin* considered and rejected this very point. It is submitted that the California Supreme Court's decision is contrary not only to the United States Supreme Court's determination that the comment results in an unfair trial but also to its own position that the question of fairness must be carefully considered and, if fairness of the trial is involved, the decision must be given retroactive application.

Conclusion

In the light of the foregoing, the following conclusions emerge. The Supreme Court will not automatically give retroactive application, even in criminal cases, to every decision recognizing or establishing a new constitutional right, but will distinguish between two broad categories of constitutional rights. The first category consists of those rights which guarantee to every accused that the

[46] See, *e.g.*, Hall v. Warden, 313 F.2d 483, 495 (4th Cir. 1963); Torcia & King, *supra* note 13, at 287.

[47] 372 U.S. 335 (1963).

[48] 63 A.C. 235, 45 Cal. Rptr. 865, 404 P.2d 473 (1965).

[49] 62 Cal. 2d at 372, 376-77, 42 Cal. Rptr. at 191, 194, 398 P.2d at 383, 386.

[50] *In re* Gaines, 63 A.C. 235, 238, 45 Cal. Rptr. 865, 867, 404 P.2d 473, 475 (1965).

[51] *Id.* at 240-41, 45 Cal. Rptr. at 868, 404 P.2d at 476.