Retroactivity in Retrospect

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One of the problems faced by any innovative court is that of deciding what protection, if any, it should give to the interests of those who relied on prior law. This problem is not a new one, nor is it confined to the area of criminal procedure.1 Recently, it has become of great importance because the courts have overruled old precedents to recognize new rights for criminal defendants. Application of the new rules to past convictions would raise the prospect that many convicted felons might be released from prison even though their trials were conducted correctly under the legal standards then applicable. Persuasive arguments have been made that the prospects of such a mass, legalized jailbreak have been greatly exaggerated, and that in any event the state has no interest in the finality of criminal judgments sufficient to justify the continued incarceration of a man whose trial was unfair by the standards of today.2 These arguments have been decisively rejected by the courts, which have assumed and exercised a power to limit the retroactive effect of their decisions. Consequently, it is no longer profitable to debate whether it would be better if this power had never been discovered or used. It is more important now to examine the various uses to which it has been put in its brief history, and to consider how it might best be used or restricted in the future.

Determining the retroactive effect of a newly recognized procedural right is a two-stage process. First, the court must decide if any limitation on retroactivity is justified, and second, it must decide which particular form of limitation would be appropriate. Many new standards are applied uniformly without regard to time, frequently effecting the release of prisoners who were convicted in the past: In fact, full retroactivity is the usual rule for constitutional decisions unless the court specifically decides otherwise.3 If the court decides

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1. See, e.g., Gelpke v. Dubuque, 68 U.S. (1 Wall.) 175 (1863) (invalidity of municipal bonds); Great N. Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) (railroad rate regulation); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959) (municipal tort liability). The discussion in this Foreword has no bearing on civil cases, where questions of retroactivity usually involve changes in substantive rules and the interests in finality are quite different.


3. See note 67 infra.
that the new right should not be fully applicable to past proceedings, the question then becomes where to draw the line. It may adopt what can be termed a final-judgment rule; applying the new right to set aside convictions still on direct appeal, but denying relief to prisoners for whom the time for appeal has passed. A court may go further and apply the new right only to trials commenced after the date of the decision announcing it, or even grant relief only in cases in which an alleged violation of the new right occurred after the date of announcement. These last two standards might be termed the trial-date rule and the violation-date rule.

For some state courts the retroactivity of procedural rights in criminal cases is simply a matter of determining how far it is possible to go in restricting application of an unpopular rule imposed by the United States Supreme Court.⁴ For the California supreme court the situation is different. As a willing follower of the United States Supreme Court in many instances, and just as often as a leader in its own right, it has had to decide for itself the extent to which innovative rules ought to be applied to the past. Its willing acceptance of new federal standards has forced it to attempt in some cases to predict what retroactive effect the Supreme Court⁵ would give to them, and in other cases to decide whether to give a greater retroactive effect to new federal rights than the federal courts have required. Its own innovations in state law and in the interpretation of federal requirements have forced it to decide what retroactive effect to give to those innovations. The California supreme court is in the process of developing a law of retroactivity that will be as important in some respects as the procedural rules, the application of which to past cases is under consideration.

I

THE EXCLUSIONARY RULE FOR UNREASONABLE SEARCH AND SEIZURE

In both expanding procedural rights for criminal defendants and limiting the retroactive effect of those rights, the California supreme court has frequently anticipated the United States Supreme Court. It

⁴ See, e.g., State v. Tahash, 275 Minn. 195, 146 N.W.2d 541 (1966), rev'd per curiam sub nom., Gerberding v. Tahash, 387 U.S. 91 (1967). In this case the Minnesota supreme court held that the United States Supreme Court's decision in Jackson v. Denno, 378 U.S. 368 (1964) was non-retroactive, despite plain statements to the contrary in Johnson v. New Jersey, 384 U.S. 719, 727 (1966). Jackson v. Denno was itself a collateral attack.

⁵ Throughout this Foreword the words "Supreme Court" standing alone designate the United States Supreme Court.
is well known that in 1955, six years before the decision in *Mapp v. Ohio*\(^6\) applied the federal exclusionary rule to the states, the California supreme court overruled its earlier precedents and held that evidence obtained in an unconstitutional search or seizure could not be admitted in a subsequent criminal prosecution. Although the court in *People v. Cahan*\(^7\) did not discuss the retroactive or prospective effect of its decision, it effectively decided that issue by deciding that the exclusionary rule was a judicially promulgated rule of evidence, and not a constitutional requirement.\(^8\) Since habeas corpus is not generally available in California to challenge evidentiary rulings,\(^9\) defendants whose convictions were final on appeal were left without an avenue for asserting the new right. This result was achieved, however, without the court ever having given explicit consideration to whether application of the *Cahan* exclusionary rule should be subject to any limitation of time. Even after the United States Supreme Court held that the exclusionary rule is constitutionally required, the California court saw the problem as one of the availability of habeas corpus. Justice Traynor's argument in a concurring opinion in *In re Harris*,\(^10\) which was later adopted by the entire court in *In re Lessard*,\(^11\) was that habeas corpus should not be available to challenge unconstitutional means of obtaining evidence, because the entire purpose of the exclusionary rule was to deter illegal police practices rather than to protect the innocent from wrongful conviction. Such deterrence, he contended, could be adequately achieved by granting a remedy at trial or on direct review.\(^12\)

Closing state habeas corpus to search and seizure claims not only denied relief to prisoners whose convictions became final before the exclusionary rule was recognized, but it also had a far broader effect. Even defendants convicted in the future would be thereafter unable to obtain relief if they presented their search and seizure claims by way

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8. Id. at 442, 282 P.2d at 910.
12. "The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *In re Harris*, 56 Cal. 2d 879, 884, 366 P.2d 305, 308, 16 Cal. Rptr. 889, 892 (1961).
of petition for habeas corpus rather than on direct appeal from their convictions. The importance of this limitation would increase if the standards which governed the legality of searches themselves changed over time. A defendant might, for example, find his conviction affirmed on direct appeal because the courts were of the view that evidence could constitutionally be obtained by electronic eavesdropping. If the courts were later to declare that electronic eavesdropping was unconstitutional, he would then be unable to obtain relief on the basis of the new rule through habeas corpus. In effect, the California approach made all further refinements of the law of unconstitutional searches as nonretroactive as the exclusionary rule itself.\footnote{13}

Because it approached the problem by determining the purposes of state habeas corpus rather than by determining whether the exclusionary rule should be denied retroactive effect,\footnote{14} the California supreme court never considered whether it served any useful purpose to apply the rule in cases pending on direct review in which the illegal search occurred before the date of the Cahan decision. If the purpose of the exclusionary rule is only to discourage future abuses, and if it is not to be applied unnecessarily to free the guilty, then it would seem that the rule need not and should not be applied unless the illegal search or seizure occurred after the police had notice that the courts would no longer accept the fruits of their transgressions. Instead of considering the merits or demerits of such a step, the court stayed with an approach that granted relief in old trials still pending on direct review, and promised to deny relief even for future trials if it was sought by way of habeas corpus.

13. The refusal to allow search and seizure issues to be raised on collateral attack has another significant effect in the case of misdemeanor convictions, which under California law may be appealed only to the Appellate Department of the Superior Court, unless that department authorizes a further appeal to the California court of appeal. For misdemeanors, habeas corpus is usually the only method of obtaining review in the District court of appeal or the California supreme court. See \textit{In re Sterling}, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965). The California rule does not affect the availability of federal habeas corpus for search and seizure claims.

14. It is interesting to compare this approach with that suggested for the United States Supreme Court in a famous article by Professor Paul Mishkin of the University of Pennsylvania. Mishkin, \textit{Foreword: The High Court, the Great Writ, and Due Process of Time and Law}, 79 \textit{HARV. L. REV.} 56 (1965). He argued that the Supreme Court should not claim a general power to declare decisions non-retroactive, but that it should instead consider whether the purposes of federal habeas corpus would be served by using that remedy to overturn final judgments of conviction on the basis of a newly-recognized right. Mishkin would allow the use of federal habeas corpus to challenge convictions that became final after the date of the overruling decision, however, in order that the power of the lower federal courts to force the states to observe federal constitutional rights be preserved. See \textit{id.} at 86-87.
II

THE ESCOBEDO-LOPEZ APPROACH

This approach was summarily abandoned in 1965 when the court considered in In re Lopez the retroactivity of its famous decision in People v. Dorado. Dorado held that the United States Supreme Court’s decision in Escobedo v. Illinois must be read to require that a suspect be advised of his right to counsel and his privilege to remain silent before being questioned in custody for the purpose of obtaining incriminating statements. For reasons that are not entirely clear, the California court assumed that habeas corpus was generally available to challenge the admissibility of statements obtained in violation of the Dorado rule, and framed the issue as simply whether the rule should be applied with full retroactivity to set aside convictions that were final before the date of the decision in the Escobedo case. In In re Lopez, the court gave four reasons for holding that it should not be so applied. First, by providing a right to counsel in the police interrogation process, the United States Supreme Court

sought the correcting of the conditions which invited the coerced confessions and the attendant evils. But the new rule need not reach back to eradicate an environment entombed in the past; if that environment did produce the evil fruit of the coerced confession we may trust that the process of trial, despite the difficulties, disclosed it.

Second, the Escobedo-Dorado rule was designed primarily to discourage oppressive police practices rather than to protect the innocent from a wrongful conviction. As in the search and seizure cases, application of the rule to past convictions would not help to deter future violations. Third, if full retroactivity were required in every case, courts would be discouraged from introducing innovations in criminal procedure. Fourth, unlimited retroactive application of the rule would result in the release of innumerable prisoners of undoubted guilt, with retrials impossible in many cases due to the lapse of time.

The Lopez opinion represents a creditable attempt to deal with a perplexing problem, but it is not entirely convincing. The court was aware that Escobedo was designed in part to prevent conviction of the innocent, and that it reflected the feeling of the United States

15. 62 Cal. 2d 368, 398 P.2d 380, 42 Cal. Rptr. 188 (1965).
19. The Escobedo opinion stressed the dangers of unreliable confessions. 378 U.S. at 488-490.
Supreme Court that the voluntariness rule was inadequate to prevent the use of coerced confessions. If past defendants could be adequately protected by a judicial examination into whether their confessions were voluntary, then it would seem that the Escobedo and Dorado cases were wrongly decided.

In fact, the decision reached in Lopez was a more difficult one than the opinion admits. Application of the Escobedo-Dorado rule to past convictions would have been wholly consistent with its purpose of preventing convictions based on compulsory self-incrimination. On the other hand, since it is well established that use of an inadmissible confession requires reversal even if the other evidence of guilt is overwhelming, 20 full retroactivity would have required the retrial of many guilty defendants who would have been convicted even if the rule had always been in effect. Moreover, many confessions obtained without the required warnings would undoubtedly have been obtained even if the warnings had been given. Our experience with the far stricter Miranda requirements proves that the flow of confessions does not dry up entirely when warnings are injected into the process. 21

Thus, fully retroactive application of the Escobedo-Dorado rule would have done a great deal more than place defendants in the same position they would have occupied if the rule had always been recognized. Similar considerations had not prevented the United States Supreme Court from giving full retroactive effect to the absolute right to counsel at trial, 22 but that right was felt to be both more basic and more clearly anticipated by a long prior line of decisions than the Escobedo right. To put it plainly, Lopez involved a delicate balance between defendant's rights and state interests rather than a decision based on the logic of the underlying constitutional right.

All the arguments given in Lopez against full retroactivity and for a final-judgment rule would equally have supported the adoption of a violation-date rule: That the absence of warnings should be grounds for reversal only in the case of statements obtained after the

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21. See, e.g., Note, Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519 (1967). Although it is customary to speak in this context of "confessions," it should be stressed that in many cases defendants are convicted on the basis of admissions made in the course of statements intended to be exculpatory.

date of the *Dorado* decision. If the new rule was needed only to prevent conditions that might lead to coercion in the future and not to remedy coercion in the past, if it was designed to prevent police oppression rather than to prevent the conviction of the innocent, and if application to past situations would result in unnecessarily releasing the guilty and hampering judicial innovation, then it would seem logical not to apply the rule to the past at all. Probably because it was not suggested, the court did not consider the possibility of this alternative in *Lopez*, nor in *In re Gaines*.\(^\text{n}\)

\section*{III

THE NO-COMMENT RULE

In *Gaines*, the court held that the United States Supreme Court's decision in *Griffin v. California*,\(^\text{24}\) forbidding the prosecutor to comment on the failure of a defendant to testify, would not be applied to set aside judgments that were final before the date of the *Griffin* decision. It justified adopting a final-judgment rule on the grounds that the forbidden comment does not necessarily affect the fairness of the entire trial, that California prosecutors justifiably relied on prior decisions holding the comment proper, and that unlimited retroactive application of *Griffin* would "place an intolerable strain on the administration of criminal justice"\(^\text{25}\) for the same reasons given in *Lopez*. Once again, all these arguments would have supported the choice of a violation-date rule, reversing convictions only if the forbidden comment occurred after the decision-date.

The opinion in *Gaines* suggested the possibility of still another alternative that would have much to recommend it. As the court observed, a comment on the defendant's failure to testify does not necessarily rob a trial of all its fairness; it may be harmless error. If full retroactivity were granted to the constitutional right announced in *Griffin*, still a great many past convictions could be saved by applying a harmless error standard. This standard might take into account the fact that the comment was lawful when made, and thus be more generous to prosecutors than the standard that might be applied when the error was committed after the right was announced.

A policy of strict reversal may be necessary to discipline prosecutors who deliberately or negligently violate known rules, but in cases tried under prior law the error might merit a reversal only if it seemed

\textsuperscript{23}. 63 Cal. 2d 234, 404 P.2d 473, 45 Cal. Rptr. 865 (1965).
\textsuperscript{24}. 380 U.S. 609 (1965).
likely to have influenced the result.\textsuperscript{26} This approach would have the disadvantage of requiring the court to reexamine many past cases and to speculate on whether the comment might have influenced the result. It would, however, constitute a good faith effort to place past defendants as nearly as possible in the same position they would have occupied if the no-comment rule had been enforced at the time of their trials.\textsuperscript{27}

That some injustice might thereby be corrected is ironically illustrated by the facts of \textit{Tehan v. Shott},\textsuperscript{28} the case in which the United States Supreme Court held that the no-comment rule need not be retroactively applied to final judgments because its primary purpose is not to protect the innocent. Had the Supreme Court devoted its attention to the facts before it, it might have discovered that Shott was an innocent man whose conviction was almost certainly due in part to the prejudicial impact of the prosecutor's repeated comments on his failure to testify.

Edgar Shott was convicted and sentenced to five years in prison for violating a section of the Ohio Blue Sky Law, which forbids the unlicensed sale of securities. Commercial paper and promissory notes are included within the definition of securities, but these items are exempt when they are not offered directly or indirectly for sale to the public. As the Ohio court instructed the jury, securities are not "offered to the public" unless they are "open to common or general participation to any and all persons, as distinguished from an offer to a particular person or persons in the course of legitimate business, or in the course of usual and ordinary borrowing of money."\textsuperscript{29} The Ohio statute, however, places the burden on the defendant to prove that any "security" he sells is exempt under the provisions of the act. The evidence at Shott's trial showed that on a single occasion he issued a promissory note to a personal friend named Sestito for $2,000 cash.

\textsuperscript{26} Since the decision in \textit{Chapman v. California}, 386 U.S. 18 (1967), a federal constitutional error may not be held harmless unless the court is able to declare it so beyond a reasonable doubt. \textit{Id.} at 24. The precise meaning of this standard is unclear, as one can demonstrate from the majority and dissenting opinions in \textit{People v. Ross}, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967). Undoubtedly, it limits the freedom of the states to find constitutional errors harmless, but \textit{Chapman} might be inapplicable if a more permissive harmless error standard were adopted as an alternative to complete nonretroactivity.

\textsuperscript{27} In fact the California supreme court did apply a harmless error standard to affirm many convictions on direct review in which impermissible comments were made at trials held before the \textit{Griffin} decision. \textit{See}, e.g., \textit{People v. Mitchell}, 63 Cal. 2d 805, 820-21, 409 P.2d 211, 221, 48 Cal. Rptr. 371, 372 (1966); \textit{People v. Cotter}, 63 Cal. 2d 386, 398-99, 405 P.2d 862, 869-70, 46 Cal. Rptr. 622, 629-30 (1965); \textit{People v. Teale}, 63 Cal. 2d 178, 196-97, 404 P.2d 209, 220-21, 45 Cal. Rptr. 729, 740-41 (1965).

\textsuperscript{28} 382 U.S. 406 (1966).

\textsuperscript{29} Petitioner's Brief for Certiorari at 4, \textit{Id.}
Shott intended to reinvest the money on extremely profitable terms, and he offered to pay Sestito 12.5 percent interest for the use of the money for sixty days. At the end of the sixty days Shott in fact repaid the money with the interest.

This was the entire case against Shott and after hearing it the defense counsel decided to rest without putting on any evidence. He probably reasoned that any burden of proving that no public sale was involved was met by the prosecution's own showing that the Sestito loan was a single transaction between personal friends. Nonetheless the case was sent to the jury after an argument in which the prosecution relied heavily on Shott's failure to testify as justifying an inference that he could not rebut the statutory presumption that his single issuance of a promissory note to a friend constituted an unlawful public offering of securities. Although the principal villain in the Shott case may have been an unreasonable shifting of the burden of proof, the guilty verdict also indicates that it is quite possible for a prosecutor to shore up a weak case-in-chief by placing undue emphasis on the defendant's failure to testify.

It may well have been necessary to restrict the retroactivity of the Griffin decision because the courts had previously endorsed comment on defendant's failure to testify and because the presence or absence of a comment is unlikely in the ordinary case to affect the result. Even the most vigorous opponents of the comment agree that its vice is that it gives undue emphasis to something the jury is likely to consider in any case. What is regrettable about the Tehan approach is that relief was unnecessarily denied even when it could be demonstrated that the defendant was probably prejudiced.

IV
THE MIRANDA WARNINGS

The decision in Tehan v. Shott seemed to indicate that the California supreme court was on the right track in interpreting the United States Supreme Court's attitude towards retroactivity. At the

30. That Shott was prosecuted and sentenced to so long a term is presumably explained by the fact that he was deeply involved in a fraudulent investment scheme. See United States ex rel. Stickler v. Tehan, 365 F.2d 199 (1966).

31. "It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on that failure does not magnify that inference into a penalty for asserting a constitutional privilege. . . . What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." Griffin v. California, 380 U.S. 609, 614 (1965).

32. When the Supreme Court held that Shott could not obtain relief on the basis of the comment on his failure to testify, it remanded the case to the United States Court of Appeals for the Sixth Circuit for consideration of the other issues in the case. That court held that the
end of the same term of Court; however, the Supreme Court gave the California courts, in particular, and the legal profession, in general, a rude shock by holding in Johnson v. New Jersey\textsuperscript{33} that the rules for confessions it had just announced in Miranda v. Arizona\textsuperscript{34} need not be applied to cases in which the trial began before the date of the decision. That the Supreme Court wished to limit the retroactive effect of Miranda so drastically is understandable since the decision required a highly detailed and specific four-part warning before any confession could be obtained that would be admissible in a criminal trial. No lower courts or law enforcement agency had anticipated precisely what form the rule would take, and so any application of Miranda to past convictions would have required the reversal of every conviction in which a confession had been used. Even the F.B.I., which was singled out in the Miranda opinion as a good example for others to follow, would have seen its convictions reversed.\textsuperscript{35} Although the Court also stated that the warnings, like the Griffin rule, were needed more to protect the dignity of the individual than to prevent the admission of unreliable evidence,\textsuperscript{36} undoubtedly practical considerations rather than logic inspired the Johnson holding.

Even if the Court's objectives are accepted, however, its precise holding is open to considerable question. In the first place, the inequity of denying relief to all other petitioners before the court on direct review who had diligently pursued the point in their briefs, while granting relief to Miranda and the three other petitioners whose cases had fortuitously been selected for announcement of the new rule, was apparent to everyone. Second, and perhaps of more general importance, the court did not explain why it had selected the date of the commencement of the trial as the significant date for determining the applicability of the new rules. Choosing that date would make sense only if the Court were primarily concerned with saving convictions that had been obtained by prosecutors who had other evidence sufficient to convict, but who relied on confessions because they reasonably believed them to be admissible. The Court made no

\textsuperscript{33} Ohio statute was constitutional and that the evidence against Shott was sufficient to justify a conviction. The opinion confused the question of whether Shott made a public sale with the quite different question of whether he borrowed the money for business purposes. Shott v. Tehan, 365 F.2d 191 (1966). The Supreme Court then denied certiorari, with the Chief Justice dissenting. Shott v. Tehan, 385 U.S. 1012 (1967).

\textsuperscript{34} 384 U.S. 719 (1966).


\textsuperscript{36} See id. at 521 (dissenting opinion of Harlan, J.). The warnings required by the Dorado case were also clearly insufficient to satisfy Miranda.
mention of this conceivable reliance interest, however, and instead emphasized that "law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda." If reliance on prior standards by law enforcement officers in the obtaining of confessions is to be protected, then plainly the significant date is the date on which the confession was obtained, and a violation-date rule is indicated. A trial-date rule still requires the reversal of convictions based on confessions that were obtained by law enforcement officers who reasonably relied on prior cases before they were overruled.

V

THE JOHNSON QUANDARY

The California supreme court was left in an unenviable position when it considered the effect of the Johnson decision in People v. Rollins. It had decided the Dorado case as it had, not because it had independently arrived at the conclusion that the Constitution compelled the result, but because it felt constrained by the necessary implications of the Escobedo opinion. In justifying the Dorado holding, the Court had stated that it was in the interests of California law enforcement officers to be informed of the full sweep of the Escobedo decision sooner rather than later, for in any event cases involving confessions obtained without the required warnings would be reversed by the United States Supreme Court.

Having thus faithfully discharged its duty to apply the Constitution as apparently interpreted by the United States Supreme

37. In any event it would seem that in such cases convictions could nearly always be obtained on retrial.
38. 384 U.S. at 731.
39. The choice of a trial-date rather than a violation-date standard in Johnson affected relatively few cases, because defendants who confess are normally tried fairly soon thereafter. The California supreme court has recently extended the anomalous trial-date rule, however, by holding that the Miranda rules apply to the retrials of defendants whose convictions have been reversed on other grounds. People v. Doherty, 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967).
40. 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967).
42. "Law enforcement will be harmed, not helped, by advising police officers, for example, that it is only when the suspect demands counsel that Escobedo applies, notwithstanding that in all other respects an investigation has reached the accusatory stage and the other conditions of
Court, the California court found that it had unnecessarily reversed dozens of convictions in which the trials had occurred before the date of the *Miranda* decision. It was now faced with the perplexing problem of what to do with the cases tried before *Miranda* that were still before it on direct review. If it stayed with the final-judgment rule that it had adopted in the *Lopez* case and applied the *Miranda* rules to all cases pending on direct review, as the Supreme Court had invited the state courts to do if they chose, it would be forced to reverse many more cases in which confessions had been obtained in full compliance with its own *Dorado* decision. It could have refused to apply either the *Miranda* or the *Dorado* decisions to cases on direct review, but to do so would make its prior reversals under the *Dorado* decision seem like the height of folly, and current affirmances the height of inequity. In the end, the California court took a middle position in *Rollins* that can be justified only because of the specific historical circumstances. It decided to apply the *Dorado* rules to all cases remaining on direct review and to apply the stricter *Miranda* rules only to trials commencing after the date of that decision. As Justice Peters pointed out in his dissent, this twin holding is logically inconsistent. If the date of the trial is the proper thing to look to in deciding the applicability of *Miranda*, then it is just as certainly the proper date to look to in deciding the applicability of *Dorado*. Undoubtedly, the decision in *People v. Rollins* represents a page of history rather than a volume of logic.

VI

THE LINEUP CASES

The fiasco in the *Rollins* case resulted solely because the California supreme court, acting in the best faith imaginable, tried to predict the unpredictable. Fortunately, it did not have to predict the...
next retroactivity decision of the United States Supreme Court—Stovall v. Denno.\(^{46}\) The rule announced by the Court in United States v. Wade\(^{47}\) and Gilbert v. California,\(^{48}\) that an accused is entitled to the presence of his lawyer at a police lineup, was not anticipated by any prior decisions in the sense that Miranda was anticipated by Escobedo. Furthermore, this time the Supreme Court announced its retroactivity decision and its decision on the merits of the constitutional issue at the same time. It held that the lineup rule, despite the fact that it was designed solely to protect the innocent from wrongful conviction, would not be applied to cases in which the lineup occurred before the date of the Wade decision, regardless of the date on which the trial commenced or the conviction became final on direct review. This time the California court, which disagreed with the holding of the Wade case in any event,\(^{49}\) found no difficulty, in People v. Feggans,\(^{50}\) in agreeing with the Supreme Court that its applicability should be limited by a violation-date rule.

The retroactivity rules adopted for both the Miranda and lineup rules had one great virtue that was missing in Tehan v. Shott. Defendants convicted in the past who could demonstrate actual prejudice from the denial of the rights protected by those decisions could obtain relief. Although prisoners could not obtain new trials merely by showing that their confessions were obtained without warnings, they could assert any police overreaching or trickery as a basis for relief under the voluntariness rule.\(^{51}\) Although they could not have their convictions set aside because they were not provided with counsel at a lineup, they could obtain relief under the due process clause if they could show that the lineup was actually conducted unfairly.\(^{52}\) The point is not that the voluntariness

\(^{46}\) 388 U.S. 293 (1967).
\(^{47}\) 388 U.S. 218 (1967).
\(^{48}\) 388 U.S. 263 (1967).
\(^{49}\) See People v. Gilbert, 63 Cal. 2d 690, 709, 408 P.2d 365, 376-77, 44 Cal. Rptr. 909, 920-21 (1965), which was reversed in Gilbert v. California, 388 U.S. 263 (1967).
\(^{50}\) 67 Cal. 2d 444, 448, 432 P.2d 21, 24, 67 Cal. Rptr. 419, 422 (1967).
\(^{51}\) “At the same time our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural requirements for direct or collateral attack are met. . . . Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. . . . That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.” Johnson v. New Jersey, 384 U.S. 719, 730 (1966).
\(^{52}\) “We turn now to the question whether petitioner, although not entitled to the application of Wade and Gilbert to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim.” Stovall v. Denno, 388 U.S. 293, 301-02 (1967).
and due process rules were adequate to safeguard their rights. If that were true, there would have been no need for providing a right to counsel at lineups and interrogations. The point is rather that when overwhelming practical considerations required that the adequate safeguard be denied, the courts at least did their best to provide relief in the extreme cases.

VII

THE CALIFORNIA RESOLUTION

The Lopez, Gaines, Rollins, and Feggans cases show a fascinating interchange between the United States Supreme Court and an intelligent and progressive state supreme court that tried, but failed, to anticipate the Supreme Court's decisions. The California supreme court's own attitude towards the retroactivity problem is better indicated, however, by its experience with an issue on which it was not acting so directly under compulsion. In 1965, in People v. Aranda, the court adopted evidentiary rules designed to limit the use of confessions at joint trials. When two defendants are tried jointly and one of them has confessed the crime, the confession may be used as evidence only against the defendant who made it. The hearsay rule and the constitutional right to confront and cross-examine witnesses prevent its use against the co-defendant. Traditionally, however, the practice had been to admit the confession at the joint trial and instruct the jury to consider it only against the defendant who confessed. When the confession described both defendants committing the crime, this practice presupposed that the jury was able to "determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time ignore the inevitable conclusion that B has committed those same criminal acts with A." In Aranda, the court held that it would be more consistent with a realistic estimate of the capabilities of jurors to require separate trials unless the confession could be effectively purged of all references to the guilt of the nonconfessing defendant. Although the court was aware that the constitutionality of the traditional rule was

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This ground of attack was in fact not recognized in California, where it had been held that impropriety in the conduct of a lineup goes to the weight rather than the admissibility of the identification testimony. People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963). After Stovall the California supreme court disapproved People v. Parham. People v. Caruso, 68 A.C. 181, 188 n.3, 436 P.2d 336, 342 n.3, 65 Cal. Rptr. 336, 342 n.3 (1968).

under strong attack, the Aranda holding was based on state rather than federal law.

The California supreme court did not explicitly consider what retroactive effect should be given the Aranda decision until over a year later, in People v. Charles. In the meantime, several courts of appeal had held that the new rule applied only to trials conducted after the date of the Aranda decision. These courts did not regard the fact that a trial conducted before that date had been reversed in the Aranda decision itself as decisive, any more than the United States Supreme Court had regarded the application of the Miranda rule to the Miranda case and the application of the lineup rule to the Wade case as precluding a different rule of retroactivity for all other cases. The California supreme court disapproved these cases and returned to the rule it had originally applied in cases involving illegally seized evidence. It held that as a new state evidentiary rule Aranda would be applied to all cases pending on direct appeal, but that it could not be asserted on collateral attack regardless of the date on which the conviction became final.

Both branches of the decision in Charles are highly questionable. In support of its dictum that Aranda error may not be raised on collateral attack, the court merely stated that "our ruling . . . did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants, and we were careful to point out that the rules announced were at least not yet constitutionally compelled. . . . The purposes of Aranda thus do not require its application to convictions long since final." The court then went on to quote the familiar language from Lopez to the effect that "to require a general release of prisoners of undoubted guilt would be to cripple the orderly administration of the criminal laws."

Despite the court's protestations, the Aranda rule is just as

58. The cases are cited in footnotes 4 and 5 of the majority opinion, id. at 335, 425 P.2d at 545, 57 Cal. Rptr. at 745.
59. This rule would seem to require that relief be denied even in those cases cited in the Charles opinion in which the District Court of Appeal affirmed on the erroneous ground that the right announced in Aranda does not apply to cases pending on direct appeal at the time of the Aranda decision. In at least one of those cases the California supreme court denied a hearing. People v. Haynes, 244 Cal. App. 2d 579, 53 Cal. Rptr. 530 (1966). The point is undoubtedly academic, however, since the Supreme Court has held that its decision in Bruton v. United States, 391 U.S. 123 (1968), is fully retroactive. Roberts v. Russell, 392 U.S. 293 (1968). Bruton adopted a rule similar to that in Aranda as a constitutional standard.
60. 66 Cal. 2d at 333, 425 P.2d at 547, 57 Cal. Rptr. at 747.
61. 66 Cal. 2d at 334, 425 P.2d at 547, 57 Cal. Rptr. at 747.
necessary to protect the innocent from wrongful conviction as is the right to confrontation and cross-examination from which it stems. The law recognizes that accomplice testimony is inherently suspect, even when given on the witness stand, because of the motivation to shift the blame to others. 62 "The unreliability of such evidence is intolerably compounded when the alleged accomplice... does not testify and cannot be tested by cross-examination." 63 Unless the court was wrong in Aranda when it determined that the jury was not likely to disregard the confession even if instructed to do so, the rule is indeed necessary to protect the innocent.

That the court chose to denominate Aranda a nonconstitutional decision does not support any limitation on its retroactive effect. Probably it chose to avoid basing its decision on the Constitution simply to create a justification for denying full retroactivity. The constitutional or nonconstitutional basis of the holding was governed by the decision on retroactivity, rather than vice versa. In any case, habeas corpus may be used in California to assert some nonconstitutional procedural rights. 64

Nor does it appear that "a general release of prisoners of undoubted guilt" would be the likely result of retroactive application of Aranda. The right applies only to prisoners who were implicated in the confession of another defendant at a joint trial. Furthermore, convictions would be set aside only if the error was not harmless, and the court in Charles held that the California standards of harmless error rather than the stricter standards applicable to federal constitutional error would be used in Aranda cases. 65

On the other hand, if the retroactivity of the Aranda rule should in some way be limited, why should it be applied to cases pending on direct review that were tried before the date of the Aranda decision? The court's reason for so applying the new rule seems to have been simply that "convictions should ordinarily be tested on appeal under

62. Cal. Pen. Code § 1111 (West 1956) prohibits convictions based on uncorroborated accomplice testimony. Wigmore observes that the distrust of such testimony rests on the presumption that the accomplice expects immunity or leniency in return for implicating others. 7 J. Wigmore, Evidence § 2057 (3d ed. 1940). A student note made the point very well: "The nature of a typical response by those subject to interrogation does not seem to have changed much over time. Compare Adam's 'the woman whom thou gavest to be with me, she gave me of the tree, and I did eat,' with Escobedo's 'I didn't shoot Manuel... (DiGerlando) did it.'" Developments in the Law, Confessions, 79 Harv. L. Rev. 935, 938 (1966).


64. See note 8, supra.

65. "So long as the Aranda rules remain solely matters of state practice... the relevant standards of prejudicial error stem not from federal law... but from our own Constitution." People v. Charles, 66 Cal. 2d 330, 337 n.10, 425 P.2d 545, 550 n.10, 57 Cal. Rptr. 745, 750 n.10 (1967).
the law then applicable, not the law prevailing at the time of the trial,” and that departures from the ordinary should be undertaken only in extraordinary circumstances. It seems faintly absurd to reject a proposed solution as untraditional when the problem is created only because courts are continually repudiating their past practices. Moreover, any rule of non-retroactivity for procedural rights basic to a fair trial is a recent innovation. Tradition aside, a trial- or violation-date rule seems logically compelled once one concludes, as the court in Charles did, that justice does not require setting aside past convictions infected with Aranda error. In all cases tried before Aranda, the prosecutors and trial judges relied on the prior law, and the resulting judgments were fair or unfair without regard to when they became final.

The strongest practical argument that can be made for a final judgment rule is that it saves convictions in those cases in which, due to the lapse of time, retrial would be most difficult. This argument assumes that it is desirable to apply new procedural holdings such as Aranda to past convictions, but concludes that it is even more desirable not to release prisoners whose convictions are so old that they probably cannot be retried. Even if this value judgment is acceptable, the date of finality of a judgment is only a very rough measure of the difficulty of obtaining a conviction on retrial. Age is only one of the factors involved, and in any case it is the date of the trial or of the commission of the offense rather than the date of finality on appeal that is the significant measure of age. A conviction delayed for some reason in the appellate process may become final long after another conviction in which the offense and the trial occurred much later. In California, a death penalty case, for example, may become final relatively quickly because the automatic appeal to the state supreme court eliminates a stage of appellate review.

In Charles the court attempted to find a compromise between the strict retroactivity that was needed to protect defendants who were

66. Id. at 335, 425 P.2d at 548, 57 Cal. Rptr. at 748. Curiously, within a month of the Charles decision the court casually adopted a rule of pure prospectivity for a change in the order of argument at death penalty cases. It gave no reason for departing from what it had so recently described as its normal practice. People v. Hill, 66 Cal. 2d 536, 564-65, n.7, 426 P.2d 908, 926 n.7, 58 Cal. Rptr. 340, 358 n.7 (1967); People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900, 905, 58 Cal. Rptr. 332, 337 (1967).

67. Linkletter v. Walker, 381 U.S. 618 (1965), was the first Supreme Court case to hold a constitutional right nonretroactive. The need for any explicit limitation on retroactivity did not become apparent until recent decisions overruled existing precedents to extend the provisions of the Bill of Rights to the states, while at the same time the practical availability of both direct appeal and collateral attack was greatly expanded by such decisions as Fay v. Noia, 372 U.S. 391 (1963), and Douglas v. California, 372 U.S. 353 (1963).

68. CAL. PEN. CODE § 1239(b) (West 1956); CAL. CONST. art. VI, § 4.
unfairly convicted and the strict prospectivity that would have saved convictions obtained in reliance on the prior law. That the court intends to follow this approach even when the most fundamental procedural rights are involved is shown by the decision in In re Harris. Harris was convicted in 1940 at the age of 14 of murder and sentenced to life imprisonment. Before the trial, his case was certified to the juvenile court, as the law required, to determine whether he should be treated as a juvenile or tried as an adult. The juvenile court waived jurisdiction and recertified the case to the adult court. Although Harris had the assistance of appointed counsel at his trial in the Superior Court, he did not have counsel in the juvenile court because at the time a right to counsel in juvenile proceedings was not generally recognized. He sought habeas corpus relief in 1967 on the basis of the United States Supreme Court's decision in Kent v. United States, which held that a juvenile court's waiver of jurisdiction was void unless the juvenile was accorded a right to counsel.

The Kent case did not necessarily require that the murder conviction be set aside, for the relief ordered in Kent was a redetermination by the juvenile court with counsel of whether juvenile court jurisdiction was properly waived. If the waiver order was properly made, the criminal conviction could stand. Nonetheless, the California court in Harris refused to grant any relief and held that Kent does not apply to cases in which the judgment became final prior to May 15, 1967. The court thus refused to allow the redetermination, with counsel, of what may have been the most important issue in the case. Difficult as it would be to reconstruct the events of 1940, it is far from impossible that a hearing today would disclose that the decision to treat a fourteen-year-old boy as a man was erroneous. To deny a prisoner the chance to show for the first time with counsel that he should never have been brought to trial because of his age hardly seems necessary to prevent a breakdown in the administration of justice.

69. 67 Cal. 2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967).
70. See People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956). Since 1961, the right has been guaranteed by statute, CAL. WELF. & INST'NS CODE § 679 (West 1966).
72. The decision in Kent was based on a statute applicable only to the District of Columbia. The court agreed with the petition's contention, however, that Kent was elevated to constitutional status by the decision in In Re Gault, 387 U.S. 1, 68 (1967).
73. See 383 U.S. at 564-65.
74. The date is that of the decision in In re Gault, 387 U.S. 1, 68 (1967).
75. The opinion in Harris gives five reasons for its holding: (1) Retroactive application of Kent would seriously disrupt the administration of justice because so many cases are involved (the court gave no particulars); (2) petitioner is now an adult (the same was true in Kent); (3)
CONCLUSION

After the decisions in Harris and Charles it appears that denial of full retroactive effect to newly announced procedural rights, including those of constitutional status, has become the rule rather than the exception in California. This statement remains true even when the entire purpose of the right is to protect the reliability of the truth-determining process rather than to deter official conduct that is offensive to law or to human dignity. Furthermore, the California supreme court claims a power to adopt a trial-date or violation-date rule for specific rights, and it has exercised this power not only when encouraged to do so by the United States Supreme Court, as in the case of the lineup rule, but also when it has wished to limit the effect of its own decisions. For example, in People v. Bandhauer the California court changed the rules of argument at death penalty trials and declared that the change would affect only future trials.

Although the court has expressed a preference for a final judgment rule, rather than a trial-date or violation-date standard, it has not adequately explained this preference or the reasons for departing from it on occasion. The court evidently does not believe that there is a jurisprudential bar to use of a trial-date or violation-date rule, and in the case of decisions like Aranda there does not seem to be any argument for denying relief to final judgments that does not also support denying relief for cases pending on appeal that were tried in reliance on the prior law.

It may be that the California court has gone both too far and not far enough. Non-retroactivity is easiest to justify in the case of the exclusionary rule for unconstitutionally seized evidence, for the exclusionary rule was adopted to deter official misconduct in the future and it has no bearing on the reliability of the determination of guilt. All the other rights discussed in this Foreword, however, are designed in part or entirely to prevent the conviction of the innocent.

the waiver of juvenile court jurisdiction has always been subject to review in the adult court (the same was true in Kent); (4) counsel could have influenced the result only by persuading the juvenile court to exercise its discretion differently (also true in Kent); and (5) denial of the right to counsel at the waiver proceedings did not result in conviction of the innocent (irrelevant). In re Harris, 67 Cal. 2d 876, 879-80, 434 P.2d 615, 617-18, 64 Cal. Rptr. 319, 321 (1967).


77. The California supreme court has in fact gone beyond what the United States Supreme Court regards as permissible for itself by assuming a power to make new rules purely prospective. A purely prospective rule is not even applied to the case in which it is announced. In People v. Bandhauer, 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967), and People v. Hill, 66 Cal. 2d 536, 426 P.2d 408, 58 Cal. Rptr. 340 (1967), the California court announced new rules for the conduct of argument at death penalty cases, to be applied "hereafter."
Any limitation on the retroactive effect of rights of this type seems justified only under extremely compelling circumstances. It is difficult to fault the judgment of the United States and California supreme courts that full retroactivity for the right to counsel at interrogations or at lineups would open the prison doors a little wider than either the justices or public opinion could tolerate. What seems to have happened, however, is that practical considerations that were overwhelming in a few specific instances have generated a rule of wide applicability.

When some limitation on retroactivity is unavoidable, the California court's stated preference for a final-judgment rule is difficult to defend. A final-judgment rule is an uneasy and unsatisfactory compromise between full retroactivity and pure prospectivity that satisfies neither the interests of the state nor those of defendants. As a measure of the difficulty of a retrial it is crude, for some convictions become final much faster than others for reasons that have nothing to do with the age or staleness of the evidence. Unlike the trial-date and violation-date standards, it will usually require the reversal of many cases tried or investigated in reliance on prior law. As a result the California supreme court has in fact chosen a trial-date or violation-date standard in recent cases when considering new procedural rules that would actually disrupt the administration of criminal justice if applied freely to past judgments.78

Whenever any rule other than full retroactivity is applied, it is important to leave open an avenue of relief for any prisoner who can

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The United States Supreme Court has given some indication that it will rarely if ever employ a final-judgment rule in the future. In DeStephano v. Woods, 392 U.S. 631 (1968), the Court adopted a trial-date rule for the newly-announced constitutional right to trial by jury, remarking in a footnote that it saw "no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal." Id., at 635 n.2.
show that his own case presents an unusually persuasive example of the need for the newly announced right. For example, the failure to warn a defendant of his constitutional rights is a circumstance to be considered in evaluating the voluntariness of his confession even if the defendant was tried before the date of the decision in *Miranda v. Arizona*. Similarly, unfairness in a lineup may be asserted under the due process rule of *Stovall v. Denno* even if the lineup was held before the decision in *United States v. Wade*. Equivalent relief was not provided, however, for prisoners convicted in the past who were demonstrably prejudiced by a comment on their failure to testify, by the use of a co-defendant's confession, or by a denial of counsel at a juvenile court waiver hearing. Such protection could have been given either by applying these rules to all past convictions but limiting their impact by a harmless error rule, or by denying retroactivity but granting relief on due process grounds when unusual unfairness was shown. When individual rights must bow to the interests of the state, it is important that the bow be no lower than necessary.