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Criminal Law--Right to Counsel at Pretrial Identification--Prospective Application [*Stovall v. Denno*, 388 U.S. 293 (1967)]

Terence J. Clark

poses of the bill is to limit the duty of out-of-State corporations, dealing primarily in interstate commerce, to collect use taxes from purchasers — in effect to curb the extraterritorial reach of State taxing authorities. The Interstate Tax Act grants immunity to mail-order houses whose contact with other States is limited to the United States mail and delivery by common carriers. The bill also immunizes out-of-State corporations which send employees to other States for the sole purpose of soliciting orders.[31] Presently the bill is awaiting debate on the floor of the House. Whatever its fate may be, the Interstate Tax Act clearly manifests a realization of the necessity for national guidelines — guidelines which will permit interstate businesses to pay their share of State and local taxes, and, at the same time to enjoy a long-awaited liberation from multiple and unjust taxation.

JAMES M. KLEIN

CRIMINAL LAW — RIGHT TO COUNSEL AT PRETRIAL IDENTIFICATION — PROSPECTIVE APPLICATION

Stovall v. Denno, 388 U.S. 293 (1967).

The defendant in *Stovall v. Denno*[1] was arrested and taken into custody for fatally stabbing a man and seriously wounding his wife. After major surgery saved the latter's life, several police officials brought the defendant into her hospital room to confront him with his alleged victim.[2] From her bed, the woman identified the defendant as her assailant and the killer of her husband. In the subsequent State murder trial, she made an in-court identification of the accused and also testified to her hospital room identification. The accused was then convicted and sentenced to death.

The instant habeas corpus proceeding presented two issues: whether a newly promulgated rule of criminal procedure, requiring the exclusion of identification evidence tainted by exhibiting the

respect to tangible personal property of a person without a business location in the State or an individual without a dwelling place in the State; but nothing in this subsection shall affect the power of a State or political subdivision to impose a use tax if the destination of the sale is in the State and the seller has a business location in the State or regularly makes household deliveries in the State.

[31] *Id.* § 513(d) (1967). *But see* Scripto, Inc. v. Carson, 362 U.S. 207 (1960). It seems that H.R. 2158 would, in effect, overrule *Scripto*.

accused to witnesses before trial in the absence of counsel,[3] was to be applied retroactively and thus govern the instant case, and whether on the facts of this case the defendant was denied due process of law in violation of the 14th amendment. Although these issues may be considered as inextricably bound together, the former was exceedingly more important than the latter, for its resolution would have a profound impact on all future judicially created rules of criminal procedure.

In *Stovall*, the Supreme Court held that the new rules in *United States v. Wade*[4] and *Gilbert v. California*,[5] announced on the same day the instant case was decided, were not applicable to the defendant. The rules will operate prospectively from the date of decision, affecting only pretrial confrontations in the absence of counsel which occurred after that date.[6] Furthermore, a majority of the Court determined that the defendant had not been denied due process of law.[7]

In holding that the right to counsel at pretrial identifications would affect only future cases, the Court again endorsed a recent trend towards prospective application of its new rules governing criminal procedure in State trials. In 1965, *Linkletter v. Walker*[8] held that the fourth amendment rule excluding evidence of unlawfully seized property in State trials[9] would apply only to those cases not yet final at the time the rule was announced.[10] One year later, in *Tehan v. United States ex rel. Shott*,[11] the Court held that the

[1] 388 U.S. 293 (1967).

[2] Defendant, the only Negro in the room, was handcuffed to one of five police officers. Although two members of the district attorney's staff were present, defendant had no counsel to assist or advise him. 388 U.S. at 295.

[3] *See* Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[4] 388 U.S. 218 (1967). It is interesting to note that *Wade* was decided on certiorari from a federal circuit court, while in *Stovall* all direct methods of review had been exhausted, which may be a salient point in the Court's denial of retroactivity.

[5] 388 U.S. 263 (1967). This case was also decided on certiorari by means of a direct petition from a State court.

[6] 388 U.S. at 296-301.

[7] *Id.* at 301-02.

[8] 381 U.S. 618 (1965). This was a State prisoner's habeas corpus proceeding, all his direct appeals having been exhausted.

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

[10] The Court here had devised the so-called "finality" test: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio." 381 U.S. at 622 n.5.

[11] 382 U.S. 406 (1966). The "finality" test was also used in this case, a habeas corpus proceeding by a State prisoner.

fifth amendment rule prohibiting comment by the prosecutor on the defendant's failure to testify in State trials[12] likewise governed only those cases not yet final when the rule was promulgated. Next, *Johnson v. New Jersey*[13] set forth a harsher rule of prospectivity from the defendant's perspective, by holding that the fifth and sixth amendment rules requiring exclusion of evidence as to statements by the accused during in-custody interrogation in the absence of counsel[14] would affect only cases in which the trial had begun on or after the dates on which the rules had been announced.[15] *Stovall* took the holding of *Johnson* one step farther by granting application of *Wade* and *Gilbert* only to those cases in which an actual violation of the rule, *i.e.*, an invalid lineup, had occurred on or after the date of the latter two decisions.[16]

In order to comprehend the impact of the above decisions, the history of the application of new rules of law must be reviewed. Traditionally, courts have given unlimited retrospective effect to a decision which overruled prior law or created previously unpronounced law.[17] This was accomplished through tacit application of the jurisprudential theory that all law was declaratory, that is, the courts discovered and declared the law, and an overruled decision was a failure at discovery — it never was the law.[18] The holding in the overruling case, therefore, was not new law. Rather it was an application of what was and always had been the only cor-

12 Griffin v. California, 380 U.S. 609 (1965).

13 384 U.S. 719 (1966).

14 Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

15 The Court declined use of the "finality" test because the reason for its creation in *Linkletter* and application in *Tehan* was not present; the rules of *Escobedo* and *Miranda* had not previously been applied to any case on direct appeal. 384 U.S. at 732.

16 The *Escobedo* case was decided on June 22, 1964, and the *Miranda* case was decided on June 13, 1966. Note 14 *supra.* Under the holding of *Johnson*, the rules of *Miranda* and *Escobedo* would apply to all instances in which the trial had begun on or after those respective dates, regardless of when the defendant's rights had been "violated" at an in-custody interrogation. But *Wade*, *Gilbert*, and *Stovall* were all decided on June 12, 1967, and the Court held that only those cases in which the "invalid" pretrial identification occurred on or after that date would be affected by the *Wade* and *Gilbert* rules. Thus, if a "violation" occurred after the pretrial lineups of *Wade* and *Gilbert*, but before the decisions were rendered in those cases on June 12, 1967, the rules would not be applicable even if the trial did not start until after that date.

17 *See* Annot., 10 A.L.R.3d 1371 (1966). In cases pronouncing a new rule of law courts have historically favored the policy of endowing the victorious party with the benefit of the new rule, especially when injustice and hardship could thereby be avoided. *Id.* at 1377-82.

18 *See* 1 W. BLACKSTONE, COMMENTARIES 69-71 (Dawson ed. 1966). William Blackstone announced this theory more than two centuries ago, but its repercussions are still being felt in American courts.

rect law.[19] Thus, the "correct law" could be applied to cases which had reached finality long before the overruling decision.[20]

Countervailing the declaratory theory was the Austinian theory, a more pragmatic approach which stated that although the overruled decision was invalid law it could not be completely erased by subsequent action of the courts.[21] Cases decided under the prior incorrect law were not to be disturbed, lest all judicial holdings vacillate on the contingency that they might at some later time be overruled.[22] Thus, new law must be given prospective application in order to eliminate an apprehension which could reach to the foundations of the juridical system.[23]

These philosophical theories, declaratory and Austinian, are presented above in their extremes to illustrate the impracticality of both. No long dissertation is needed to reveal the harsh results which either might impose on litigants who have relied on a decision only to have it subsequently overruled. However, since the application of either theory is an implementation of judicial policy rather than judicial power,[24] the question must inevitably arise as to which philosophy should be employed in a given case.

The Supreme Court has attempted to determine whether retroactivity or prospectivity is justified for a new law in the field of

[19] *Id.* at 70. For a discussion of Blackstone's theory and antagonistic arguments, see E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 571-79 (1953).

[20] This is but a logical extension of Blackstone's declaratory theory. It is interesting to note, however, that even the great Vinerian professor himself expressed grave reservations about wholesale retroactive application of criminal laws. Indeed, in some instances he felt that criminal decisions should be given only prospective application. 1 W. BLACKSTONE, *supra* note 18, at 46.

[21] This positivist theory gradually evolved through the growing apprehension concerning the soundness of Blackstone's jurisprudential philosophy. A. AUSTIN, LECTURES ON JURISPRUDENCE 221-34 (4th ed. 1873).

[22] *See* J. BENTHAM, A COMMENT ON THE COMMENTARIES 190-95 (Everett ed. 1928). Jeremy Bentham attended Blackstone's lectures on English law and was immediately critical of the "frivolous" reasons given for various rules of law. E. PATTERSON, *supra* note 19, at 471. Austin, a follower of Bentham, likewise deplored the uncertainty of judge-made law under the declaratory theory. *Id.* at 571-72.

[23] Many legal methodologists have attacked unlimited retroactive application of an overruling decision and have advocated the use of prospectivity as a device to solidify judge-made law. *See, e.g.*, J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 94-100 (2d ed. 1921); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). One author proposed a model statute to authorize prospective overruling in all courts. Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180 (1931).

[24] It is generally accepted that a court may choose for itself whether to employ the declaratory or the Austinian theory, for the court's choice is dictated by its policy in precedent, not by any inherent power to apply either philosophy. *See, e.g.*, Justice Cardozo's opinion for the Court in Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 362-64 (1932). *See also* Annot., *supra* note 17, at 1374.

criminal procedure by gradually evolving a third theory which may be termed the "functional approach." *Linkletter*, the first case to deny retrospective application to a privilege emanating from the Bill of Rights, employed the Austinian theory as a vehicle for arriving at the functional approach. Relying on the fact that the Constitution neither requires nor prohibits retroactive application,[25] the Court drew its justifications for prospectivity from a series of Austinian decisions. In 1932, the Supreme Court held in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*[26] that a State could constitutionally apply its overruling decisions in future cases only: "Indeed, there are cases intimating, too broadly . . . that it *must* give them that effect; but never has any doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted . . . ."[27] Eight years later, in *Chicot County Drainage District v. Baxter State Bank*,[28] the Court held that, in an action involving collateral attack upon a prior judgment, no inviolate principle of retroactive application could be justified:

> The past cannot always be erased by a new judicial declaration. The effect of the subsequent overruling as to the invalidity may have to be considered in various aspects, — with respect to particular relations . . . and particular conduct. . . . Questions of rights, . . . of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy . . . [all] demand examination.[29]

The proper criteria of the functional approach can therefore be seen as evolving from the previously discussed cases. To determine the operation of a new rule, a court must balance the merits of the case by first reviewing any prior history of the rule in question. Then it must look to the purpose and effect of the new rule, the reliance placed on the prior law, and the impact on the administration of justice if the new rule is to be given retrospective application. Once specifically laid down in *Linkletter*,[30] these same guidelines

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[25] 381 U.S. at 622.

[26] 287 U.S. 358 (1932).

[27] *Id.* at 364.

[28] 308 U.S. 371 (1940).

[29] *Id.* at 374. It is interesting to note that in James v. United States, 366 U.S. 213 (1961), three concurring Justices thought that reliance on a past decision was a sufficient reason to overrule the prior law prospectively in a manner such that the new rule would not apply to the immediate defendant but it would apply to all defendants in future trials.

[30] 381 U.S. at 629, 636, wherein the guidelines were spelled out by the Court for the first time in their present form.

have been followed with varying weight in *Tehan*,[31] *Johnson*,[32] and *Stovall*.[33] However, in utilizing these functional criteria, the Court has found it necessary to make further delineations. Thus, when the purpose of a rule of criminal procedure is to protect the process of guilt-determination at trial by excluding unreliable evidence or to prevent a clear danger of convicting the innocent by providing the accused with a means to procure a proper defense, then it ought to be given retroactive effect. But when the purpose of the new rule is to exclude reliable evidence in an effort to deter offensive police practices or to protect the integrity of the judicial system, then the rule should be given prospective effect only.[34]

This reasoning of the Court is too logical to admit conceptual defeat. The difficulty arises from the subjective manner in which the Court must determine the purpose for a rule; *i.e.*, whether it falls into that category of rules which bears a close relationship to the fairness of truth-determination at trial and must be given retrospective application. *Linkletter* refused retroactivity because State courts had relied on the fact that prior law did not exclude highly reliable, but illegally seized, evidence and the purpose of the rule was said to be a deterrent to offensive police practices.[35] Similarly, the refusal to apply retroactivity in *Tehan* was because a State prosecutor's comment on the defendant's failure to testify was held not to relate to the ascertainment of truth. Comment was eliminated both to ensure that the prosecution would shoulder its burden of proof and to discourage courts from penalizing the defendant's exercise of the privilege against self-incrimination.[36]

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[31] 382 U.S. at 410, 415, wherein the Court gave much weight to the purpose of the new rule.

[32] 384 U.S. at 727. The Court here gave divided weight to reliance on previous law and the purpose of the new rule, but the deciding factor for prospective application was that the purpose of the rule could be effected through a means other than retroactivity.

[33] 388 U.S. at 297. As in *Johnson*, the fact that the new rule could be effectuated in another manner was deemed important, but overwhelming emphasis was placed on the fact that retroactive application would seriously hamper the administration of justice. *See* note 47 *infra* & accompanying text. One author has pointed out the possible arbitrariness of such a policy: "A court is on weak grounds when it denies justice because it is worried about its work load. Yet, when no injustice will result, judicial administration is a legitimate concern." Bartlett, *Prospective Overruling and Property Law*, 18 W. RES. L. REV. 1205, 1235 (1967), wherein the writer also discussed the history of overruling and prospectivity in criminal cases. *Id.* at 1210-18, 1231-36.

[34] *Compare* Linkletter v. Walker, 381 U.S. 618 (1965), *with* Gideon v. Wainwright, 372 U.S. 335 (1963).

[35] 381 U.S. at 637.

[36] 382 U.S. at 415.

In *Johnson*, however, the Court could not state definitely that the right to counsel at in-custody interrogation might never relate to the integrity of the factfinding process, since the possibility of coercive questioning in the absence of counsel might render any statements of the accused involuntary and thus unreliable evidence. Therefore, the Court dwelled on different criteria:

> [W]e emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which *other safeguards* are available to protect the integrity of the truth-determining process at trial.[37]

The purpose of the rule was said to be a guard against any possibility of unreliable statements being obtained through interrogation, that is, to give full effect to the fifth amendment privilege against self-incrimination by employing the sixth amendment right to counsel as a protective device.[38] This was but a further extension of rights granted previously under the fifth amendment. Therefore, the purpose of the new rule could be adequately accomplished through another method, without giving it retroactive application, *i.e.*, by allowing the defendant in a habeas corpus proceeding to claim that his statements were acquired against his will in violation of traditional standards of due process.[39] Furthermore, as had been asserted in *Linkletter* and *Tehan*, retroactive application of the new rule would not have the justifiable effect of curing errors committed by police in violation of that rule, while at the same time it would tend to disrupt the administration of the criminal courts.[40]

Stovall has further delineated among the proper criteria, and may be read as the most recent culmination and furthest extension of the functional approach.[41] Indeed, it may be interpreted as the

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[37] 384 U.S. at 729-30.

[38] *Id.* at 730.

[39] *See* Davis v. North Carolina, 384 U.S. 737 (1966). This companion case to *Johnson* was employed as a vehicle to promulgate the "other safeguards" method of attack, to be used whenever prospectivity barred the defendant's access to the new rule. In *Johnson*, the Court foresaw two possible methods of protecting the reliability of the factfinding process: retroactive application of the new rule or an independent test on collateral attack to determine whether the defendant's statements were voluntarily made. Given that choice, the Court selected the latter method and detailed its implementation in *Davis*.

[40] 384 U.S. at 731.

[41] The Court has distorted the fine line between reliable and unreliable evidence in an effort to justify its prospective application of a new rule. The final guideline of the functional approach — whether retroactivity would have an adverse effect on the admin-

first time that the sixth amendment right to counsel, standing alone, has not been given retrospective application. As with previously imposed exclusionary rules,[42] the holdings of *Wade* and *Gilbert* requiring counsel at a pretrial identification were aimed at deterring arbitrary and offensive police practices and ensuring the fundamental fairness of our judicial system.[43]

A violation of this new requirement creates a substantial threat of unreliable evidence being admitted at trial, because the secret and suggestive circumstances surrounding a pretrial identification would tend to impair the objective judgment of a witness. Thus, an in-court identification, based solely on the previous confrontation, would be similarly unreliable.[44] Moreover, if a witness does not testify as to the earlier confrontation, but still identifies the accused in court relying on the previous and possibly defective identification, then the defendant is denied his fundamental sixth amendment right of cross-examination of witnesses.[45] Thus, the defendant would have no means of attacking the in-court identification unless counsel had been present at the pretrial confrontation to view the reliability of the "factfinding process" of identification.

While asserting that presence of counsel was designed to enhance the reliability of identification evidence, the *Stovall* Court nevertheless relied heavily on language from *Johnson* in holding that whether lack of counsel would inevitably infect "the integrity of the truth-determining process at trial is a 'question of probabili-

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istration of justice — has been given more weight than ever before. *See* notes 44-47 *infra* & accompanying text.

[42] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

[43] The Court in *Wade* concluded that if before the trial a witness makes an in-court identification of an accused after having viewed him in absence of counsel, such evidence must be excluded unless it can be shown that it had an "independent origin" or that its admission would be "harmless error." 388 U.S. at 239-42; *see* Chapman v. California, 386 U.S. 18 (1967) (harmless error test); Wong Sun v. United States, 371 U.S. 471 (1963) (independent origin test).

In *Gilbert*, the Court proclaimed that it was constitutional error to admit in-court identifications without first determining if they were tainted by the illegal pretrial lineup or were of "independent origin." 388 U.S. at 272.

[44] 388 U.S. at 273.

[45] 388 U.S. at 235. The Court reiterated the fear enunciated in *Escobedo* that the trial might become merely an appeal from the pretrial identification. *Id.* at 226. In 1964, the Court had granted the right to counsel for in-custody interrogation proceedings in order to prevent the trial from becoming an appeal from that "critical stage." Escobedo v. Illinois, 378 U.S. 478, 487-88 (1964). Concerning the proposition that a defendant has an absolute right to cross-examination, see Pointer v. Texas, 380 U.S. 400 (1965).

ties' . . . ."[46] Although in *Johnson* the Court analyzed the probabilities and concluded that other safeguards were still available to protect the reliability of the evidence, in *Stovall* it scanned the probabilities and then took a novel approach by stating: "Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice."[47] The Court felt that the new rule was necessary to prevent the possibility of any unfairness, but that retroactive application would require courts to reexamine thousands of cases in which there was no real prejudice even though counsel was not present at a pretrial identification. In an apparent effort to pay homage to the "other safeguards" test promulgated in *Johnson* wherein the aggrieved defendant was afforded a method of collateral review, the Court in *Stovall* granted the accused the privilege of alleging and proving on collateral attack that the pretrial confrontation was a violation of due process of law under the 14th amendment. However, unlike the alternate safeguard permissible under *Johnson*, the *Stovall* due process test is not grounded specifically upon that which the new rule seeks to protect — the reliability of evidence taken in absence of counsel. Rather, it is grounded upon broad notions of fundamental fairness,[48] and may not always be adequate to ensure reliability.

Thus the proper criteria of the functional approach have been shifted to the extent that the Court subjectively deemed a substantial burden on the administration of justice the plausible justification for employing *Stovall* as a vehicle to render prospective a ruling which gave defendants the right to counsel at a "critical stage." Indeed, a serious question must arise concerning the source of power which the Court used not only to govern the case, but also to create the rule which *Stovall* rendered prospective. That source must necessarily be the same in both instances.

In both *Wade* and *Gilbert*, the sixth amendment right to counsel was applied to a stage in the adversary proceedings which had not previously been considered critical. Application of the new rule of criminal procedure was easily made in *Wade*, a federal case, since the Supreme Court has supervisory power over the federal

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[46] 388 U.S. at 298.

[47] *Id.*

[48] In *Stovall*, the due process test and the powers used by the majority to employ it were attacked by Justice Black in his dissenting opinion. 388 U.S. at 303-06.

courts.[49] Yet, the feasibility of applying the same rule in *Gilbert*, a State case, is questionable since the Court has no supervisory power over State courts, but only a limited constitutional power via the 14th amendment. Since the new rule was rendered strictly prospective in *Stovall*, it is doubtful that the rule can be considered "fundamental" to the constitutional provisions of the sixth amendment and thus, it would not apply to the States through the 14th amendment. Apparently, then, the Court has created a sixth amendment rule for the State courts through an unwarranted exercise of its supervisory power, rather than solely through an implementation of the 14th amendment.[50] Indeed, the Supreme Court may have allowed the functional approach to dissolve a distinction which traditionally has been thought to exist: provisions fundamental to the Bill of Rights are only applicable to the States through the due process clause of the 14th amendment, but an exercise of supervisory powers to fashion rules implementing the Bill of Rights is valid only in relation to federal courts.[51]

Such an exercise of the Court's power, however, is not unique in *Stovall*, for it has been evident in other recent cases.[52] In order to justify an imposition of new rules of criminal procedure on the States, the Court has gradually expanded the scope of the Bill of Rights through a theory of penumbral rights which emanate from the literal provisions of the constitutional amendments.[53] Although it is beyond the scope of the present discussion to attempt a complete review of the penumbral rights theory in relation to the exercise of supervisory powers over State courts in lieu of the implementation of the specific provisions of the Bill of Rights through the 14th amendment, it is interesting to view the problem as evidenced in *Stovall*.

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[49] The Supreme Court's supervisory power over federal courts has been implied from U.S. CONST. art. III, § 1; *see* Ker v. California, 374 U.S. 23, 31 (1963).

[50] Other Supreme Court decisions have also failed to define clearly the power exercised over the State courts. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). *See also* 19 CASE W. RES. L. REV. 157, 160-67 (1967).

[51] *Cf.* McNabb v. United States, 318 U.S. 332, 340-41 (1943). Justice Black's dissent in *Wade* should also be noted. 388 U.S. at 243-50.

[52] See cases cited note 50 *supra*.

[53] Penumbral rights are not stated specifically in the Bill of Rights, but are implied to give "life, meaning, and substance" to the specific provisions. *See* Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965). Many noted authors feel that the creation of penumbral rights is an exercise of the Court's supervisory powers, and thus, they are not binding on the States. *See, e.g.*, Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 19-20 (1965); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934-40 (1965).

Initially, the sixth amendment right to counsel was held to be violated when a State court did not afford an indigent the benefit of an attorney at a felony trial.[54] Similarly, the Court has held that the assistance of counsel is necessary at pretrial arraignment[55] and on appeal.[56] These rights were considered so fundamental to due process and equal protection of law that they were given retroactive effect. But in *Miranda v. Arizona*,[57] which was rendered prospective in *Johnson*, the Court held that the police have an affirmative duty at the stage of in-custody interrogation to inform the accused in an effective manner that he has the right to counsel for protection of his privilege against self-incrimination. Imposing this duty on the police is admittedly only one possible means of ensuring fairness to the accused when he is being questioned about a crime,[58] as is requiring the presence of counsel at pretrial identification only one method of ensuring that the accused is presented to witnesses in a proper manner.[59] Therefore, since other means are available which can constitutionally serve the same purpose, the States should conceivably be free to exercise their own prerogatives rather than having the Court fashion all-encompassing rules for them. Justice Harlan's dissenting opinion in *Chapman v. California*[60] stated the argument well:

> The primary responsibility for the trial of state criminal cases still rests upon the States, and the only constitutional limitation upon these trials is that the laws, rules, and remedies applied must meet constitutional requirements. If they do not, this Court may hold them invalid. The Court has no power, however, to declare which of many admittedly constitutional alternatives a State may choose. To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system.[61]

By rejecting this argument, a majority of the Court has tacitly expressed the implication that it feels the necessity for imposing upon the States a uniform national system of criminal procedure. How-

[54] Gideon v. Wainwright, 372 U.S. 335 (1963).

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

[56] Douglas v. California, 372 U.S. 353 (1963).

[57] 384 U.S. 436 (1966).

[58] *Id.* at 444.

[59] 388 U.S. at 238-39.

[60] 386 U.S. 18 (1967). The Court in this case dismissed the California "harmless error" provision in the State constitution as being too vague and fashioned its own "harmless error" test for State courts to follow.

[61] *Id.* at 47-48.

ever, in order to implement such a system in a manner which will not burden the administration of justice in State courts, retroactive application must be denied to the new rules. Prospective application is conceptually justifiable because these recent rules, while clamping down on offensive police practices, operate to exclude what may well be highly reliable evidence.[62] Furthermore, retroactive application has always been granted by the Court to exclude what it deems to be unreliable evidence,[63] and presumably it always will do so in the future. Therefore, only two real problems remain to trouble constitutional lawyers: the subjective approach of the Court in determining which evidence is reliable and which is unreliable, and the possible lack of a justifiable source of power which would permit the Court to impose any new rules upon the States.

The first problem has been alleviated somewhat by the promulgation of various due process tests to be used on collateral attack when the defendant claims the privilege of a new rule which prospective application has denied to his case.[64] Although the due process test may not be sufficient to determine the reliability of evidence in all pretrial identification cases, in the conveniently chosen vehicular case of *Stovall* the "reasonableness" of the collateral tests was amply illustrated. The Court viewed the totality of the circumstances under which the defendant had been confronted with the victim for purposes of identification and found no violation of the 14th amendment. The witness in *Stovall* was the only person who could identify the defendant and she might have died in the hospital before seeing him. Thus, the "emergency" status of this pretrial confrontation may be said to eliminate the necessity of counsel's protection in much the same manner as the taking of a blood sample from the accused in an emergency situation does not require the police to provide the protection of counsel or to procure a warrant.[65] Both relate to what should be reliable physical identification evidence. Indeed, in light of the witness's recovery from surgery and subsequent in-court identification in *Stovall*, the failure to provide counsel for the hospital confrontation may well have been a "harm-

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[62] In Massiah v. United States, 377 U.S. 201, 208-10 (1964), Justice White delivered a torrid dissenting opinion in which he expressed grave doubt for the necessity of creating rules of criminal procedure which exclude relevant and reliable evidence.

[63] *See, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964); Reck v. Pate, 367 U.S. 433 (1961).

[64] *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966).

[65] Schmerber v. California, 384 U.S. 757 (1966).

less error,"[66] for counsel may have been able to do little more than the police had done to ensure the reliability of the earlier identification, under the circumstances.

The second problem, concerning the Court's source of power, has been hidden by the functional approach to the law. According to some, there has been no constitutional justification for imposing the recent rules of criminal procedure upon the States, for the rules have no foundation in the specific provisions of the 14th amendment or the Bill of Rights, since they are based on the judicially created theory of penumbral rights.[67] But the logical criteria of the Court, in determining whether a rule must be given prospective application have evolved into a self-contained system of balance of powers. By reviewing the function, background, and impact of a new rule, and by further differentiating between those rules which protect the fairness of guilt-determination and those which merely curb offensive police practices, the Court has given all lower courts a modicum of certainty for future decisionmaking. State courts now have much new precedent to draw upon in their effort to ensure defendants a fair trial and police officials realize what is required of them for the future. Any further rules of criminal procedure which the Court fashions for the States will presumably be given prospective effect only,[68] for all the areas of the adversary system which could promote unreliable evidence are hopefully protected. New rules will probably focus on the action of police officials, on that "Bill of Duties" which prevents infringement of the integrity of our juridical system. Finally, it actually appears that the majority and dissenting opinions of the Court may differ only in respect to the amount of faith each would place in the capacity of State police to protect the rights of the accused while they are protecting society.[69] It is submitted that the Warren Court may be close to accomplishing its apparent goal, a uniform national system of criminal procedure.

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[66] *See* Chapman v. California, 386 U.S. 18 (1967).

[67] Freund, *supra* note 53; Friendly *supra* note 53; *see* 19 CASE W. RES. L. REV. 157, 160-67 (1967).

[68] In light of the recent trend, these rules would most likely operate prospectively from the date of the decision in which they were announced. It is submitted that the best course for the Court to follow would be to announce prospectivity in the cases creating the new rules, rather than awaiting a convenient vehicular case.

[69] *See* Escobedo v. Illinois, 378 U.S. 478, 499 (1964) (White, J. dissenting).