CONSTITUTIONAL LAW—PROSPECTIVE-ONLY DOCTRINE—JUVENILES' RIGHT TO JURY TRIAL—*De Backer v. Brainard*, 396 U.S. 28 (1969).

> I think this doctrine of prospective-only application is nothing less than judicial amendment of the Constitution, since it results in the Constitution meaning one thing the day prior to a particular decision and something entirely different the next day even though the language remains the same. Under our system of government such amendments cannot constitutionally be made by judges but only by the action of Congress and the people. Depriving defendants of jury trials prior to *Duncan* violated the Constitution just as much as would similar deprivations after that decision, yet this Court treats these equal deprivations with clearly unequal justice. I cannot agree to such refusals to apply what appear to me to be the clear commands of the Constitution.

So stated Mr. Justice Black in his dissenting opinion in the case of *De Backer v. Brainard*.[1]

De Backer, a 17 year old juvenile, was charged with delinquency under Nebraska Law.[2] He was alleged to have possession of a forged bank check which he intended to use for his own purposes. Such acts, if committed by an adult, would be forgery under Nebraska state law.

At the hearing before a juvenile court, defendant requested a jury trial, arguing that since this right was guaranteed by the sixth amendment to the Constitution, a statute prohibiting juries at juvenile delinquency proceedings was unconstitutional. His request was denied. After being found a "delinquent child," he was committed to a state training school where he could be confined until his 21st birthday.

De Backer unsuccessfully sought state habeas corpus.[3] On certiorari to the Supreme Court of the United States, defendant urged that, under the sixth and fourteenth amendments, trial by jury was required in a state juvenile court proceeding. He based this contention on the theory that the act, if committed by an adult, would require a jury trial if

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1 396 U.S. 28, 34-35 (1969).

2 NEB. REV. STAT. § 43-201(4) (1943). "Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance."

3 183 Neb. 461, 161 N.W.2d 508 (1968); four of the seven justices of the Nebraska Supreme Court thought the statutory provisions requiring that juvenile hearings be held without a jury, NEB. REV. STAT. § 43-206-03(2) (1943), and be based on a preponderance of the evidence, NEB. REV. STAT. § 43-206-03(3) (1943), were unconstitutional. The Nebraska Constitution provides, however, that "No legislative act shall be held unconstitutional except by the concurrence of five judges." NEB. CONST. art. V., § 2.

requested. He relied on *In re Gault*[4] in light of *Duncan v. Louisiana*[5] and *Bloom v. Illinois*.[6] *Gault* held that juveniles charged with "delinquency" as a result of committing criminal acts were entitled to certain constitutional safeguards.[7] *Duncan* and *Bloom* guaranteed to adults in "serious" criminal cases and contempt actions the right to trial by jury.[8]

In a divided opinion, the Court held the instant case to be inappropriate for determining whether juveniles are entitled to jury trial under *Duncan* and *Bloom*, since those cases were to be given only prospective application,[9] *i.e.*, state trials beginning before May 20, 1968, the date of *Duncan* and *Bloom*, would not be reversed for failure to grant jury trials. Therefore, since the hearing in the present case was held on March 28, 1968, defendant would have no constitutional right to trial by jury even had he been tried as an adult.

The doctrine of prospective-only application, as applied to criminal cases involving expansive interpretation of the Bill of Rights, was first applied in the case of *Linkletter v. Walker*.[10] Prior to that case, new constitutional rules were always applied to cases finalized before promulgation of the rule. In *Linkletter*, the Court set forth a rather extensive history of the development of the theory of prospective-only application. The Court began with *Blackstone's*[11] statement that the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." It then stated that at common law there was no authority for the proposition that judical decisions made law only for the future,[12] and thereafter cited its own holding in *Norton v. Shelby County*[13] that an unconstitutional law was as inoperative as

4 387 U.S. 1 (1967).

5 391 U.S. 145 (1968).

6 391 U.S. 194 (1968).

7 The guaranteed constitutional safeguards enumerated in *Gault* were: notice of the issues involved; benefit of counsel; protection against compulsory self-incrimination; and confrontation of the witnesses against them. Right to jury trial was neither specifically included nor excluded.

8 Generally, a crime punishable by six months in prison is a "serious crime" requiring states to grant jury trial under the sixth and fourteenth amendments. 391 U.S. 145, 158-59 n.30.

9 De Stefano v. Woods, 392 U.S. 631 (1968).

10 381 U.S. 618 (1965).

11 BLACKSTONE, COMMENTARIES 69 (15th ed. 1809).

12 "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (dissenting opinion of Holmes, J.).

13 118 U.S. 425 (1886). It was held that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 442.

though it had never been passed. Finally, it exposited the developments in case law which it believed evolved into the present doctrine of prospective-only application.

These developments may, in general, be placed into two categories. The first encompasses those cases in which judgment had been entered but, prior to review by an appellate court, a law (be it statute,[14] constitutional amendment,[15] or treaty[16]) had intervened. These cases held that if the judgment could not be affirmed except by violation of the intervening law, the judgment must be set aside. Of course, earlier cases adjudicated before the new law were not opened to review. This applied equally to criminal as well as civil suits.[17]

The second category includes civil cases such as divorces,[18] the power of municipalities to issue bonds,[19] contract actions[20] and bankruptcy proceedings.[21] In such cases, the courts held that changes in the law resulting from judicial decisions and the determination of unconstitutionality of legislative acts or statutes, etc., could be subject to no set principle of absolute retroactive invalidity, but depended upon a consideration of

> particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, [and] of public policy in the light of the nature both of the statute and of its previous application. . . .[22]

Citing *United States v. Schooner Peggy*,[23] *Chicot County*,[24] *State v. Jones*[25] and *James v. United States*,[26] the Court stated that in applying

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14 Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940).

15 United States v. Chambers, 291 U.S. 217 (1934).

16 United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

17 Note, 71 YALE L.J. 907, 914 (1962).

18 Bingham v. Miller, 17 Ohio 445 (1848).

19 Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).

20 Kuhn v. Fairmont Coal Co., 215 U.S. 349, 371 (1910).

21 Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

22 Id. at 374.

23 5 U.S. (1 Cranch) 103 (1801),

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [w]here individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment . . . which cannot be affirmed, but in violation of law, the judgment must be set aside. *Id.* at 110.

24 308 U.S. 371.

25 44 N.M. 623, 107 P.2d 324 (1940).

26 366 U.S. 213 (1961).

the principles of prospective application in the developing case law, no distinction was drawn between civil and criminal litigation.[27]

In light of this background, the Court in *Linkletter* stated that "in appropriate cases the Court may in the interest of justice make the rule prospective."[28] While this is unquestionably the rule as developed by the cases, the key words, "appropriate" and "justice," must be further considered. Is a case determining expanded Bill of Rights' guarantees an "appropriate" one for prospective application? Is it "justice" to deny these rights to particular individuals simply because they were unlucky enough to have already been convicted in trials using procedures which the Court later declares unconstitutional?

The impression created by the majority's exposition of the case law development is that prospective-only application of procedural determinations involving Bill of Rights' guarantees is simply a logical consequence, merely the next step, in the developing doctrine of prospective application. On the contrary, the Court's application of this doctrine, in a manner which deprives certain persons of the benefits of an expanded view of constitutional rights and privileges, while at the same time granting these benefits to others, is a drastic departure from the previous theory of non-retroactivity. It had always been

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27 In this regard, it must be noted that *Schooner Peggy* involved condemnation proceedings of a foreign ship seized under an order of the President where, while the case was still pending an appeal before the Supreme Court, an intervening treaty was entered into between the U.S. and the involved foreign power, providing that any property not "definitely condemned" should be restored, *i.e.*, this was a case of intervening law (a treaty) before final adjudication and was not a criminal proceeding.

Chicot County involved bankruptcy proceedings in which a settlement was reached in a lower court. The parties had relied upon this settlement, deemed at the time to be final, and had acted accordingly. The Court therefore held that although the statute supporting the settlement was later ruled unconstiutional, the parties in relying and acting upon it had been justified and their status should remain unchanged.

State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), did, however, deal directly with a criminal case. The court held there that a new interpretation of certain acts as being in violation of a criminal statute was not to be given retrospective effect since earlier decisions had held such acts not to be criminal. The Court there stated,

> Shall . . . [this overruling decision] operate retrospectively and possibly subject to heavy penalties and the stigma of criminal convictions those who, acting in reliance on the former decision, did only that which this court declared, even if erroneously, to be within the law? . . . The plainest principles of justice demand . . . . [it be given prospective application only].

(107 P.2d at 329). Numerous cases holding similarly were cited.

James v. United States, decided by essentially the same court as *Linkletter*, held that embezzled funds are to be considered taxable income overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946), but reversed defendant's conviction in light of possible reliance on *Wilcox*. A majority of five members felt that *Wilcox* must be overruled only "in a manner that will not prejudice those who might have relied on it." *Id.* at 221.

28 381 U.S. at 628.

judicial policy to apply decisions prospectively only in cases in which rights of individuals might otherwise be jeopardized. This was especially true in the area of criminal law. For example, even in the cases[29] heavily relied on by the Court to show the applicability of this doctrine to criminal cases, possible reliance by the defendants (each of whom was acquitted) upon earlier overruled decisions was the determinant in the prospective-only decisions.

The Court conceded that the background cases dealt only with the invalidity of statutes or decisions overruling long-established rules.[30] Cases turning on constitutional grounds are entirely another matter. To extend the rule into this area would, as Mr. Justice Black said,[31] amount to the Constitution meaning one thing one day and something entirely different the next. Nevertheless, the Court held that

> there seems to be no impediment . . . to the use of the same rule in the constitutional area where the exigencies of the situation require such an application. . . . [W]e believe the Constitution neither prohibits nor requires retrospective effect.[32]

Much as this pronouncement might be disputed, it is presently the law of the land and has therefore had far-reaching effects on subsequent decisions, including such controversial landmark cases as *Miranda v. Arizona*,[33] *Escobedo v. State of Illinois*,[34] *Mapp v. Ohio*,[35] *United States v. Wade*,[36] *Gilbert v. California*[37] as well as *Duncan* and *Bloom*.[38]

Since *Linkletter*, the Court has developed a formula or list of criteria[39] applicable to each case in determining whether retroactivity or non-retroactivity should apply. The three criteria are:

(a) the purpose to be served by the new standards;

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29 James v. United States, 366 U.S. 213 (1961); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).

30 381 U.S. at 628.

31 De Backer v. Brainard, 396 U.S. 28, 34 (1969).

32 381 U.S. at 629.

33 384 U.S. 436 (1966), relating to right of suspect to have attorney present at an in-custody interrogation.

34 378 U.S. 478 (1964), relating to inadmissibility of statements elicited by police during in-custody interrogation if accused's request for an attorney has been denied and he has not been warned of his absolute constitutional right to remain silent.

35 367 U.S. 643 (1961), relating to exclusion of evidence seized in violation of the search and seizure provisions of the fourth amendment.

36 388 U.S. 218 (1967), relating to the exclusion of identification evidence tainted by exhibiting the accused to identifying witnesses before trial.

37 388 U.S. 263 (1967) (same issues as *Wade*).

38 391 U.S. 145; 391 U.S. 194.

39 *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966), first set forth the proposition which has been followed ever since.

(b) the extent of reliance by law enforcement authorities on the old standards; and
(c) the effect on the administration of justice of a retroactive application of the new standards.

It should be stressed, said the Court in *Johnson v. State of New Jersey*,[40]

> that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. . . . [nor is it] automatically determined by the provision of the Constitution on which the dictate is based.[41]

In every instance of retroactive application of constitutional rules of criminal procedure in recent years, the Court concluded that retroactivity was justified because the rule affected "the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent."[42] These cases include those involving denial of right to counsel,[43] denial of full opportunity to appeal because the accused is poor,[44] and wrongful use of a coerced confession.[45]

On the other hand, cases involving right to trial by jury,[46] privileges against self-incrimination[47] and against illegal search,[48] and comment by court or prosecutor on defendant's refusal to testify[49] have received only prospective application. The majority of the Court apparently felt that such rights were not so fundamental that their denial precluded a fair trial. As the Court stated in *Linkletter*, to release guilty persons convicted by the use of relevant but illegally seized evidence, by retroactive application of a "procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."[50]

A further aspect of prospective-only application to be considered is the question of which cases are definitely barred from benefit of the

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40 *Id.*
41 *Id.* at 728.
42 *Id.*
43 Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).
44 Griffin v. Illinois, 351 U.S. 12 (1956).
45 *Cf.* Jackson v. Denno, 378 U.S. 368 (1964).
46 Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968).
47 *Cf.* Escobedo v. Illinois, 378 U.S. 478 (1964).
48 Mapp v. Ohio, 367 U.S. 643 (1961).
49 Griffin v. California, 380 U.S. 609 (1965).
50 381 U.S. at 638.

new ruling—are they cases which are already finalized,[51] or do they also include cases still pending at some state of appeal? The answer, in light of the most recent cases (set forth below), appears to be the latter. In earlier cases, such as *Linkletter* and *Tehan v. United States*,[52] the position was taken that only cases that were finalized prior to an overruling decision were barred from the benefit of the decision. In *Tehan*, the Court stated that "there was no question of the applicability of the [self-incrimination] rule to cases still pending on direct review at the time it was announced."[53] However, ten months later in *Johnson*, the Court held that the rulings of *Escobedo* and *Miranda* would not be applied retroactively and that the respective rules laid down therein were to be available only to persons whose trials began after the dates of the decisions, and should not affect cases still on direct appeal when they were decided.[54] *Stovall v. Denno*,[55] decided eight months later, held that, for the purpose of applying prospective rules regarding tainted identification evidence, no distinction was justified between final convictions and convictions at various stages of trial and direct review.[56] *De Stefano v. Woods*[57] cited the above passage from *Stovall* in regard to prospective application of the right to jury trials; *De Backer* is in accord. It would appear that the trend has been to define "prospective" in these situations to mean application of the new rule only to the case in which it is promulgated and to cases which have yet to come to trial as of that date.[58]

Justices Black and Douglas strongly dissented from every decision applying prospective-only application to criminal cases turning on constitutional grounds. Their position, that prospective-only application amounts to judicial lawmaking and substitutes the Court's judgment for what the Constitution declares to be the supreme law of the land, has remained essentially unchanged since first presented in *James v. United States*[59] and *Linkletter*.[60]

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51 Cases in which the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari elapsed or a petition for certiorari finally denied.

52 382 U.S. 406 (1966).

53 *Id.* at 409 n.3.

54 384 U.S. at 733.

55 388 U.S. 293 (1967).

56 *Id.* at 300.

57 392 U.S. 631.

58 *See* Mr. Justice Harlan's dissenting opinion in Desist v. United States, 394 U.S. 244, 256-69 (1969).

59 366 U.S. 213, 225 (dissenting opinion). Justices Black and Douglas dissented, saying: In our judgment one of the great inherent restraints upon this Court's departure

Perhaps the arguments against prospective decisions in the constitutional area can best be summed up by the following quote from Mr. Justice Black's dissent in *Stovall:*

> It seems to me that to deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them. Once the Court determines what the Constitution says, I do not believe it has the power, by weighing "countervailing interests," to legislate a timetable by which the Constitution's provisions shall become effective. . . . The concept of due process under which the Court purports to decide this question . . . is that this Court looks at "the totality of the circumstances" of a particular case to determine in its own judgment whether they comport with the Court's notions of decency, fairness, and fundamental justice, and, if so, declares they comport with the Constitution. . . . Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using the Due Process Clause to authorize this Court to override its written limiting language by substituting the Court's view of what powers the Framers should have granted government.[61]

In reply to the argument that retroactive application of such cases as *Miranda* and *Mapp* would lead to the wholesale release of the guilty victims, Mr. Justice Black, in *Linkletter* stated:

> It has not been the usual thing to cut down trial protections guaranteed by the Constitution on the basis that some guilty persons might escape. There is probably no one of the rights in the Bill of Rights that does not make it more difficult to convict defendants. But all of them are based on the premise, I suppose, that the Bill of Rights' safeguards should be faithfully enforced by the courts without regard to a particular judge's judgment as to whether more people could be convicted by a refusal of courts to enforce the safeguards. Such has heretofore been . . . the general maxim.[62]

Further, in this regard, Mr. Justice Black cited the majority opinion in *Mapp* as follows:

> In some cases this will undoubtedly be the result. . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing

from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application.

60 381 U.S. 618.

61 388 U.S. 293, 304-5.

62 381 U.S. at 650.

> can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.[63]

The doctrine of prospective-only application of constitutional decisions in criminal cases has in the four short years since its inception created enormous amounts of controversy and numerous commentaries,[64] both pro and con. A doctrine, which in the words of Mr. Justice Harlan,[65] has "generated so many incompatible rules and inconsistent principles," cannot be said to be settled. " 'Retroactivity' must be rethought."[66]

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63 367 U.S. 643, 659.

64 *E.g.* Rogers, *Perspectives on Prospective Overruling*, 38 UMKC L. REV. 35 (1968); *Evidentiary Use of Constitutionally Defective Prior Convictions*, 68 COLUM. L. REV. 1168 (1968); Fairchild, *Limitation of New Judge-made Law To Prospective Effect Only: "Prospective Over-ruling" or "Sunbursting,"* 51 MARQ. L. REV. 254 (1967); *Constitutional Rules of Criminal Procedure And The Application of Linkletter*, 16 J. PUB. L. 193 (1967); Schaefer, *Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967); *Linkletter, Shott, and The Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1966); *Retroactivity of Constitutional Decisions*, 41 NOTRE DAME LAW. 206 (1965); Torcia and King, *Mirage of Retroactivity And Changing Constitutional Concepts*, 66 DICK L. REV. 269 (1962).

65 394 U.S. 244, 258 (dissenting opinion).

66 *Id.*