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Retroactivity In Civil Suits: Linkletter Modified

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RETROACTIVITY IN CIVIL SUITS: *LINKLETTER* MODIFIED

The test for determining whether a newly-recognized constitutional safeguard should be limited to prospective application was first set out by the Supreme Court in *Linkletter v. Walker*.[1] There, a convicted plaintiff, who had exhausted all state appeal by February 1960, sought to have the exclusionary search and seizure safeguards announced in *Mapp v. Ohio*[2] (decided in June 1961) applied to his state prosecution.[3] To determine whether a new constitutional rule of procedure should be applied retroactively as well as prospectively, the Court must, Mr. Justice Clark stated, "look to the purpose of the *Mapp* rule; the reliance placed upon the [old] doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*."[4]

In two recent cases, *United States ex rel. Jones v. Rundle*[5] and *Adams v. Carlson*,[6] the *Linkletter* test was applied although the actions were *civil* in nature.[7] In both of these cases inmates sought to have the constitutionality of in-prison disciplinary procedures, under which they were confined to punitive

1. 381 U.S. 618 (1965). See generally Mishkin, The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965) [hereinafter cited as Mishkin].

2. 367 U.S. 643 (1961).

3. 381 U.S. at 621.

4. Id. at 636. The Linkletter test is often stated as requiring an examination of: " '(a) the purpose to be served by the new standards, (b) the extent of the 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.' " Williams v. United States, 401 U.S. 646, 652-53 n.5 (1971), quoting Stovall v. Denno, 388 U.S. 293, 297 (1967).

5. 358 F. Supp. 939 (E.D. Pa. 1973).

6. 488 F.2d 619 (7th Cir. 1973).

7. The Rundle case arose under 42 U.S.C. § 1983 (1970) which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In Preiser v. Rodriguez, 411 U.S. 475 (1973), an action under § 1983 was denied to prisoners who challenged "the very fact or duration of the confinement itself." Id. at 499. When such a challenge is made, it should be brought under the federal habeas corpus statutes; state prisoners would thus be required to exhaust all state remedies before bringing a federal suit. Id. at 489-90. The court pointed out that a "§ 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." Id. at 499. The Preiser case was decided three days before Rundle and was not considered there. As to the civil damages sought there, Preiser made it clear that § 1983 is permitted for that purpose. 411 U.S. at 494. As to the expungement requested in Rundle, it would seem that such an action would not be a request to shorten the prison term. Id. at 487. In Rundle, the court spoke of recomputation of "good time" as a possible equitable remedy, but the prisoner requested only expungement of the affair from his record (apart from damages). The Preiser case would not negate this

segregation, determined under due process standards recently announced by the circuit courts.[8]

In the *Rundle* case, an inmate at a Pennsylvania state prison was placed in punitive segregation after a November 1970 hearing by the prison behavior clinic.[9] Although prisoner Jones was not told the evidence against him, permitted to explain his actions, nor allowed to have the veracity of a misconduct report thoroughly investigated,[10] the clinic found he had violated prison rules. Jones brought the action against the prison officials[11] seeking monetary damages as compensation for violation of due process and expungement of the affair from his prison record. The court held that the constitutionally required procedures for disciplinary hearings (as set out by the Third Circuit in August 1972[12]) were violated,[13] but still faced the question of the retroactive application of the

suit, although it might qualify some of the dicta in the opinion. See text accompanying notes 76 & 81 infra.

The court in Adams at first had determined that although 28 U.S.C. §§ 1331(a), 1361 (1970) were the cited bases for jurisdiction, "[t]he underlying cause of action... must be based on 42 U.S.C. § 1983, and we must confront the question of whether Preiser v. Rodriguez sets a bar to federal jurisdiction of the instant case. We conclude that it does not." Adams v. Carlson, No. 73-1268 (7th Cir., Aug. 23, 1973) at 1 n.1 (citation & italics omitted). However, the court amended its opinion on October 4, 1973, eliminating all reference to the § 1983 cause of action and to the effect of Preiser, finding the case to arise purely under the federal question jurisdiction of 28 U.S.C. § 1331(a) (1970) and the mandamus provision of 28 U.S.C. § 1361 (1970). 488 F.2d at 619, 621 n.1. It is submitted that the court's first appraisal of the jurisdictional base was perhaps the more accurate.

8. The case setting out the new rule for the Third Circuit was Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972) (civil rights complaint seeking injunctive and declaratory relief). United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir.), cert. denied, 411 U.S. 921 (1973), was also invoked, since it followed the Gray case. The case setting out the new rules for the Seventh Circuit was United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).

9. At Graterford Correctional Institution, inmates may be disciplined only after a hearing by the prison behavior clinic composed of five prison administrators with a majority required for decision making.

10. United States ex rel. Jones v. Rundle, 358 F. Supp. 939, 942-43 (E.D. Pa. 1973). The report of a prison guard was the only evidence of rule violation presented at the hearing, and the only investigation of the report was the asking of that guard if the report was true. The court found that this was not sufficient. Id. at 943-44, citing Lathrop v. Brewer, 340 F. Supp. 873, 880-81 (S.D. Iowa 1972).

11. The defendant Rundle was superintendent of the prison and had no direct involvement in the clinic, but he was found to be responsible under § 1983, for, under Monroe v. Pape, 365 U.S. 167, 187 (1961), § 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. Rundle could have ordered his subordinates to "inform the accused of the evidence against him." 358 F. Supp. at 948. The argument of immunity from civil liability was rejected. Id. at 948-49.

12. See note 8 supra.

13. Both Gray and Tyrrell relied heavily on the landmark case of Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972), and adopted the due process requirements set out in that case: "If substantial deprivations are to be visited

procedures. The court concluded that the new procedural safeguards should be applied retroactively where expungement was sought, but only prospectively where civil damages were requested.[14]

In *Adams*, the inmates were placed in segregation after their participation in a general work stoppage. Their indefinite segregation was affirmed by the prison adjustment committee,[15] in July and August, although the inmates had been given neither advance notice of the hearings nor an opportunity to have the guards' misconduct report investigated.[16] The inmates alleged irreparable injury and "sought, by motion for a preliminary injunction, immediate relief from their indefinite segregation without due process . . . ."[17] The Seventh Circuit Court of Appeals found that its new due process standards (established in May 1973[18]) had been violated. After applying the standards retroactively, the court ordered new hearings and remanded to the district court for a further determination of whether the new standards were currently being followed.[19]

Originally at common law, it was assumed—usually without discussion—that court decisions would be applied retroactively.[20] In 1940, the Supreme Court

upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." Id. at 198 (citations and footnote omitted). On the evolution of the "hands off" doctrine to the recognition of federal judicial responsibility in state prison affairs see Goldfarb & Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175 (1970); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963).

14. 358 F. Supp. at 952.

15. 488 F.2d at 622. At Marion Penitentiary all major misconduct reports are referred to an adjustment committee with a duty to "make findings and impose effective goal-oriented disciplinary action." Id. at 622 n.3.

16. Id. at 622.

17. Id. at 624.

18. United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973). The rules set out therein provide "that the Constitution requires, as a bare minimum, advance written notice, a dignified hearing in which the accused may be heard, an opportunity to request that other witnesses be called or interviewed, and an impartial decision maker." Id. at 716.

19. 488 F.2d at 636.

20. Blackstone, the foremost exponent of retroactivity, concluded that overruled decisions were not law at all and therefore the overruling decision should be applied to past cases. 1 Blackstone, Commentaries 69 (15th ed. 1809), discussed in Linkletter v. Walker, 381 U.S. at 622-23. See generally Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201, 205-16 (1965) [hereinafter cited as Currier]; Note, Retroactivity of Criminal Procedure Decisions, 55 Iowa L. Rev. 1309, 1310-13 (1970) [hereinafter cited as Criminal Procedure Decisions]; Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 908-12 (1962) [hereinafter cited as Prospective Overruling].

This theory was applied in its most rigid form in Norton v. Shelby County, 118 U.S. 425 (1886) which 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; cf. Kuhn v. Fairmont Coal Co., 215 U.S. 349,

opted for prospective application in *Chicot County Drainage District v. Baxter State Bank*,[21] where it was recognized that:

> The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.[22]

In limiting the discussion to the narrow res judicata aspects of the case, the Court failed to provide any structured method for weighing these reliance interests so important to retroactivity. No doubt this decision was influenced by the admitted difficulty of the task.

Under the *Linkletter* criteria there is no assumption that new decisions will be applied retroactively,[23] although there are indications that the courts still feel it necessary to discredit retroactive application of the given case, rather than to make a positive argument for prospectivity.[24] Under the *Linkletter* test, it originally appeared that foreshadowing the new rule in earlier decisions would be sufficient to justify retroactive application.[25] Under the formulation articulated in *Desist v. United States*,[26] however, even if a new constitutional rule were foreshadowed in earlier decisions, a court could still decide the retroactivity issue to the extent that the new rule departed from the past.[27] This loosening of the original *Linkletter* test tended to expand the number and type of recent decisions accorded prospective application.[28]

372 (1910) (Holmes, J., dissenting); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

21. 308 U.S. 371 (1940). Cf. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (Cardozo, J., opinion of Court). For a discussion of Sunburst and Justice Cardozo's views on prospectivity see generally Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967) [hereinafter cited as Schaefer].

22. 308 U.S. at 374.

23. "[W]e believe that the Constitution neither prohibits nor requires retrospective effect." 381 U.S. at 629.

24. In Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), for example, the Court stated that "[a]fter full consideration of all the factors, we are not able to say that the [Griffin v. California, 380 U.S. 609 (1965)] rule requires retrospective application." Id. at 419. It thus made no positive case for prospectivity.

25. Johnson v. New Jersey, 384 U.S. 719, 734 (1966); accord, Michigan v. Payne, 412 U.S. 47, 55-56 (1973).

26. 394 U.S. 244 (1969).

27. Id. at 246. See generally Prospective Overruling, supra note 20, at 944-45; Criminal Procedure Decisions, supra note 20, at 1309.

There has been much criticism of the foreshadowing principle. See Adams v. Illinois, 405 U.S. 278, 286-87 (1972) (Douglas, J., dissenting); Mackey v. United States, 401 U.S. 667, 676-77 (1971) (Harlan, J., concurring in part); Linkletter v. Walker, 381 U.S. at 644-45 (Black, J., dissenting).

28. This may be further evidence in support of one commentator's finding that "the Court has seemed to modify the reasoning of the original decisions whenever that reasoning

Linkletter, as noted, established a tripartite test. The "[f]oremost among these factors is the *purpose* to be served by the new constitutional rule."[29] If this purpose is not advanced by making the rule retroactive, then the rule is to be applied prospectively.[30] In *Linkletter*, the Court found that the purpose of the new evidence-excluding rulings in *Mapp v. Ohio* was to deter lawless police action[31] —a purpose which would not be advanced by retroactivity. The Court pointed out that it had found a purpose demanding retroactivity in *Griffin v. Illinois*,[32] *Gideon v. Wainwright*[33] and *Jackson v. Denno*,[34] where "the principle . . . applied went to the fairness of the trial—the very integrity of the fact-finding process."[35] In making a determination of purpose, the Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question . . . ."[36] This weighing process was expanded in *Johnson v. New Jersey*,[37] where the rules of *Escobedo v. Illinois*[38] and *Miranda v. Arizona*[39] were applied prospectively. The Court in *Johnson* emphasized "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 . . . ."[40] The Court conceded that the purpose of *Escobedo* and *Miranda* was to preclude the possibility of unreliable statements during in-custody interrogation.[41] However, the Court denied retroactive application because, on balance, it found the danger of *actual* unreliability was not as great as in overt coercion cases; moreover, any actual overt coercion proved by petitioners could have been handled

might support general retroactivity." The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 138 (1966) [hereinafter cited as The Supreme Court, 1965 Term].

29. Desist v. United States, 394 U.S. 244, 249 (1969) (emphasis added) (footnote omitted).

30. 381 U.S. at 629, 637.

31. Id. at 636-37.

32. 351 U.S. 12 (1956) (prohibiting the states from allowing the costs of appeal to prejudice an indigent, as the equivalent of the denial of a fair trial).

33. 372 U.S. 335 (1963) (involving the right of an indigent to have the advice of counsel at trial, since this right affected the reliability of the trial).

34. 378 U.S. 368 (1964) (involving the right of an accused to have an involuntary confession excluded).

35. 381 U.S. at 639 (in Mapp, the actual guilt or innocence of the accused was not at issue).

36. Id. at 629.

37. 384 U.S. 719 (1966).

38. 378 U.S. 478 (1964).

39. 384 U.S. 436 (1966) (requiring warnings before confessions could be used in evidence).

40. 384 U.S. at 728-29. This loose determination is subject to the same criticism alluded to in note 27 supra.

41. 384 U.S. at 730. In Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), it was decided that the purpose of the Griffin rule against self-incrimination did not relate to protecting the innocent from conviction, but rather to preserving the integrity of the judicial system. Id. at 415, 418. See note 24 supra.

under then existing case law.[42] This type of analysis, which seeks to find the purpose of a new rule and the degree of its effect on the integrity of the fact-finding process, has led some critics to characterize the *Linkletter* test as illogical and confusing.[43] Where opinions are unclear, brief, or rendered with several concurring opinions, unjustified speculation as to purpose may result. Even where the purpose is clear, uncertainty is likely, for in determining whether the effect on the fact-finding process is sufficient to require retroactivity, a court has no guidelines.

The second prong of the *Linkletter* test relates to the reliance placed on prior decisions by law enforcement agencies and by the courts.[44] Although reliance was not found to have been critical in *Linkletter*,[45] in cases like *Stovall v. Denno*[46] it was used to tilt the balance against retroactivity.[47]

Since the consequences of prior reliance by law enforcement agencies and by courts may burden the administration of justice, the latter two elements of the *Linkletter* test often are closely related.[48] The extent of this relationship depends on the particular facts in each case. Obviously, if a decision is accorded retroactive application, law enforcement agencies can be burdened by an undue increase in the volume of retrials[49] and are faced with relocating witnesses to prove

42. 384 U.S. at 730-31. This reasoning in Johnson was followed in Michigan v. Payne, 412 U.S. 47, 55-56 (1973), where the Court refused to apply new resentencing safeguards retroactively because any actual prejudice could be cured under existing law. For the existing law referred to in Johnson see Fay v. Noia, 372 U.S. 391 (1963); Reck v. Pate, 367 U.S. 433 (1961).

43. Adams v. Illinois, 405 U.S. 278, 286-87 (1972) (Douglas, J., dissenting); Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part); Vaccaro v. United States, 461 F.2d 626, 631 (5th Cir. 1972); United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971) (claiming that Linkletter test is too confusing); The Supreme Court, 1965 Term, supra note 28, at 138-39.

44. See Criminal Procedure Decisions, supra note 20, at 1320.

45. 381 U.S. at 637; accord, Desist v. United States, 394 U.S. 244, 251 (1969); see Williams v. United States, 401 U.S. 646, 653 (1971); Criminal Procedure Decisions 1320.

46. 388 U.S. 293 (1967).

47. Id. at 299-300 (law enforcement officials of the federal government and all 50 states relied on the belief that the Constitution did not require counsel at pre-trial confrontations for identification); see Adams v. Illinois, 405 U.S. 278, 284-85 (1972). At least one commentator has argued that reliance should be dropped from the Linkletter test. Mishkin, supra note 1, at 73. For a theory that prospective application should be based on actual reliance see generally Aera Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 298 (2d Cir. 1942) (Frank, J., concurring). See also The Supreme Court, 1965 Term, supra note 28, at 139, suggesting that law enforcement officials and lower courts will be encouraged "to take a restrictive view of constitutional decisions which they consider distasteful, since they will be secure in the knowledge that convictions obtained by interpreting ambiguous constitutional rules favorably to themselves will not be reversed." Contra, Schaefer, supra note 21, at 643-46.

48. Criminal Procedure Decisions, supra note 20, at 1320.

49. In Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), the Court cited California's amicus brief which stated that " 'thousands of cases were tried in California [one of six states not having a no comment rule] in which comment was made upon the failure of the accused to take the stand.' " Id. at 418. See generally The Supreme Court, 1965 Term,

facts found in cases settled years before.[50] It has been suggested that "not forcing the retrial or release of prisoners—plays a disproportionate role in influencing the decision"[51] to apply new procedural rules prospectively.

Quite obviously, in a civil case, retroactive application poses different considerations from those in a criminal case.[52] Although civil cases, such as *Chicot County*, give us no carefully outlined test of retroactivity,[53] the courts have focused on the reliance factor in dealing with changes in sovereign and charitable immunity,[54] and with the social need for stability factors in divorce,[55] municipal bond,[56] contract[57] and property[58] cases. When dealing with criminal cases in areas where statutes have been newly construed and considering whether to apply a decision prospectively or retroactively, the courts have given the defendant the benefit of the doubt.[59] The *Linkletter* test differs from these formulations in that it treats constitutionally mandated safeguards, puts great stress on the purpose of the new rule,[60] and provides a seemingly logical and consistent method of determining when to rule in favor of retroactivity.[61]

Notwithstanding these differences, the *Rundle* court cited *Linkletter* for the proposition that "the principles of retroactivity apply equally to civil and criminal cases"[62] and continued: "Therefore, we will undertake the same type of analysis in this case, but other factors will become relevant because the effects of civil remedies may differ from criminal remedies."[63] Unfortunately, the court

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supra note 28, at 136; Criminal Procedure Decisions 1321; Comment, Linkletter, Shott, and the Retroactivity Problem in Escobedo, 64 Mich. L. Rev. 832, 839-40 (1966).

50. 382 U.S. at 418-19; Mishkin, supra note 1, at 91; Criminal Procedure Decisions 1321.

51. The Supreme Court, 1965 Term, supra note 28, at 138.

52. See Currier, supra note 20, at 234-35, 241-52; Mishkin, supra note 1, at 77; Criminal Procedure Decisions 1313-15.

53. In Chicot County, the broad outlines of a test are suggested, but nothing so well defined as in Linkletter. See text accompanying note 22 supra.

54. Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960); see Currier 212-16, 245; Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1, 20 n.62 (1960). Contra, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (but the legislature denied application of the decision retroactively).

55. Bingham v. Miller, 17 Ohio 445, 448-49 (1848). See generally Currier 210, 243; Prospective Overruling, supra note 20, at 916-17.

56. Douglass v. County of Pike, 101 U.S. 677, 679 (1879); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863); Currier 208-09, 243; Prospective Overruling 917-20.

57. See Spruill, The Effect of an Overruling Decision, 18 N.C.L. Rev. 199, 212 (1940).

58. Id. at 214.

59. James v. United States, 366 U.S. 213 (1961) (embezzlement case applied prospectively); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940) (change in definition of a lottery applied prospectively); Currier 248-49; Criminal Procedure Decisions, supra note 20, at 1315; Prospective Overruling 923-25.

60. See text accompanying note 29 supra.

61. Criminal Procedure Decisions 1319.

62. 358 F. Supp. at 950.

63. Id.; see Adams v. Carlson, 488 F.2d at 619 (similar reference to Linkletter).

failed to note that *Linkletter* did not specify that the particular three-pronged test designed for handling criminal procedure issues was equally suited to civil cases.[64]

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[65] the Supreme Court refused to judge the validity of the Third Circuit's attempt to apply *Linkletter* to a treble damages action[66] because the judicial rules in question had been foreshadowed.[67] However, in *Chevron Oil Co. v. Huson*,[68] a civil damages suit, the Court did apply part of the *Linkletter* test. The modified *Linkletter* formula considered: 1) the novelty of the rule; 2) the purpose and effect of the rule and whether it would be furthered or retarded by retroactive application and 3) the *inequity* imposed by retroactivity.[69] This is significant in that the purpose of a civil rule was being given great weight, whereas, under the older formulations applied to civil cases, reliance and stability were usually considered the main factors.[70]

64. In Dasho v. Susquehanna Corp., 461 F.2d 11 (7th Cir. 1972), the court said: "There is almost no suggestion in any of the cases from Linkletter v. Walker through Mackey v. United States ... that this line of authority should be applied to civil litigation." Id. at 20 (citations omitted). In Linkletter the Court said: "That no distinction was drawn between civil and criminal litigation is shown by the language used not only in [United States v.] Schooner Peggy, [5 U.S. (1 Cranch) 103 (1801)], and Chicot County [Drainage Dist. v. Baxter State Bank, 308 U S. 371 (1940)], but also in such cases as State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940) and James v. United States, 366 U.S. 213 (1961)." 381 U.S. at 627 (italics omitted). The Court had relied heavily on Chicot County, a civil case, for the power of courts to rule prospectively, so it was important to show that no barrier to criminal application was presented there.

65. 392 U.S. 481 (1968); cf. Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam); Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969).

66. In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 776 (3d Cir. 1967), the court held: "We believe that retroactivity should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish ...." Id. at 789.

67. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968); see text accompanying note 25 supra.

68. 404 U.S. 97 (1971).

69. Id. at 106-7. See Higley Hill, Inc. v. Knight, 360 F. Supp. 203, 206 (D. Mass. 1973) (applying the Chevron test to the question of retroactive application of Fuentes v. Shevin, 407 U.S. 67 (1972), which had provided new safeguards of notice and hearing before ex parte attachments of property could be made).

70. In the recent civil case of Lemon v. Kurtzman, 411 U.S. 192 (1973), the Supreme Court did stress reliance and was obviously concerned with stability. There, the Court decided that religious schools, providing secular classes under contracts with the State of Pennsylvania made pursuant to a state statute later declared unconstitutional, were entitled to payment for services performed prior to the statute's invalidation. The purpose of the invalidation was to prevent entanglement of the state in religious matters. The Court concluded that this purpose would not be undermined by making payments for services performed prior to invalidation of the statute. The contract nature of this case pervaded the decision, and the importance of upholding justified reliance on contracts formed under currently valid statutes undoubtedly greatly influenced the decision.

After showing that the new rules were not foreshadowed,[71] the *Rundle* court determined that the

> major reason for providing due process safeguards for prison disciplinary hearings is that irrationally, unfairly determined conclusions are not reliable [and] that the single most important purpose to be served by the new constitutional standards is to increase the reliability of the fact-finding process.
>
> This conclusion weighs heavily for retroactivity.[72]

Under the normal *Linkletter* analysis of a criminal case, this conclusion would be followed.[73]

However, in *Rundle*, where monetary damages were sought, the court said: "In this civil action regarding prison discipline for monetary damages, the fact that the major purpose of the constitutional standards is to increase fact-finding reliability is not as conclusive as it is in criminal procedure."[74] This represents a significant change in the priorities of the factors in the *Linkletter* test since the "purpose of fact-finding reliability" was the most important factor warranting retroactivity. In reaching its result the court cited, but did not really apply, the *Johnson* balancing test: " '[W]hether 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.' "[75] Instead, the court found that fact-finding reliability was of lesser importance in civil cases, in reality ignoring the degree to which reliability was impaired.

Since other safeguards, such as expungement and restoration of "good time," may be employed to protect the plaintiff at least partially, the court decided that retroactivity was not required.[76] Where the balancing principle was applied in

71. 358 F. Supp. at 950-51, citing United States ex rel. Arzonica v. Scheipe, 474 F.2d 720 (3d Cir. 1973) which said that Gray and Tyrrell were novel cases. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), aff'd in part, rev'd in part sub nom. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972), the landmark case setting out procedural safeguards for prisoners, was not settled until after the hearing in Rundle. In the Rundle opinion, many cases were cited to establish that the Gray rule was new in the Third Circuit. 358 F. Supp. at 950.

72. 358 F. Supp. at 951. Gray, which set forth the new rule in quoting Sostre v. McGinnis, said: " 'If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined....' " Gray v. Creamer, 465 F.2d 179, 185 (3d Cir. 1972).

Several cases have held that various due process safeguards could be applied retroactively, since the reliability of the fact-finding process was impaired. See, e.g., Berger v. California, 393 U.S. 314 (1969) (per curiam); McConnell v. Rhay, 393 U.S. 2 (1968) (per curiam); Roberts v. Russell, 392 U.S. 293 (1968) (per curiam). See also Williams v. United States, 401 U.S. 646 (1971) (holding that fact-finding is the most important factor).

73. Williams v. United States, 401 U.S. 646, 653 (1971).

74. 358 F. Supp. at 951. The court cites as reasons for this difference: 1) that the consequences of error are not as severe since the prisoner goes from a restricted environment to a more restricted one, not from freedom to prison, and 2) that the collateral consequences of a guilty finding are also less. Id.

75. Id. The court quoted Johnson v. New Jersey, 384 U.S. 719, 728-29 (1966).

76. 358 F. Supp. at 951. The court here cited Cox, supra note 28, at 137, which discussed

Johnson v. New Jersey, a criminal case, complete protection was afforded by the alternative safeguard; the civil nature of *Rundle* led the court to require less complete protection.[77] The serious nature of criminal cases involving loss of freedom requires different retroactive protection than civil cases involving loss of property.[78]

Unlike traditional *Linkletter* analysis, great stress was put on the effect retroactivity of civil damages would have on the administration of justice. As seen earlier, depending on the particular circumstances of each case, reliance and burden on the administration of justice can be closely related.[79] The *Rundle* court emphasized the heavy and justified reliance of prison officials on the old rules and concluded that allowing civil damages to be awarded under these circumstances would have a "dire effect on prison systems"[80] and, hence, the administration of justice.

As to expungement and recomputation of "good time," the *Rundle* court reasoned that the burden on the administration of justice would not be as great because granting this relief would only require a change in each prisoner's file and a recomputation of his release date.[81] Thus, under each remedy, the purpose and reliance were the same, but it was on the difference in the burden on administration of justice that the prospectivity/retroactivity issue was decided.

In arguing that the *Linkletter* test could be applied in the *Adams* case, the Seventh Circuit reasoned by analogy.[82] After conceding that the new procedural rules for disciplinary hearings were not foreshadowed, the court said: "To the extent that a prison disciplinary hearing may be analogized to a criminal trial, *Linkletter* must be our analytical touchstone, for [the case setting out the new

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Johnson v. New Jersey and its ruling: "We ... must take account ... of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." Johnson v. New Jersey, 384 U.S. 719, 729 (1966). The application of other safeguards in Johnson would have given the accused the complete relief to which he was entitled without requiring the retroactive application of Escobedo and Miranda. See text accompanying note 42 supra. For the effect of the Preiser case on "good time" see note 7 supra.

77. The Johnson Court determined that on balance, of all in-custody interrogation cases, only in cases of coerced confessions was the truth-determining process in sufficient danger to require retroactivity. Since Jackson v. Denno, 378 U.S. 368 (1964), had been given retroactive effect, the alternative remedy of proving actual coercion would give the complete relief.

78. See Mishkin, supra note 1, at 77.

79. See text accompanying note 48 supra.

80. 358 F. Supp. at 952. The court pointed out that since "Rundle ... may be personally liable for every minute any prisoner spent in solitary confinement in Graterford Prison within the reach of the statute of limitations. . . . The consequence would be the end of the prison administration because any sensible prison administrator would immediately resign because it would be virtually impossible for him to protect himself from civil liability." Id.

81. Id. For the effect of the Preiser case on "good time" see note 7 supra.

82. The court may have been influenced in drawing such an analogy since the new rules which were adopted by the Miller case (see note 8 supra) were heavily based, by way of analogy, on safeguards required by Morrissey v. Brewer, 408 U.S. 471 (1972) (hearings that could revoke parole).

procedural rules] was concerned almost exclusively with the procedural integrity of prison hearings."[83] It was further argued "[t]hat the prisoner is convicted by an administrative prison board instead of a court makes no significant difference. Nor does it matter that . . . this case arise[s] in a civil rather than a criminal context."[84]

As with the equitable remedies sought in *Rundle*, the *Adams* court found that the new rules should be applied retroactively since they have the purpose of affecting the integrity of the fact-finding process.[85] Since there were no alternative protections to damages available, as in *Johnson* or *Rundle*, and no excessive burden on the administration of justice, the "purpose" aspect of the *Linkletter* rule mandated retroactivity.

The modified *Linkletter* test as applied in *Rundle* permits great flexibility[86] in deciding cases where different consequences flow from different remedies. Also, in prison cases of this type brought under 42 U.S.C. § 1983, the courts face many of the same constitutional issues dealt with in the more conventional *Linkletter*-type case. From an analytical point of view, the logic of deciding *Rundle*-type cases in terms of *Linkletter*—as opposed to *Chicot County*'s vague consideration of the consequences of reliance—is compelling. It might be argued, however, that basing the prison official's nonliability on the happenstance that his detriment also burdens the administration of justice is faulty; what should be considered is the equity of the official's position in his reliance, as was suggested in *Chevron*.[87] Viewed in these terms, it is possible that the *Rundle* court was really motivated by the equity of the official's position, but chose to decide the case on burden of administration of justice grounds to cloak the decision with the authority of the *Linkletter* rule.

Under either *Linkletter*, *Chicot County* or *Chevron*, the result reached in *Rundle* would be the same as to damages. Whether, under different circumstances, the results would still be the same would depend on the courts' willingness to follow formulations regardless of the apparent equities. As to equitable remedies—with *Adams* following the *Rundle* result in finding new disciplinary hearing safeguards retroactive—it seems that this line of reasoning will be followed in the other circuits.

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83. 488 F.2d at 627.

84. Id. (citation omitted).

85. Id.

86. In Furman v. Georgia, 408 U.S. 238 (1972) (given retroactive effect in Walker v. Georgia, 408 U.S. 936 (1972)), the Court prohibited capital punishment but refused to order retrials of the cases because of the burdens such an order would put on the courts. Robinson v. Neil, 409 U.S. 505 (1973), held that in cases of double jeopardy, capital punishment similar to that in Furman, and others dealing with non-procedural constitutional issues, the Linkletter test was not helpful in determining the retroactivity issue and did not have to be followed. In such cases, the purpose of insuring the integrity of the fact-finding process is not important.

87. See text accompanying note 69 supra.