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# A Test For Retroactivity In Criminal Cases - Schowgurow v. State

## A Test For Retroactivity In Criminal Cases

*Schowgurow v. State*[1]

The defendant, a Buddhist, was convicted of murder in the Circuit Court for Cecil County, Maryland. Both before and during trial defendant made motions to dismiss on the ground that the grand jury and the petit jury were selected in derogation of the first and fourteenth amendments of the Constitution of the United States. The defendant contended that persons of his religion were excluded from both juries by article 36 of the Maryland Declaration of Rights,[2] which requires

1. 240 Md. 121, 213 A.2d 475 (1965).

2. MD. DECLARATION OF RIGHTS art. 36:
That as it is the duty of every man to worship God in such a manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person be compelled

jurors to believe in the existence of God. The lower court denied the defendant's motion. On appeal the Maryland Court of Appeals reversed, stating that the requisite belief in article 36 was in violation of the first and fourteenth amendments, both on its face and as applied. The court also carefully noted that its decision was retroactive only insofar as it applied to cases not final[3] at the announcement of the decision.[4]

In *State v. Madison*,[5] *Schowgurow* was applied to invalidate the indictments of grand juries indicting all criminal defendants whose cases were still pending at the time of the *Schowgurow* decision, regardless of a defendant's religious belief or disbelief.[6]

These two cases have given rise to serious problems in Maryland. Since *Schowgurow* and *Madison*, new juries have been drawn throughout the state. According to the Attorney General,[7] from 2000 to 3000 persons required re-indictment. The validity of witness oaths has been

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to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; *nor shall any person otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God,* and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come. (Emphasis added.)

3. The Court of Appeals points out in Hays v. State, 240 Md. 482, 214 A.2d 573 (1965), that the U.S. Supreme Court in a similar pronouncement on non-retroactivity in Linkletter v. Walker, 381 U.S. 618 (1965), said that "final" meant after the availability of appeal had been exhausted.

4. It has been suggested that the federal courts are prohibited by the "case and controversy" provision of the U.S. Constitution from making a rule retroactive until the point is raised and argued before the court. See, *e.g.*, Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962). While there is no similar prohibition in the Maryland Constitution, the Court of Appeals has said on a number of occasions that it does not render advisory opinions. See Tanner v. McKeldin, 202 Md. 569, 580, 97 A.2d 449 (1952); Hammond v. Lancaster, 194 Md. 462, 71 A.2d 474 (1950). It could be argued that it would have been wiser if the Maryland Court had refrained from deciding the retroactivity point until it was properly before the Court. Perhaps a better result would have been forthcoming if the issue had been fully briefed and argued before the Court.

5. 240 Md. 265, 213 A.2d 880 (1965). In this case Madison had been indicted before the *Schowgurow* decision but had not yet been tried. He is a Seventh Day Adventist who admits he believes in the existence of a Supreme Being. The State argued that Madison could not question the validity of the indictment under *Schowgurow* because he was not a member of the excluded class, but the Court of Appeals held that he did not have to have standing or show prejudice where the system of jury selection was unconstitutional on its face; to require him to do so would violate the equal protection clause of the fourteenth amendment to the U.S. Constitution. Therefore, since Madison's case was not final before *Schowgurow*, his indictment was dismissed.

6. Not long after the *Madison* decision, the Court of Appeals handed down two more cases to clear up any confusion created by *Schowgurow* and *Madison*: Smith v. State, 240 Md. 464, 214 A.2d 563 (1965) and Hays v. State, 240 Md. 482, 214 A.2d 573 (1965). Smith had been indicted but not tried at the time *Schowgurow* was handed down. After consulting with his attorney, he waived his right to challenge his indictment under *Schowgurow*, and was tried and convicted in Baltimore City. After his conviction he changed his mind and appealed on the ground that he could not waive the defective indictment. The Court of Appeals said he could and affirmed his conviction.

The defendants in *Hays* had been convicted before *Schowgurow*, but their time for appeal had not yet expired. On appeal they raised the *Schowgurow* point, but the State argued that since they had not raised the point in the trial court, they had impliedly waived their right to challenge the indictment. The Court of Appeals reversed, holding that a defendant could not impliedly waive this point if his conviction was not final before *Schowgurow*.

7. See The Evening Sun (Baltimore), Oct. 21, 1965, p. C22, col. 7.

seriously questioned,[8] as has the constitutionality of our perjury laws.[9] The Court of Appeals has already stated that the rule of *Schowgurow* applies to civil cases.[10] The validity of acts of judges have been questioned.[11] The cases may also have some affect on dying declarations.[12] Undoubtedly, other areas of the law may be affected, but the principal concern here is the retroactivity of *Schowgurow* itself.[13]

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8. In the Daily Record (Baltimore), Nov. 8, 1965, p. 2, col. 3, the Attorney General of Maryland stated that it was his opinion that the witness oaths were valid, but that in order to be completely safe, some slight changes should be made. A portion of this opinion is set out below:

> Our efforts in this direction are not to be construed as meaning that we harbor any serious reservations regarding the applicability of the affirmation to non-believers. To the contrary . . . we are confident that the same may lawfully be so utilized and we are prepared to defend that position.
>
> In light of the aforegoing, we offer the following suggestions:
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> (1) The traditional oath — "In the presence of Almighty God, you do solemnly promise and declare that the evidence which you will give to the Court (and Jury) in the matter now pending before it (them) shall be the truth" — should continue to be administered to all witnesses who do not first express a contrary desire. [Author's note: notice that the traditional "so help me God" has been removed from the oath.]
>
> (2) The standard affirmation — "You do solemnly sincerely and truthfully declare and affirm that the evidence which you will give to the Court (and Jury), in the matter now pending before it (them), shall be the truth, the whole truth, and nothing but the truth, and so, you do affirm" — should continue to be administered . . . to all witnesses who indicate that their refusal to take the oath is predicated upon their disbelief in the existence of a Supreme Being and who do not object to taking this form of affirmation.
>
> (3) A modified affirmation — "You do declare and affirm that the evidence which you will give to the Court (and Jury) in the matter now pending before it (them), shall be the truth, the whole truth, and nothing but the truth, and so, you do affirm" — should be administered to all witnesses who indicate a preference not to be inducted into the witness stand pursuant to either of the above procedures.

The Attorney General's position seems to fully protect the witness, but might it not possibly prejudice a defendant? Suppose a jury is made up completely of believers and a witness refuses to swear (this refusal takes place in open court) and wants to affirm. Might this not make the witness a little less believable to the jury? Since it seems that believers would be just as likely to tell the truth if they took a more general oath, why have different oaths? The common law tradition of the oath is strong, but is not the real purpose to put the witness under the perjury laws? It would seem reasonable and safer in order to avoid the possibility in the future of chaos similar to that that developed after *Schowgurow,* to have one oath for all witnesses.

9. See The Evening Sun (Baltimore), Oct. 18, 1965, p. B24, col. 1.

10. In Schiller v. Lefkowitz, 242 Md. 461, 219 A.2d 378 (1966), the court held that while the rule of *Schowgurow* applies to civil cases, it does not apply retroactively even to those cases not finalized prior to the date of *Schowgurow.*

11. Ralph v. Brough, 248 F. Supp. 334 (D. Md.) (1965). This contention was answered by the *de facto* argument discussed *infra,* note 13.

12. This exception to the hearsay rule requires that the declarant believe in the life hereafter. The only reason to suppose he is any more reliable just before death is because it seems that a person who believed he would soon "meet his maker" would be less likely to tell a lie. If he does not believe in the hereafter, there is no reason to think he would be any more trustworthy just before death. This seems to be a valid rule of evidence, and it is highly doubtful that a non-believer is prejudiced by it.

13. Somewhat related to retroactivity is the argument of counsel in Smith v. State, 240 Md. 464, 214 A.2d 563 (1965), that since the grand jury was unconstitutionally composed, the indictment was defective and the court could not obtain jurisdiction. The effect of the argument, if successful, would have been to render all convictions prior to the *Schowgurow* decision null and void. This argument was predicated upon a long line of decisions commencing with State v. Williams, 5 Md. 82 (1853), and Bruce v. Cook, 6 Gill & J. 345 (1834). Those cases indicate that a defective indictment gives the court no jurisdiction. The Court of Appeals answered this contention by stating that a defective indictment was "voidable and not void" and thus could be waived. It is submitted, therefore, that the portion of *State v. Williams* under discussion has been impliedly overruled. If a defective indictment can be waived, it is an admission that a defective indictment may give jurisdiction, since jurisdiction usually cannot be waived.

The problem of retroactivity, discussed briefly in *Schowgurow*, has recently been considered specifically by Judge Thomsen of the Federal District Court for the District of Maryland in the cases of *Smith v. Brough*,[14] *Ralph v. Brough*[15] and *Brown v. Brough*.[16] All of these cases were brought on habeas corpus petitions.[17]

In *Smith v. Brough* the court reached the conclusion that *Schowgurow* was not retroactive. Judge Thomsen quoted from the *Schowgurow* opinion: "In the many difficult questions of constitutional law arising from criminal trials, the protection of the rights of the individual is weighed against the protection of society. Both are basic to ordered liberty. On the matter of retroactivity here involved, the dip of the scales is obvious."[18] Using this balancing test to weigh the interest of society against the interest of the individual, the court allowed the petitioners in *Brown* and *Ralph*, which were capital cases, to re-petition in the state courts under the Maryland Post Conviction Procedure Act. The court indicated there was some question whether a man's being under penalty of death might alter the "dip of the scales," and it wanted the state courts to first decide the question.[19]

It is important to note here that in both *Schowgurow* and the above cases, the Maryland Court of Appeals and the Federal District Court purported to follow the test laid down by the United States

The Court of Appeals cited the case of Kimble v. Bender, 173 Md. 608, 196 Atl. 409 (1938), in the *Smith* opinion. Perhaps a better argument could be based on that case. There, a justice of the peace was held to be a "de facto" officer though the statute for his appointment was unconstitutional. The Court of Appeals cited the case of Norton v. Shelby County, Tenn., 118 U.S. 425 (1886), which enunciates a principle particularly applicable to *Schowgurow*. The Court in *Norton* laid down a limitation upon the rule that where an office is itself legal and the statute for selection of the officer is unconstitutional, still the officer, if selected under color of law, is a "de facto" officer, and his acts prior to the declaration of unconstitutionality are valid. The doctrine of *Norton* has been used in a number of criminal cases. Most of these cases involved the validity of acts of a judge where the statute for selection or appointment has been declared unconstitutional. Maryland has followed *Norton* in a number of cases. See, *e.g.*, Reed v. President of North East, 226 Md. 229, 172 A.2d 536 (1961); Izer v. State, 77 Md. 110, 26 Atl. 282 (1893).

Applying the *Norton* rule to jurors, it is evident that their acts prior to the declaration of unconstitutionality of article 36 are valid and that their indictments therefore conferred jurisdiction. This rule will apply assuming that the jurors were selected under color of law and that their position is considered to be an office. There is no doubt that the position of a juror is an office, for as the Maryland court stated in *Schowgurow*, "A grand or petit juror serves in an office of trust (apart from profit)." 240 Md. 121, 125, 213 A.2d 475, 478 (1965).

The effect of the theory of waiver and that of the "de facto" officer are much the same. The distinction, however, is that in the former the court must abandon the rule that a defective indictment gives a court no jurisdiction, while in the latter the rule is maintained. If the rule has been abandoned, serious difficulties with the rule of former jeopardy may result.

For a good discussion of the "de facto" theory as applied to judges, see Judge Thomsen's opinion in Ralph v. Brough, 248 F. Supp. 334 (D. Md. 1965).

14. 248 F. Supp. 435 (D. Md. 1965).

15. 248 F. Supp. 334 (D. Md. 1965).

16. 248 F. Supp. 342 (D. Md. 1965).

17. In a case under the Maryland Post Conviction Procedure Act, Hamm v. Warden, 240 Md. 725, 214 A.2d 141 (1965), the Court of Appeals in dicta upheld its decision regarding the retroactivity of *Schowgurow*. The Court ruled that the question was not properly before the court because the petitioner had not properly raised the point in the lower court, but said that it nevertheless would have been unavailing. See also Husk v. Warden, 240 Md. 353, 214 A.2d 139 (1965).

18. 240 Md. 121, 134, 213 A.2d 475, 484 (1965).

19. For discussion of the problems raised by this approach, see *infra* note 54 and accompanying text.

Supreme Court in the case of *Linkletter v. Walker*.[20] In that case the Supreme Court held the exclusionary rule of *Mapp v. Ohio*[21] not to be retroactive. The *Linkletter* opinion stated that retroactivity should be governed by "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[22]

Although the result in *Schowgurow* was proper, the statement of the rule as a weighing of the interests of the individual against the interests of society may be misleading. The analysis which follows hopefully shows that the correct test for retroactivity deals more with the nature and amount of prejudice to the defendant than with the weighing of the individual's rights against those of society.[23] Only where there is some substantial doubt as to whether the defendant's right to a fair trial has been prejudiced should the society's interest in administrative convenience be weighed. If the District Court in *Brown* and *Ralph* had been applying this more specific rule, rather than the vague balancing of interests test, it is doubtful that it would have concluded that there may be other factors to be weighed when the death penalty is involved.[24]

## THE PURPOSE OF *Schowgurow* AND RETROACTIVE APPLICATION

The purpose of the *Schowgurow* decision was twofold: first, to insure the defendant of his first amendment right by eliminating discriminatory laws based upon theism or non-theism; second, to protect the integrity of the fact-finding process, *i.e.*, to insure as nearly as possible the finding of truth by eliminating any possibility of a prejudiced or biased jury resulting from discriminatory state laws.[25] Would these purposes be furthered by a retroactive application of its rule?

20. 381 U.S. 618 (1965). This is the leading case to date on the problem of retroactivity. Its application was limited to cases not finalized at the time of its decision.

21. 367 U.S. 643 (1961). In this case the Supreme Court held that the exclusion of evidence seized in violation of the search and seizure provisions of the fourth amendment was required in state cases by the due process clause of the fourteenth amendment.

22. 381 U.S. 618, 629 (1965).

23. The Supreme Court in Johnson v. New Jersey, 34 U.S.L. WEEK 4592, 4595 (U.S. June 21, 1966) (No. 49) said: "Finally, we 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."

24. In *Schowgurow* the Court of Appeals pointed out that neither the Constitution nor the Supreme Court has spoken finally on the problem of retroactivity. In Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932), Mr. Justice Cardozo said that a state "may make a choice for itself between the principle of forward operation and that of relation backward." See also Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

25. That these are the purposes is adequately supported by an examination of the opinion. In *Schowgurow* the court stated, 240 Md. at 131:

> Under the decision of the Supreme Court in *Torcaso,* we are constrained to hold that the provisions of the Maryland Constitution requiring demonstrations of belief in God as a qualification for service as a grand or petit juror are in violation of the Fourteenth Amendment, and that any requirement of an oath as to such belief, or inquiry of prospective jurors, oral or written, as to whether they believe in a Supreme Being, is unconstitutional.

In Torcaso v. Watkins, 367 U.S. 488, 496 (1961), the Supreme Court held: "This Maryland religious test for public office unconstitutionally invades the appellant's

In the *Linkletter* decision the Supreme Court said that the retroactive application of the *Mapp* rule would not further its purpose, which they thought was to restrain police officers from making illegal searches and seizures. The following questions, therefore, must be analyzed: first, would the protection of first amendment rights be furthered by its retroactive application; secondly, would the integrity of the fact-finding process be enhanced by its retroactive application?

On the surface it would appear that any decision concerning individual rights protected by the Constitution would be furthered by its retroactive application. This point of view has been ably argued by many legal writers.[26] But an examination of the cases indicates that the Supreme Court, despite its apparent recent concern with individual rights, does not make rules retroactive on this ground. The fact that an individual's rights have been violated is a good ground for making the decision in the first place and for making it the law for the future, but it is not necessarily a reason for applying the rule to the past. The leading cases in which the Supreme Court has allowed retroactive application of a rule — *Griffin v. Illinois,*[27] *Eskridge v. Washington,*[28] *Gideon v. Wainwright*[29] and *Jackson v. Denno*[30] — were decided in the way they were, not so much because an individual's rights were violated, but because a serious question of the fairness and verity of the trial was raised. The Supreme Court has apparently never given retroactive application to a rule based on infringement of individual rights alone.

In *Tehan v. United States,*[31] which involved the right against self-incrimination, the Court recently stated its position as follows:

> As in *Mapp,* therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede

freedom of belief and religion and therefore cannot be enforced against him." The combination of these two cases adequately demonstrates that one of the primary motivations of the Court of Appeals in deciding *Schowgurow* was the protection of religious liberty. Further, in 240 Md. at 125 the Court of Appeals said: "In Maryland, both grand and petit jurors are an integral part of our judicial system; they are regarded as fundamental safeguards to individual liberty, and, in their deliberation, each member exercises a part of the sovereign power of government in the administration of justice." It is thought that this statement along with the Maryland court's discussion of other selective exclusion cases and its presumption of prejudice for purposes of standing (See Smith v. Brough, 248 F. Supp. 435 [1965]) adequately demonstrates the other purpose of the *Schowgurow* decision — the protection of the integrity of the fact-finding process, the protection of our judicial system as one which is devoted to the finding of truth.

26. See, *e.g.,* Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L.J. 907 (1962); and Torcia & King, *The Mirage of Retroactivity and Changing Constitutional Concepts,* 66 DICK. L. REV. 269 (1962).

27. 351 U.S. 12 (1956).

28. 357 U.S. 214 (1958).

29. 372 U.S. 335 (1963).

30. 378 U.S. 368 (1964).

31. 382 U.S. 406 (1966).

> that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values — values reflecting the concern of our society for the right of each individual to be let alone.[32]

The *Tehan* decision held against retroactive application. But the question has been asked: Why not make it retroactive on the basis of the individual's rights alone? Mr. Justice Black, joined by Mr. Justice Douglas, in his dissent in *Linkletter* seemed to feel that the *Mapp* rule should apply to cases finalized prior to the *Mapp* decision simply because that case involved an individual's constitutionally protected right:

> As the Court concedes . . . this is the first instance on record where this Court, having jurisdiction, has ever refused to give a previously convicted defendant the benefit of a new and more expansive Bill of Rights interpretation. I am at a loss to understand why those who suffer from the use of evidence secured by a search and seizure in violation of the Fourth Amendment should be treated differently from those who have been denied other guarantees of the Bill of Rights.[33]

This point of view cannot be answered to everyone's satisfaction. It could be argued that if the defendant did not raise and argue the right in question at his trial, he waived this right. This is a fictional line of thinking; a person cannot waive an unknown right. The problem lies in the fact that an individual right cannot be divorced from the interests of society, *i.e.,* that society has an interest in seeing that every person has his rights protected. However, society also has an interest in maintaining predictability in the administration of a judicial system under which the guilty remain in jail. In addition, once an individual right has been violated by an illegal search and seizure or by a coerced confession, retroactivity will not correct the personal wrong. Therefore, it seems fair to say that the violation of an individual's rights should not produce retroactivity unless the violation was so great as to seriously challenge the reliability of the trial, *e.g.,* as in *Gideon.*

It is thus apparent that the Supreme Court will make a rule retroactive only when there is a great possibility of prejudice to the integrity of the fact-finding process which places the finding of truth in serious doubt. In the present situation, although the defendant's individual rights were violated by article 36 of the Maryland Declaration of Rights, the overall purposes inherent in our legal system — fairness, consistency, and reliability — would not be served by making the *Schowgurow* rule retroactive.

In *Griffin v. Illinois*[34] the Supreme Court held that the denial of an appeal to indigent defendants solely because of their inability to obtain

32. *Id.* at 416.
33. Linkletter v. Walker, 381 U.S. 618, 646 (1965).
34. 351 U.S. 12 (1956).

a transcript was a denial of the equal protection of laws guaranteed by the fourteenth amendment of the United States Constitution. The Court reasoned that Illinois' prior recognition of the right of appeal as an essential part of its judicial system, precluded it from affirming its necessity in some cases and not in others. *Griffin* was given retroactive operation by the Illinois Supreme Court.[35] In *Eskridge v. Washington*[36] the state had adopted the same unconstitutional procedure which had been condemned in Illinois. In that case the Supreme Court, though not discussing retroactivity, granted petitioner relief on federal habeas corpus though his case had become final before the *Griffin* decision was rendered. This ruling also gave *Griffin* retroactive operation.

The defendant in *Gideon v. Wainwright*[37] was denied court-appointed counsel in a criminal proceeding. The Supreme Court held that the denial of counsel in such a case was a fundamental denial of due process of law in derogation of the fourteenth amendment. This case, like *Eskridge,* was decided on federal habeas corpus, and thus as a practical matter was made retroactive, though retroactivity was not discussed.[38] The *Gideon* Court recognized that the existence of counsel was an essential part of our fact-finding process — the adversary system.

In *Jackson v. Denno,*[39] the New York procedure in question left to the jury the determination of the voluntariness of confessions. The Supreme Court held that the admissibility of an involuntary or coerced confession would be highly prejudicial to the accused and a fundamental denial of due process of law contrary to the fourteenth amendment. Again, this case was brought before the Court on federal habeas corpus and had retroactive effect. Underlying the Court's statements existed the tacit assumption that coerced confessions are inherently suspect and untrustworthy. The Court thus realized that a coerced confession must be excluded from the jury, the objectivity of which is an essential part of our judicial system.

The Supreme Court in *Mapp v. Ohio*[40] held that evidence, unlawfully seized, was inadmissable in the prosecution of the accused. The fourth amendment prohibition of unlawful search and seizures was thus applied to the states through the due process clause of the fourteenth amendment. As discussed earlier, that case was held to be not retroactive in *Linkletter v. Walker*[41] where the Court said that their underlying reasoning in the *Mapp* decision was that, in order to prevent the police from violating the fourth amendment right in order to obtain convictions, it was necessary to apply the exclusionary rule to the states, other state methods of preventing such unlawful actions having failed. It is apparent that the *Mapp* Court simply wanted to

35. People v. Griffin, 9 Ill. 2d 164, 137 N.E.2d 485 (1956).

36. 357 U.S. 214 (1958).

37. 372 U.S. 335 (1963).

38. The Maryland Court of Appeals held *Gideon* to be retroactive in Manning v. State, 237 Md. 349, 206 A.2d 563 (1965). See 25 MD. L. REV. 355 (1965).

39. 378 U.S. 368 (1964).

40. 367 U.S. 643 (1961).

41. 381 U.S. 618 (1965).

protect the rights of individual defendants and to prohibit unlawful violation of those rights by the police.

In *Griffin v. California*[42] the Supreme Court held that a prosecutor's or judge's comment on the accused's failure to testify was violative of the defendant's fifth amendment protection against self-incrimination. A comment, as distinguished from a confession, is not evidentiary in nature. The right against self-incrimination was made applicable to the states through the due process clause of the fourteenth amendment in *Malloy v. Hogan.*[43] *Griffin* was held to be not retroactive in *Tehan v. United States.*[44] The *Tehan* Court indicated that the *Griffin* decision was based upon the determination of the desirability of protecting an accused's right against self-incrimination. It then pointed out that this fifth amendment right was designed to prevent invasions of privacy and to require the prosecution to bear the burden of conviction in our accusatorial system. The Court denied, however, any relationship between the fifth amendment right and a finding of truth.

In *Johnson v. New Jersey,*[45] the Supreme Court held that the rules of *Escobedo*[46] and *Miranda*[47] should not apply retroactively. *Escobedo* held, at least, that statements made by the accused while being interrogated by police after having been refused counsel were inadmissible.[48] *Miranda* extended the rule of *Escobedo* by requiring police to advise an accused that he has a right to remain silent, that anything he says may be used against him, that he has a right to an attorney, and that he has a right to a court-appointed attorney if indigent. As in *Tehan,* the Court said, "the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination."[49] In addition, contrary to *Jackson v. Denno,*[50] there was an independent determination of voluntariness wherein the statements were found to be voluntary. This being so, the presumption against truthfulness would not lie.

When these cases are placed in juxtaposition, it is evident that retroactivity depends upon the degree to which the fact-finding process was influenced by the various unconstitutional practices.[51]

*Schowgurow,* as far as insuring the integrity of the fact-finding process is concerned, falls between *Linkletter,* which involved illegal search, and *Tehan,* which involved comment on failure to testify, and is probably closer to *Linkletter.* There is some possibility of detriment to that process when a class is excluded from the jury, but certainly the possibility is slight in this case; for a man's religion, in contrast to his race, is not self-evident. The fact that Buddhists were or were not members of the jury would cast little doubt upon the finding of truth, and therefore the rule of *Schowgurow* should not be retroactive.

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42. 380 U.S. 609 (1965).
43. 378 U.S. 1 (1964).
44. 382 U.S. 406 (1966).
45. 34 U.S.L. WEEK 4592 (U.S. June 21, 1966) (No. 49).
46. Escobedo v. Illinois, 378 U.S. 478 (1964).
47. Miranda v. Arizona, 34 L.W. 4521 (1966).
48. See, 75 MD. L. REV. 165 (1965).
49. 34 U.S.L. WEEK, *supra* note 45, at 4595.
50. Jackson v. Denno, *supra* note 39.
51. Johnson v. New Jersey, *supra* note 23.

It is clear that a rule should be made retroactive where the practice which the rule is correcting produces a serious doubt as to the integrity of the fact-finding process. However, where the purpose of the rule is not clear, the burden which retroactive operation would place upon the administration of the courts and the history of the prior rule may have to be considered.

### ADMINISTRATIVE AND HISTORICAL CONSIDERATIONS

Many may submit that administrative difficulties are the most important considerations in determining retroactivity. So far as policy is concerned, this may be true. Certainly Mr. Justice Black suggested in his dissent in *Linkletter v. Walker* that the majority was enunciating a departure from retrospective operation in part upon the basis of administrative difficulties.[52] The necessity of re-indicting and re-trying all persons presently convicted of crimes, the expense and time which would be entailed, and the obstruction which retrospective operation would place in the path of the development of new law and in the path of litigants seeking relief in other cases must, of course, be considered.

In *Tehan v. United States,* Mr. Justice Stewart in his majority opinion refers to the "effect on the administration of justice" as the "last important factor" to be considered in determining retrospective operation.[53] But it seems that the Supreme Court has not adopted a policy of refusing retroactivity on administrative grounds where the purpose is to insure the fairness of the fact-finding process.

There may, of course, be an acceptable method of applying the administrative argument. It is submitted that whether such an application is acceptable is governed by the interests placed in balance. It has been suggested that the determination of retroactivity might include the weighing of the gravity of the sentence.[54] This result would occur when weighing the interests of society in the administration of the courts against the interests of individual prisoners. Such a weighing of interests presents many problems, but the following are strikingly evident: first, it would be difficult to determine the gravity of sentence which would demand retroactive operation; and second, there would seem to be little justification for a rule which predicates the existence of a fundamental denial of due process upon the severity of the sentence and the crime committed — murderers ought not to have a right which petty thieves do not.

On the other hand, if the interests balanced are those of society in the smooth administration of the courts and those of society in a legal system which perpetuates a finding of truth, a proper result may be reached. Where no question of truth is involved, the administrative difficulties obviously outweigh all other considerations.[55] Where the

52. 381 U.S. 618, 640 (1965).
53. 382 U.S. 406, 418 (1966).
54. See note 19 *supra* and accompanying text. In Ralph v. Brough, 248 F. Supp. 334 (D. Md. 1965) and Brown v. Brough, 248 F. Supp. 342 (D. Md. 1965), the District Court felt that there *may* be other interests to be considered when a petitioner is under sentence of death.
55. See, *e.g.,* Linkletter v. Walker, 381 U.S. 618 (1965).

purpose of the rule contended to be retroactive is obviously to protect a finding of truth, no administrative difficulties would override the mandate of retrospective operation which such a rule presents.[56] But where the purpose is debatable, as in *Tehan v. United States*,[57] — that is, where the purpose of protecting the integrity of the fact-finding process cannot necessarily be said to be the overriding consideration — administrative difficulties may require retrospective operation only insofar as it applies to cases not final. The administrative considerations may persuade the court to say that the purpose of the decision was only to protect individual constitutional rights — not a finding of truth.

It has already been determined that the primary purpose of *Schowgurow* clearly was to guarantee the freedom of religion or non-religion specified in the first amendment of the federal constitution, rather than guarantee the integrity of the fact-finding process, and this being so, any discussion of administrative difficulties is unnecessary. If this were not the case, however, the history of the prior rule would be pertinent.[58]

The importance of historical analysis, in the absence of a clear indication of purpose, lies primarily in its use in determining whether a state was justified in maintaining the unconstitutional practice. If

56. See, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

57. Tehan v. United States, *supra* note 53.

58. If the history were pertinent, however, it is thought that Maryland was well justified in its position. The Supreme Court has never said that all exclusions from jury service are unconstitutional. On the contrary, in Strauder v. West Virginia, 100 U.S. 303, 310 (1879), the Court said that a state may make discriminations in jury selection within the limits of the fourteenth amendment. In *Ex Parte* Virginia, 100 U.S. 339, 345 (1879), the Court took an even more limited view of its power in relation to the exclusion of a class from jury service. The Court said that the fourteenth amendment had expanded the power of Congress and that Congress should enforce it by legislation; the courts should not declare state laws void when Congress had acted. Congress has only acted in the Civil Rights Act of 1875 (now 18 U.S.C. 243) where "race, color, or previous condition of servitude" are disallowed as qualifications for jurors.

While it is not contended here that only Congress can implement the fourteenth amendment in selective exclusion cases, it is submitted that both *Strauder* and *Ex Parte Virginia* are representative of the Supreme Court's inclination to allow the states to judge what exclusions were reasonable — at least prior to 1905 when State v. Mercer, 101 Md. 535, 61 Atl. 220 (1905) was decided by the Maryland Court of Appeals. *Mercer* is the only case which raised the point in Maryland prior to *Schowgurow*. Though the constitutionality of article 36 was not in question in that case, the court showed little reluctance in stating that the provision meant exactly what it said — that no one would be competent as a juror in this state who did not believe in the existence of God.

It is further submitted that the Court of Appeals could honestly believe at that time that exclusion of non-believers was reasonable. In the first place, while the Supreme Court had banned exclusion on the basis of race, a man's race is obvious to the jury but his religion is not. Secondly, and probably of more importance, the Maryland rule of selection seems to have been carried over from the common law distinction between the ability of believers and non-believers to testify honestly.

In Torcaso v. Watkins, 223 Md. 49, 161 A.2d 438 (1960), a case which the United States Supreme Court later reversed, the Court of Appeals held that a person, who was appointed a notary public and who was refused office because of his refusal to state a belief in the existence of God as required by article 37 of the Declaration of Rights, was not deprived of any of his rights under the federal constitution. It was not until they were reversed by the Supreme Court in Torcaso v. Watkins, 367 U.S. 488 (1961), that the Maryland courts knew that exclusion based upon the disbelief in God were unconstitutional. The Maryland Court of Appeals acted as quickly as possible after *Torcaso*, declaring article 36 unconstitutional in *Schowgurow*, the first case which raised the issue.

the state courts had reason to know that the proscribed practice was unconstitutional, and yet continued to uphold it, there may be some justification for disregarding administrative considerations. This is so because a state ought not to be able to rely upon administrative difficulties where there is an absence of surprise. The difficulties are of the state's own making since its courts continued to follow that which they knew or should have known to be unconstitutional. But if the state could not have known the practice to be unconstitutional, there may not be a justification for disregarding administrative considerations, particularly if it be assumed that the state has an interest in convicting and punishing the guilty defendant and that this interest has become vested by the finding of guilt.[59] In other words, where the overriding purpose of the rule cannot fairly be said to be the protection of the integrity of the fact-finding process, an absence of historical justification for the perpetuation of the prior rule may cause the court to disregard administrative considerations in a determination of retrospective operation and apply any doubt in favor of retroactivity.

## CONCLUSION

The Maryland Court of Appeals stated that *Schowgurow* should not be retroactive. This is the proper result; for a careful application of the test for retroactivity as set out in *Linkletter* and *Tehan* indicates that there was little possibility of prejudice to the defendant, and that the primary purpose of the decision was not to insure the integrity of the fact-finding process. Only in the close cases, such as *Tehan,* need the administrative and historical aspects of the test be considered in any detail.

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59. In the *Linkletter* opinion, 381 U.S. at 636, the majority seemed to say that the states have a "vested interest" in upholding convictions made under the doctrine of Wolf v. Colorado, 338 U.S. 25 (1949), which was overturned by *Mapp,* 367 U.S. 643 (1961). In his dissent in *Linkletter,* Mr. Justice Black stated that the majority rested their opinion on the "vested interest" theory. 381 U.S. at 653. This theory appears to have been used first by the Supreme Court in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940).