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Search and Seizure: Mapp v. Ohio, Prospective or Retrospective

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an intolerable burden would be placed on governmental units if they were bound by the doctrine of estoppel in their multiplicity of functions, causing the resulting depletion of public funds.

It must be noted, however, that a contradiction of this trend came forth from the Wisconsin court not long ago. In *Holytz v. City of Milwaukee*,[17] the court swept away all remaining vestiges of governmental immunity, exposing governments as a result, to suit in the operation of governmental as well as proprietary powers, thus *expanding* governmental liability for acts of its agents. On the other hand, Justice Currie's view would decrease responsibility by not allowing estoppel for acts done in pursuit of governmental functions, thus *lessening* governmental jeopardy to suit. Although the *Holytz* case reflects the growing tendency to treat governments the same as individuals before the law, Justice Currie's concurring opinion if properly interpreted by this note, marks a change in this trend.

The above analysis of the concurring opinion of the *Schober* case points out the hopeless confusion on the holdings as to whether estoppel applies to the taxation and zoning functions of government, or as to what test is to be applied to determine if the facts in a particular case warrant applicability. The concurring opinion does not serve to clear up the confusion.

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Search and Seizure: Mapp v. Ohio, Prospective or Retrospective—A 66 year old woman was found gagged, bound and stabbed to death in her tavern-residence. A cigar box containing cash, a safe deposit box key, and other keys with a metal tag bearing her husband's name were missing. The defendant was picked up for questioning, and later he guided the police officers to his hotel, telling the officers his room number. The defendant waited outside, knowing that the officers were searching his room. The search, which was conducted without a warrant, produced the missing cigar box, cash, and keys. When informed of the discovery, the defendant admitted robbing the tavern, carrying a loaded gun and binding and gagging the victim, although he could not recall stabbing her.

He was tried, convicted of murder in the first degree, and sentenced to death. At his trial, he made no objection when the articles discovered during the search of his hotel room were offered and admitted into evidence. All his state remedies were denied[1] as was his application for certiorari to the United States Supreme Court.[2]

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[17] 17 Wis.2d 26, 115 N.W.2d 618 (1962).

[1] Hall v. State, 223 Md. 158, 162 A.2d 751 (1960), 224 Md. 662, 168 A.2d 373 (1961).

[2] Hall v. State, 368 U.S. 867 (1961).

At the time of the trial and appeals, Maryland courts had adopted a modified version of the rule in *Wolf v. Colorado,*[3] sanctioning the admission into evidence in felony cases of material seized by state officers in an unlawful search. But, within one year after defendant's appeals had been denied, the United States Supreme Court overruled the decision in *Wolf v. Colorado,*[4] and held that the federal exclusionary doctrine as set forth in *Weeks v. United States*[5] was applicable in state as well as federal prosecutions.[6]

After the *Mapp* decision, the defendant filed a petition of habeas corpus in the Federal District Court. The District Court denied the petition,[7] but the United States Court of Appeals for the Fourth Circuit reversed the conviction and ordered a new trial, on the basis that since the officers had conducted an illegal search, the admision into evidence of the fruits of the search was prejudicial error.[8] Thus, the rule set forth in *Mapp v. Ohio*[9] was applied retrospectively.[10]

The significance of this decision can be seen in the fact that prior to the *Mapp* decision, approximately one-half of the states allowed the admission of evidence obtained by an illegal search and seizure. If the *Mapp* doctrine applies to all prior cases where illegally obtained evidence was used, all these individuals would have a right to a new trial.

The initial inquiry is whether declarations of law by the Supreme Court can be limited to only prospective application. The traditional theory has been that judges do not make law, but only discover it.

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[3] 338 U.S. 25 (1949).
[4] *Ibid.*
[5] 232 U.S. 383 (1914).
[6] ". . . Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 654, 655 (1961). ". . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. . . . " Mapp v. Ohio, 367 U.S. 643, 655, 656 (1961).
[7] Hall v. Warden, 201 F.Supp. 639 (D. Md. 1962).
[8] Hall v. Warden, 313 F.2d 483 (4th Cir. 1963). The State of Maryland has filed a Petition for Writ of Certiorari with the Supreme Court of the United States.
[9] *Supra* note 6.
[10] See Gaitan v. United States, —— F.2d —— (10th Cir. 1963) where the court applied the Mapp rule prospectively in deciding that a pre-Mapp connection based on illegally seized evidence need not be vacated.

> For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law;* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined.[11]

A strict application of this theory indicates that since the prior law never was a law, when a prior decision is overruled, the new law must operate retrospectively. The Supreme Court has never directly decided whether or not it is bound to apply a new overruling decision retrospectively, although in *Chicot County Drainage District v. Baxter State Bank* there is strong dictum that in declaring a statute unconstitutional the decision may be applied prospectively only.[12] Numerous lower court decisions have also been limited to prospective operation.[13]

This writer feels it is a more realistic approach to decide whether a decision should be applied retrospectively or prospectively on the merits of each case.

Though the Supreme Court did not explicitly state whether the *Mapp* decision was to apply either retrospectively or prospectively, some of the language used could be interpreted as showing an intent to apply the new rule retrospectively. The Court speaking through Justice Clark said:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '[t]he criminal is to go free because the constable has blundered'. *People v. Defore,* 242 N.Y., at 21, 150 N.E. at 587. In some cases this will undoubtedly be the result.[14]

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[11] I BLACKSTONE, COMMENTARIES 69 (Cooley ed. 1884).

[12] 308 U.S. 371, 374 (1940). "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425, 442; Chicago, I. & L. Ry. Co. v. Hackett, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. 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. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

[13] Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941), *cert. denied,* 314 U.S. 678 (1941). Also see Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) footnote 46 for a list of citations in support of the courts power to apply a decision prospectively.

[14] *Supra* note 6, at 659.

The Court then made a footnote reference to *Griffin v. Illinois*,[15] and said the class of state convictions possibly affected by the *Mapp* decision would be of relatively narrow compass when compared with *Griffin*. In the *Griffin* case, the Supreme Court held that an indigent had a right to be furnished a free transcript of his trial, when a transcript was necessary for an appeal. And in a later case the Court held that the *Griffin* doctrine was retrospective.[16] Thus, it could be implied that the Court felt *Mapp* should be retrospective since *Griffin*, which concerned a greater magnitude of cases, was held to be retrospective.

Additionally, it appears that Justice Harlan in his dissent considered the *Mapp* decision to be retrospective since he said that the number of appeals which have appeared before the Supreme Court concerning the admissability of illegally obtained state evidence ". . . would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on Wolf. . . ."[17]

Though the language used in *Mapp* does tend to indicate that the decision will be applied retrospectively, this writer feels the language is not so strong as to preclude a contrary finding. Therefore, the question of applying the *Mapp* decision retrospectively or prospectively is still open to discussion on its merits.

On the fact, it appears all the equities are in favor of applying the rule retrospectively. For, simply stated, why would a conviction stand when the same person could not be convicted now on the same evidence.[18] Moreover, applying the doctrine retrospectively doesn't automatically free the individual from prison, since it merely requires a new trial. Yet, the purpose of this exclusionary doctrine should not be forgotten. It isn't solely to prevent the conviction of the innocent, but rather to deter unconstitutional methods of law enforcement as well.

> Yet however, felicitous their phrasing, these objections hardly answer the basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter —to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.[19]

That the purpose of the exclusionary doctrine differs from the retrospective rule of the *Griffin* case can be readily seen. In the *Griffin* case the individual was being deprived of his right to appeal, i.e., the right

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[15] 351 U.S. 12 (1955).
[16] Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1957).
[17] *Supra* note 6, at 676.
[18] See 36 WASH. L. REV. 407, 431-433 (1961) where the author feels that since Mapp is a constitutional interpretation, there cannot be two constitutional standards; one before and one after Mapp.
[19] Elkins v. United States, 364 U.S. 206 (1959).

to have a higher court decide whether prejudicial error precluded him from having a fair trial, with the possible result of a conviction of an innocent person. But, under the *Mapp* rule, probative evidence is being withheld for the primary purpose of deterring illegal searches.[20] The guilt of the individual is not in issue. And, though it does not necessarily follow that the individual will be released from prison since he will only be given a new trial, practically it would be impossible to litigate the facts behind the obtaining of evidence in cases long concluded.[21]

It is this writer's opinion that in deciding whether the *Mapp* decision should be given the retrospective operation, the court should weigh the individual's interest against the purpose of the exclusionary doctrine and the efficient administration of justice.

Ancillary to the main issue of whether the *Mapp* decision should be applied retrospectively is the issue of whether Hall's failure to make a timely objection to the proffered evidence obtained from the illegal search precludes him from raising it on this appeal. The general rule was well stated in *Whitney v. Steiner:*

> Whatever the theoretical basis, however, the Supreme Court has explicitly held that where a state prisoner, asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus. . . . Under such circumstances the petitioner has . . . 'forfeited his constitutional claim.'[22]

The court did recognize a number of exceptions to this rule though, including cases where the petitioner can present other strong reasons justifying his failure, or cases where particular circumstances exist which are deemed to justify federal action. It is suggested that the particular circumstances in the instant case do justify overlooking the failure to object to the evidence offered. The Supreme Court had for many years steadfastly refused to require the states to adopt the *Weeks* exclusionary doctrine, nor did its decisions suggest that they would change the rule. It may have been wiser to object to the introduction of the evidence as was done in the *Mapp* case, but it seems ". . . under these special circumstances, the failure of Hall to object to the admission of the fruits of the illegal search and to raise the question on appeal is not only understandable but excusable."[23]

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[20] It could be argued that this purpose would best be served by applying the decision retrospectively since this would immediately demonstrate to law officers the effect of illegal searches and seizures.

[21] The Circuit Court of Appeals pointed out that even Hall's confession may be inadmissible since it was given immediately after Hall was told of the result of the search.

[22] 293 F.2d 895, 898, 899 (4th Cir. 1961).

[23] *Supra* note 8, at 30.