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Constitutional Law-Search and Seizure-Retrospective Application of *Mapp v. Ohio*

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RETROSPECTIVE APPLICATION OF *Mapp v. Ohio*—On February 15, 1960, the Louisiana Supreme Court affirmed petitioner's conviction for simple burglary. The conviction was obtained through the use of evidence unlawfully seized from petitioner in violation of the fourth amendment of the United States Constitution.[1] In December 1961 the District Court for the Parish of West Feliciana denied petitioner's writ of habeas corpus filed after the Supreme Court decision of *Mapp v. Ohio*,[2] which forbade introduction at state trials of evidence seized by state officers in violation of the fourth amendment. The denial of the writ was affirmed by the Louisiana Supreme Court, and certiorari was denied by the United States Supreme Court.[3] A similar petition was then filed in forma pauperis in the United States District Court for the Eastern District of Louisiana, alleging exhaustion of state remedies. The court denied the petition. On appeal to the Court of Appeals for the Fifth Circuit, *held*, affirmed. The purpose of the *Mapp* exclusionary rule is deterrence of state officers from violation of the fourth amendment, and this purpose will be best served by prospective application of the rule. *Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963).

Historically, there have been two basic doctrines regarding judicial decisions that enunciate new principles of law.[4] The older theory, advanced by Blackstone, contends that judicial decisions do not pronounce new legal principles, but merely state what has always been the law, thus requiring retrospective application.[5] Opposed is the Cardozo "realistic" theory, which advances the proposition that judges, within the limits imposed on judicial legislation, can and do pronounce new law as the concepts and mores of society change.[6] This "new law" would then apply only

1 U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

2 367 U.S. 643 (1961).

3 Linkletter v. Walker, 370 U.S. 928 (1962).

4 See generally Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

5 1 BLACKSTONE, COMMENTARIES *69, 70.

6 CARDOZO, THE NATURE OF THE JUDICAL PROCESS 10-11, 124-25 (1921); see ABA, CANONS OF JUDICIAL ETHICS XIX; 2 SIMPSON & STONE, LAW AND SOCIETY 705 (1949). The Supreme Court adopted the "realistic" theory in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940), and Griffin v. Illinois, 351 U.S. 12, 26 (1956) (concurring opinion of Frankfurter, J.). See Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963), applying the Cardozo theory to the same question raised in the principal case. For a case criticizing this theory, see Legg's Estate v. Commissioner, 114 F.2d 760, 764 (4th Cir. 1940).

in the future. The more modern viewpoint, as enunciated by many courts and commentators today, is a compromise between these two positions and is most in line with recognized principles of fairness and justice. Analytically this solution involves the following steps: first, the purpose or purposes of the new rule must be defined; second, the court must determine whether these purposes will be best served by prospective, retrospective, or partially retrospective application of the rule.[7] Despite the general acceptance of the above position, in the wake of *Mapp* several courts have differed as to the application of the above test to the exclusion of evidence seized in violation of the fourth amendment.[8]

In 1949, the Supreme Court recognized in *Wolf v. Colorado*[9] that "the security of one's privacy against arbitrary intrusion . . . is basic to a free society . . . [and] implicit in the concept of ordered liberty."[10] The Court in *Wolf* held the fourth amendment enforceable against the states through the fourteenth amendment. But it was not until 1961, in *Mapp v. Ohio*,[11] that the Court extended the exclusionary rule to state criminal trials and to evidence seized illegally by state officers.[12] In general, three basic theories as to the nature and purpose of the exclusionary rule have been proffered, and the Court has never definitely stated which is correct. From one point of view, it has been argued that the fourth and fifth amendments together necessitate exclusion, *i.e.*, invasion of privacy to obtain evidence is a form of self-incrimination.[13] This view is considerably weakened as an operative rationale because the self-incrimination clause has not been extended to the states[14] and the evidence involved in cases pronouncing this view should have been excluded on the basis of state self-incrimination clauses

7 Principal case at 17; Comment, 71 YALE L.J. 907, 942 (1962). *But see* Note, 16 RUTGERS L. REV. 587, 592 (1962).

8 *Compare* Hall v. Warden, 313 F.2d 483, 495 (4th Cir. 1963), *with* principal case at 18. Since there is a clear conflict between the circuits, the question will undoubtedly be brought soon to the Supreme Court. Other federal decisions on this question are Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); Hurst v. People, 211 F. Supp. 387, 395 (N.D. Cal. 1962), applying *Mapp* retrospectively, and Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963), denying retrospective application. State decisions have been fairly consistent in not allowing retrospective application of *Mapp*. See, *e.g.*, *In re* Harris, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305 (1961) (concurring opinion of Traynor, J.), *In re* Winkle, 372 Mich. 292, 125 N.W.2d 894 (1964), People v. Figueroa, 220 N.Y.S.2d 131 (Kings County Ct. 1961); Commonwealth *ex rel.* Wilson v. Rundle, 412 Pa. 109, 194 A.2d 143 (1963); Commonwealth *ex rel.* Stoner v. Myers, 199 Pa. Super. 341, 185 A.2d 806 (1962).

9 338 U.S. 25 (1949).

10 *Id.* at 27.

11 367 U.S. 643 (1961).

12 The Court had already held that evidence obtained illegally by federal officers could not be used in state trials, Rea v. United States, 350 U.S. 214 (1956), and that evidence obtained illegally by state officers could not be used in federal trials, Elkins v. United States, 364 U.S. 206 (1960). Both of these decisions, however, were based on the supervisory power of the Court, and did not mention exclusion as a constitutional right.

13 Mapp v. Ohio, 367 U.S. 643 (1961) (concurring opinion of Black, J.); Boyd v. United States, 116 U.S. 616 (1886); *cf.* Irvine v. California, 347 U.S. 128 (1954); Rochin v. California, 342 U.S. 165 (1952).

14 Adamson v. California, 332 U.S. 46 (1947).

or the fairness concept of the due process clause, regardless of its manner of procurement.[15] A second view, often erroneously stated to be the holding in *Mapp*, is that the fourth amendment substantively includes the exclusionary rule, making exclusion a separate right on an equal footing with the right to privacy.[16] If, as this view dictates, the interests protected by the fourth amendment are both the right to be secure from unreasonable search and the right to have unlawfully seized evidence excluded at trial, then individuals convicted by such unlawful evidence have been denied a substantive constitutional right, and should be released. However, exclusion was not recognized at common law[17] and its rejection does not deny a fair trial to the accused, as the authenticity of the evidence seized is not impaired by the manner in which it was gathered.[18] Exclusion is not historically based, but rather is a judicially created doctrine of recent origin. Thus, in no way can exclusion be considered a fundamental right of our society, and it is this still valid "fundamental rights" test that the Court uses in determining which substantive rights are applicable to the states by virtue of the due process clause of the fourteenth amendment.[19] A third view holds that exclusion is merely a rule of evidence, applicable to federal courts by virtue of the Supreme Court's supervisory power, and therefore inapplicable to the states.[20] This view is in direct conflict with *Mapp* since it would compel the conclusion that exclusion cannot be extended to the states by the Supreme Court.

A close examination of *Mapp* will reveal a logical solution to the question of the real nature of the exclusionary rule—an answer which was accepted by a majority of the Supreme Court in *Ker v. California*,[21] a later decision interpreting *Mapp*. Exclusion is not part of the fourth amendment, but is necessitated by the fourth; it is a rule of evidence, but of

15 The distinction between a coerced confession and evidence unlawfully seized should be noted. Courts reject the coerced confession as evidence because of self-incrimination clauses (state or federal) which would be violated upon the admission of the evidence. The privilege of privacy is violated upon entry of the house or home, and subsequent admission of the evidence seized is not part of the violation. The reliability of the evidence is not in question (vis-à-vis a coerced confession, which can never be used), and there would be no question of its admissibility if a warrant had been procured. *Accord*, People v. Defore, 242 N.Y. 13, 25-27, 150 N.E. 585, 589-90 (1926). In both of the above instances, courts would reject evidence seized in such a manner as would "shock the conscience" in violation of the fundamental fairness concept of the due process clause. See Rochin v. California, 342 U.S. 165 (1952).

16 Hall v. Warden, 313 F.2d 483 (1963); Comment, 25 GA. B.J. 238 (1962).

17 People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); 8 WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

18 See note 15 *supra*.

19 See Palko v. Connecticut, 302 U.S. 319 (1937), which holds that a right is included in the due process clause of the fourteenth amendment if it is a "fundamental right of free society" and "implicit in the concept of ordered liberty."

20 Mapp v. Ohio, 367 U.S. 643 (1961) (dissenting opinion of Harlan, J.)

21 374 U.S. 23 (1963). *Ker* calls the exclusionary rule a "concomitant command" of the fourth amendment. *Id.* at 44. Note that the opinion of the Court in *Mapp* was concurred in by only four Justices.

constitutional dimension.[22] This distinction is not specious, but is repeatedly suggested by the *Mapp* opinion. *Mapp* calls the exclusionary rule a sanction against violation of the fourth amendment, a necessary corollary the purpose of which is to deter invasion of privacy and compel respect for the Constitution.[23] The only interest directly protected by the fourth amendment is privacy, but a necessary component of effective protection is exclusion, and since it is constitutionally based, the Supreme Court has the power to impose it on state courts. Otherwise the promise of freedom from unreasonable search and seizure becomes a mere "form of words."[24] Exclusion then is a constitutional procedure for enforcing the right to privacy, and not a substantive right itself.[25]

Once the real nature and purpose of the exclusionary rule is determined, it becomes clear that this purpose is best served by prospective application of the rule.[26] As was recognized in the principal case, wholesale review of numerous past convictions will have little if any deterrent effect on future invasions of privacy. However, the *Mapp* rule was applied retroactively to reverse Miss Mapp's conviction, and was applied in several later cases[27] where defendants' appeals were still pending at the time of *Mapp*.[28] To select the date of the decision as the boundary line and not even apply the rule in the case where it was pronounced,[29] although entirely consistent with the object of deterrence, would seem to deny equality and justice to prisoners in the same situation as Miss Mapp, *i.e.*, those who were pressing appeals at the time of the *Mapp* opinion.[30] A reasonable point in time must

22 Commonwealth *ex rel.* Wilson v. Rundle, 412 Pa. 109, 120, 194 A.2d 143, 148 (1963).

23 Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).

24 *Id.* at 655.

25 See Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 435 (1961), to the effect that because exclusion is not a substantive right itself, the "fundamental rights" test of Palko v. Connecticut, 302 U.S. 319 (1937), need not be applied to extend it to the states. See generally Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 660-62 (1962).

26 Compare Griffin v. Illinois, 351 U.S. 12 (1956), stating that the purpose of the holding that indigent convicted defendants must be supplied with a free transcript if such is needed to prosecute an appeal, is to provide fairness and equal protection to all defendants. This rule was later applied retrospectively to effectuate this purpose, Eskridge v. Washington State Bd., 357 U.S. 214 (1958).

27 Ker v. California, 374 U.S. 23 (1963); United States *ex rel.* Mancini v. Rundle, 219 F. Supp. 549 (E.D. Pa. 1963). A recent Michigan case states that no case has been found where a conviction which had become final before *Mapp* was overturned because of the *Mapp* opinion. *In re* Winkle, 372 Mich. 292, 125 N.W.2d 894 (1964).

28 There has been much comment about certain language in *Mapp* that implies a retrospective intention of the Court. The Court stated: "We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns v. Ohio*, 360 U.S. 252, *Griffin v. Illinois*, 351 U.S. 12, and *Herman v. Claudy*, 350 U.S. 116. . . . In any case, further delay in reaching the present result could have no effect other than to compound the difficulties." 367 U.S. 643, 659 n.9 (1961). However, the problem of retrospective application should not be concluded by the uncertain language in this footnote. See Bender, *supra* note 25, at 670-71.

29 See Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

30 Such must have been the reasoning of the Court in Ker v. California, 374 U.S. 23 (1963).

be selected, before which no conviction will be disturbed. It would seem most reasonable to apply the exclusionary rule to reverse the convictions in cases where the issue can be raised on direct appeal, that is, where the conviction is not yet final, as these are cases that could conceivably have been vehicles for declaring the new principle. Thus a pre-*Mapp* conviction could not be collaterally attacked, nor directly attacked if the defendant has not preserved an exception to the admission of the questioned evidence. Since exclusion is not itself a substantive constitutional privilege, objections based on the impossibility of waiver of constitutional rights have no merit. A sudden change of law is not an ordinary occurrence, and the transition will necessarily be arbitrary to some extent, but the above solution, applied as in the principal case, seems to be most in line with reason and fairness.

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