THE RETROACTIVE EFFECT OF AN OVERRULING CONSTITUTIONAL DECISION: *MAPP v. OHIO*

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The recent decision of the Supreme Court of the United States in *Mapp v. Ohio*,[1] suddenly overruling *Wolf v. Colorado*,[2] has created an interesting problem regarding the retroactive effect of an overruling decision. *Wolf*, decided in 1949, had held that the Constitution does not impose upon the states the same obligation imposed upon the national government in *Weeks v. United States* [3] to exclude evidence from criminal trials when it is the fruit of an unreasonable search and seizure. *Mapp* holds instead "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." [4] The case was one in which state police officers broke into defendant's home, used force to restrain her when she objected to their failure to display a warrant, and conducted an exhaustive search. Obscene material was found, for the possession of which defendant was convicted. Overruling *Wolf* and applying the new exclusionary rule, the Supreme Court reversed the conviction because it rested upon unconstitutionally seized evidence. *Mapp*, rather than *Wolf*, applies for the future. The problem of retroactivity is to determine which rule applies when trials predating the announcement of the new exclusionary rule are now challenged because of the admission of evidence—when trials which took place under one rule of constitutional law are challenged under a superseding and contrary rule.

Mapp is explicitly a constitutional case. The ordinary, usually silent, assumption in the Supreme Court of the United States has undoubtedly been that a decision determining the meaning of the Constitution must be retroactive, even if it is an overruling decision. The classic statement is in *Norton v. Shelby County*,[5] refuting the argument that a state statute, held unconstitutional, might nevertheless give validity to official conduct taken pursuant to it before the announcement

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1 367 U.S. 643 (1961).
2 338 U.S. 25 (1949).
3 232 U.S. 383 (1914).
4 367 U.S. at 655.
5 118 U.S. 425, 442 (1886).

of unconstitutionality: "An unconstitutional act is not a law; it confers no right; 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." [6] Under this view, a judicial decision, overruled because unconstitutional, probably should be no more operative than an unconstitutional statute.

But prospective judicial overruling has become an accepted technique in some states,[7] and, perhaps under this influence, the Supreme Court has more recently declared that there are appropriate limits to treating unconstitutional federal law "as though it had never been passed." According to a unanimous opinion by Mr. Chief Justice Hughes in *Chicot County Drainage Dist. v. Baxter State Bank*: [8]

> [I]t is quite clear . . . . 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, or 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

[6] *Ibid.* Even under this traditional view of absolute retroactivity of constitutional decisions, an exception might be made by the Court for state judicial overrulings which, if retroactively applied, would unconstitutionally impair the obligation of contracts. See Muhlker v. New York & H.R.R., 197 U.S. 544 (1905); Douglass v. County of Pike, 101 U.S. 677, 687 (1879); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 432 (1853). See also Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206 (1863). The Court would no longer so use the contract clause. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Central Land Co. v. Laidley, 159 U.S. 103 (1895). For the effect of an overruling decision in general, see FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940); Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199 (1940); Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1939); Note, 60 HARV. L. REV. 437 (1947); *Address of Chief Judge Cardozo*, 55 Report of N.Y.S.B.A. 263, 294-95 (1932).

As to an overruling decision in the traditional view, see 1 BLACKSTONE, COMMENTARIES *70: "[T]he subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or injust, it is declared, not that such a sentence was *bad law*, but that it was *not law* . . . ."

[7] See, *e.g.*, Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943); State v. Jones, 44 N.M. 623, 630-31, 107 P.2d 324, 329 (1940). State prospective overruling was found consistent with the due process clause of the fourteenth amendment in Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

[8] 308 U.S. 371 (1940).

> 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.[9]

With regard to the particular past circumstances in which a constitutional overruling decision will not be given full retroactive application, the Court has never been more expositive, and there are almost no decisions. In the *Chicot County* case a federal district court had entered a decree under the statute before it was ruled unconstitutional. The Supreme Court held the subject matter of the district court decree to be res judicata. Reliance by the parties upon overruled federal law probably would also give reason for denying retroactive application to an overruling decision in some circumstances. Should the Court, for example, ever overrule its decisions in *Harris v. United States*[10] and *United States v. Rabinowitz*,[11] permitting broad searches incident to lawful arrests, and hold instead that the Constitution prohibits such searches without warrants, it would not be frivolous to urge that a policeman who had made a broad incidental search without a warrant before the overruling decision should not be liable for damages in trespass or for violation of the Civil Rights Acts.[12] A not entirely dissimilar case is *James v. United States*,[13] decided one month before *Mapp v. Ohio*. *James* was a tax-evasion prosecution for failure to report embezzlements as income. The Court had previously held that embezzlements were not income under the same provision of the Internal Revenue Code.[14] In *James* the Court overruled that decision but dismissed James' indictment. There was no opinion joined in by a majority of the Justices, and the decision may have turned entirely on the statutory need for the evasion to be "willful." The result of the case is, however, that, so far as prosecutions for evasion are concerned, the overruling decision is prospective only.[15]

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9 *Id.* at 374.

10 331 U.S. 145 (1947).

11 339 U.S. 56 (1950).

12 REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). Compare Abel v. United States, 362 U.S. 217, 235 (1960):

> Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits on searches incidental to lawful arrests. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial; and the petitioner himself accepted the *Harris* case on the motion to suppress, nor does he ask this Court to reconsider *Harris* and *Rabinowitz*. It would, under these circumstances, be unjustifiable retrospective lawmaking for the Court in this case to reject the authority of these decisions.

13 366 U.S. 213 (1961).

14 Commissioner v. Wilcox, 327 U.S. 404 (1946).

15 Attention in the Supreme Court to the possibility of prospectively changing federal law seems to have been increasing. In addition to the *James* case, at least two Justices have separately urged, although without success, that particular decisions

Thus, despite general statements, there seem to be potential limits upon the retroactive application of overruling constitutional decisions. The problem is to determine for each case whether there are reasons for imposing a limit. *Chicot County* suggests that reliance and res judicata are not the only reasons which may be deemed compelling in limiting retroactivity.[16] The Supreme Court, through a failure even to recognize the question in all but one or two cases where it has come up, has given no general guidelines. The purpose of this article is to examine what seems relevant in determining the proper retroactive effect of a particular overruling constitutional decision in a case where the Court has not adequately treated the question—*Mapp v. Ohio*. I shall urge that the retroactive effect of *Mapp* ought, in fact, to be quite limited, not so much because of reliance upon the old law as because the purposes of the new law do not seem to be meaningfully served by applying it to the past.

I. The General Character of the Problem

The quick argument for retroactive[17] application of *Mapp* is probably as follows: It is now held that a conviction obtained through

announcing new principles—one of them constitutional, the other not—be applied only prospectively. See Mr. Justice Black, dissenting in Mosser v. Darrow, 341 U.S. 267, 276 (1951) (newly articulated duties of a reorganization trustee); Mr. Justice Frankfurter, concurring in Griffin v. Illinois, 351 U.S. 12, 25 (1956) (newly articulated obligation of state to provide indigent defendant with free transcript on appeal). In the same term as *Mapp*, in Green v. United States, 365 U.S. 301 (1961), the plurality opinion of four Justices laid down a rule of conduct to be followed in the future by federal trial judges but did not overturn a conviction in a previous trial where the rule possibly had not been followed. See also note 12 *supra*.

There is one outstanding case of prospective overruling of federal law in a lower federal court. In 1941 the Court of Appeals for the District of Columbia decided that a decision of the Supreme Court overruling an earlier decision of the Court giving broad scope to statutory summary contempt would not be applied for the benefit of a prisoner convicted under the overruled decision and now seeking to attack his conviction collaterally: "We reject the idea that if a court was considered to have the power . . . to do a certain thing under existing statutory construction, and . . . that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power . . . ." Warring v. Colpoys, 122 F.2d 642, 647 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941). The opinion is severely criticized in 2 Hart & Sacks, The Legal Process 631-36 (Tent. ed. 1958).

[16] See text accompanying note 9 *supra*.

[17] Throughout this article, "retroactive" is used to indicate application of the new exclusionary rule to trials taking place before *Mapp*'s announcement; application of the rule to trials taking place after the *Mapp* decision is considered "prospective." But application of *Mapp* to a trial held shortly after *Mapp*'s decision might well affect occurrences before the decision and thus might be looked on as a "retroactive" application. The criminal conduct, the unconstitutional police conduct, and some of the trial preparation in a case tried shortly after *Mapp*'s decision will have predated *Mapp*. A retroactive application of new law is probably bothersome only when some action was taken in reliance upon the old law. It is safe to say that no criminal conduct prosecuted after *Mapp* was engaged in in reliance upon *Wolf*. Although it is not beyond belief that state police may have engaged in unconstitutional searches whose fruits would be used in cases tried just after *Mapp* because of *Wolf*, that reliance is entitled to no weight, particularly in view of the language of the *Wolf* opinion. Some trial preparation, however, may legitimately have been done in reliance upon *Wolf* before the *Mapp* decision, and it is remotely possible that evidence has thus been irretrievably lost which would not have been lost had *Mapp* been the law

the use of unconstitutionally seized evidence is unconstitutional. If there is a postconviction remedy for such a constitutional error, one should not refuse it to persons already convicted by means of such evidence simply because they were convicted too early. Refusing retroactive enforcement will keep them in prison on the basis of what is now deemed to be an unconstitutional trial. Without going deeply into the purpose of the new rule, the contrary argument is probably one of reliance: for twelve years state courts in at least half the states have used relevant evidence in reliance upon express permission given by the Supreme Court in *Wolf v. Colorado*.[18] *Wolf* had never, until the day of its overruling, been said to be of doubtful authority by a majority of the Court.[19] If the Constitution is now held to have been violated by a conviction rendered before *Mapp*'s decision, there must be a new trial of a defendant already proven guilty. One should not so overturn the widespread and seemingly legitimate use by state courts and prosecutors of probative evidence to determine guilt in reliance upon *Wolf*, especially since successful reprosecutions may now often be impossible.[20]

The clash of interests can be resolved, I believe, by recognizing the specially prospective reasons for *Mapp*'s exclusionary rule which make it unnecessary to disturb legitimate reliance upon *Wolf* in order to vindicate *Mapp*'s constitutional purpose; but that does not solve the whole problem. To say that *Mapp* is "prospective" does not immediately determine which prisoners are to have its benefit and which are not. The Supreme Court's decision was announced on June 19, 1961. It was applied to reverse Miss Mapp's conviction. If "prospective"

all along. The same kind of retroactivity was potentially present in the *Mapp* case itself, but the Court applied the new rule there without seeming to consider it. Later in this article, I advance the suggestion that cases relevantly later in time than *Mapp* are entitled to the benefit of the new rule even though some retroactive application of the law may be present. See notes 87-92 *infra* and accompanying text.

[18] Although *Mapp* is an overruling decision, it is not wholly fair to say that it represents a complete reversal of prior law. Even under *Wolf*, states were not free to permit the use of relevant nontestimonial evidence in complete disregard of the manner in which it had been obtained. Rochin v. California, 342 U.S. 165 (1952), held that evidence obtained from the defendant through forcible use of a stomach pump could not be used: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of [state] conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Id.* at 173. How much change *Mapp* actually brings about depends upon what searches by state officials will be held to violate "the Constitution," a question so far not explicitly resolved by the Court. Although the constitutional standards governing state officials under the fourteenth amendment may not be the same as those governing federal officials under the fourth, it is fair to predict, in view of the whole Court's treatment of *Mapp* as an overruling decision of great importance, that *Mapp* will be far more restrictive upon state law enforcement officials than *Rochin*.

[19] See Elkins v. United States, 364 U.S. 206, 213-14 (1960).

[20] State reliance upon the admissibility of unconstitutionally seized evidence in trials conducted before *Wolf* was decided may not be entitled to as much consideration as reliance after *Wolf* had expressly held such evidence admissible. I do not, however, suppose *Mapp* can be made to apply to persons convicted before *Wolf* or after *Mapp* but not to those convicted in between.

means "after the date of decision," someone tried on June 18 would not benefit from the new rule, although Miss Mapp did, and she was tried months before that. Yet it is not easy to pick a date prior to the *Mapp* decision—for example, the date of Miss Mapp's trial—and say that on that day, otherwise without significance, the meaning of the Constitution suddenly changed and that all prisoners subsequently convicted are entitled to *Mapp*'s benefit, whereas those previously convicted are not.

Practically, *Mapp*'s potential retroactive effect seems quite significant. Despite the national government's lead, almost half the states were admitting unconstitutionally seized evidence in their criminal trials when *Mapp v. Ohio* was decided.[21] In 1949, when *Wolf v. Colorado* was decided, the fraction was about two-thirds.[22] Among the "admission" states have been some of the most populous: New York, Ohio, Pennsylvania, and, until 1955, California. Thus, if *Mapp* is held to be retroactive, there are likely to be a large number of state prisoners ready to invoke postconviction remedies to claim that their convictions are unconstitutional. If *Mapp* should be applied broadly to previous trials through these remedies, it is difficult to say why almost every state prisoner in an "admission" state who has been convicted through officially obtained nontestimonial proof cannot in good faith demand at least a hearing to determine how that proof was obtained—to determine, for example, whether there was sufficient cause to make a search or an arrest preceding a search. This is an issue heretofore largely irrelevant and probably unsettled by the trial record, but upon which a constitutional right would now turn. If *Mapp* is unconditionally retroactive, not only must there be a large number of hearings, but a large number of prisoners from "admission" states are probably entitled ultimately to have their convictions reversed, for a primary reason given for overruling *Wolf* was that under its rule state police did not sufficiently respect constitutional limits. Even in states which have been applying an exclusionary rule, the constitutional restraints upon police may not have been properly interpreted.[23]

II. Availability of a Postconviction Remedy

The national significance of *Mapp*'s potential retroactive effect depends largely upon the availability of federal habeas corpus to invoke the new decision. There are not likely to be a very large number of

[21] See Appendix to Elkins v. United States, 364 U.S. 206, 224-32 (1960).

[22] See Appendix to Wolf v. Colorado, 338 U.S. 25, 33-39 (1949).

[23] Two cases from such a state which the Court has agreed to review are People v. Ker, 15 Cal. Rptr. 767 (Dist. Ct. App. 1961), *cert. granted,* 368 U.S. 974 (1962); Robinson v. California, 184 Cal. App. 2d 69, 7 Cal. Rptr. 202 (Dist. Ct. App. 1960), *prob. juris. noted,* 368 U.S. 918 (1961).

pre-*Mapp* convictions still directly reviewable in the Supreme Court,[24] and if *Mapp* cannot be raised through federal collateral attack, states with collateral remedies of a similar or narrower scope may also justifiably refuse relief. Thus the question whether *Mapp* is retroactive will be largely academic if federal habeas corpus can in no circumstances be invoked to claim the admission of unconstitutionally seized evidence.

Although it is not entirely clear whether federal habeas corpus will be available to invoke the new exclusionary rule, it seems that it will. In administering the *Weeks* rule, the Supreme Court appears never to have determined that the admission of evidence in a federal prosecution can be collaterally attacked. There have been a number of cases in the lower federal courts under *Weeks* which have held that the question of illegally seized evidence could not be raised on collateral attack, with dicta that this is generally the rule.[25] However, if federal habeas corpus is now generally available to challenge an unconstitutional trial, as seems to be the case,[26] *Mapp* would be appropriately raised through the writ,[27] for the Court has explicitly held that the admission of evidence in violation of *Mapp* is unconstitutional. It is true that *Mapp*'s constitutional error does not go to abstract "guilt," but neither does the admission of a compelled but reliable confession, which can be raised on federal habeas corpus.[28] The lower court decisions under *Weeks* are not inconsistent with the conclusion that *Mapp* may be raised collaterally, for in all of them, either (1) the seized material was not actually used in evidence but allegedly induced a guilty

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24 Some of those so far reported are described in the Note at the end of this article. See pp. 680-83 *infra*.

25 *E.g.*, Jones v. Attorney General, 278 F.2d 699, 701 (8th Cir. 1960): "The legality of a search and seizure and the admissibility of the evidence obtained thereby are questions for the trial proceedings and for an appeal from conviction, and are not matters which can be used to make a collateral attack upon the conviction and sentence." Among the other cases are United States v. Zavada, 291 F.2d 189 (6th Cir. 1961); Plummer v. United States, 260 F.2d 729 (D.C. Cir. 1958) (per curiam); Wilkins v. United States, 258 F.2d 416 (D.C. Cir. 1958); United States v. Scales, 249 F.2d 368 (7th Cir. 1957), *cert. denied*, 356 U.S. 945 (1958); United States v. Walker, 197 F.2d 287 (2d Cir. 1952), *cert. denied*, 344 U.S. 877 (1952); Graham v. Squier, 132 F.2d 681 (9th Cir. 1942), *cert. denied*, 318 U.S. 777 (1943); Taylor v. Hudspeth, 113 F.2d 825 (10th Cir. 1940). According to a well-respected state judge, not at all hostile to the exclusionary rule, this line of cases establishes that "the lower federal courts have consistently adhered to the rule that the question of unconstitutionally seized evidence may not be raised on collateral attack." Traynor, J., concurring in *In re* Harris, 366 P.2d 305, 308 (Cal. 1961). Justice Traynor takes the position that the exclusionary rule should not be invokable on collateral attack. See note 46 *infra*.

26 Waley v. Johnston, 316 U.S. 101, 104-05 (1942); see Hill v. United States, 368 U.S. 424, 428 (1962) (dictum).

27 The Court's opinion in *Mapp* seems silently to have assumed the new rule to be potentially available on collateral attack: "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." 367 U.S. at 659 n.9. See also Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218, 236 n.105 (1961), indicating his and Judge Learned Hand's similar assumption.

28 See, *e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961).

plea; (2) at the time of decision the collateral remedy was believed to apply only to jurisdictional defects; (3) the federal exclusionary rule was not deemed to be a constitutionally required rule and thus not raisable on collateral attack—a belief frequently founded on *Wolf* but squarely rejected in *Mapp*; or (4) the question of admissibility had been waived through not being raised at trial or not being invoked on appeal.

Although postconviction collateral attack may theoretically be generally available, it may be urged that a doctrine of waiver will actually eliminate most retroactive claims. Ordinarily, the state may urge that a constitutional matter is closed to a state prisoner if it was not duly raised when the opportunity was fairly present to do so.[29] Can it be said that, even though *Mapp* may be retroactive in theory, the only state prisoners who can now claim *Mapp*'s benefit over the state's objection are those who are able to show that they moved to suppress unconstitutionally seized evidence at their trials, and that they pressed the question on appeal as fully as possible? If so, this would greatly reduce the practical problem, for in the light of *Wolf* it is unlikely that there are very many such prisoners.

If there is a constitutional right to *Mapp*'s benefit capable of being applied to persons previously convicted, the brunt of *Mapp*'s retroactivity does not seem to me to be fairly avoidable through invoking supposed waivers on the part of prisoners who did not object to evidence at trial or on appeal. The application of constitutional law cannot under any meaningful doctrine of waiver be conditioned upon the defendant having raised arguments which, at the time they should have been raised, had been fully and expressly rejected by the Supreme Court. There does not seem to be any reason to penalize prisoners who accepted *Wolf* as compared with those who either did not know of it, ignored it, or attempted, despite its apparent continued validity, to have it overruled. Presumably the Court does not aim to encourage constitutional litigation over what it has held to be settled, and the result of such a distinction would be to discourage defendants from abandoning any argument, no matter how often it has been rejected by the Court. A broad distinction among prisoners who now claim a constitutional right on the basis of whether they did or did not acquiesce in *Wolf* before *Mapp* seems untenable.[30]

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[29] Brown v. Allen, 344 U.S. 443, 482-87 (1953); Chavez v. Dickson, 280 F.2d 727, 733-35 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961).

[30] See Mr. Justice Frankfurter concurring in Griffin v. Illinois, 351 U.S. 12, 25 (1956), which announced for the first time a new principle governing state criminal procedure:

> Candor compels the acknowledgement that the decision rendered today is a new ruling. Candor compels the further acknowledgement that it would not be unreasonable for all indigent defendants, now incarcerated, who at the

The significance of an objection to evidence made when there was no exclusionary rule is illustrated in a state context by cases coming after *People v. Cahan*,[31] in which the Supreme Court of California overruled its previous decisions refusing to exclude illegally seized evidence and adopted the *Weeks* rule instead. There were quickly presented for decision a number of pending appeals in which illegally seized evidence had been used at trial before the announcement of the overruling decision. The California Supreme Court seems to have assumed *Cahan* to be potentially applicable to all these appeals. In *People v. Kitchens*,[32] for much the reasons just given, a distinction between prisoners who had and had not objected to the introduction of the evidence was correctly rejected. The case was reversed and remanded for a hearing at which both parties would "be given an opportunity to litigate the issue of the legality of the search and seizure on the basis of all of the facts." [33] But in *People v. Fararra*,[34] decided the same day, a different limitation was created: only when the record on appeal established "prima facie" that the search and seizure were illegal would *Cahan* be held applicable to pending appeals in previous trials and a hearing ordered to determine illegality.[35] This result followed because "to reverse the judgment it would be necessary to presume that the officers acted illegally . . . ." But "error will not be presumed on appeal . . . and in the absence of evidence to the con-

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> time were unable to pay for transcripts of the proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negatived.

See also Litchfield v. Tinsley, 281 F.2d 486, 487-88 (10th Cir. 1960); Medberry v. Patterson, 174 F. Supp. 720, 725-26 (D. Colo. 1959); United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734, 746-47 (N.D. Ill. 1959), *aff'd*, 274 F.2d 250 (7th Cir. 1960), *vacated sub nom.* Reck v. Pate, 367 U.S. 433 (1961); Allen, *Federalism and the Fourth Amendment*, in THE SUPREME COURT REVIEW 1, 42-46 (Kurland ed. 1961). This last case seems to be a very dubious application of Mr. Justice Frankfurter's argument. A few decisions in the district courts on federal habeas corpus brought after *Mapp* seem to have used waiver as a reason for denying the petition in a way which seems to me illegitimate. See cases discussed in the Note appended to this article, pp. 680-83 *infra.*

A different question arises if the Supreme Court holds *Mapp* not generally retroactive and a state nonetheless chooses to apply the decision to previous trials, but only in cases of prisoners who moved to suppress the evidence at trial. It would there have to be decided whether that state differentiation was so arbitrary as to contravene the fourteenth amendment.

31 44 Cal. 2d 434, 282 P.2d 905 (1955).

32 46 Cal. 2d 260, 294 P.2d 17 (1956).

33 *Id.* at 264, 294 P.2d at 20.

34 46 Cal. 2d 265, 294 P.2d 21 (1956).

35 See also People v. Citrino, 46 Cal. 2d 284, 287, 294 P.2d 32, 34 (1956); People v. Maddox, 46 Cal. 2d 301, 304, 294 P.2d 6, 8, *cert. denied*, 352 U.S. 858 (1956).

trary it must also be presumed that the officers regularly and lawfully performed their duties." [36]

The limit on retroactive use of postconviction remedies in *Fararra* is not so drastic as the doctrine of waiver and may be justifiable as a reasonable limitation on the availability of state remedies, but it should not be used to limit federal habeas corpus.[37] If persons convicted before *Mapp* cannot be charged with any obligation to have objected to the evidence used against them it will be primarily a matter of luck whether the state record reveals police misdeeds. If there is a constitutional right to *Mapp*'s benefit available to previously convicted state prisoners, at least the federal courts should now have to permit a record of alleged police illegality to be made out, in view of the fact that the previous state record was made when the vital facts were justifiably believed by both sides to be irrelevant.[38] If not, there would be a "constitutional right" without any fair chance to assert it. There would be irony too in defeating the constitutional claim through presuming that the state police acted legitimately when a basis—perhaps the most important basis—of both *Cahan* and *Mapp* was a judgment that the exclusionary rule is necessary to stop the police from making the fourteenth amendment's guarantee of privacy "an empty promise," [39] " 'because other remedies have completely failed to secure compliance with the constitutional provisions . . . .' " [40]

If *Mapp* is held to be retroactive, prisoners convicted while *Wolf v. Colorado* was law should not have their remedies limited either by their failure to object to evidence or by the failure of the record to show police unconstitutionality. If it is burdensome and disturbing to look forward to a vast number of hearings at the request of previously convicted state prisoners claiming the benefit of *Mapp*, that must be taken into account in deciding whether it is indeed wise or necessary to say that *Mapp* is generally retroactive. Such considerations should not be permitted to generate illegitimate distinctions between individual pris-

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[36] People v. Fararra, 46 Cal. 2d 265, 268, 294 P.2d 21, 23 (1956).

[37] The only use of the *Fararra* doctrine in California has been on direct review. I have not been able to find reports of any California collateral attacks under *Cahan*, and a recent opinion in the California Supreme Court by the author of *Cahan*, *Kitchens*, and *Fararra* reviewing the problem does not mention any, suggesting, on the contrary, that state collateral attack should not be available to raise the admission of unconstitutionally seized evidence. Traynor, J., concurring in *In re* Harris, 366 P.2d 305, 309, 16 Cal. Rptr. 889, 894 (1961). See note 46 *infra*.

[38] It is interesting that in the few cases in the states which have so far considered the application of *Mapp* to trials where the record was made before *Mapp*'s announcement, the principal problem has seemed to be to afford the *prosecution* an opportunity now to justify what the record shows to have been an unreasonable search. See cases discussed in the Note appended to this article, pp. 680-83 *infra*.

[39] Mapp v. Ohio, 367 U.S. 643, 660 (1961).

[40] *Id.* at 651, quoting People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955).

oners. I should like, then, to give my reasons for believing that *Mapp*'s application ought generally to be only prospective.

III. The Prospective Purpose of *Mapp*

It is difficult to assign a particular reason to a decision which comes after long constitutional controversy; nor is the *Mapp* opinion unambiguous with respect to the reasons for decision. But the reason which seems principally to have motivated the Court to exclude unconstitutionally seized evidence from state criminal trials does not appear to apply in general to past trials. If the primary constitutional purpose compelling state exclusion of unconstitutionally seized evidence will not be served by a sweeping reexamination of past convictions, then, especially in view of action taken by the states in legitimate reliance upon *Wolf*—some of it irrevocable—there is no reason not to say that *Mapp*, generally, should be applied only prospectively. That the reasons for an overruling constitutional decision are adequately served when its application is limited to the future seems as good a reason for limiting retroactive application when the overruled decision has been a guide to conduct as those grounds generally touched on in the opinion in the *Chicot County* case.[41]

A. Deterring Unconstitutional Searches

What is the constitutional reason for *Mapp*? Although the rule is one excluding evidence, it is plain that it derives not at all from the probative character of unconstitutionally seized material. Narcotics seized without a warrant are as cogent in evidence as narcotics seized through solicitous police procedures. Persons convicted through unconstitutionally seized nontestimonial evidence plainly are not deprived of a fair trial in the sense of a trial ill-suited to the discovery of truth.

The compulsory exclusion of unconstitutionally seized evidence in the states seems designed primarily not to insure a fair trial on the issue of guilt but to protect the interest of the individual outside the courtroom in being free from unwarranted governmental intrusion into his privacy, a freedom recognized specifically in the fourth amendment as respects the federal government and held by the Court to be implicit to some extent in the fourteenth amendment as respects state officials. It is an accepted belief today that this freedom is protected through the exclusion of evidence because of the deterrent effect exclusion will have upon the police who gather evidence. Exclusion is primarily designed to eliminate an encouragement which would otherwise exist

[41] See text accompanying note 8 *supra*.

for police to ignore constitutional limits upon their conduct, thus protecting everyone, guilty and innocent, from improper searches by tending to make them fruitless no matter what is discovered.[42] Exclusion of relevant evidence is resorted to because there is no other effective means of discipline.[43] Although it is not an entirely satisfactory means of enforcing the Constitution, there can be no doubt that the Court in *Mapp v. Ohio,* believing that the police in states which were admitting unconstitutionally seized evidence had too frequently ignored and would continue to ignore the Constitution, found exclusion necessary primarily for these reasons of deterrence:

> In short, the admission of the new constitutional right by *Wolf* [to be free from unconstitutional state searches and seizures] 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. Only last year the Court [in *Elkins v. United States*[44]] itself recognized that the purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[45]

This purpose of the new rule to deter police, which seems from the *Mapp* opinion to be its main purpose, is not meaningfully served by the general application of the rule to past trials. The purpose of deterrence is a particularly prospective purpose. The only police conduct which can now be deterred is future conduct. It is unlikely that sudden reexamination of a great number of old trials would increase the future obedience of state police to constitutional rules. If police respect for the Constitution in states previously admitting unconstitutionally seized evidence is to be changed by *Mapp v. Ohio* it is because they will now act with the expectation that the fruits of unconstitutional searches, and therefore unconstitutional searches themselves, will no

[42] See United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) (L. Hand, J.).

[43] See Mapp v. Ohio, 367 U.S. 643, 651-52 (1961):

> Significantly, among these now following the rule is California, which according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." *People v. Cahan,* 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." 338 U.S. at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.

[44] 364 U.S. 206, 217 (1960).

[45] Mapp v. Ohio, 367 U.S. 643, 656 (1961).

longer be useful. That expectation depends entirely upon the Court's explicit determination to enforce the *Mapp* rule in the future, not on the reversal of convictions going back into the past.

I do not mean to say, of course, that the exclusionary rule, though announced, should never be applied to reverse a conviction, on the ground that it is always only the threat of future exclusion which controls the police. If that course were followed for long there would obviously be no effective threat. The rule must be enforced. It has been enforced in the *Mapp* case and will continue to be enforced in future trials in which there is no reason for adhering to the old law. But it does not seem to further deterrence to upset what is past and what was done in reliance upon *Wolf*. The fact of reliance, coupled with the fact that retroactivity will not further the purpose of the new rule, counsels leaving past convictions as they are.[46]

B. Other Possible Purposes

Although deterrence is the main reason for the new rule, are there perhaps other reasons for *Mapp* which would make it more properly retroactive in application? The Court's opinion expresses considerable concern for " 'the avoidance of needless conflict between state and federal courts' " having different rules regarding the admission of unconstitutionally seized evidence and for the elimination of suspicious "working arrangements" between federal and state officials and the "inducement to evasion" of the federal exclusionary rule which occurred as long as evidence unconstitutionally seized by federal officials might be used by state officials in state courts having concurrent jurisdiction. "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their

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[46] The only reason concerned with police deterrence which I can imagine for generally reexamining past convictions is that by immediately providing a great number of cases for litigation full retrospective application of *Mapp* would inevitably result in clarifying more quickly the boundaries of the new rule, particularly the meaning of "unconstitutional searches and seizures" as applied to state police conduct, and would thereby provide a surer guide for future police activity. It would be fantastic for a court thus deliberately to create litigation for the purpose of clarifying its decision; it is also quite possible that deterrence is more effective under a broadly phrased rule of unsure content than under decisions whose limits are clear.

Justice Traynor has used *Mapp*'s prospective purpose of police deterrence as a basis for suggesting not that the rule ought to be prospective only, but that it should not be available on collateral attack, apparently even for a post-*Mapp* trial. *In re* Harris, 366 P.2d 305, 16 Cal. Rptr. 889 (1961) (concurring opinion). The argument seems to be that since no single decision refusing to exclude evidence significantly impairs the deterrent effect if the exclusionary rule is generally applied, there is no need based on deterrence to enforce the rule on collateral attack as long as it is enforced at trial and on direct review. Since the number of pre-*Mapp* convictions pending on direct review is limited, Justice Traynor's approach would result in *Mapp* generally being prospective in application. I agree with this result, but I cannot see the justification for denying the benefit of the exclusionary rule to persons unconstitutionally convicted after *Mapp* because it is sought on collateral attack.

now mutual obligation to respect the same fundamental criteria in their approaches."[47] Although these are not inconsequential benefits of the new rule, their status as constitutional reasons is questionable, and it is doubtful therefore that they could have determined the *Mapp* decision. At any rate, insofar as *Mapp* can eliminate differences between federal and state law, this is accomplished as well by prospective operation of the new rule and will not be furthered by the reversal of past convictions in cases where both state police and state courts have already acted under the old rule.

The Court's opinion in *Mapp* suggests " 'the imperative of judicial integrity' " as a possible justification for the new rule separate from the purpose to deter state police from constitutional infractions. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe it own laws, or worse, its disregard of the charter of its own existence."[48] The Court cites *Elkins v. United States,*[49] which had prohibited federal courts from using evidence unconstitutionally seized by state officials, and Mr. Justice Brandeis' dissenting opinion in *Olmstead v. United States,*[50] urging the federal courts to reject evidence obtained through wiretapping. Judicial integrity was obviously relevant in *Elkins* and *Olmstead* since those cases dealt with evidential rules to be followed by the federal courts—rules which did not need to be, and indeed in *Elkins* were expressly said not to be, constitutional rules. *Mapp,* however, creating a rule governing state courts, had to be a constitutional decision. It is difficult to say that the due process clause, concerned with fairness to the accused individual, imposes such notions of judicial integrity on state courts, forbidding them to use relevant evidence to achieve convictions when that would not be consistent with the state court's integrity. Nor would that integrity—if it is a separate federal concern under the fourteenth amendment—be significantly advanced by reversing now a number of cases in which the evidence was received and the conviction rendered before *Mapp* was announced.

If *Mapp v. Ohio* must be applied generally to previous trials, it must be because its rule is intended directly to relieve those who have actually suffered an unconstitutional search, not just to provide an indirect means of assuring general privacy through the removal of an incentive to police to act improperly. It seems safe to say that the exclusion of evidence is not a constitutionally required state compen-

[47] Mapp v. Ohio, 367 U.S. 643, 657-58 (1961).
[48] *Id.* at 659.
[49] 364 U.S. 206 (1960).
[50] 277 U.S. 438, 485 (1928).

sation for the victims of an unconstitutional search. If the purpose is to relieve the individual defendant it must be because of some unconstitutional unfairness at his trial through the use of the evidence. There is one Supreme Court decision, made while *Wolf v. Colorado* was the law, which did indeed seem to call for the exclusion of evidence improperly seized by state police without explicit reference to a purpose to deter state police but because the use of the evidence, though probative, was thought to deprive the accused of a trial compatible with due process of law. *Rochin v. California* [51] compelled the exclusion of evidence by the State because of the particularly brutal way in which it had been obtained by the police from the person of the accused: "convictions cannot be brought about by methods that offend 'a sense of justice.'" Although the search in *Mapp* involved some use of illegitimate physical force against Miss Mapp in the course of securing the evidence, the Court plainly did not decide *Mapp* as a particular application of *Rochin*.[52] Nor does it seem that the opinion in *Mapp* can be taken to have created a sudden and sweeping extension of the *Rochin* decision, holding that there is a violation of the due process clause because of offensiveness to "a sense of justice" whenever unconstitutionally obtained evidence is used against an accused, despite the absence of a violation of the person, which was the basis of *Rochin*.[53] It is highly relevant in this regard that Justices Douglas and Black, whose votes were necessary to constitute the five-Justice majority in *Mapp*, wrote concurring opinions. Mr. Justice Douglas' opinion states only the need for deterrence of state police as a reason for the new decision; Mr. Justice Black's opinion particularly stresses his belief that the Court was not relying on the necessarily imprecise rule of *Rochin* to decide *Mapp*. It should certainly have taken some exposition, not present in the *Mapp* opinion, to show why, apart from the need to deter state police, state courts act inconsistently with fundamental ideas of fairness to the individual when they convict through perfectly relevant evidence not taken in any way from the person, leaving the remedy for the police misconduct to a separate proceeding.

C. *The Theory of Self-Incrimination*

There is one situation in which the exclusion of evidence has always been deemed to be constitutionally required without explora-

[51] 342 U.S. 165 (1952).

[52] *Rochin*, in fact, has never subsequently been applied by the Court to reverse a conviction, although it has been urged. See Breithaupt v. Abram, 352 U.S. 432 (1957); Irvine v. California, 347 U.S. 128 (1954). I can find only one such application in the lower courts. United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957).

[53] *Rochin* is cited but once in the Court's opinion, and that is a "*cf.*" reference to a single page. 367 U.S. at 657, quoted note 60 *infra*.

tion of the need for police deterrence: when its use would amount to unconstitutional self-incrimination. Although the Court has held that the federal rule against compelled self-incrimination is not as such applicable to the states,[54] a basic part of it is probably enforceable through the due process clause. If self-incrimination was a basis for *Mapp,* there would be reason for its application to previous convictions, for these individual trials would now be deemed to have been constitutionally unfair apart from the prospective general purpose of police deterrence.

One possible reason for overturning some convictions based on compelled incrimination—that compulsion makes the evidence so unreliable that its use is not due process—plainly does not apply in *Mapp* and other cases where materials whose very possession is illegal, like narcotics or obscenity, have been seized. But a coerced confession will be excluded under the due process clause despite any substantial doubt as to its truth.[55] The cases so holding have at least a surface similarity to *Mapp,* for reliable evidence obtained unconstitutionally cannot be used. And the use of a quotation from *Boyd v. United States*[56] in the beginning of the *Mapp* opinion[57] suggests that an aspect of self-incrimination may be a basis for the new exclusionary rule: "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation [of the fourth and fifth Amendments] . . . ."[58]

Although the Court's opinion in *Mapp* never clearly states self-incrimination as a basis for decision, Mr. Justice Black's concurring opinion, relying upon *Boyd,* asserts that the self-incrimination inherent in the use of unconstitutionally seized evidence is not only a possible ground, but to his mind the only tenable ground for the Court's judgment.[59] Mr. Justice Black's vote was needed to make the opinion in *Mapp* an opinion of the Court. Since the Court's opinion is not wholly clear as to the reasons for decision, his theory must be reckoned with.[60] But I think it can be shown that the *Boyd* case is not,

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

55 See Rogers v. Richmond, 365 U.S. 534 (1961), and cases cited therein.

56 116 U.S. 616 (1886).

57 367 U.S. at 647.

58 *Id.* at 630.

59 Mapp v. Ohio, 367 U.S. 643, 661-66 (1961).

60 The closest the Court's opinion comes to relying upon a theory of self-incrimination is the following difficult passage:

> [A]s to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an

in fact, authority for the exclusionary rule of *Mapp* and that the use of the seized matter to convict in the latter case was not meaningfully self-incrimination. There is therefore no reason to suppose that a majority of the Court implicitly adopted Mr. Justice Black's theory of decision that a trial based upon unconstitutionally seized evidence is unfair aside from the need for deterrence of police.

If the *Mapp* decision had been based upon self-incrimination, it should be irrelevant that the police had failed to secure a judicial warrant before seizing the evidence. Judicial authority for the production of evidence does not eliminate self-incrimination, it aggravates it. Police cannot get a warrant to compel a man to incriminate himself, no matter how strong the probable cause to believe in his guilt.[61] When the use of evidence amounts to compelled self-incrimination, production of that evidence for use in a prosecution could not be officially compelled. Obscene materials are, however, the proper object of governmental process; their production can be compelled if the compulsion takes a proper form. The police infraction in *Mapp* was that the search was made without a warrant and without good reason to search without a warrant. With a proper warrant the evidence could have properly been compelled by the police, and if it had been, its use plainly would not have been deemed unconstitutional by the Court. Thus *Mapp* cannot have involved what is ordinarily meant by self-incrimination.

In the *Boyd* case, the Court expressly held the evidence sought by the Government was evidence which the Government was not entitled to compel under any circumstances. *Boyd* held unconstitutional a federal statute permitting the subpoena of a person's books for use at a pro-

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> "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram v. United States*, 168 U.S. 532, 543-544 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 489-490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. *Rochin v. California*, 342 U.S. 165, 173 (1952).

367 U.S. at 657. At best, this does not refute the theory. To say that the fourth and fifth amendments are part of a great constitutional purpose to protect liberty is to state the truth, but it is certainly not to say that the fifth amendment is responsible for the *Mapp* decision. The end of the passage seems at first to be giving a reason for decision, but it does not. The question in *Mapp* was whether the use of evidence is unconstitutional because it has been unconstitutionally obtained. It states the result, but not the reason, to refer to the evidence in *Mapp* as "unconstitutional evidence." The only possible reason for decision given here is symmetry between the fourth and fifth amendments: if violations of one lead to exclusion so should violations of the other. I assume that a desire for symmetry is not a sufficient reason to limit state power under the fourteenth amendment.

[61] In this sense, *Rochin* may be similar to the confession cases. Would the Court have upheld the conviction in that case if the extraction of the evidence from the defendant through forcible use of a stomach pump had been authorized by a court upon probable cause?

ceeding to forfeit his goods. The compulsive procedure there—a subpoena—was regular and as solicitous of privacy as a proper warrant. The point of the case was that a search solely for evidence is unconstitutional; the only proper searches are for materials which the Government has some right to possess or confiscate aside from their value as evidence, although, once seized, such material may be used as evidence.

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.[62]

This distinction between proper searches for contraband or forfeited material and searches solely for evidence is not peculiar to the *Boyd* case. It is embodied in rule 41 of the Federal Rules of Criminal Procedure and has been followed by the Court in at least three leading cases.[63]

Whether or not the *Boyd* case was correct to condemn searches merely for evidence, it is clear that the thing which *Boyd,* the state confession cases, the ordinary notion of self-incrimination, and perhaps even *Rochin* have in common is that in them the evidence was not subject to governmental compulsion in any form. *Mapp* is not similar because the object of the search there was one which *Boyd* (and the Federal Rules of Criminal Procedure and the later cases) explicitly describe as a proper object of a search: "the search and seizure of articles and things which it is unlawful for a person to have in his possession." [64] Thus even if the doctrine of *Boyd* and the state confession cases have a basis in the rule against self-incrimination, there is no similar self-incrimination in *Mapp.*

Finally, to decide *Mapp* in direct reliance upon *Boyd*—a federal prosecution—or upon any principle of self-incrimination under the fifth amendment is, as Mr. Justice Black concedes, to agree with what he "regard[s] to be the proper approach to interpretation of our Bill of Rights," [65] that is, that the constitutional protection against self-incrimination is the same with regard to the states as to the federal government. The Court has rejected this view over Justice Black's dissent in *Adamson v. California,*[66] and *Mapp* does not say that the

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62 116 U.S. at 623.

63 Abel v. United States, 362 U.S. 217 (1960); Harris v. United States, 331 U.S. 145 (1947); Gouled v. United States, 255 U.S. 298 (1921).

64 116 U.S. at 624.

65 367 U.S. at 665.

66 332 U.S. 46 (1947).

Court has changed its position on this. Had the Court been relying upon a theory of self-incrimination in *Mapp*, where the application of such a theory is not obvious, it can be expected that there would have been some discussion of the ruling of *Adamson.*

Thus, the only constitutional purpose supporting the decision in *Mapp* which seems to have substantial force is the purpose of deterring state police from constitutional infractions. That purpose is fully served through prospective application, and there seems no need generally to disturb legitimate reliance on *Wolf v. Colorado.*

IV. THE PRECEDENTS

The *Mapp* opinion contains several statements which are at least consistent with *Mapp's* solely prospective effect. For example:

> *Presently,* a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may . . . .[67]
>
> If the fruits of an unconstitutional search *had been* inadmissible in both state and federal courts, this inducement to evasion [the use of those "fruits" in a state prosecution], would have been sooner eliminated.[68]
>
> Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their *now* mutual obligation to respect the same fundamental criteria in their approaches.[69]
>
> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, . . . we can *no longer* permit that right to remain an empty promise.[70]

These do not seem to reflect conscious disposition of the issue.[71] At most, they may indicate that the Court was not aware of the potential retroactivity of its decision while being consciously determined that the decision should be retroactive. It is unlikely that such loose language would have been used if the Court had consciously decided to make *Mapp* retroactive. This is not entirely without importance

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67 367 U.S. at 657. (Emphasis added.)

68 *Id.* at 658. (Emphasis added.)

69 *Ibid.*

70 *Id.* at 660. (Emphasis added.)

71 Some state courts since *Mapp* have relied on this and other similar language in the opinion as indicating that the Court fully intended *Mapp* to be prospective. See cases discussed in the Note appended to this article, pp. 680-83 *infra.* Others have thought that the Court indicated precisely the opposite. See Allen, *supra* note 30, at 43: "The short of the matter appears to be that in *Mapp* the Court fully expected its decision to be given retrospective application." See also Friendly, *Reactions of a Lawyer-Newly Become Judge,* 71 YALE L.J. 218, 236 n.105 (1961).

should it be argued on the basis of some other part of the opinion that the Court has, in fact, authoritatively ruled that its decision is retroactive.

The only words of the *Mapp* opinion which seem to support retroactivity are in a mysterious footnote—number nine, which is appended to a text passage having no apparent connection with the question. The text passage is:

> 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 [of the *Mapp* decision].[72]

Footnote nine then reads as follows:

> As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. 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 those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.[73]

Although I think this footnote is relevant to *Mapp*'s retroactive application, it is difficult to pin down its meaning because the Court uses words having no obvious significance and does not explain what significance was intended. What, for example, is "the same contention" which "was urged and later proved unfounded" in *Burns v. Ohio*, *Griffin v. Illinois*, and *Herman v. Claudy*? No "contention" at all is stated in the footnote. The only "contention" in the preceding text, that "[t]he criminal is to go free because the constable has blundered," is irrelevant to *Burns*, *Griffin*, and *Herman*, since it relates solely to the wisdom of excluding evidence as a means of controlling police misconduct. *Burns*, *Griffin*, and *Herman* had nothing to do with illegally seized evidence.

Some clue may be found in the footnote's last sentence. It speaks of "difficulties" which would be "compound[ed] by further delay." I can think of only one possible set of such legitimate "difficulties"

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[72] 367 U.S. at 659.
[73] *Id.* at 659 n.9.

connected with the formulation of a new exclusionary rule. Those are the "difficulties", such as they would be, of the new rule's retroactive application.[74] If the rule is to be retroactive, the longer the Court waits to overrule *Wolf v. Colorado* the more state prisoners convicted under *Wolf* there will be to claim retroactive benefit when the overruling comes, thus perhaps "compounding" the difficulties.[75] If those are the "difficulties" and if footnote nine does indeed deal with the problem of retroactivity, then the "same contention" which "proved unfounded" in *Burns*, *Griffin*, and *Herman* may well be the "contention" that retrospectively invalidating an important aspect of state criminal procedure will result in the inordinate reexamination of a great number of past convictions. This contention was, in fact, expressly made in the opinion of one Justice in *Griffin*,[76] is suggested in the dissent in *Mapp*,[77] and may have been below the surface of the opinions in *Burns* and *Herman*.

Footnote nine then makes some sense if it is assumed that the Court took it for granted *Mapp* was to be retroactive. In this light, the footnote is a defense of the new decision despite that assumed retroactivity. The footnote, although it never articulates the result, attempts to play down the likely effects of retroactive application and to characterize them as unavoidable in any case.

Is *Mapp*'s retroactivity to be deemed settled by such a footnote? I think not. The general statements from the Court's opinion quoted earlier contradict any impression drawn from the footnote that the Court indeed consciously assumed that *Mapp* would be retroactive. But even if one is willing to accept the tangled analysis just given as indicating a silent assumption on the Court's part that *Mapp* was to be retroactive, I do not think that should be taken as the equivalent of a disposition of the question. Unless the solution is obvious or the problem unworthy of the Supreme Court's considered disposition, law simply should not be made through silent assumptions hidden away in mysterious footnotes. For many good reasons, decision rightly calls for some attempt at articulation, of both the problem and the reasons for a court's decision.

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[74] I do not count the "difficulties" that might result from a change in the personnel of the Court which might dissipate the present majority favoring the overruling of *Wolf*.

[75] This assumes that as time goes on the number of prisoners incarcerated through unconstitutionally seized evidence would increase were *Wolf* not overruled —probably a fair assumption.

[76] Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring).

[77] Mapp v. Ohio, 367 U.S. 643, 676 (Harlan, J., dissenting): "[T]he issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance upon *Wolf*."

The answer may be that the Court, including at least some of the dissenters, did believe the solution obvious and beyond dispute because of a belief that *Mapp*, as a constitutional decision, inevitably had to be retroactive. But retroactivity is not required where there are reasons for refusing to apply a constitutional ruling to previous events, and I have tried to show that such reasons are present in the case of *Mapp*. There is also reason to believe from footnote nine that the Court may have assumed retroactivity in the belief that the practical consequences would not be significant. I have tried to show that that belief is also wrong. The prospect of having a serious problem disposed of through an assumption without apparent consideration of the contrary arguments is, moreover, especially disturbing in *Mapp*. The *Mapp* decision came out of the blue. As the opinions show, the proposition that *Wolf* should be overruled was not urged at all by the appellant and was only "request[ed]" without argument in the brief of an amicus curiae.[78] This lack of argument may not have affected the sufficiency of the Court's consideration of whether to overrule *Wolf*, but it surely makes it unlikely, in view of the inadequacy of the opinion on the point, that the retroactive effect of the new decision has yet been fully considered in the Court. There is no reason not to consider it now, in a proper case. This ought to be done, if deep consideration is the proper basis for lasting judgment.

Are there cases in the Supreme Court before *Mapp* which settle the problem as the *Mapp* opinion does not? The Court, not overtly treating the question, cites none. So far as I can tell, there is one generally similar episode in which the Supreme Court has taken relevant action. In *Griffin v. Illinois*,[79] the Court held for the first time that a state which affords appeals in criminal cases is obligated by the Constitution to provide free transcripts to indigents who otherwise could and would appeal. The *Griffin* decision overruled no federal statute or previous decision of the Court. It did, however, flow directly from the very general commands of the fourteenth amendment and may have upset a general assumption in the states that the constitutional rule was otherwise, an assumption upon which the states may have relied. Indeed, Mr. Justice Frankfurter's opinion in *Griffin*, speaking for himself alone and concurring only in the result, states his general view that the rule of *Griffin* should apply only prospectively.[80] This suggestion was ignored by the remainder of the majority of the Court, even though *Griffin* was a five-to-four decision in which Mr. Justice Frankfurter's vote was necessary to the result. *Griffin* alone,

[78] See 367 U.S. at 646 n.3; *id.* at 673-74 n.5 & 6 (dissenting opinion).
[79] 351 U.S. 12 (1956).
[80] *Id.* at 26.

therefore, contains nothing explicit which controls or affects *Mapp*'s retroactive application. Four Justices' failure to respond to Justice Frankfurter's suggestion may indicate an unspoken assumption on their part that retroactivity is necessary. Yet it may not. One cannot tell.

Griffin has, however, been in fact applied by the Court to litigation taking place well before it was decided. *Griffin* was decided in 1956. *Eskridge v. Washington State Board* [81] involved a prisoner convicted of murder in a state court in 1935. He gave timely notice of appeal and moved for a free transcript because of his indigence. The free transcript was denied, the denial was affirmed by the highest court of the state, and the prisoner's appeal to the Supreme Court dismissed for failure to file a certified transcript. After *Griffin,* the prisoner, still in jail, alleging that his conviction had been unconstitutional under *Griffin,* applied for habeas corpus in the highest court of the state, which was denied. The Supreme Court granted certiorari and reversed per curiam:

> In *Griffin v. Illinois,* 351 U.S. 12, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here . . . . The judgment of the Washington Supreme Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.[82]

In a brief notation, Justices Harlan and Whittaker dissented, "believing that on this record the *Griffin* case, decided in 1956, should not be applied to this conviction occurring in 1935 . . . ." [83] Mr. Justice Frankfurter did not participate.

Eskridge thus holds *Griffin* applicable to previous convictions, at least where the prisoner requested a free transcript and showed his indigence within the time prescribed for an appeal. Except for the brief dissent, the problem of retroactivity is not discussed. The Court silently assumes the answer, as perhaps four Justices did in *Griffin* and five did in footnote nine of *Mapp*. If the problem of applying *Mapp* retroactively were identical with the problem of applying *Griffin* to the past, the failure to state the reason for *Eskridge* would not matter. In the face of the dissent and after Mr. Justice Frankfurter's concurrence in *Griffin, Eskridge* plainly represents a conscious choice to make *Griffin* retroactive. But *Mapp* is so different from *Griffin* that the

[81] 357 U.S. 214 (1958).

[82] *Id.* at 216.

[83] *Ibid.* See also Patterson v. Medbury, 368 U.S. 839 (1961) (memorandum of Harlan, J.).

silent disposition of *Eskridge* cannot control the present problem. The primary reason for limiting *Mapp* to prospective operation, that the purpose of *Mapp*—deterrence of police—is not served by overturning previous convictions, is absent in *Griffin*. There are on the contrary substantial affirmative reasons which might justify applying *Griffin* to past cases which are not present in *Mapp*. *Griffin* is concerned not with deterrence but with fairness to the indigent accused. If an indigent has been unfairly deprived of an appeal deemed constitutionally necessary to afford him the same access to justice as a non-indigent, presumably he should now have his appeal, unless there are contrary considerations. Nor are the reasons contrary to retroactivity so strong in *Griffin* as in *Mapp*. State reliance is entitled to more respect when, as in *Mapp*, it has been based on a case squarely in point and later overruled than when, as in *Griffin*, it rests on assumptions drawn from the absence of authority. Moreover, if *Griffin* has been violated, that requires an appeal, not a new trial. A new trial will be necessary only when there is found to be error, or no record exists. The record or the undisputed evidence will more likely show whether *Griffin* has been violated, as it did in *Eskridge*, than whether *Mapp* has. And since *Griffin* is not an overruling case it is more justifiable to limit its application to prisoners who requested a free transcript when they wished to appeal, for the Supreme Court had not said that this request was useless, as in *Wolf*.

To summarize: *Griffin*, *Eskridge*, and *Mapp* may all contain an assumption on the part of several of the Justices that constitutional decisions are necessarily retroactive. The truth is, however, that retroactivity is not inevitable. Since the Court has never articulated principles of retroactivity governing *Mapp*, and since there seem to be good reasons why *Mapp* should not be retroactive, retroactivity in the peculiar circumstances of *Mapp* still needs to be the subject of the Court's deliberative decision.

V. Drawing a Line

Assuming that *Mapp* can and should be held to be generally prospective, the problem remains to draw the line between prospective and retrospective application. What does "prospective" mean? Had *Mapp* not yet been decided, one might say it should apply only to trials held after the announcement of its decision. The result would be that the new rule would not be applied to decide the *Mapp* case itself, for the trial there had obviously taken place before the Supreme Court's decision. This type of wholly prospective judicial overruling has been

used in appropriate cases in some states, and *James v. United States*[84] is not entirely dissimilar. There are well-known arguments against it. It may be said that the Supreme Court should not undertake the final formulation of a radical change in constitutional law in a case where the change will be only dictum; that to do so is to go against the notion that constitutional questions should be decided only in concrete cases. It can be said to encourage disrespect for precedent. Since prisoners are not institutional litigants interested in cases other than the immediate one, it might be thought to discourage the development of the fourteenth amendment through adversary litigation to establish a precedent that new rules might not be applied in the cases announcing them.

With regard to the *Mapp* case, these arguments against wholly prospective overruling are not as strong as they might be. The decision to impose an exclusionary rule for the general purpose of deterring police is not enlightened in the least by the facts of a particular case. In view of the specially prospective purpose of an exclusionary rule, it is also improbable that its wholly prospective application would discourage litigation of other alleged constitutional errors of a different character. If the Court is going to take upon itself the job of formulating a rule not keyed to the disposition of a particular case but primarily designed to control the general process of state law-enforcement, and if that function is an appropriate one, there is reason to say that that is also an appropriate occasion for a wholly prospective, somewhat legislative, announcement. On the other hand, the primary reason for refusing to apply the newly announced rule in *James* and some of the state cases—that otherwise the defendant would be subjected to criminal sanctions through reliance on a judicial decision—did not apply in *Mapp*, where the state reliance upon *Wolf* was significant but not nearly so drastic in its consequences as reliance upon an overruled decision exculpating from criminal liability.

Whether *Mapp v. Ohio* should be prospective in the sense just discussed is moot, for the Court has reversed Miss Mapp's previous trial. The opinion does not reveal that the Court considered not applying the rule to her case. In the light of the standard arguments against overruling through dictum, in the light of the fact that the Court has never in terms adopted the technique of wholly prospective overruling, and in the light of the fact that the *Mapp* opinion does not discuss the problem of retroactivity in the slightest, I do not think it can be argued that the reversal of Mapp's previous trial automatically established the retroactive application of the decision to all other prior trials. Not if

[84] 366 U.S. 213 (1961), discussed in text accompanying notes 13-15 *supra*.

the decision should generally apply only prospectively and if a justifiable line can be drawn. The situation, then, is that generally, previous trials should not be affected by *Mapp*, while Mapp's previous trial has been nullified. Can distinctions be drawn preserving the general prospective quality of *Mapp*, or need the new rule be completely retroactive because Mapp's conviction has been reversed?

If Mapp's case has been reversed, and if the purposes of the new rule do not call for reversal of any other past cases, why not simply apply the new rule to no other past trials than Mapp's? In *Molitor v. Kaneland Community Unit Dist.*[85] the Supreme Court of Illinois so held when, in a suit arising out of a school bus accident, it overruled the doctrine giving Illinois school districts immunity from tort liability.

> In here departing from *stare decisis* because we believe justice and policy require such departure, we are nonetheless cognizant of the fact that retrospective application of our decision may result in great hardship to school districts which have relied on prior decisions upholding the doctrine of tort immunity of school districts. For this reason we feel justice will best be served by holding that, except as to the plaintiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences.[86]

This technique, in the view of the *Molitor* court, avoided overruling in dictum and maintained the incentive to challenge vulnerable precedent.

There may be some prisoners who were tried before the announcement of the *Mapp* decision, however, whose cases are placed in time so close to Miss Mapp's, or even after hers, that it does not seem justifiable to treat them differently from her merely because the new rule was announced through her case, not theirs. In the *Molitor* case the court gave the plaintiff the benefit of the new rule but denied its benefit to other children injured in the same accident who had also brought suit.[87] There ought to be a less capricious way to treat relevantly identical litigants. Suppose that, along with Mapp's case, there was filed another case in the Supreme Court questioning the continued validity of *Wolf v. Colorado*. Had this case been decided on the same day as Mapp's case, I assume the new rule would have been made applicable to it by the Court just as it was to Mapp's case.[88] Had the second case been held for disposition in the light of *Mapp*, the same

[85] 18 Ill. 2d 11, 163 N.E.2d 89, *cert. denied*, 362 U.S. 968 (1960).

[86] *Id.* at 26-27, 163 N.E.2d at 96-97.

[87] Since this article was written, the Illinois court has modified its ruling as applied to other persons injured in the same accident. Moliter v. Kaneland Community Unit Dist., No. 36588, Ill., March 23, 1962.

[88] Depending upon the reasons for decision there, Marcus v. Search Warrant, 367 U.S. 717 (1961), decided the same day as *Mapp*, may be such a case. In a separate opinion, Justices Black and Douglas seem explicitly to have used *Mapp* to decide *Marcus*. *Id.* at 738.

thing would be true: If the exclusionary rule were applied to Mapp's case, it would also be applied to the "held" case, no matter how strong the arguments against general retrospective application. If a second case was not so held, but merely stood behind *Mapp* on the Court's docket, why should not *Mapp* likewise apply? If a defendant was tried in Ohio one month after Mapp, convicted one month after Mapp through unconstitutionally seized evidence, appealed one month after Mapp, and brought to the Court one month after Mapp, it makes no sense to reverse Mapp's conviction but not his, even though the new rule should not generally be retroactive. This is true if both litigants have argued the overruling equally, but it seems especially so when, as in *Mapp*, the litigant in the overruling case primarily argued a different ground for reversal. In such a situation the Court simply fastens upon a case which happens to be before it for other reasons to implement a decision not meaningfully influenced by the arguments or facts in that case.[89]

There seem to be two grounds upon which prisoners convicted before the announcement of *Mapp v. Ohio* can claim to have cases at least as recent as Mapp's: if their trials were at the same time or after Mapp's or if their cases were or will be before the Supreme Court on direct review at the same time or after Mapp's with the admissibility of evidence still an issue in the case. If both these things are true the case is in all respects later than Mapp's. Since Mapp did not forcefully argue to overrule *Wolf*, it is probable that if the Court had not had Mapp's case in which to formulate the new rule it would have done so in the next case fairly raising the issue. The prisoner in that case should not lose the benefit of the new rule because Mapp's case reached the Court before his. It is true that every prisoner who had preserved an objection to unconstitutionally obtained evidence when *Mapp* was decided might not have carried that issue to the Supreme Court if *Mapp* had not come down. But there is no way to tell which would have and which would not. Without destroying the general notion of prospectiveness, *Mapp* should be applied to persons, if there are any, convicted after Mapp whose cases are pending on direct review in the states or before the Supreme Court and who have not waived the right to raise the propriety of the admissibility of unconstitutionally seized evidence in their trials.

As to prisoners like Miss Mapp in only one of the two relevant respects—time of trial or status of appeal—the easier cases seem to be those where the trial may have predated Mapp's but where the admis-

[89] There was, in fact, at least one petition for certiorari before the Court when or shortly after *Mapp* was decided which the Court has "remanded for consideration in light of *Mapp v. Ohio*." Winkle v. Bannan, 368 U.S. 34 (1961). The case was a collateral attack and the action was taken on the suggestion of the state attorney general. See the Note appended to this article, pp. 680-83 *infra*.

sibility of the evidence was still properly pending on direct review when *Mapp* was announced. These cases would get to the Supreme Court after Mapp's and could as well as Miss Mapp's have been the vehicle for overruling *Wolf* had Mapp's case not come up. No sudden change of conditions just before Mapp's trial requires that the new rule not also apply to trials preceding it somewhat. If the case is still pending on direct appeal, that at any rate fairly well insures that the trial will not have been too much earlier than Mapp's trial. State courts should thus now apply *Mapp* on direct review as well as at trial when this issue has not been waived, and the Supreme Court should dispose of any certioraris or appeals from such cases under the new rule.[90]

It is less clear that the new exclusionary rule should be made applicable to prisoners whose trial took place after Mapp's but who either (1) never pressed the admissibility of the evidence at trial or on direct review and can no longer do so under state law or (2) did bring the issue to the Supreme Court on direct review only to have the conviction affirmed, the appeal dismissed, or certiorari denied. Such cases could not, like Mapp's, have been vehicles for announcing the new rule. Their claim to its benefit depends on an argument that although the rule is prospective, it is a rule governing trial and their trials took place after Mapp's, in which the rule has been applied. I find it persuasive that the rule ought to be evenhanded, in that, as a rule governing trial, it ought to be applied or not uniformly to all trials held at the same time. To apply *Mapp* to cases where the admissibility of evidence was not raised would probably require a new hearing, perhaps in a collateral proceeding, to determine the relevant facts, which is a conceivable reason for a distinction, but there is weakness in any distinction turning on the vigilance of prisoners to challenge *Wolf* while it seemed to be the law. It would not show too much concern for an orderly and fair transition from one constitutional rule to another to hold *Mapp v. Ohio* applicable to all prisoners tried after Miss Mapp as well as to all prisoners, no matter when tried, in whose cases the admissibility of the evidence was pending on direct review when *Mapp* was decided. It may also seem natural to the states to apply *Mapp* to any conviction pending on direct review on any issue,

[90] A few cases directly reviewing convictions have been reported in the states since *Mapp*. In all of those which I have found, the courts have indicated that they will apply *Mapp* to determine the appeals despite the fact of a pre-*Mapp* trial. Where this was relevant, the courts have said that they will remand for a new hearing if necessary to determine whether *Mapp* was violated. See the cases discussed in the Note appended to this article, pp. 680-83 *infra*. In some of these cases it is not clear that objection was made to the evidence at trial or that exclusion was urged on appeal before the *Mapp* decision, but in all of them the courts seem to have assumed that the issue of the evidence was still open to their review.

although the admissibility of the evidence had not previously been raised.[90]

VI. Conclusion

I do not think it is inconsistent to say that the constitutional purpose of *Mapp v. Ohio* is not served by generally retroactive application but that Mapp's case and a few others relevantly like it with trials occurring before the announcement of the new rule should nevertheless be governed by *Mapp*. It might have been better for the Court to have announced the new rule wholly prospectively, not applying it to the case before it, especially since there was another ground on which Miss Mapp's conviction could have been reversed. But the Court has applied the rule to her case, and that must now be taken as correct—if only because it has been irrevocably decided. The Court should also have the power to reverse other cases if it finds that they are relevantly the same as the overruling case. In the implementation of a new constitutional rule, the Court is entitled to see that unjustifiable distinctions between individuals are not created. A proper view of the Court's function under the fourteenth amendment should not force it to choose between permitting an unconstitutional practice to continue and being capricious as between individuals in bringing about a necessary change.

The distinctions I suggest between those previous trials which will and those which will not be governed by *Mapp* are obviously not entirely satisfactory. It is not easily defensible to say that several months' difference in the status of a case on review or perhaps one day's difference in the time of trial should determine which of two inconsistent constitutional rules applies. If one views the lack of a fully mechanical or totally defensible way to distinguish among cases tried before *Mapp*'s announcement as a barrier to making such distinctions at all, then one must choose either to make the new rule applicable only to trials postdating *Mapp* or to make it completely retroactive. Since the Court has already applied the rule to Miss Mapp's case, the only logical choice would be complete retroactivity. In view of legitimate reliance on *Wolf v. Colorado* and the fact that the purposes of the new rule do not call for general reexamination of previous convictions, it is safe to say that complete retroactivity is less justified than a somewhat arbitrary line excluding most previous trials. The line might be drawn at solely prospective application except for Mapp's case, but if distinctions are to be drawn between trials

[91] See, *e.g.*, People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961), discussed in the Note appended to this article, pp. 680-83 *infra*.

antedating the *Mapp* decision, it seems to me that that distinction, made in the *Molitor* case, is less defensible than those I have suggested.

The problem is not one of discovering the wholly satisfying or wholly logical solution, for none exists. A sudden change of law, especially for a deterrent purpose, is an unorthodox exercise of judicial power, and it is not surprising that the transition cannot be neatly resolved through judicial decision. I do not see how the problem of choosing what, according to relevant criteria, seems to be the most satisfactory of several unsatisfactory means of transition can be avoided. I have tried to suggest the proper guidelines for such a solution. What seems most important is that the Court restrict its choice to one among those solutions which recognize both the generally prospective nature of the new rule and the need for some equality of treatment between Miss Mapp and prisoners very similarly situated.[92]

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[92] Since reliance upon the old rule of law is a relevant fact in deciding whether to apply the new rule to the past, a distinction among past cases might be the particular disturbance to state law enforcement which would result through *Mapp*'s application. The Court seems not to have considered this in reversing Miss Mapp's conviction, and that seems to be a good reason for not considering reliance in the decision of other particular cases. An inquiry into the seriousness and irrevocability of the state reliance upon *Wolf* in a particular case would in any case be difficult and unsatisfactory, since it would have to include, for example, an appraisal of the present status of the state's case against the prisoner. State reliance should probably be taken into account only as the basis for formulating general rules. If the guidelines of those general rules are whether cases are relevantly as recent as Miss Mapp's, the states will not be given many old cases to retry.

The distinctions I suggest in the text flow primarily from the fact that *Mapp* was decided on direct review of a conviction. It may be asked what the situation would be if *Mapp* had come to the Court instead on review from the denial of some form of postconviction collateral relief, the prisoner having been convicted years before. If the Court had formulated a new exclusionary rule in such a case and applied it to the prisoner, there would be considerable difficulty, if not impossibility, in making any tenable distinctions between that prisoner and all other state prisoners convicted before the new rule was announced. But this is not the way the *Mapp* case came to the Court. If the Court *had* formulated the new exclusionary rule in review of a postconviction collateral attack, one hopes that it would have addressed itself to the problem of retroactivity more carefully than it did in the actual *Mapp* decision.

NOTE

A few cases since *Mapp v. Ohio* (June 19, 1961) have explicitly or implicitly decided aspects of *Mapp*'s effect upon previous trials. Those I have found are described in this Note. The results of none of them are in irreconcilable conflict with the suggestions of this article as to *Mapp*'s proper retroactive effect, and several may support my distinctions. My search for cases generally stopped on February 1, 1962.

FEDERAL CASES

Original Habeas Corpus: I have found six decisions in applications for federal habeas corpus from pre-*Mapp* convictions which may have been generated by *Mapp*. Hall v. Warden, 201 F. Supp. 639 (D. Md. Jan. 23, 1962); Johnson v. Walker, 199 F. Supp. 86 (E.D. La. Nov. 17, 1961); Mezzatesta v. Delaware, 199 F. Supp. 494 (D. Del. Nov. 16, 1961); United States *ex rel.* Hunter v. Fay, 199 F. Supp. 415 (S.D.N.Y. Nov. 6, 1961); Rayne v. Warden, 198 F. Supp. 552 (D. Md. Oct. 18, 1961); United States *ex rel.* Gregory v. New York, 195 F. Supp. 527 (N.D.N.Y. June 28, 1961).

In all the cases the petitions were denied. In two of the cases, *Gregory* and *Hunter*, denial was on the solid ground of failure to exhaust existing state remedies. In *Gregory* petitioner was convicted in New York before 1960, and his conviction affirmed by the highest court of the state. Certiorari was denied by the Supreme Court in 1960. Four days after *Mapp*'s announcement, he filed a writ of habeas corpus in the district court, relying on *Mapp*. It does not appear whether objection had been made to the introduction of the evidence at trial or on appeal. The petition was denied:

> In the Mapp majority opinion, it is not clear whether or not such ruling is to have prospective or retroactive effect, but . . . [the opinion] in note 9 reminds: "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."
>
> It is not evident from the petition whether the question of alleged search and seizure as claimed was presented to and reviewed by the Courts of New York. In courtesy to the Courts of New York, it would seem recanvass of these situations should be made by them, or state appellate reargument sought, before petitions with this challenge should be entertained in this District Court.

195 F. Supp. at 528. *Hunter* is similar, except that there it was clear that petitioner had not previously objected to the evidence. "Relator appears to rely on Mapp v. Ohio . . . . Clearly, the state courts should be afforded the initial opportunity to evaluate any possible retroactive effect that this decision may have on their criminal procedures." 199 F. Supp. at 417.

In *Mezzatesta* the petition was denied on the ground of failure to apply for certiorari following the affirmance of the conviction by the Delaware Supreme Court in December, 1960:

> [P]etitioners must first have exhausted available state remedies. Mezzatesta and Williams have made no application for a writ of certiorari to issue from the United States Supreme Court . . . . Counsel in oral argument stated that the long standing rule of the Supreme Court as laid down in Wolf v. People of State of Colorado . . . deterred him from applying for the writ of certiorari as to issues related to the admission of evidence allegedly illegally seized in connection with the State criminal action. But this is no cogent reason for the present Court to allow petitioners to circumvent the rule with respect to application for certiorari.

199 F. Supp. at 495-96. This result may be correct because of *Mapp*'s prospectiveness (Mapp's trial was probably later than petitioner's here, and the only opportunity the state courts had to review the conviction directly was before the *Mapp* decision) or on the theory that there is still an opportunity to apply for certiorari out of time, so existing remedies have not been exhausted. It seems wrong, however, to say that the petition must be denied because the objection to the evidence was permanently waived through failure to apply for certiorari while *Wolf* was law, implying that the result would be different if a petition for certiorari had been made and denied. See pp. 657-60 *supra*.

In *Rayne v. Warden* and *Johnson v. Walker* denial seems to have been on the grounds that the search was not unreasonable, and also on the ground that there had been a "waiver." *Rayne*:

> I find by the weight of the evidence in the hearing here that the search referred to was done by the express and voluntary consent of the petitioner. It is not clear what, if anything, resulting from the search and seizure was offered in evidence at the trial; but if there was error in admitting any part of it, that error could be corrected only by a direct appeal in the case and is not available on habeas corpus in the absence of such an appeal.

198 F. Supp. at 555. *Johnson*:

> [O]n the trial of this case, the question was thoroughly explored before the jury, and it was found, as a matter of fact, that petitioner had consented to the search and seizure now complained of. Defense counsel objected to the testimony on this point and was overruled by the Court, and then reserved the bill of exception to the ruling . . . . However, this bill of exception was never urged on appeal or otherwise before any appellate court in Louisiana, and was not urged by petitioner until it was presented here at this hearing for the first time. Hence, petitioner has completely failed to exhaust his State Court remedies as to this issue and in all probability has waived any constitutional rights that he otherwise might have had for failure to timely urge this exception.

199 F. Supp. at 97. As in *Mezzatesta, Mapp*'s prospectiveness, not waiver, seems the better ground for denying these petitions. See pp. 659-67 *supra*.

In *Hall v. Warden*, the grounds for denial seem to have been a combination of *Mapp*'s prospectiveness and waiver:

> I conclude that Mapp v. Ohio was not intended to require that a new trial or release must be granted to a person convicted in a state court because evidence obtained as a result of an unlawful search was admitted in evidence at the trial, where the point was not raised at the trial and the judgment had become final before the decision of the Supreme Court in the Mapp case.

201 F. Supp. at 643.

Supreme Court: In the Supreme Court of the United States, a petition for certiorari involving a pre-*Mapp* trial from the Supreme Court of Michigan has been granted and the judgment summarily "vacated and, as suggested by the Attorney General of Michigan, the case . . . remanded for consideration in light of *Mapp v. Ohio* . . . ." Winkle v. Bannan, 368 U.S. 34 (Nov. 6, 1961). This case involved a state collateral attack, rather than a direct review of the conviction (the Supreme Court of Michigan affirmed the conviction in 1960, People v. Winkle, 358 Mich. 551, 100 N.W.2d 309 (1960)). But the suggestion of the state attorney general distinguishes the case from collateral attacks in pre-*Mapp* trials where the State will refuse to reexamine its holding in the light of *Mapp*. In Ker v. California, 368 U.S. 974 (Jan. 23, 1962), the Supreme Court has granted review of an appellate court affirmance of a pre-*Mapp* conviction in which allegedly unconstitutionally seized evidence was admitted over objection. See also Robinson v. California, 368 U.S. 918 (Nov. 20, 1961). Since California has excluded unconstitutionally seized evidence since 1955, this may not represent a retroactive application of *Mapp* at all; it will, in any case, be an application on direct review.

STATE CASES

New York: New York admitted illegally seized evidence before *Mapp*. On July 6, 1961, a state supreme court judge issued a certificate of reasonable doubt to permit a pre-*Mapp* conviction to be appealed on the basis of *Mapp*. "The Mapp decision will cause our New York appellate courts to restudy and reevaluate our state laws of search and seizure in the cases coming before them. The present case may be one of them." People v. Carafas, 219 N.Y.S.2d 52, 53 (Sup. Ct. 1961). The next day, the court of appeals, in an appeal from a conviction in a pre-*Mapp* trial argued but not yet decided, ordered reargument, "particularly with reference to the effect of the decision of the Supreme Court of the United States in *Mapp v. Ohio*. . . ." People v. McNeil, 10 N.Y.2d 749, 177 N.E.2d 48, 49, 219 N.Y.S.2d 606 (July 7, 1961). The appellate division did the same with an appeal pending before it. People v. West, 14 App. Div. 2d 592, 218 N.Y.S.2d 971 (July 25, 1961). *Mapp*'s applicability on collateral attack in New York was raised and denied in People v. Figueroa, 220 N.Y.S.2d 131 (County Ct. Sept. 28, 1961). Petitioner had been convicted in 1957.

No appeal was taken. After Mapp's decision he petitioned the trial court (coram nobis) to vacate the conviction under *Mapp*. It does not appear whether objection to evidence had been made at trial but "there was no evidence adduced at the trial" regarding the reasonableness of the search. *Ibid.* Petition was denied on the ground that *Mapp* is not retroactive:

> Mapp itself removes the last vestige of doubt as to the intent of the Supreme Court to impose the rule prospectively and not retroactively . . . [relying on some language in the opinion of the Court]. I conclude . . . that until Mapp (June 19, 1961), evidence obtained as a result of an unreasonable search and seizure was admissible in the courts of this State to convict. Therefore coram nobis does not lie to vacate a conviction obtained by what was at the time of trial constitutional evidence.

220 N.Y.S.2d at 133. On November 30, 1961 the New York Court of Appeals decided that *Mapp* will be applied in pending appeals even though the trial predated *Mapp*. People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961). Defendant had been convicted in January 1961. The appellate division affirmed on June 13, 1961, six days before *Mapp*. It does not appear whether defendant objected to the evidence either at trial or before the appellate division. Conviction was reversed and a new trial ordered:

> There can be no doubt that it is the duty of State courts to follow the *Mapp* holding in all trials taking place after June 19, 1961. However, whether we are commanded to, and if not whether we should, apply it in pending appeals . . . where, as here, the trial was completed and an intermediate appellate court has affirmed before *Mapp* was decided, is a threshold question in this case. . . . While it is the general rule that we give effect to the law as it exists at the time of our decision . . . some of the members of this court have felt that we are not required to, and should not, do so in the instant case particularly because of the language employed by the Supreme Court in *Mapp* at pages 654-656, 658. The majority, however, are of the opinion that we should adhere to the general rule, and review defendant's conviction in light of the law as it presently exists.

Id. at 370-71, 179 N.E.2d at 480, 223 N.Y.S.2d at 464-65. The trial record indicated that the search had been unconstitutional unless there had been probable cause:

> Of course, when this case was tried, the People were not required to prove that the police had probable cause . . . . Since the law did not require such proof, the present record may not disclose what cause, if any, the police had . . . . In light of the *Mapp* decision, this conviction must be reversed on the present record, but the People should have the opportunity to establish the propriety of the police entry . . . .

Id. at 374, 179 N.E.2d at 482, 223 N.Y.S.2d at 467. Since the case was in all respects later than Mapp's, I would agree that this was a proper retrospective application of the new rule.

Other States: New Jersey did not exclude evidence before *Mapp*. A state collateral attack upon a pre-*Mapp* conviction was denied after a hearing on September 21, 1961, on the ground that there had been no unconstitutional search. Application of Bogish, 69 N.J. Super. 146, 173 A.2d 906 (Law Div.), *cert. denied*, 363 U.S. 824, *motion for leave to file petition for writ of habeas corpus denied*, 366 U.S. 957 (1961). "Another question which need not be decided in view of this court's finding that there was no unreasonable search or seizure is whether the effect of the *Mapp v. Ohio* . . . decision is retrospective in nature." *Id.* at 155, 173 A.2d at 911. On November 6, 1961, the New Jersey Supreme Court applied *Mapp*, as did the *Loria* case in New York, to a pending appeal on a pre-*Mapp* motion to suppress evidence, the result being a remand. State v. Valentin, 36 N.J. 41, 174 A.2d 737 (1961). Defendant had moved to suppress evidence before trial, and the motion had been denied because New Jersey did not follow the exclusionary rule. *Mapp* had been decided before argument of the appeal.

> As the result of this new doctrine, obviously, if the shotgun involved here was secured through an unreasonable search and seizure, defendant's application to bar its introduction as evidence against him is sound and must be granted. . . . That problem cannot be determined on the record now before us which the decision in Mapp has rendered inadequate. Undoubtedly, if Mapp had been decided prior to the motion in the County Court, the Prosecutor would have presented whatever proof he may have had as to the nature

> of the search and seizure. . . . [W]e do not believe that the Prosecutor should be penalized for relying on what appeared to be the law of our State at the time. For that reason, the matter will be remanded to the County Court to permit both parties to introduce all relevant proof on the new issue generated by Mapp.

Id. at 738. See also State v. Masi, 72 N.J. Super. 55, 177 A.2d 773 (Law Div., Jan. 30, 1962); State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (County Ct. Jan. 24, 1962).

In Alabama a case was affirmed which challenged a pre-*Mapp* conviction on direct review because the search was found not to be unconstitutional on the basis of an adequate record. Apparently objection to the evidence had been made and litigated below. Thompson v. State, 132 So. 2d 386 (Ala. Ct. App. Aug. 15, 1961).

The Supreme Judicial Court of Massachusetts has reached the same result as the New York Court of Appeals in the *Loria* case. Commonwealth v. Spofford, 30 U.S.L. WEEK 2455 (Mass. March 1, 1962).