Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE JOHN M. HARLAN

May 1, 1961

Re: No. 236 - Mapp v. Ohio

Dear Tom:

I hope you will not mind my writing you candidly as to my concern over your opinion in this case.

I would have supposed that the Court would have little difficulty in agreeing (as indeed I thought the whole Court had) that a state prohibition against mere knowing possession of obscene material, without any requirement of a showing that such possession was with a purpose to disseminate the offensive matter, contravenes the Fourteenth Amendment, in that such a statute impermissibly deters freedom of belief and expression, if indeed it is not tantamount to an effort at "thought control."

In that circumstance, I am unable to understand why a ground for deciding this case should have been chosen which is not only highly debatable and divisive, but also requires the overruling of a decision to which the Court has many times adhered over the past dozen years.

Your proposed overruling of Wolf is, I submit, both unnecessary and inadvisable, particularly for these reasons:

(1) Unless we are to "Sunburst" (something which is especially difficult in a constitutional case; and cf. our troubles in James, a non-constitutional case), this course threatens a jail delivery of uncertain, but obviously serious, proportions.

SUNBURST -

(2) Your opinion will, I predict, prompt much, and perhaps confusing, writing among the Brethren.

Writing

(3) Being itself a constitutional adjudication, this course derives no support from the rule of avoidance of constitutional issues. It simply substitutes one constitutional ground for another.

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This is not the time for a discussion of the merits of what you are holding, but a few observations may be in order. Your opinion, if I read it correctly, involves, in effect, this syllogism: (a) Wolf held that the concepts (including, as Wolf was interpreted in Elkins, the standards) of the Fourth Amendment are carried to the States as part of the "ordered liberty" assured by the Fourteenth Amendment; (b) the Weeks "exclusionary" rule is part of the Fourth Amendment; and (c) it is therefore incongruous that the Weeks rule should not also follow into the States. I seriously question the validity of both the minor premise and conclusion of this reasoning:

(1) For myself, I am not yet ready to hold (and I do not think the cases compel us to hold) that the Weeks rule is constitutionally based, that is, that Congress could not pass a statute rendering illegally seized, though relevant, evidence admissible in a federal criminal trial. See Black, J., concurring in Wolf, 338 U.S., at 39-40; cf. People v. Defore, 242 N.Y. 13 (Cardozo, J.). Debate on this score is certainly not foreclosed by anything said by the majority in Wolf; see 338 U.S., at 28-33; it was consciously avoided.

(2) Even were the Weeks rule deemed to reflect a requirement of the Fourth Amendment, it by no means follows that the Fourteenth Amendment carries that rule to the States. See, e.g., Wolf, at 33, and Elkins at 213.

I am sure you do not intend to suggest that the Fourteenth "incorporates" the Fourth as such. Wolf itself (see especially p. 26), let alone the uniform course of the Court's decisions, have laid that ghost at rest.

And, also surely, the "non-exclusionary" aspect of Wolf did not go on mere "factual considerations" devolving from the circumstances that most of the States at that time had no "exclusionary" rule. Rather, it most certainly rested on the fundamentals of federal-state relations in the realm of criminal law enforcement.

What is it, may I ask, that should lead us at this juncture to say in effect that a State which has no "exclusionary" rule must now adopt one, and that a State whose "exclusionary" experience has been unfortunate is henceforth constitutionally forbidden to revert to a "non-exclusionary" policy? I find nothing in such cases as Rea, Elkins, Schnettler, or Rogers v. Richmond, still less in Rochin, that warrants departure from what, in my opinion, Wolf soundly held.

The upshot of all this is that I earnestly ask you to reconsider the advisability of facing the Court, in a case which otherwise should find a ready and non-controversial solution, with the controversial issues that your proposed opinion tenders.

Perhaps you will have gathered from the foregoing that I would not be able to join you in your present opinion!

Sincerely,

J.M.H.

Mr. Justice Clark

P.S. If you dont mind my saying so, your Opinion comes perilously close to accepting "incorporation" for the Fourth A., and will doubtless encourage the "incorporation" enthusiasts.

J.M.H.