May 4, 1961

Dear John:

Re: No. 236, Mapp v. Ohio

You are quite right that the case might go off on the ground that a conviction based upon mere possession of obscene material without a showing as to dissemination would be impermissible under the free speech guaranty of the Fourteenth Amendment. But, of course, as was pointed out in the Conference, it clearly raises the Wolf question to which there was made direct reference in the opinion of the Ohio Supreme Court. Indeed, at Conference three gave the latter as an alternate ground for reversal.

It is true also that Wolf has been adhered to in several cases, but in each in which a full dress opinion resulted it was done grudgingly. See Irvine, where Bob Jackson indicated that it was not then time to overrule or change it, and Elkins, which, though it did not involve this problem, indicated that Wolf had muddied the waters.

I see no occasion for resort to the Sunburst doctrine. Even as to the oldest claims timely objection at the original trial would be necessary and I would imagine that relatively few before or since Wolf would have raised the point. At any rate, their attack would be a collateral one which raises other problems for the claimants.

There is, of course, as in all controversial cases, ground for disagreement. I have a court and therefore my theory at least has support. I think the trouble stems from Wolf which, like the second Covert, enunciates a constitutional doctrine which has no escape clause militating against the present inexorable result, i.e., if the right to privacy is really so basic as to be constitutional in rank and if it is really to be enforceable against the states (Wolf), then we cannot carve out of the bowels that right the vital part, the stuff that gives it substance, the exclusion of evidence. It has long been recognized and honored as an integral part of the equivalent right against federal action.

Naturally, I think, as I indicated in my concurrence in Irvine, that the Weeks rule is a constitutional one. I believe our opinions support this -- even Wolf says it is a constitutional rule formulated by "judicial implication." Wolf, of course, does not visit it against the states. Wilkins, as I read it, did not pass on this question but it affords much support for my view.

ELKINS

I agree that Wolf rested on the "fundamentals of federal-state relations." The only trouble is that the statistical trend Wolf used to support abstention is now reversed. See Elkins. All I say is that since Wolf made privacy a constitutional right enforceable against the states we are obliged to enforce it as we do other basic rights -- and that what, if any, pressure the federalism concept brought to bear upon the judgment in Wolf is now dissipated. Quite frankly I believe that the present result achieves a necessary measure of symmetry in our constitutional doctrine on both federal and state exercise of those powers incident to their enforcement of criminal law which deal most directly with individual freedom and poise perhaps its greatest threat.

Nor do I believe, John, that the opinion is a windfall to "incorporation" enthusiasts. If it is, then Wolf brought it on. However, I adhere to all that is said in Palko and will be glad to say so if I am understood presently to be saying otherwise.

I hope that you will restudy the opinion, John, and find logic and reason in it. If you have any suggestions I shall welcome them.

Yours,

TCC

Mr. Justice Harlan