

May 3, 1961

Dear John:

Re: No. 236, Mapp v. Ohio

free speech guaranty of the Fourteenth Amendment.

direct reference in

clearly

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 First Amendment. But, of course, as was pointed out in the Conference, it raises the Wolf question, which was pointed up by the opinion of the Ohio Supreme Court. Indeed, at Conference three gave the latter as an alternate ground.

there

made

for reversal.

It is true also that Wolf has been adhered to in several cases, but in each where 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, Also Elkins, which though it did not involve this problem indicated that Wolf had muddied the waters.

in which

I see no occasion for the Sunburst doctrine. Almost the claims would not antedate 1949. Even as to these, objection would be necessary at the time of original trial and few would have raised the point. As to them, the attack would be a collateral one which raises other problems for the claimant.

resort to and

the oldest claims

timely

before or since Wolf

I would imagine that relatively

There is, of course, as in all controversial cases, ground for disagreement. I have a court and so 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, i. e. if the right to privacy stems from the constitution and is enforceable against the states (Wolf), then we cannot carve out of that right a vital part (exclusion of evidence) that has long been recognized and honored as part of the same right against federal action.

At any rate, their

therefore

multitasking the court cannot make a separate request

if it is really to be

the

an integral

equivalent

the bowels

the stuff that gives it substance, the

is really so basic as to be constitutional in name,

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 by "judicial implication." Wolf, of course, does not visit it against the states ~~as to the exclusion of evidence.~~ Wilkins, as I read it, did not pass on this question but it affords much support to my view.

formulated

I agree that Wolf rested on the "fundamentals of federal-state relations." The only trouble is the statistics Wolf uses to support abstention are 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 the federal-state relation doctrine ~~now supports that requirement.~~
 that *-al trend* *d* *new concept* *brought to bear upon the judgment in Wolf* *what, if any, pressure* *is now dissipated.*

necessary

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.

Quite frankly I believe that the present result achieves a measure of symmetry in our constitutional doctrine on both

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.

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.

Yours,

TCC

Mr. Justice Harlan

Dear John:-

You are quite right that the case might go on the ground that ^{a conviction based upon} mere possession of obscene material without a showing as to dissemination would be impermissible under the 1st Amendment. But, of course, as was pointed out in the conference it raises the Wolf question which was pointed up by the opinion of the Chief S.C. Indeed, at conference three gave ^{of the latter} that as an alternate ground.

It is true also that Wolf has been adhered to in several cases but in each where a full bench opinion ^{resulted} ~~expressed~~ it was done grudgingly. See Swine where Robinson indicated that it was not their time to overrule or change it. Also Ellins ~~where it was~~ ~~the Wolf case had contentment given~~ which though it did not involve this problem indicated that Wolf had muddied the waters.

I see no occasion ^{for} ~~to use~~ the Sutro doctrine. At most the claims were not antedate 1949. Even as to those objections ^{the time of original} ~~issued~~ ^{raised the point.} ~~be necessary at original trial & few would have been made.~~ ~~as to those for~~ ^{them} the attack would be a collateral one which raises other problems for the claimant.

There is, of course, as in all cases, ^{contributory} ground for disagreement. I ~~see~~ have a conviction, and so my theory at least has support. I think the trouble stems from Wolf, which like the second Conroy, enunciates a constitutional doctrine that ~~requires a conviction~~ ^{requires a conviction} which has no escape

clause, i.e., if the right to privacy ^{stems from the} ~~is~~ a constitutional one is enforceable against the states (Wolfe) then we cannot carve out of that right a vital part (exclusion of evidence) that has long been recognized ~~and~~ and honored ^{as part of the same right} against federal action.

Naturally, I think, as I ~~said in my~~ indicated in my concurrence in Irvin, that the Wicks rule ^{is} a constitutional one. I believe ^{over} ~~the~~ opinion's support this - even Wolfe says ^{it is a constitutional rule} ~~that is true by~~ "judicial implication". Wolfe, of course, does not visit it against the states as to ^{the} exclusion of evidence. Elkins as I read it did not pass on this question but it affords much support to my view.

I agree that Wolfe rested on ^{the "fundamentals of"} federal state-relationships. The only trouble in the statistics Wolfe uses to support a statement are now reversed. See Elkins. All I say is that since Wolfe made privacy a constitutional right enforceable against the states we are obliged to enforce it as we do other basic rights - and that the federal-state relation doctrine now supports that requirement.

Now do I believe, John, that the opinion ^{is a windfall to} ~~encourages~~ "incorporation" enthusiasts. If it is then Wolfe brought it on. However, I adhere to all that is said in Palko and will be glad to say so.

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

Yours - Tee