May 3, 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 ~~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.

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.

I see no occasion for the Sunburst doctrine. ~~At most 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.

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.

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.

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.

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.

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

Dear John :-

You are quite right that the case might go up 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 Ohio S.C. Indeed, at Conference three gave the latter as an alternate ground.

It is time also that Wolf be treated with 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 where it was the Wolf rule had outlived its which though it did not involve this question indicated that Wolf had muddied the waters.

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clause, ie, if the right to privacy [stems from the] a constitution and is unenforceable against the states (Wolf) 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 to you~~ indicated in my concurrence in Irvine, that the Mapp rule is a constitutional one, I believe our opinions support this - even Wolf says ~~this is true by~~ it is a constitutional rule by "judicial implication". Wolf, of course, does not visit it against the states as 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 Wolf rested on [the "fundamentals of federal state-relations". The only trouble in the statistics Wolf uses to support abstention are now reversed. See Elkins. All I say is that since Wolf made privacy a constitutional right unenforceable 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.

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.

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 - Tom C