

Mapp v. Ohio / Excerpts from the Dissenting Opinion

The following are excerpts from Justice Harlan's dissenting opinion:

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new *Wolf* rule, which now replaces it.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether §2905.34 of the Ohio Revised Code making criminal the *mere* knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the 14th Amendment. That was the principal issue, which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court.

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in non-Constitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.

It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

I would not impose upon the States this federal exclusionary remedy.

Our concern herein is not with the desirability of that [exclusionary] rule but only with the question whether the States are Constitutionally free to follow it or not as they themselves determine.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect.

Questions to Consider

1. What does the term “judicial restraint” mean? Does Justice Harlan think the majority has exercised judicial restraint in this case?
2. According to Justice Harlan, what was the primary issue raised by the appellant?
3. What was the issue that the Court ultimately decided?
4. What does Justice Harlan think about the fact that the Court decided a different issue than the one that was originally raised?
5. Does Justice Harlan support the notion of states controlling their own criminal justice systems or of the federal government making decisions for them?

