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Yale Kamisar

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SOME REFLECTIONS ON CRITICIZING THE COURTS AND
"POLICING THE POLICE"

YALE KAMISAR*

This comment is a concluding paper by Professor Kamisar concerning an article by Professor Fred E. Inbau of the Northwestern University School of Law entitled "Public Safety v. Individual Civil Liberties: The Prosecutor's Stand," which appeared in the March, 1962, issue of the *Journal* (Vol. 53, No. 1) at pp. 85-89. Professor Kamisar replied to the Inbau article in the June, 1962, number of the *Journal* (Vol. 53, No. 2) at pp. 171-93. Professor Inbau's rebuttal to the Kamisar response appeared in the September, 1962, number of the *Journal* (Vol. 53, No. 3) at pp. 329-32. Comments from readers concerning these articles appeared in the June, 1962, number (Vol. 53, No. 2) at pp. 231-32; further letters concerning this exchange of views appear in the "Reader Comments" section of the present issue.—EDITOR.

"[R]ecent years have seen a recurrence of that old storm of criticism of the Supreme Court which seems to renew itself in our history every twenty years or so. The main lines of the attack, whether by lawman or layman, have had a quiet consistency. The underlying beat is always: 'I don't like these *results!*' And that underlying drumbeat is commonly, though not always, masked by noise about how the Supreme Court (or the members thereof) are abandoning their Constitutional function, usurping legislative power, disrupting our commonwealth, and this or that in addition. Marshall's court got this treatment; Taney . . . And here we are again." †

"We say we believe in law. We dedicate a day to its honor, by formal proclamation of our President. . . . Yet, day by day, we hear many voices that seem to be subversive of law . . . We have, in America, given a new exaltation to the power of the judiciary. We have accorded to our courts the power to invalidate the acts of those who are more directly responsible to the people's will. Both de Toqueville and Bryce have remarked that in our polity scarcely a question arises which does not become, sooner or later, a subject of judicial debate. . . . What is important is that we recognize the additional stresses to which our system subjects our courts, and, in the sense in which we now use it, our law. Our judges personify law and the rule of law. We owe them the same honor we owe the law itself." ††

We need the relatively few professors we have with Fred Inbau's rich background in law enforcement work and tough, earthy approach to problems of criminal procedure and constitutional law.

* The author is Professor of Law in the University of Minnesota Law School. He is also a member of the Advisory Committee on the Revision of the Minnesota Criminal Law. In 1960-1961, Professor Kamisar was a Social Science Research Council Fellow, studying the prosecutor's discretion in the State of Minnesota and the substantive criminal law "in practice." Prior to joining the faculty of the University of Minnesota in 1957, he was engaged in the practice of law in Washington, D. C.

† LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 384 (1960). For a brief but incisive discussion of the passions roused by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); "but a few of the violent controversies which swirled about the

I don't think Professor Inbau would deny that he is "prosecution minded," but surely more of his teaching brethren are "defense minded." If he finds it difficult to set aside the question of the guilt or innocence of a particular individual and focus solely upon the procedural and constitutional features of the case, others sometimes find it difficult to take into account considerations of police efficiency and public security. If he dwells too long

heads of the Justices of the Supreme Court during the first century of its existence," see McGowan, *The Supreme Court in the American Constitutional System: The Problem in Historical Perspective*, 33 *NOTRE DAME LAW.* 527, 532-43 (1958).

†† Horsky, *Law Day: Some Reflections on Current Proposals to Curtail the Supreme Court*, 42 *MINN. L. REV.* 1105, 1106-08 (1958). See also McGowan, *supra*, at 540-43.

on the "needs" of the policeman—virtually to the exclusion of all other values and policies—others sometimes forget that constitutional guarantees "ought not to be an obstacle in a game but only a protection against arbitrary and capricious police action," that "if the rules make sense in the light of a policeman's task, we will be in a stronger position to insist that he obey them."¹

Professor Inbau's law enforcement background and police-prosecution perspective were put to good use in his famous 1948 article, "The Confession Dilemma in the Supreme Court."² It has deservedly been called an "important" contribution to the literature.³ But 1948 was a long time ago—in this business.

Then the *McNabb* rule looked as if it might be tottering; it has since been twice reaffirmed.⁴ By then, the Court had already banned "dry run" hangings, beatings, and other crude practices on the part of state officers, but as torture and terror became outmoded and were displaced by more subtle interrogation pressures, the area was marked by uncertainty. There is little uncertainty now; for a number of recent state confession cases has seen a vigilant Court outlaw much "psychological coercion," as well as physical violence.⁵

Back in 1948, the Supreme Court had not yet ruled that the security of one's privacy against unreasonable search and seizure was binding on the states through the due process clause;⁶ it has since held that not only are these guarantees applicable to the states but that they must be enforced against them by means of the same sanction used against the federal government—exclusion of the illegally seized evidence.⁷ If more examples of the imposition of national standards on state criminal proceedings are needed, in certain situations the states are now required to furnish *all* indigent prisoners with a free trial transcript or an adequate substitute.⁸

Today, the course of the Court is clear. Once concerned with property rights much more than

¹ Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 66 (1957).

² 43 ILL. L. REV. 442.

³ McCORMICK, EVIDENCE 241 n.1 (1954).

⁴ *Upshaw v. United States*, 335 U.S. 410 (1948) (decided after the Inbau article); *Mallory v. United States*, 354 U.S. 449 (1957).

⁵ *E.g.*, *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *Fikes v. Alabama*, 352 U.S. 191 (1957).

⁶ Of course, it was to do so the following year, in *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸ *Griffin v. Illinois*, 351 U.S. 12 (1956).

human liberty, "it is now the keeper, not of the nation's property, but of its conscience."⁹ Whether or not this was always so, in the past decade a majority of the Court has heeded the warning that "federalism should not be raised to the plane of an absolute, nor the Bill of Rights . . . reduced to a precatory trust."¹⁰ More and more, the Court has come to realize that to the peoples of the world "the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."¹¹ Surely and steadily, "the national ideal is prevailing over state orientation."¹²

In the meantime, how has Professor Inbau reacted to all this?

I regret to say that his voice has grown louder and harsher. This is understandable, if not excusable. It has always been easier for winners to be more gracious than losers. And Inbau must have realized some time ago that he is taking a "somewhat lonely position,"¹³ that he is fighting a losing—if not a lost—cause. Convinced that a major factor accounting for the stream of decisions against his views is "the neglect or failure of the police and prosecution to present adequately . . . [their] side of the issue,"¹⁴ and evidently determined to remedy the matter, it is not too surprising that Professor Inbau has mistaken intemperateness for articulateness.

CRITICIZING THE COURT

Of course, I find nothing unprofessional or unlawful in anybody's criticism of the Court for having overruled *Wolf v. Colorado*.¹⁵ How could I? I was one of the many who criticized the Court for *not* overruling the *Wolf* case.¹⁶ But criticism comes in different sizes and varieties.

It is one thing to differ with the Court about what the law is or ought to be; it is quite another thing to *deny that the Court has the power or the right*

⁹ Lewis, *Historic Change in the Supreme Court*, New York Times Magazine, June 17, 1962, p. 7.

¹⁰ Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 774 (1961).

¹¹ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

¹² Lewis, *supra* note 9, at 7.

¹³ *Cf.* McGarr, *The Exclusionary Rule: An Ill-Concepted and Ineffective Remedy*, 52 J. CRIM. L., C. & P.S. 266 (1961).

¹⁴ Inbau, *The Social and Ethical Requirements of Criminal Investigation and Prosecution*, 3 CRIM. L. Q. (Canada) 329, 350 (1960).

¹⁵ 338 U.S. 25 (1949).

¹⁶ Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

to say what the law is. The court needs and welcomes criticism possessing "that quality of judiciousness which is demanded of the Court itself";¹⁷ the profession and the public can get along quite nicely without the kind that "fans the fires of lawlessness and cynicism . . . ignited in the wake of the school desegregation cases,"¹⁸ and without the kind that "offers comfort to anyone who claims legitimacy in defiance of the courts."¹⁹ I leave it to the reader to label Professor Inbau's brand of criticism. Here are some samples:

"We are not only neglecting to take adequate measures against the criminal element; we are actually facilitating their activities in the form of what I wish to refer to as 'turn 'em loose' court decisions and legislation. To be sure, such decisions and legislation are not avowedly for the purpose of lending aid and comfort to the criminal element, but the effect is the same. . . ."

"What particularly disturbs me, and I am sure many of you, is the dangerous attitude that has been assumed by the United States Supreme Court. *The Court has taken it upon itself, without constitutional authorization, to police the police.*"²⁰

"[The overruling of *Wolf v. Colorado* is] just another example of the Court's continuing efforts to police the police—and that is an executive, or at most a legislative function of government. It certainly is not the constitutional function of the judiciary."²¹

"[T]he reason is perhaps more disturbing than the individual case decisions themselves.

"It has become all too fashionable in judicial circles to line up 'on the liberal side.' In their zeal to become 'great judges' the formula seems to be, with some who harbour that aspiration, either adopt a 'turn 'em loose' policy or count yourself out as a great judge."²²

"*The courts have no right to police the police.* . . . Furthermore, the courts have enough troubles of their own. Witness what goes on in some of

the municipal or magistrate courts of our large cities. In my opinion there are, in such courts, more hurts to the innocent and more trampling over of the basic individual civil liberties and ethical considerations than you will find in most police departments. *Much of the concern, energy, and efforts that the courts expend with respect to police conduct could be better spent on getting their own house in order.*"²³

In his "reply," appearing in the preceding issue of the *Journal*, Professor Inbau is a good deal more restrained than he has been in other recent writings. But he still cannot resist challenging, once again, the right of the High Court to tell the people of Michigan that the "proximate solution" they worked out for the search and seizure problem must be set aside, the *right* of the Court to tell the people of that state that their judgment must be overridden.²⁴

I am not sure I fully understand such talk. If the Supreme Court lacks such a right, how does it ever declare state executive and legislative action or state constitutional provisions in violation of the federal constitution? Can it be that Inbau still resists the idea of constitutional review by an independent judiciary? Can it be that he still insists that "no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature [or its citizenry] has unlimited powers"?²⁵ Can it be that he still disputes the proposition that "there are some phases of American life which should be beyond the reach of any majority, save by [federal] constitutional amendment"?²⁶ That due process rights "depend on the outcome of no elections"?²⁷ Can it be—at this late date—that Inbau is petitioning for rehearing in *Marbury v. Madison*²⁸ and *Fletcher v. Peck*?²⁹

In his "reply," Professor Inbau tells us: "I am opposed to illegal police searches and seizures, but I do not believe that the United States Supreme Court had the right to order the states to free guilty persons merely because the police had acted illegally in obtaining the evidence of guilt."³⁰

²³ *Id.* at 350-51.

²⁴ Inbau, *More About Public Safety v. Individual Liberties*, 53 J. CRIM. L., C. & P.S. 329, 329-30 (1962).

²⁵ An argument disposed of in Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 199 (1952).

²⁶ *Id.* at 197.

²⁷ Jackson, J., in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

²⁸ 5 U.S. (1 Cranch) 137 (1803).

²⁹ 10 U.S. (6 Cranch) 87 (1810).

³⁰ Inbau, *supra* note 24, at 332.

¹⁷ FREUND, *The Court and Its Critics*, in THE SUPREME COURT OF THE UNITED STATES 177 (1961).

¹⁸ *Id.* at 172.

¹⁹ WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 47 (1961).

²⁰ Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85 (1962). (Keynote address at the 1961 Annual Conference of the National District Attorneys' Association.) (Emphasis added.)

²¹ *Id.* at 86-87.

²² Inbau, *The Social and Ethical Requirements of Criminal Investigation and Prosecution*, 3 CRIM. L. Q. (Canada) 329 (1960). (Emphasis added.)

I realize you put a certain "punch" into your criticism when you phrase it in terms of the Court *ordering the states to free* the guilty. But the Court issues no such orders. Exclusion of the evidence, of course, does not necessarily free a particular defendant. On remand, he can still be—and he has been—convicted on properly obtained evidence, if there is such evidence and it is sufficient.

I am aware, too, that a complaint carries an extra "wallop" when you talk about the Court overturning state convictions "*merely because* the police . . . acted *illegally*." The only trouble is that the Court doesn't upset state convictions unless the police acted *unconstitutionally*, *i.e.*, in violation of due process. There *is* a difference. For example, despite the "impressively pervasive [state] requirement" that arrested persons be promptly arraigned,³¹ "the majority of the Court have steadily rejected the argument that the securing of the confession during a period when the prisoner's detention was illegal because of failure to produce him promptly for a preliminary hearing is of itself a sufficient basis for overturning the conviction on due process grounds."³²

As I translate Professor Inbau, then, what he is saying is this: I am opposed to unreasonable searches and seizures, but I do not believe the Supreme Court has the right to reverse a state conviction and remand for a new trial merely because the first conviction was based on evidence obtained by the police in violation of the federal constitution. Somehow, when you put it that way, his position seems to lose some of its appeal, doesn't it?

The next time Professor Inbau feels the need to warn the courts—and even the legislatures³³—to leave the police alone, he should consider that "the

³¹ *McNabb v. United States*, 318 U.S. 332, 343 (1943).

³² *McCORMICK, EVIDENCE* 245 (1954). For more recent discussions of the problem see Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, 52 J. CRIM. L., C. & P. S. 2, 7-8 (1961); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 28-31 (1961).

As an astute commentator has recently observed, "in most instances the [state] courts have not even discussed whether in-custody investigation by the police is legal"; they "have not needed to mark out the boundaries of proper police conduct short of that extreme characterized as coercion." Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 22 (1962). This article, unfortunately not yet in print when I wrote my first "reply" to Professor Inbau, is an extraordinarily thoughtful, careful, and dispassionate treatment of a very explosive subject.

³³ See, *e.g.*, Inbau, *supra* note 20, at 88-89.

root idea of the Constitution" has been said to be "that man can be free because the state is not."³⁴ The next time he feels the urge to protest that the Court has gone beyond its constitutionally authorized functions he should consider the post-*Baker v. Carr*³⁵ remarks of the U. S. Attorney General: "When people criticize the courts for invading spheres of action which supposedly belong to other parts of our constitutional system, they often overlook the fact that the courts must act precisely because the other organs of government have failed to fulfill their own responsibilities."³⁶ The next time he feels compelled to lash out at the Court for its indulgence in judicial legislation, he should consider the observation of Chief Justice Walter Schaefer of the Illinois Supreme Court: "That [U.S. Supreme Court] decisions are creative seems to me unavoidable, particularly in a developing area of the law. To a court the common denominator of all cases is that they must be decided. *The decision that lets a conviction stand may be quite as creative as that which strikes one down*. It, too, becomes a precedent, and so shapes the law of the future."³⁷

"POLICING THE POLICE"

Professor Inbau insists that decisions dealing with the problems of arrest, search and seizure, and interrogation constitute "policing the police."³⁸

³⁴ Rostow, *supra* note 25, at 195.

³⁵ 369 U.S. 186 (1962) (holding that the federal judiciary can hear cases involving the apportionment of state legislative seats).

³⁶ Remarks of Attorney General Robert F. Kennedy, quoted in Lewis, *Historic Change in the Supreme Court*, *New York Times Magazine*, June 17, 1962, pp. 7, 38.

³⁷ Schaefer, *supra* note 13, at 6. (Emphasis added.) The author also points out, *id.* at 4, that "the problems which are vital today were not presented to the Court until recently," *e.g.*, the right to counsel in 1932, the admissibility of a coerced confession in 1936. He observes, too, that "the lateness of these decisions cannot be explained on the theory that the Court was originally reluctant to decide such cases. Apparently the question simply did not reach the Court." *Ibid.*

³⁸ In a footnote supporting his criticism of *Mapp v. Ohio*, Professor Inbau assures us, Inbau, *supra* note 24, at 330n.6: "In this connection, I should also like to point out that when I say that the Supreme Court has no right to police the police, I have some company in the person of Mr. Justice Harlan. See his dissent in *Rea v. United States*, 350 U.S. 214, 218 (1956)."

I submit that the reference to Justice Harlan "in this connection" is, at the very least, misleading. *Rea* was an extraordinary case which found a majority of the Court voting to *enjoin* a federal agent from giving, in a state prosecution, evidence which he had obtained in the course of an illegal federal search. Justice Harlan voiced doubts that "the federal courts share with the executive branch of the Government responsibility for

I prefer to call it *enforcing the Constitution*. Of course, here as elsewhere, the question of the Court's power and responsibility cannot be resolved by "little more than a play upon words."³⁹ *Whatever* one calls it, I think judicial intervention in these troublesome areas is *more justifiable, more appropriate*, than in most other fields. For here "the Court has put its emphasis on procedure, on due process in the primary meaning of the concept, for which the judiciary has special competence and responsibility."⁴⁰

A close student of the man and his work has observed that a main characteristic of Justice Brandeis was "an insistence on jurisdictional and procedural observances" and a "respect for the spheres of competence of other organs of authority."⁴¹ Thus, in the celebrated case of *International News Service v. Associated Press*,⁴² Brandeis "had been willing, indeed insistent, that the inequities of the competitive struggle be left for resolution by the legislature, lest the Court do an ill-considered job."⁴³ Yet, the Brandeis dissent in the *Olmstead* case⁴⁴ has well been called "a *locus classicus* on the theme of the dynamism of the law."⁴⁵ Why this apparent departure from his general philosophy? Those who deny that the

Court has the power or the responsibility to "police the police" would do well to consider the reasons advanced for Brandeis's activism in *Olmstead*:

"In this case the responsibility of the Court was inescapable. The issue involved the basic processes of government as they impinge on the individual against whom the forces of the law are brought to bear . . . [T]he processes of the criminal law had been applied to the individual, and no agency of government more appropriate than the Court could be expected to resolve the contest between public power and personal immunity."⁴⁶

In his "reply," Professor Inbau once again comes out bravely for better police selection and training and more pay.⁴⁷ As if this were really an issue! Of course, I agree with him. We need these things badly.

But why must better methods of selection and promotion and proper training and compensation afford "the *only* real, practically attainable protection . . . against police abuses of individual rights and liberties"?⁴⁸ Why does the issue have to be framed in terms of better pay and training *versus* the exclusionary rules? Why can't we have both?

There is impressive evidence—which Inbau does not attempt to refute—that we *can* and we *should*. There is impressive evidence in the two jurisdictions which have held the spotlight in recent years—the State of California and the District of Columbia—that the exclusionary rules have stimulated intensive police training in the law of arrest, interrogation, and search and seizure and led to more thorough and exact police work generally.⁴⁹ In California, the *Cahan* decision has also evoked extensive new legislation, in many respects codifying, clarifying, and streamlining the

supervising law enforcement activities *as such*," 350 U.S. at 218 (Emphasis added.) He pointed to and relied on this language in *McNabb* (a case that has dismayed Inbau, but which Harlan voted to reaffirm in *Mallory*): "We are not concerned with law enforcement practices *except in so far as courts themselves become instruments of law enforcement*," 350 U.S. at 218-29, quoting from 318 U.S. at 347. (Emphasis added.) How, then, does the *Rea* dissent give aid and comfort to Professor Inbau? He denies the right of the judiciary to "police the police" in cases such as *McNabb* and *Mapp* where the courts *were* instruments of law enforcement.

³⁹ Cf. *Baker v. Carr*, 369 U.S. 186, 209 (1962).

⁴⁰ FREUND, *op. cit. supra* note 17, at 180. See also Newman, *The Process of Prescribing "Due Process"*, 49 CALIF. L. REV. 215, 236 (1961): "Procedure (the kind of procedure that is used to deprive people of life, liberty, and property) is peculiarly a lawyer's topic. In other fields there are businessmen and churchmen and doctors and engineers for whom lawyers speak."

⁴¹ FREUND, *Portrait of a Liberal Judge: Mr. Justice Brandeis*, in THE SUPREME COURT OF THE UNITED STATES 119-20, 126-27 (1961).

⁴² 248 U.S. 215 (1918). The majority held that a company which gathers news has a *quasi* property in the results of its enterprise, as against a competitor.

⁴³ FREUND, *op. cit. supra* note 41, at 134.

⁴⁴ *Olmstead v. United States*, 277 U.S. 438, 471 (1928). The majority held that telephone wires and messages passing over them are not within the constitutional protection against unreasonable search and seizure.

⁴⁵ FREUND, *op. cit. supra* note 41, at 133.

⁴⁶ *Id.* at 133-34. For a similar conclusion about Justice Brandeis, based on *other* Brandeis opinions, see FELLMAN, THE DEFENDANT'S RIGHTS 5-6 (1958).

⁴⁷ Inbau, *supra* note 24, at 332.

⁴⁸ *Ibid.* (Emphasis added)

⁴⁹ See the testimony of law enforcement officers collected in Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., C. & P.S. 171, 179-81, 191-92 (1962).

As the author of the *Cahan* opinion recently observed, the exclusionary rule has not "engendered the problems" about lawful and unlawful police conduct in search and seizure, but merely "tardily excavated them from the obliettes where lie the stifled problems of the law. So long as illegally obtained evidence remained admissible in many states there was little motivation for full-scale inquiry." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. J. 319, 321.

laws of arrest and search and seizure⁵⁰—another Inbau objective.

I can see how improvements in police selection, training, leadership and tradition would *strengthen* the case for judicial review. Court opinions are more likely to be “wasted” on indifferent, insensitive police departments; more apt to exert a constructive influence on good departments, more apt to stir thought and action when quality and training are high. But I fail to see how better pay, selection, and training would *eliminate* the need for judicial review.

As an astute commentator has observed:

“Order is not to be exalted at the cost of liberty, and so even the best selected and best trained and best disciplined police forces must be subjected to incessant scrutiny, exacting criticism, and rigorous control. . . . It is quite true, of course, that eternal vigilance is the price of liberty. But it is imperative to remember that the vigilance demanded by this maxim means vigilance against duly constituted authority—against the forces of order.”⁵¹

STARE DECISIS IN PARTICULAR AND “NEUTRAL PRINCIPLES” IN GENERAL

In his “reply,” Professor Inbau emphasizes that “*all along* the Court had considered the exclusionary rule to be only a rule of evidence; it did not evolve into a due process requirement until the 6 to 3 decision in *Mapp v. Ohio* on June 19, 1961.”⁵² He dwelt at some length on this point in his earlier commentary this year:

“*For many years* the United States Supreme Court held that state courts and state legislatures were at full liberty to accept or reject the exclusionary rule. . . . The Court said so *as recently as 1949* in *Wolf v. Colorado*. . . . Now . . . the Court holds that if a state admits such evidence it is a violation of due process!

“

“*After all these years* . . . the Court . . . suddenly labels the rule to be a requirement of due process. Of little comfort is the fact that *three of the nine justices* . . . adhered to the former viewpoint.”⁵³

This I am afraid, is another example of Inbau’s soapboxmanship.

Not until 1949 did the issue squarely face the

Court—and badly split it. (Professor Inbau neglects to point out that only *five* of the nine justices “adhered to the former viewpoint” in the first place.) *Not until 1949* did a bare majority of the Court perform the remarkable feat of “simultaneously creating a constitutional right and denying the most effective remedy for violation of that right.”⁵⁴ *Not until 1949* did the Court hold that one may be executed or imprisoned on the basis of evidence *obtained* in violation of due process and yet, somehow, *not be deprived* of life or liberty without due process.⁵⁵

The *Wolf* case and Professor Inbau’s shock and dismay at its overruling a decade later well illustrate, I think, how “today’s new and startling decision quickly becomes a coveted anchorage for new vested interests.”⁵⁶

In bemoaning the fate of *Wolf*, Professor Inbau exudes a considerable reverence for the principle of *stare decisis*. He has not always felt this way. There was a time when he urged the Court to overrule the *McNabb* case, adding that “in any event, the least the Court should do short of an abandonment of the *McNabb* rule itself is to . . . establish a new rule somewhat midway between . . . [the federal rule] and the conventional voluntary-trustworthy test of admissibility.”⁵⁷ On the same occasion, he implored the Court “at the earliest opportunity, [to] *reconsider* the ‘inherent coercion’ rule [formu-

⁵⁴ Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304 (1951).

⁵⁵ One federal district judge tried hard to explain *Wolf* this way: “An unreasonable search by a state agent or official is not *such a violation* of the Fourteenth Amendment as will invoke operation of that Amendment.” *Mackey v. Chandler*, 152 F. Supp. 579, 581 (W.D.S.C. 1957). (Emphasis added)

Mr. Justice Frankfurter was badly plagued by his own *Wolf* opinion when he dissented from the 5-4 majority opinion in *Irvine v. California*, 347 U.S. 128 (1954) (affirming a conviction based on evidence obtained as a result of Los Angeles police planting microphones in petitioner’s hall, bedroom, and bedroom closet.) As Professor Francis Allen has observed: “[T]he Court had apparently treated the police behavior in *Wolf* as violating the defendant’s Fourteenth Amendment rights; that is to say, rights ‘basic to a free society’. . . . To label a right ‘basic to a free society’ is to say about as much as can be said. Yet *Wolf* refused to vindicate these rights by reversal of the conviction. Given *Wolf*, how are the rights flouted by the Los Angeles police in *Irvine* to be characterized? There is a certain inelegance in speaking of rights ‘very basic to a free society’ or in indulging in what appears to be almost a comparison of superlatives.” Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 9.

⁵⁶ Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

⁵⁷ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 463 (1948).

⁵⁰ See Kamisar, *supra* note 49, at 180 n. 78.

⁵¹ BARTH, *THE PRICE OF LIBERTY* 193 (1961).

⁵² Inbau, *supra* note 24, at 330. (Emphasis added)

⁵³ Inbau, *supra* note 20, at 86-87. (Emphasis added)

lated and applied in the famous Fourteenth Amendment Due Process confession case of *Ashcraft v. Tennessee*⁵⁸] . . . and substitute a rule which will be more intelligible and administratively practicable."⁵⁹

Indeed, at the very time he laments the Court's departure from precedent in *Mapp*, Professor Inbau cannot resist trotting out the standard arguments for overruling the *Weeks* rule of exclusion in federal search and seizure cases⁶⁰—and that goes back a full half century! I am sure Professor Inbau would not suppress his glee if *Weeks* were overturned, or if the "rule of automatic reversal" in coerced confession cases, first formulated by the Stone Court, met a similar fate.⁶¹ Or the rule articulated in *Gouled v. United States*,⁶² some 40 years ago, that objects of "evidentiary value only" are beyond the reach of an otherwise valid warrant.⁶³ Or *Rochin*, the famous "stomach pumping" case.⁶⁴

Only when he likes a decided case, e.g., *Wolf v. Colorado*, does Professor Inbau manage to "acquire an acute conservatism" in the *status quo*.⁶⁵ When he is *unhappy* about the way a case was decided, Inbau, it seems, *does* agree that after all "it is the Constitution which [a Supreme Court Justice] swore to support and defend, not the gloss which his predecessors may have put on it."⁶⁶ When he *dislikes* a particular precedent, Inbau, it seems, *does* recognize that a Justice formulating his view cannot do otherwise but "reject some earlier ones as false . . . unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him."⁶⁷

In short, Professor Inbau's notion of *stare decisis* appears to run along these lines: It is more important that the applicable rule of law be settled than it be settled right (1) *especially* when you think it was "settled right," e.g., *Wolf*; (2) *except* when you think it was "settled wrong," e.g.,

⁵⁸ 322 U.S. 143 (1944).

⁵⁹ Inbau, *supra* note 57, at 463. (Emphasis added) See also *id.* at 447.

⁶⁰ Inbau, *supra* note 20, at 86.

⁶¹ *Id.* at 87. See the commentary on Inbau's criticism of this rule in Kamisar, *supra* note 49, at 173.

⁶² 255 U.S. 298, 309-11 (1921).

⁶³ Inbau, *supra* note 20, at 87. See the commentary on Inbau's criticism in Kamisar, *supra* note 49, at 177.

⁶⁴ *Rochin v. California*, 342 U.S. 165 (1952). For a critical view of this case, see Inbau, *The Perersion of Science in Criminal and Personnel Investigations*, 43 J. CRIM. L., C. & P.S. 128 (1952).

⁶⁵ Douglas, *supra* note 56, at 737.

⁶⁶ *Id.* at 736.

⁶⁷ *Ibid.*

McNabb, Ashcraft, Gouled. Of course, once the decision to invoke the principle of *stare decisis* turns on whether the case to be overruled "seems to hinder or advance the interests or values" you support, you *no longer* have a principle—it has been "reduced to a manipulative tool."⁶⁸

Mapp and *Wolf* deal with Fourteenth Amendment Due Process cases. This is hardly the battleground to make a brave stand for *stare decisis*. The Justice who told us that "*in most matters* it is more important that the applicable rule of law be settled than that it be settled right,"⁶⁹ also told us:

"But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning. . . ."⁷⁰

I think the post-*Wolf* years contained some valuable lessons of experience.

For a long, long time opponents of the exclusionary rule have been telling us that the criminal should not go free merely because "the constable has blundered."⁷¹ But this argument loses a good deal of its force when we are confronted with the *Chief of Police-approved* illegality that characterized the recent cases of *Irvine v. California*⁷² and

⁶⁸ WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 17, 21 (1961).

⁶⁹ Brandeis, J., dissenting in *Burnet v. Colorado*, 285 U.S. 393, 406 (1932). (Emphasis added)

⁷⁰ *Id.* at 406-08. See also Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201, 215 (1961): "[T]he need for logical symmetry and consistency is a variable. In real property law and in many portions of commercial law, certainty and predictability are primary needs. . . . But on problems of public law, which at any given time are especially difficult, creating law that will benefit living people is far more important than that the law be settled. Therefore, on most matters of public law, being governed by the ideas of men long dead is unsatisfactory and may be even abominable."

⁷¹ E.g., Cardozo, J., in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

⁷² 347 U.S. 128 (1954). The Chief Justice and Justice Jackson took the position that a copy of the *Irvine* opinion—setting forth the "almost incredible" invasions of petitioner's privacy—should be sent to the United States Attorney General for his attention, *id.* at 138. The Attorney General did conduct an investigation, the results of which disclosed that "the police officers who placed the detectograph or microphone in Irvine's home were acting under orders of the Chief of Police, who in turn was acting with the full knowledge of the local District Attorney." Letter of Feb. 15, 1955, from Warren Olney III, then Assistant United States Attorney General, on file with the *Stanford Law Review*, reprinted in part in Comment, 7 STAN. L. REV. 76, 94 n.75 (1954).

People v. Cahan,⁷³ and the deliberate, calculated illegality that accounts for systematic police raids and round-ups.⁷⁴

In the course of overruling precedents of more than thirty years standing to adopt the exclusionary rule of 1955, the California Supreme Court, per Traynor, J., observed:

"[W]ithout fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate flagrant acts in violation of both Constitutions. . . . It is clearly apparent from their testimony that they casually regard

⁷³ 44 Cal. 2d 434, 282 P.2d 905 (1955). See Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 75-76 (1957).

Professor John Barker Waite, a sharp critic of the exclusionary rule for at least 30 years, has adapted remarkably to new events. Thus, in his latest writing, he expresses annoyance at the *Cahan* court because it "disapproved use of the dictaphones despite . . . the authorization by the police chief." Waite, *The Legal Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 594, 601 (1958). (Emphasis added) This is not the first time opponents of the exclusionary rule have worked both sides of the street. See Kamisar, *supra* note 49, at 175-76, 177 n. 62.

⁷⁴ See, e.g., Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?* 51 J. CRIM. L., C. & P.S. 402, 406 (1960); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1195, 1197-98, 1201-02, 1205-06 (1952).

If Illinois had adopted the *McNabb-Mallory* rule, criticism to the effect that the rule regards the "overzealous officer" or the "blundering constable" as a greater danger than the unpunished criminal would have been likely, but, until quite recently, most inappropriate. Until it came to the attention of the courts a short time ago, Chicago Police Department Rule No. 465 baldly asserted that the requirement of promptly bringing an arrestee before a judge or magistrate "does not apply when the offender is a well-known criminal who is held pending investigation." "Thus an officer of the executive branch—a policeman—was authorized by police regulations to perform a judicial function and decide whether the suspect was a 'good guy' and therefore should receive the benefits of the law, or he could decide the suspect was a 'bad guy' . . . and make an exception and suspend the operation of the Constitution and laws of Illinois." Caldwell, *Police Efficiency in Law Enforcement as a Foundation of American Life*, 48 A.B.A.J. 130, 132-33 (1962). Mr. Caldwell also notes that the former Police Commissioner of Chicago reportedly told the city council's committee investigating crime that his "policy has always been . . . to pick up criminals, simply because they are criminals" even though "it may be illegal, and I have received some complaints from the civil liberties group." *Id.* at 132. Incidentally, the author of the aforementioned article, Arthur B. Caldwell, is not a "sensitive soul" (Professor Inbau's term for other law professors; see Kamisar, *supra* note 49, at 173 n. 20), but a former federal prosecutor for many years who is currently Chief of the Trial Staff of the Civil Rights Division, U.S. Department of Justice.

such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them.

" . . .

"We have been compelled to [exclude illegally seized evidence] . . . because other remedies have completely failed to secure compliance with the Constitutional provisions on the part of police officers."⁷⁵

The reaction of Chief William Parker of the Los Angeles Police Department to the adoption of the exclusionary rule is, I think, typical and most illuminating:

"It now appears that the Court will approve the introduction of evidence seized without a warrant only when the officer had probable cause. . . . Authority to search the person is apparently limited to the individual for whom there is probable cause . . . and does not include companions that may be with him.

" . . .

"The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute 'probable cause' . . .

" . . .

"As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule."⁷⁶

⁷⁵ *People v. Cahan*, 44 Cal. 2d 434, 437-38, 445, 282 P.2d 905, 907, 911 (1955). Judge Traynor, author of the *Cahan* opinion, had earlier written an opinion rejecting the exclusionary rule, *People v. Gonzales*, 20 Cal. 2d 165, 124 P. 2d 44 (1942). He has recently shed further light on "the education that leads a judge to overrule himself," Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1961 DUKE L. J. 319, 321-22: "My misgivings . . . grew as I observed that time after time [illegally seized evidence] was being offered as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure, subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity? It was one thing to condone an occasional constable's blunder. . . . It was quite another to condone a steady course of illegal police procedures. . . . It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine."

⁷⁶ PARKER, *POLICE* 115-16, 117, 131 (Wilson ed. 1957). See the discussion in Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1153-54 (1959); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM L., C. & P.S. 255 (1961).

Of course, the "framework of limitations" was imposed by the state and federal constitutional guarantees, not the exclusionary rule. Of course, so long as the state and federal constitutions were operative, a criminal offense *never* justified "affirmative police action" *unless and until* there was "sufficient information to constitute 'probable cause.'" The police react to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had *just been written!* They talk as if and act as if the exclusionary rule *were* the guaranty against unreasonable search and seizure. *Why shouldn't the courts?*

STATISTICS, TESTIMONY AND THE FORCE OF
"SIMPLE LOGIC"

In my earlier article in this *Journal*, I dwelt at considerable length on statistics and law enforcement testimony regarding the impact of rules of evidence on crime rates and police-prosecution efficiency. I did so in response to the charge that proponents of the exclusionary rules do not like to look at and talk about these "facts."⁷⁷ Consequently, as Professor Inbau has observed, my article turned out to be a good deal longer than his speech which brought it into being. Perhaps it was too long. For I must confess that when I read Professor Inbau's "reply" to me, I sometimes had the uncomfortable feeling that he hadn't quite read the whole article.

For example, I pointed out that three years after *Mallory* was handed down, United States Attorney Oliver Gasch reported "*Mallory* questions, that is to say, confessions or admissions, are of controlling importance in probably less than 5% of our criminal prosecutions," that "reliance upon confessions generally has been minimized" and "the accumulation of other evidentiary material . . . become standard operating procedure,"⁷⁸ that the Washington, D.C., Police Department had testified that since *Mallory* was decided: (a) the District's solution rate had remained "nearly double" the national average; (b) indeed, the District's overall percentage of major crime solutions had *increased*; (c) specifically, the percentage had risen in cases of aggravated assault from 84.3 to 88; in robbery from 61.3 to 65; in housebreaking, from 50.5 to 54

per cent.⁷⁹ *How does Professor Inbau reply to all this?*

He tells us: "In communities such as Washington, D.C., most serious crimes will remain unsolved if the police are not permitted to interrogate criminal suspects. To prohibit police interrogation—which, in effect, is what the *McNabb-Mallory* rule does—means, therefore, that fewer crimes will be solved and successfully prosecuted."⁸⁰ No documentation. No attempt to refute the testimony of the high ranking law enforcement officers I quoted. No attempt to explain away the statistics they presented.

Take another example. After wrestling with the problem for several years, the United States Attorney for the District of Columbia dismissed the suggestion that the *McNabb-Mallory* rule affected the crime rate as "much too speculative."⁸¹ Indeed, the District's incidence of rapes, aggravated assaults, and grand larceny was *lower* in 1960 than in 1950. During this period, Maryland and Virginia had neither the *McNabb-Mallory* rule nor the exclusionary rule in search and seizure cases; District law enforcement officers, of course, were "handcuffed" by both. Nevertheless, on a per 100,000 population basis, the District's overall felony rate increased a mere one per cent *as against* 69 per cent for the three Maryland and Virginia suburbs for which generally complete figures were available, and *as against* a nation-wide increase for the seven major offenses of 66 per cent.⁸² *How does Professor Inbau reply to all this?*

As a result of the *McNabb-Mallory* rule, he informs us, "More criminals will remain at large, to commit other offenses. At the same time the deterrent effect of apprehension and conviction will be lost insofar as other potential offenders are concerned. The crime rate is bound to be greater under such circumstances, and I do not feel the need of statistics to support that conclusion."⁸³ Once again, Professor Inbau is unburdened by documentation and untroubled by the need to explain away the other fellow's.

Professor Inbau, it develops, need not deal with statistics or police-prosecution testimony because he has "simple logic" on his side. "[S]imple logic," he points out, "is available to support the proposition that the *McNabb-Mallory* rule *does*, and *is*

⁷⁹ *Id.* at 191-92.

⁸⁰ Inbau, *supra* note 24, at 331.

⁸¹ Kamisar, *supra* note 49, at 187.

⁸² *Id.* at 185.

⁸³ Inbau, *supra* note 49, at 331.

⁷⁷ See Kamisar, *supra* note 49, at 184. (The charge was made by Chief William Parker of the Los Angeles Police Department.)

⁷⁸ Kamisar, *supra* note 49, at 192.

bound to have a crippling effect upon law enforcement in any metropolitan jurisdiction saddled with the rule."⁸⁴ Again, no attempt to square this view with the Washington, D.C., experience.

Doesn't "simple logic" end, or stand in need of considerable revision, when experience to the contrary begins? Isn't *this* "simple logic"?

I think Profesor Inbau has stymied me at last. I mean, when somebody issues a warning in 1957

⁸⁴ *Id.* at 331. (Emphasis added)

that a bloody revolution or widespread depression is going to occur in 1958 or 1959, he may or may not be right. His logic may or may not be sound. You can argue about it. But if this same person insists in the year 1962 that these events *did take place* in 1958 or 1959 and turns his back on you and walks off in a huff—chanting "simple logic, simple logic"—when you try to establish that they *never happened*, what do you do then? Where do you go from there?