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## **PUBLIC SAFETY v. INDIVIDUAL CIVIL LIBERTIES: THE PROSECUTOR'S STAND\***

**FRED E. INBAU**

Today we are faced with a serious international threat to our national existence. This we all know and recognize; and we are taking reasonable and appropriate measures to guard against any Communist attack upon this country. We are also trying to hold back the threat to the security of the free world generally. What many of us don't realize, however, is that we are also faced with another serious threat to our public safety and security from another kind of enemy right within our own borders—unorganized as well as organized criminals. Just yesterday the F.B.I. released a report which reveals that although the population in this country has increased 18% since 1950, the crime rate has increased 98%. Murder, rape, or assault to kill occurs every 3 minutes. A burglary is perpetrated every 39 seconds. Robberies and burglaries in 1960 were 18% higher than in 1959.

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 legislations. 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. It is all being done in the name of "individual civil liberties."

### **I. DANGER SIGNS IN SUPREME COURT DECISIONS**

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. It has also functioned at times as a super-legislative body. Moreover, even

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as regards its constitutionally authorized judicial function, the Court has gone far beyond all reasonable bounds in imposing its own divided concepts of due process upon the states. It has also gone much too far as regards its concepts of admissibility of evidence in criminal prosecutions in the federal courts.

These are harsh words, I know. But the time has come for some plain speaking with respect to what has been going on in the field of criminal law.

I propose to demonstrate to you the validity of every statement I have just made. Before doing so, may I make it clear at the outset that I am not opposed to the Bill of Rights. I believe in the Bill of Rights, which is so often shaken in the face of some of us by flag-waving civil libertarians when these critical issues of criminal law administration are under discussion and debate. I believe in due process, equal protection, free speech, and all else. But I also believe that we should not be unmindful of what is contained in the Preamble to the Constitution itself. The Preamble states that the purpose of the Constitution was "to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

#### A. THE EXCLUSIONARY RULE

To illustrate what I have in mind, let me start off with a recent United States Supreme Court decision, *Mapp v. Ohio*,<sup>1</sup> which imposed the exclusionary rule upon all the states as a requirement of due process, whereas previously it was only a rule of evidence applicable in about half the states and in the federal courts also.

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 with respect to evidence obtained as a result of unreasonable search and seizure. The Court said so as recently as 1949 in *Wolf v. Colorado*.<sup>2</sup> In that case the Court held that although the Fourth Amendment unreasonable search and seizure provision was applicable to the states through the Fourteenth Amendment, the admissibility of evidence thus seized was a matter for each state to decide. Now, this June, the Court holds that if a state admits such evidence it

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<sup>1</sup> 81 S.Ct. 1684 (1961).

<sup>2</sup> 338 U.S. 25 (1949).

is a violation of due process! All states, therefore, must follow the exclusionary rule.

Some eminent jurists of the past, including Justice Benjamin Cardozo, at the time when he sat on the New York Court of Appeals, were opposed to the exclusionary rule. In his celebrated opinion in *People v. Defore*<sup>3</sup> Justice Cardozo gave some clear cut, sensible reasons why New York chose not to follow the exclusionary rule. He adhered to the view that relevant evidence should not be brushed aside and ignored solely because of the methods the police used to obtain it. The great scholar, Dean John Henry Wigmore, was opposed to the rule, and in his monumental treatise on Evidence he pointed out the historically unfounded judicial reasoning that was used in the first federal case to adopt the exclusionary rule.<sup>4</sup>

In any discussion of the pros and cons of the exclusionary rule, consideration should also be given to the fact that the free, law abiding countries of England and Canada have always admitted evidence even though it may have been unreasonably seized.

After all these years of a general recognition of the exclusionary rule as a rule of evidence only, and after it was for so long proclaimed to be such by the Supreme Court itself, the court in *Mapp v. Ohio* suddenly labels the rule to be a requirement of due process. Of little comfort is the fact that three of the nine justices (Frankfurter, Harlan, and Whittaker) adhered to the former viewpoint.

Why this change in the Court's attitude? The answer, in my opinion, is very simple. It's 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.

One further word regarding *Mapp v. Ohio*, and this will be of concern to those of you who come from the states that have been admitting illegally seized evidence. What courts will decide whether the evidence has been unreasonably seized? Your state courts? And will their decisions be final? Or will the decisions be the subject of federal court review by an independent determination of unreasonableness? If the latter—and that has been the trend—you had better plan on enlarging your staff to

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<sup>3</sup> 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>4</sup> See 8 WIGMORE, EVIDENCE § 2184 (1940).

keep up with the volume of business. And we'll need more federal judges. In fact, we'll need more justices on the Supreme Court itself.

Furthermore, you'll experience some real jolts if the same standards of "unreasonableness" are applied to your own cases as in many federal cases. You recall *Work v. United States*,<sup>5</sup> where looking into a narcotic peddler's garbage can was held to be an unreasonable search. There are also such cases as *Morrison v. United States*,<sup>6</sup> where the court suppressed as evidence the soiled handkerchief found in a sex pervert's shack, after it was pointed out by a child victim who led the police to the location and told them where they would find the handkerchief the offender used to clean himself off after the commission of his act. The Court held that the handkerchief was merely evidentiary material; that since it was not an instrument of the crime, or the fruits of the crime, or a weapon, or contraband, it was not subject to seizure.

## B. CONFESSIONS

Another recent Supreme Court decision, *Culombe v. Connecticut*,<sup>7</sup> further illustrates the Court's growing assumption of power over the states and their courts and police. The facts of the case need not concern us now. What is important is the Court's pronouncement that if it finds a criminal confession has been coerced, the state court conviction will be reversed even though it is "convincingly supported by other evidence."

If the present trend continues, the time is not far off when the Court will impose upon the state courts—as a due process requirement—the same kind of rule that now prevails in the federal courts by reason of the *McNabb-Mallory* decisions.<sup>8</sup> As you know, those two cases hold that if a confession is obtained by federal officers during a period of unnecessary delay in taking the arrestee before a committing magistrate, the confession is not usable as evidence, regardless of how voluntary or trustworthy it may be.

Even before the Supreme Court gets around to doing that, however, some of what the Court has already said and done as

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<sup>5</sup> 243 F.2d 660 (D.C. Cir. 1957).

<sup>6</sup> 262 F.2d 449 (D.C. Cir. 1958).

<sup>7</sup> 81 S.Ct. 1860 (1961).

<sup>8</sup> *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

regards the federal law enforcement officers will have “rubbed off” on the state courts, and they will establish similar rules even though they are not required to do so by any United States Supreme Court decision. As an example of that, there is the 1960 decision of the Michigan Supreme Court in *People v. Hamilton*,<sup>9</sup> in which the Michigan Court adopted the *McNabb-Mallory* rule. It did so of its own volition, since the rule has not thus far been labeled as a requirement of due process. So now, in Michigan, if there is a delay in taking an arrested person before a committing magistrate, and the court finds that the delay was for the purpose of interrogating the arrestee with a view to obtaining a confession if he happens to be guilty, the confession is inadmissible as evidence.

Let me give you another example of state court activity along a similar line. The New York Court of Appeals recently held in *People v. Waterman*,<sup>10</sup> that law enforcement officers have no right to interrogate anyone after he has been indicted—or, to put it another way, after the “formal commencement of the criminal action.” The reasoning back of the decision appears in the following excerpt from the court’s opinion:

An indictment is the “first pleading on the part of the people” . . . and marks the formal commencement of the criminal action against the defendant. Since the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant’s guilt of the crime charged . . . the necessities of appropriate police investigation “to solve a crime, or even to absolve a suspect” cannot be urged as justification for any subsequent questioning of the defendant. . . . Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

If the Michigan Supreme Court adopts the same rule that the New York Court did in the *Waterman* case—and my guess is that it will—then the police of Michigan (or rather I should say, the people of Michigan) will be confronted with an intolerable situation. What the two rules put together will mean is this: after the judicial process has started there can be no interrogation of the accused; and after arrest there can be no interrogation of the arrestee, since he must be brought before a committing

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<sup>9</sup> 357 Mich. 410, 192 N.W.2d 738 (1960).

<sup>10</sup> 9 N.Y.2d 561, 175 N.E.2d 445 (1961).

magistrate without unnecessary delay. In other words, police interrogations will be outlawed altogether.

The seriousness of this development can be fully appreciated only when consideration is given to the fact that under such restrictions most serious crimes will go unsolved, because the only way most of them can be solved is by the interrogation of persons under suspicion. This point I need not labor to you men. But it certainly needs hammering home to some judges and legislators.

I referred to the *Mallory* case earlier—the U.S. Supreme Court decision outlawing a confession obtained by federal officers during a delay in taking the arrestee before a federal commissioner for arraignment. I think you'll be interested in what Mallory, the rapist, did after the Supreme Court turned him loose. Shortly thereafter he assaulted the daughter of a woman who had befriended him. Later he was caught in Philadelphia while burglarizing the home of a woman who claimed he raped her. Mallory was convicted of burglary and aggravated assault.

## II. JUDICIAL LEGISLATION

Earlier I referred to the Supreme Court's indulgence in judicial legislation. Let me illustrate what I had in mind.

In the famous (or infamous) case of *McNabb v. United States*,<sup>11</sup> you may recall that the Court relied upon an old federal statute which dealt with the arraignment of arrested persons, and the Court's opinion related how this statute was intended to guard against "the evil implication of secret interrogation of persons accused of crime." As a matter of fact the statutory provision had no such purpose back of it. It had been tacked onto an appropriation bill for the purpose of putting an end to a practice that existed about the 1890s whereby federal commissioners and marshalls were cheating the government in the matter of fees and mileage expense charges. That's why they were thereafter required to take an arrested person before the nearest magistrate. Moreover, there was no reference at all to the time when this was to be done. The Court filled that in.

Furthermore, in the *McNabb* case you will also recall how the Court erroneously assumed that the defendants had not been promptly arraigned. And even when that fact had been called

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<sup>11</sup> *Supra* note 8.

to the court's attention in a petition for a rehearing, the petition was denied.

A further example of the Court's eagerness to ascribe to a statute a meaning which was not at all in the minds of the legislators concerns Section 605 of the Federal Communications Act. Section 605 was not aimed at law enforcement officers as a prohibition against wiretapping for law enforcement purposes. It was merely a 1934 re-enactment of a provision in the Radio Act of 1927, with an entirely different purpose in mind.

Another example of the Court's propensity to distort the meaning and purpose of a statutory provision in order to reach a result commensurate with the Court's own philosophy is *Carroll v. United States*.<sup>12</sup> That case held that the government had no right to appeal from a trial court order suppressing evidence on the ground of an unreasonable search and seizure. It viewed appeals by the Government to be "unusual, exceptional, not favored." And this is a case where it seems clear to many, including the Court of Appeals, that the Congress wanted to confer that right upon the government.

### III. LEGISLATIVE RESTRICTIONS

Not only have the courts been unduly restricting the police and prosecution, many legislatures have been doing the same thing. In Illinois we now have a statute prohibiting any kind of electronic eavesdropping over the telephone, on the street, or anywhere else.<sup>13</sup> And mind you, this was not a piece of legislation engineered by the hoodlum element of Illinois; it was the work of some starry-eyed civil libertarians.

Anyone with law enforcement experience in metropolitan areas, or in the federal government, knows all too well that wiretapping and other electronic eavesdropping activities are indispensable to effective law enforcement. To be sure, there must be controls upon the police to prevent abuses. But there are all too many legislators and others who will not lift their heads out of the sand and face up to the practical realities of law enforcement.

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<sup>12</sup> 354 U.S. 448 (1957).

<sup>13</sup> ILL. REV. STAT. ch. 38, §§ 14-1-14-7 (1961).

I could go on with additional illustrations, but these few should serve to permit me to draw some conclusions for your consideration.

#### IV. CONCLUSION

We can't have "domestic tranquility" and "promote the general welfare" as prescribed in the Preamble to the Constitution when all the concern is upon "individual civil liberties."

Individual rights and liberties cannot exist in a vacuum. Alongside of them we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have "rights" without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety and security, are the labels on empty bottles.

This truism that we can't have unbridled individual liberties and at the same time have a safe, stable society is the first message that we must get across to the public.

I am fed up with such platitudes as "the right to be let alone"—when it is used as though it were an unconditional right. Sure, as individuals, we all would like to be let alone. You and I at times would like to do as we please. If we are in a hurry to go somewhere in our car, we might want to run a red light or to exceed the speed limit and be let alone after we do it. The burglar, the robber, the rapist would also like to be let alone. But in the interest of public safety and public welfare, there must be reasonable restraints upon the conduct and activities of all of us.

And talking about wants, let us have these wants alongside the want to be let alone. I want to be able to walk along the street after dark and be relatively secure that someone will not crack my skull for the money in my wallet. I want my daughter to be able to walk home after dark and be relatively free from being dragged into an alley and raped. I want property owners to be reasonably free from racketeers, and from the thefts committed by burglars, robbers, and others.

The public must be made aware of the practicalities of law enforcement. They must be made to understand that law enforcement officers cannot offer the required protection demanded of them from within the strait-jacket placed upon them by present day court and legislative restrictions.