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PUBLIC SAFETY v. INDIVIDUAL LIBERTIES: SOME "FACTS" AND "THEORIES"

YALE KAMISAR

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In the following article, Professor Kamisar replies to an article by Professor Fred E. Inbau, 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. The author responds to Inbau's criticisms of criminal law decisions handed down by the United States Supreme Court in recent years, discussing in particular cases concerning the exclusion of confessions and illegally seized evidence. He then examines the effect of the exclusionary rules upon police attitudes and practices, weighs the value of these rules against possible alternatives, and analyzes the statistical evidence pertaining to the effect of the exclusionary rules upon crime rates.—EDITOR.

"The facts that we dislike we call theories; the theories that we cherish we call facts."¹

Professor Inbau detects a certain irrationality, if not hysteria, in this business of excluding illegally seized evidence and unlawfully elicited confessions "all being done in the name of 'civil liberties.'"² He pleads for temperateness. No emotive words, he begs. No shaking of the Bill of Rights in our faces by "flag-waving civil libertarians," please.³ So, let us accompany him as he approaches these critical issues of criminal law administration calmly and dispassionately:

In order to maintain "public safety and security from another kind of enemy right within our borders," he asks, shouldn't we remove the "handcuffs" the courts have placed on the police? Do you want "unbridled individual liberties," he continues, or a "safe, stable society?" Do you believe in the "unconditional" "right to be let alone" or are you willing to impose "reasonable restraints" "in the interest of public safety and public welfare?" Are you for or against decisions and legislation which have the effect of "lending aid and comfort to the criminal element?" Whose side are you on, concludes Inbau, the side of law and order—or the side of "the burglar, the robber, the rapist?"⁴

Of course, Professor Inbau is scarcely the first opponent of the exclusionary rule to respond to the sound and fury of "starry-eyed civil libertarians" with the voice of reason. For example, a generation ago, at the New York Constitutional Convention of 1938, the District Attorney of New York County similarly resisted two proposals to exclude evidence obtained in violation of guarantees against unreasonable searches and seizures and unreasonable interception of telephone communications. Alarmed because sponsors of these proposals were submitting "something which is dangerous, and concealed by high sounding phrases,"⁵ he felt compelled "to place on the record the facts about both":⁶

"Who are the people who would be protected by these proposals? Call the roll: Al Capone, Lucky Luciano, Waxie Gordon, Dutch Schultz, Tootsie Herbert, and all the others."⁷

Another delegate to the convention more or less threw Hitler, Mussolini, and Stalin into the fray:

"[I]f you vote for the [proposals] . . . you are not alone aiding and abetting the crooks but you are also aiding and abetting . . . the Communists and the Fascists and the Nazi . . . [T]he

¹ F. S. Cohen, *Field Theory and Judicial Logic*, in *THE LEGAL CONSCIENCE* 134 (L. K. Cohen ed. 1960).

² See Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 86 (1962) (hereinafter referred to as "Inbau").

³ See Inbau 85-86, 89; Inbau, *The Social and Ethical Requirements of Criminal Investigation and Prosecution*, 3 CRIM L. Q. (Canada) 329, 333, 350-51 (1960); Inbau,

Restrictions in the Law of Interrogation and Confessions, 52 NW. U.L. REV. 77, 79 (1957).

⁴ 1 NEW YORK CONSTITUTIONAL CONVENTION, REVISED RECORD 369 (1938) (hereinafter referred to as "NEW YORK CONVENTION").

⁵ *Ibid.*

⁶ *Id.* at 373.

people of this State care if an armory is set up in our midst and that house or home becomes an armory of crooks or enemies from within and is loaded down with machine guns, and there are a hundred machine guns there, and bombs and grenades, and then we will prohibit our law enforcement agents: they are prohibited from using evidence obtained illegally against those enemies from within."⁷

As for the home-grown, garden-variety criminal, observed this same delegate,

"[I]f that proposition prevails there will be the greatest single celebration in the City of New York among the crooks and gangdom and racketeers that was ever known in that city, and from far and wide all the other racketeers and murderers and kidnappers and embezzlers will all collect into the City of New York to celebrate this famous victory of the forces of evil, so that they can be protected by the Constitution of the State of New York."⁸

Sooner or later, no doubt, someone will come up with the suggestion that the underlying purpose of the bizarre gathering of "underworld overlords" at Apalachin, New York, was to celebrate the recent *Benanti* "victory" and/or to plot winning strategy in the forthcoming *Elkins* and *Mapp* cases.⁹

THE "INNOVATIONS" OF THE WARREN COURT

It has become fashionable in some quarters to hail virtually every important decision handed

⁷ *Id.* at 564. Cf. ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 57-58 (1956): "Of course [commented California prosecutor J. Francis Coakley], the agents of the international criminal conspiracy of communism who desire to undermine and destroy our government also like these [recent Supreme Court] decisions, because thereby the way is made easier for them to pursue their trade.... The pendulum has swung too far to the left and it would be a good thing for this country if the pendulum would swing back to the middle where it belongs...."

⁸ NEW YORK CONVENTION 562-63. Cf. the testimony of Edgar Scott, District of Columbia Deputy Chief of Police, that the *Mallory* decision "is going to encourage the criminals to come to Washington... to commit their crimes. If a remedy is not found, that is what is going to happen." *Hearings Before the Special Subcommittee To Study Decisions of the Supreme Court of the United States of the House Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 1, at 47-48 (1957) (hereinafter referred to as the "1957 House Committee Hearings"). A "remedy," i.e., the repeal or relaxation of the *McNabb-Mallory* rule, was not found, but Chief Scott's due predictions have not been borne out. See text at notes 159-168, *infra*.

⁹ *Benanti v. United States*, 355 U.S. 97 (1957),

down by the Warren Court as a radical departure from reason and precedent. According to these observers, whether or not—like the mule—recent Supreme Court decisions lack hope of posterity, they do lack pride of ancestry.

In this respect, Professor Inbau parts company with his fellow-critics of the *Mallory* case.¹⁰ Most of his brethren assumed an absolutely, positively thunderstruck pose when *Mallory* was handed down. While Inbau shares their distress, he can hardly share their astonishment. His difficulty is that 14 years ago he roundly condemned the *McNabb* decision on the very grounds upon which the *Mallory* case is now being criticized. At that time he said of the *Upshaw* case, then pending in the Supreme Court, that since the unreasonable delay in taking the arrestee before a committing magistrate preceded Upshaw's confession, "if the Court really meant what it seemed to say in the *McNabb* case, a reversal of the [conviction] is in order."¹¹ The subsequent reversal in *Upshaw* dem-

barred use of wiretap evidence gathered by state officials in federal prosecutions. *Elkins v. United States*, 364 U.S. 206 (1960), wiped out the "silver platter" exception to the federal exclusionary rule, i.e., the doctrine that illegally seized evidence may be used in a federal prosecution if state officers present it to federal authorities on a "silver platter." *Mapp v. Ohio*, 367 U.S. 643 (1961), rendered all evidence obtained by unreasonable searches and seizures inadmissible in state courts.

It has been said that the Apalachin meeting "points up the need for strengthening law enforcement on a statewide basis by permitting them to use modern electronic devices to combat organized crime." NEW JERSEY JOINT LEGISLATIVE COMMITTEE, REPORT ON WIRETAPPING AND THE UNAUTHORIZED RECORDING OF SPEECH 31 (1958) (minority recommendations). The trouble with this conclusion is that for 13 years prior to the meeting, the host, one Joseph Barbara, Sr., had been pursued by a state trooper "in all ways possible (including tapping of his telephone) and [he] got no evidence of illegality, although he did get word of the meeting if not of its purpose." *United States v. Bufalino*, 285 F.2d 408, 419 (2d Cir. 1960) (Clark, J., concurring).

¹⁰ *Mallory v. United States*, 354 U.S. 449 (1957), reaffirming *McNabb v. United States*, 318 U.S. 332 (1943), operates to exclude from federal prosecutions all confessions or admissions elicited during pre-commitment detention, whether or not they appear to be voluntarily made.

¹¹ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 454-55 (1948).

From the outset, the Department of Justice seemed to perfectly comprehend the meaning of *McNabb*. See, e.g., the Department's Circular No. 3793, dated April 1, 1943: "The attention of all United States Attorneys is directed to two recent decisions of the Supreme Court reversing convictions because of the admission of confessions made while the accused were illegally detained by enforcement officers. *McNabb v.*

onstrated that the Court did mean what it said.¹² So did the later *Mallory* reversal. Thus, Inbau's own writings on the subject amply demonstrate that it was the Stone Court, per Frankfurter, J., which departed from the conventional voluntary-trustworthy tests. The Vinson Court, per Black, J., reaffirmed this approach; the Warren Court, per Frankfurter, J., re-affirmed it.

Although Professor Inbau's prior writings have narrowed the fronts on which he can attack *Mallory*, he has more freedom of movement elsewhere. Thus he registers shock and dismay over the Court's "pronouncement" in *Culombe v. Connecticut*¹³ "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.'"¹⁴

Inbau's fear that *Culombe* signifies an ominous trend is difficult to justify. Here, too, the Court is simply restating "the rule of automatic reversal" in coerced confession cases formulated by the Stone and Vinson Courts.¹⁵ On at least two oc-

United States; Anderson v. United States, decided March 1, 1943. . . . Although the opinions refer to circumstances, e.g., ignorance of the accused, discomforts of place of detention, extended questioning, which might be regarded as bringing into question the voluntary character of the confessions, the decisions are expressly based upon failure of the arresting officers to comply with statutory duty to bring arrested persons before a committing magistrate with reasonable promptness." (Emphasis in the original.)

¹² *Upshaw v. United States*, 335 U.S. 410 (1948).

¹³ 367 U.S. 568, 621 (1961).

¹⁴ Inbau 87.

¹⁵ See *Lyons v. Oklahoma*, 322 U.S. 596, 597 n.1 (1944); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Brown v. Allen*, 344 U.S. 443, 475 (1953).

It is true that there is some language to the contrary in *Stein v. New York*, 346 U.S. 156 (1953), a confession case considerably complicated by the "unorthodox" New York trial procedures employed to resolve the voluntariness issue, see Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 319-39 (1954), and by the fact that the automatic reversal doctrine was "put to a distorted use by the defense," who unsuccessfully sought an instruction that if the jury found the confessions involuntary they must acquit, whereas the proper remedy is the granting of a new trial. MCCORMICK, EVIDENCE 245-46 n.27 (1954). Most commentators concluded that *Stein* did not constitute an abandonment of "the rule of automatic reversal." See MCCORMICK, *supra*; Meltzer, *supra* at 339-54; Miller, *The Supreme Court's Review of Hypothetical Alternatives in a State Confession Case*, 5 SYRACUSE L. REV. 53 (1953); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 423-29 (1954). They did so largely for the reasons later advanced by the Court for adhering to the *Lyons-Malinski-Haley* rule: "In that case [*Stein*] this Court did not

casions, Mr. Justice Reed, perhaps this generation's most "conservative" justice in these matters,¹⁶ made similar "pronouncements" on behalf of the Court. He noted as early as 1944 that "whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider" for if "admission of this confession denied a constitutional right to defendant the error requires reversal."¹⁷

The reason for the rule is not hard to find. As Mr. Justice Whittaker observed for the Court: "[The prosecution] suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."¹⁸

As might be expected, Professor Inbau has some unkind things to say about *Mapp v. Ohio*,¹⁹ although, since former U. S. Attorney General Tom Clark wrote the majority opinion he can hardly blame this one—as he has others—on the "ex-law professors."²⁰ Police and prosecutors

find that the confession was coerced. Indeed it was there recognized that when 'the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession. . . .'" *Payne v. Arkansas*, 356 U.S. 560, 568 n.15 (1958).

¹⁶ See, e.g., his dissenting opinions in *McNabb v. United States*, 318 U.S. 332, 347 (1943), and *Upshaw v. United States*, 335 U.S. 410, 414 (1948).

¹⁷ *Lyons v. Oklahoma*, 322 U.S. 596, 597 n.1 (1944). To similar effect is his statement in *Brown v. Allen*, 344 U.S. 443, 475 (1953).

¹⁸ *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958).

¹⁹ Inbau 86-87.

²⁰ Thus, in recent testimony Professor Inbau (who stressed at the outset that he did not appear "just in that capacity" but as one with much "practical experience") explained how the *McNabb* "innovation" came about, *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., on H.R. 11477, S. 2970, S. 3325 and S. 3355, at 58, 65 (1958) (hereinafter referred to as the "1958 Senate Committee Hearings"):

"Unfortunately, the United States Supreme Court, and it was made up at that time of some even more sensitive souls than we see, perhaps, at the present time—there were some law professors on it, ex-law professors—and they assumed that those practices which were revealed in these [coerced confession] decisions were commonplace, they were universal, and the Court, acting in that feeling of resentment, laid down in the *McNabb* case its so-called civilized-standards rule."

Evidently Professor Inbau does not realize that prior to mounting the teacher's platform "ex-law professor" Frankfurter, author of the much-maligned *McNabb* opinion, served several years as an assistant U.S. attorney in the Southern District of New York,

have been making grating noises about the exclusionary rule in search and seizure cases for a long time. For whatever questions may be raised about the reliability of illegally procured confessions, there is not likely to be much doubt about the evidentiary value of illegally seized narcotics or counterfeit money. Thus, down through the years the exclusion of illegally seized physical evidence has drawn the hottest fire from law enforcement officers.

Mapp v. Ohio was hardly the beginning. If anything, it was the culmination of a series of developments. Then, when *did* it begin? This is not an easy question to answer.

"All is fluid and changeable," observed Cardozo. "There is an endless 'becoming.'"²¹ "In a sense," Lon Fuller has written, "the thing we call 'the story' is not something that is, but something that becomes; it is . . . as much directed by men's creative impulses, by their conception of the story as it ought to be, as it is by the original event which unlocked those impulses. . . . The statute or decision is not a segment of being, but, like the anecdote, a process of becoming. By being reinterpreted it becomes, by imperceptible degrees, something that it was not originally."²²

Chief William H. Parker of the Los Angeles Police Department might well say it began with *Wolf v. Colorado*,²³ where "for the first time in the history of the Country the United States Supreme Court applied the fourth amendment . . . to the states by virtue of the fourteenth amendment, and thus began a whole new era."²⁴ This takes us back more than a decade.

Wigmore probably would point to "the heretical influence of *Weeks v. United States*"²⁵ which "creates a novel exception, where the Fourth Amendment is involved, to the fundamental principle that *an illegality in the mode of procuring evidence is no ground for excluding it*."²⁶ But we have now travelled back a full half century. Back to Mr. Justice Day, speaking for the White Court;²⁷ and to Mr. Justice Holmes, steadfastly

subscribing to and extending the "heretical" principle with the ruling that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all."²⁸

Perhaps *Mapp's* beginnings go back still further, way back to the reign of Elizabeth I. At that time, Wigmore tells us, the attorney-client privilege—the oldest of the privileges for confidential communications—"already appears as unquestioned."²⁹

The privilege which protects a witness against self-incrimination and the privileges which shield confidential communications between attorney and client, husband and wife, physician and patient, and priest and penitent "do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."³⁰

If the sentiment of loyalty which attaches to the attorney-client privilege, or the desire to promote full disclosure by the client, overrides the search for truth, what is so bizarre about regarding the fourth amendment values and policies as more important than this same search? If the search for truth may be obstructed in the name of a physician-patient or marital relationship, what is so "heretical" about doing so in the name of constitutional guarantees?

Whether or not the exclusionary rule in search and seizure cases is a late offshoot of the deeply-rooted rules of privilege, the *Mapp* case is the latest offshoot of the firmly-imbedded *Weeks* rule. Here, as elsewhere, Professor Inbau cannot attack *this* Supreme Court without scathing many predecessor Supreme Courts as well.

Some 30 years ago, Professor John Barker Waite, a long-time critic of the exclusionary rules, observed that "such an issue as that in the *Olmstead* case is the perfect illustration of the judicial function of evaluating conflicting interests."³¹ Why can't the same be said for *Mapp* or *Culombe* or *Mallory*? I approve of the recent Supreme Court

and, then, an additional year as a special assistant to the U.S. Attorney General.

²¹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 28 (1921).

²² FULLER, *THE LAW IN QUEST OF ITSELF* 9-10 (1940).

²³ 338 U.S. 25 (1949).

²⁴ 1957 *House Committee Hearings* at 74.

²⁵ 8 WIGMORE, *EVIDENCE* §2184, at 32 (3d ed. 1940) (hereinafter cited as "WIGMORE").

²⁶ *Id.* at 36. (Emphasis in the original.)

²⁷ *Weeks v. United States*, 232 U.S. 383 (1914).

²⁸ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

²⁹ 8 WIGMORE §2290.

³⁰ MCCORMICK, *EVIDENCE* 152 (1954).

³¹ Comment, 27 MICH. L. REV. 78, 82 (1928).

decisions, but surely even those who deem them unwise cannot have forgotten that "the right to choose is not destroyed by the unwisdom of the choice."³²

Evidently, Professor Inbau is an ardent exponent of states' rights. He is noticeably disturbed that *Mapp* destroyed the "full liberty" of state courts and state legislatures to accept or reject the exclusionary rule.³³

What is his reaction on learning that the Michigan Supreme Court chose to adopt the *McNabb-Mallory* rule?³⁴ This is cited as a sorry example of what the Supreme Court "has already said and done" "rubbing off" on the state courts, causing them to "establish similar rules *even though they are not required to do so* by any United States Supreme Court decision."³⁵ Professor Inbau reiterates this point a moment later: The Michigan Court "*did so of its own volition*, since the rule has not thus far been labeled as a requirement of due process."³⁶ Running through these comments on the Michigan scene is a certain astonishment: Don't those state judges realize they are not *supposed* to do anything above and beyond the *minimum* requirements of fourteenth amendment due process!

The Supreme Court, charges Inbau, has "func-

³² Cardozo, J., in *Pallocco v. Lehigh Valley R.R.*, 236 N.Y. 110, 114, 140 N.E. 212, 213 (1923).

³³ Inbau 86.

³⁴ *People v. Hamilton*, 357 Mich. 410, 102 N.W.2d 738 (1960). Professor Inbau tells us none of the facts about the *Hamilton* case nor does he suggest the decision might have been a response to local conditions. Consider Bailer & Quick, *Evidence and Criminal Law*, 7 WAYNE L. REV. 51, 60-61 (1960):

"It is to be noted that the *McNabb* doctrine was deemed necessary in fact, because of the widespread official gutting of the remedy of habeas corpus, by failure to arraign. This is of a special significance in the City of Detroit where there is substantial evidence that the Recorders Court, in cooperation with the police and prosecuting officials had, before the *Hamilton* case, effectively debilitated the grand old remedy of habeas corpus by providing that on application for habeas corpus the police may still be allowed to hold a person not charged with a crime for up to seventy-two hours even though there is no evidence against the individual. Indeed, persons illegally arrested were permitted to be incarcerated for shocking periods of time, even though not suspected of committing a crime. It was done in the interest of practicality (a defense not available to defendants)."

Perhaps it is not amiss to note that Kermit Bailer, Esq., co-author of the above article, is not and never has been a law professor, but was a former assistant Wayne County prosecutor.

³⁵ Inbau 87. (Emphasis added.)

³⁶ *Ibid.* (Emphasis added.)

tioned at times as a super-legislative body."³⁷ How does he take the news that the Illinois legislature has prohibited law enforcement electronic eavesdropping? This, he protests "was the work of some starry-eyed civil libertarians."³⁸ Of course, if legislation is passed or state constitutions are amended to achieve results desired by opponents of the exclusionary rules, they tell us this is because "the people . . . became sufficiently incensed."³⁹ Sheriffs and police and prosecutors' associations, they would have us believe, never pressure legislatures; only civil liberties groups do.⁴⁰

Current talk about the courts' usurping legisla-

³⁷ Inbau 86.

³⁸ *Id.* at 88.

³⁹ Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 197 (1954), discussing the 1936 amendment to the Michigan Constitution which permitted the introduction into evidence of illegally seized firearms and blackjacks. Narcotic drugs were covered by further amendment in 1952.

⁴⁰ *But cf.* Samuel Dash, former trial attorney in the Criminal Division of the Department of Justice and former District Attorney of Philadelphia, commenting on the 1957 California scene, DASH, KNOWLTON & SCHWARTZ, *THE EAVESDROPPERS* 199-200 (1959):

"Because of these bills [prohibiting police use of bugging equipment] on the one hand and on the other the feeling of the police that additional laws were needed to aid them in their investigations, the Peace Officers Association of California joined with the District Attorneys Association and the Sheriffs Association of California to influence legislative action. They prepared an impressive booklet which set out in brief form all the proposed law-enforcement bills. Under each bill, they printed in bold type 'approved,' 'approved with amendment,' or 'disapproved.'"

"A very active lobbying program was undertaken by the law-enforcement organizations in Sacramento. District attorneys and police chiefs were assigned to meet with legislators during the legislative session and to persuade them to vote against the bills the law-enforcement organizations disapproved and to vote for the bills they approved. One police chief admitted that he had told a senator on the judiciary committee investigating police wiretapping and bugging that if he wanted to get ahead politically, he had better stop interfering with law enforcement. The police chief indicated that he was speaking for the combined forces of the Peace Officers Association, the District Attorneys Association, and the Sheriffs Association of the state of California.

"The only bill that was finally enacted relating to police bugging was the bill which the law-enforcement organizations had marked 'approved.' Staff members of the Regan Committee privately admitted that they had censored their own report and had not pushed for police restrictions because of the powerful influence of the law-enforcement groups. The governor vetoed this bill on the ground that he did not believe it was sufficiently restrictive of police bugging activity. This maintained the status quo, with the 1941 law permitting police bugging."

tive powers in the process of "policing the police"⁴¹ is difficult to reconcile with the tactics of exclusionary rule opponents a generation ago. For example, at the 1938 New York State Constitutional Convention, those seeking to write the exclusionary rule into the state constitution were told to "leave it to the courts":

"If we are well advised we shall leave the construction of the language of Constitution and statute alike to our own courts, as we have done hitherto. That process supplies, in a constantly changing situation, the best and simplest protection the individual and the public can have."⁴²

Following *Olmstead v. United States*,⁴³ permitting the use of wiretap evidence in federal courts, regardless of state laws on the subject, a number of attempts were made to prohibit or limit tapping. In 1931, one such effort was resisted by Congressman Oliver of Alabama on the ground that "the weight and effect" of wiretap evidence "under the charge of the court, may properly be left to the jury."⁴⁴ When pressed by Congressman LaGuardia as to where he would "draw the line in respect to lawful and unlawful use of the wires," Congressman Oliver replied: "I said a few moments ago that it is a matter that must largely address itself to the courts and to the juries, under proper instruction."⁴⁵

If a transcendental principle pervades the camp of exclusionary rule opponents, it seems to be this: Whatever the arena in which civil liberties groups choose to do battle, tell them they belong in the *other* one!

THE "UNCONDITIONAL" RIGHT TO BE LET ALONE

Professor Inbau, for one, is against "*unbridled* civil liberties" and "fed up with such platitudes as 'the right to be let alone'—when it is used as though it were an *unconditional* right."⁴⁶

Just what *unbridled* liberties and *unconditional* rights does Professor Inbau have in mind? Certainly, Dolly Mapp wasn't asking for any when several policemen forcibly opened the door to her house, prevented her attorney from seeing her or even entering the house, pulled a fake "warrant" from her bosom after she grabbed it from one of

the officers who showed it to her, then "hand-cuffed" her because she had been "belligerent" in resisting their "rescue" of the "warrant" from her person.⁴⁷ Mr. Culombe would have settled for a good deal less than an *unconditional* right of privacy, too. "A moron or an imbecile" who "spent six years in the third grade" and who "has twice been in state institutions for the feeble-minded," Mr. Culombe "did not see an attorney until six days after he was first arrested and after he had confessed to the police."⁴⁸

In an article appearing in this *Journal* a year ago, Professor Inbau urged legislation authorizing "privately conducted police interrogation, covering a reasonable period of time, of suspects who are *not unwilling to be interviewed*."⁴⁹ If the police presently lack such authority, this does evidence an era of "unbridled liberties" and "unconditional rights." But do they? If the suspect is "not unwilling," what's the problem? Why do the police have to *arrest him at all*, let alone bring him before a committing magistrate? "It would be absurd to suggest that police must arrest a person before they can ask him questions."⁵⁰

Evidently, Professor Inbau does not share the Supreme Court's view that "while individual cases have sometimes evoked 'fluctuating differences of view,' . . . it can hardly be said that in the over-all pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary."⁵¹ But he cannot quarrel with the proposition that

⁴⁷ *Mapp v. Ohio*, 367 U.S. 643, 644-45 (1962).

⁴⁸ *Culombe v. Connecticut*, 367 U.S. 568, 639 (1961) (Douglas, J., concurring).

⁴⁹ Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., C. & P.S. 16, 20 (1961). See also *id.* at 19.

⁵⁰ *Goldsmith v. United States*, 277 F.2d 335, 344 (D.C. Cir. 1960). "Interrogation of suspects prior to arrest is a valuable technique," recently observed the U.S. Attorney for the District of Columbia, "and it is widely utilized by the F. B. I." Memorandum From Oliver Gasch to Maj. Robert V. Murray, Chief of the Metropolitan Police, in *Hearings on District of Columbia Appropriations for 1961 Before a Subcommittee of the House Committee on Appropriations*, 86th Cong., 2d Sess., at 621 (1960) (hereinafter referred to as "*Hearings on District of Columbia Appropriations for 1961*"). "Of course," added Mr. Gasch, "it should be emphasized that following arraignment [commitment] it is possible to interrogate the individual concerned." *Id.* at 622. Only last year, in this *Journal*, a commentator with prior police experience of his own maintained that "interviewing of a possibly concerned person has legal and psychological advantages over interrogation of an arrestee." Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, 52 J. CRIM. L., C. & P.S. 2, 12 (1961).

⁵¹ *Elkins v. United States*, 364 U.S. 206, 222 (1960).

⁴¹ Inbau 86.

⁴² NEW YORK CONVENTION 479-80.

⁴³ 277 U.S. 438 (1928).

⁴⁴ 74 CONG. REC. 2903 (1931).

⁴⁵ *Id.* at 2904.

⁴⁶ Inbau 89. (Emphasis added.)

"what the Constitution forbids is not all searches and seizures, but unreasonable ones."⁵²

For example, in the recent *Draper* case,⁵³ the Court upheld an arrest (and accompanying search) without a warrant, but based on a tip from a known and "reliable" informer that petitioner was peddling narcotics. The information was corroborated only to the extent that the informer's detailed description of petitioner and report of his whereabouts on a certain morning squared with the arresting officer's observations. The Court underscored the "large-difference" between "what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search."⁵⁴ In rejecting petitioner's contention that the arresting officer's "hearsay" information was insufficient to show probable cause or constitute reasonable grounds, the Court recalled that "in dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."⁵⁵

Similarly, in the still more recent *Jones* case,⁵⁶ the Court sustained a search warrant based on a tip (corroborated by "other sources" and by the fact that the persons implicated were known to be addicts) from an unnamed but "reliable" informer that petitioner and another were engaged in illicit narcotic traffic and kept a ready supply on hand. *Jones* reaffirms that with or without a warrant the arresting officer may "rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated."⁵⁷

Professor Inbau, no doubt, disagrees that *Draper* and *Jones* illustrate the general principle. He points to the rule first articulated in *Gouled v. United States*⁵⁸ some 40 years ago that objects of "evidentiary value only" are beyond the reach of an otherwise valid warrant or police officers acting on "probable cause."⁵⁹

I share Inbau's view that the *Gouled* rule is

⁵² *Ibid.*

⁵³ *Draper v. United States*, 358 U.S. 307 (1959).

⁵⁴ *Id.* at 312-13.

⁵⁵ *Id.* at 313, quoting with approval from *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

⁵⁶ *Jones v. United States*, 362 U.S. 257 (1960).

⁵⁷ *Id.* at 269.

⁵⁸ 255 U.S. 298, 309-11 (1921). See also, e.g., *Abel v. United States*, 362 U.S. 217, 237-38 (1960); *Harris v. United States*, 337 U.S. 145, 154 (1947); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932).

⁵⁹ Inbau 87. Actually, Professor Inbau points to

unsound and undesirable.⁶⁰ So, it seems, does just about everybody else—"liberal" or "conservative"—who has written on the subject.⁶¹ *Gouled* is wrong *because* it departs from the fundamental principles pervading search and seizure law. But how does it follow that the fundamental principles are also unsound?

To demonstrate the invalidity of a particular application of a general rule is hardly to destroy the general rule itself. If it were, neither the parol evidence rule nor the hearsay rule nor the rule against perpetuities *nor any other familiar rule* could survive attack.⁶²

the recent (and questionable) application of the *Gouled* rule in *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958).

⁶⁰ See Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 914-18 (1960). The rule has far more often been professed in terms than followed in practice; "while 'a search for an object of purely evidentiary significance' may be taboo, objects have been and will continue to be found to possess a bit more than 'purely evidentiary significance' just about whenever a resourceful judge wants to so find." *Id.* at 917. See also Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185, 211-13 (1961).

In any event, Professor Inbau's fears that "mere evidence"—non-documentary in nature—must now be excluded from state courts seem unfounded. For one thing, it is by no means clear that even in the federal courts the rule extends to *non-documentary* objects of purely evidentiary significance. See generally Comment, 20 U. CHI. L. REV. 319 (1953). For another, "whatever *Gouled's* contemporary vitality in the federal system, the point is that it rests both on the fourth as well as the fifth amendment, and that it is the fifth rather than the fourth which precludes the admission of the purely evidentiary items. *Mapp's* exclusionary doctrine on the other hand rests solely on the fourth amendment so far as the states are concerned. Thus, if *Gouled* depends both on the fourth and fifth, the doctrine would appear inapplicable to the states." Broeder, *supra* at 212. See also Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150, 161, 174 n.122 (1960).

⁶¹ See, e.g., MAGUIRE, EVIDENCE OF GUILT 183 (1959); 8 WIGMORE, EVIDENCE §2184a, at 45 (McNaughton rev. 1961); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 66 (1957).

⁶² Of course, over the years, opponents of the exclusionary rule have worked *both* sides of the street. They have sought to invalidate the basic principle not only by pointing to the *Gouled* doctrine, which goes too far, but also by citing the late "silver platter" doctrine—which *did not go far enough*. Thus, at the 1938 New York Constitutional Convention, opponents of the *Weeks* rule turned again and again to the "silver platter" doctrine as proof that "the Federal courts have been compelled to depart from their own rule in order that the guilty may not escape," NEW YORK CONVENTION 372; that "these exceptions to the rule illustrate its basic unsoundness," *ibid.*; that "they [the Supreme Court] found in individual cases that the rule had to be limited, and they limited it so that it was

At this point, Professor Inbau would probably trot out a decision which has nothing to do with the *Gouled* rule—*Work v. United States*,⁶³ the famous (or infamous) “garbage can” case. This case, Inbau tells us, establishes “the sanctity of the garbage can.”⁶⁴ This case, Inbau insists, “illustrates the general principle.”⁶⁵

ridiculous,” *id.* at 467; that there is “no great fundamental principle involved in this debate . . . because if there was, then the judges of the Supreme Court of the United States are also unprincipled because . . . they also say . . . and have allowed in our Federal courts down through the years evidence to be used that is procured by officers connected with the local political bodies,” *id.* at 527.

No sooner was *Elkins* handed down, than opponents of the exclusionary rule hastened to the other side of the street. *Elkins* became support for the view that the Court is “willing to serve as a super-censor and super-jury over state practices. . . . Apparently improper searches and seizures carried out by state officers now are deemed to violate the fourteenth amendment due process clause, without regard to the constitutional and statutory provisions provided by the states themselves to govern conduct of their own law enforcement officers.” George, “*The Potent, The Omnipresent Teacher: The Supreme Court and Wire-tapping*,” 47 *V.A. L. REV.* 751, 782 (1961).

Would it not be more appropriate for Professor George to direct his attack at the scope of the substantive right rather than the *Elkins* decision implementing it? Improper state searches and seizures had been deemed to violate fourteenth amendment more than a decade earlier—in *Wolf v. Colorado*, 338 U.S. 25 (1949). From that date (with the probable exception of the fifth amendment-oriented *Gouled* rule), any state provision purporting to narrow the substantive protection afforded by the federal constitution against unreasonable search and seizure was invalid. See Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 *ILL. L. REV.* 1, 6–11 (1950); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 *MINN. L. REV.* 1083, 1101–08 (1959); cf. Foote, *Safeguards in the Law of Arrest*, 52 *Nw. U.L. REV.* 16, 36–44 (1957).

Professor George is distressed that *Elkins* showed little regard for state law governing local officers. He is not disturbed at all, however, over what the “silver platter” doctrine might have been doing to *federal law governing federal officers*. Consider, e.g., the remarks of Delegate T. J. Curran, an opponent of the exclusionary rule: “I was for four years an assistant United States attorney in the Southern District of New York. As a matter of fact, there is no Federal rule, if we mean by ‘Federal rule’ an inviolate principle of law that the Federal courts always enforce. . . . For instance, Federal officers always work with local police officers. And what happens? . . . They then say to the local police officers, ‘We will now leave you to conduct the illegal search . . . and when you get the evidence, you will go to the court and submit the evidence,’ and that evidence is accepted. And there are thousands of cases in the Southern District of New York in which convictions were obtained by that method, and the same rule applies throughout this country.” *NEW YORK CONVENTION* 527. See generally Kamisar, *supra* at 1177–90.

⁶³ 243 F.2d 660 (D.C. Cir. 1957).

⁶⁴ 1958 Senate Committee Hearings at 74.

⁶⁵ *Ibid.*

The facts in *Work*, according to Inbau, are quite simple: “Looking into a narcotic peddler’s garbage can was held to be an unreasonable search.”⁶⁶ “That particular case is an outrage, the case where, because the police rooted in somebody’s garbage can and found evidence of narcotics . . . the narcotics peddler went free.”⁶⁷ Can it really be that that’s all there is to the *Work* case? Let’s take a closer look.

Without a warrant, and admittedly without cause to make a search or arrest absent a warrant, two police officers entered petitioner’s dwelling place. Then, petitioner walked past the officers and out of the house to an area under the porch. The officers followed her and saw her put something (which turned out to be narcotics) into a trash can located in the porch area, within the “curtilage” of her home.⁶⁸ “It would be unacceptably naive,” declared the court, “to conclude that this attempt by her to hide [the phial] immediately following the presence of the officers in the hall, and that the finding of the phial by the officers, were not direct consequences of their unlawful entry.”⁶⁹

Work does not establish the “sanctity of the garbage can” any more than does *Williams v. United States*⁷⁰ the “sanctity of the precinct station corridor.” In the *Williams* case, defendant was illegally arrested on the street, ordered into a police car, and driven to a precinct building. As he was being marched through the corridor leading to “the desk” where suspects are booked and searched, he dropped a cigarette package (containing narcotics) in an unsuccessful attempt to rid himself of the incriminating evidence before he reached “the desk.” The evidence was suppressed as the “product” of a fourth amendment violation; the “throwing away” occurred as the result of and only because of the unlawful arrest.⁷¹

If *Work* and *Williams* do illustrate a “general principle,” it is one that Professor Inbau appears to have missed: The courts will look at the totality of the circumstances and when they conclude that the proffered evidence was the “product” or “fruit” of an unreasonable search or seizure they

⁶⁶ Inbau 87.

⁶⁷ 1958 Senate Committee Hearings at 74. To the same effect is Peterson, *The Crooks Get All the Breaks*, *Sat. Eve. Post*, Sept. 23, 1961, pp. 10, 13.

⁶⁸ 243 F.2d at 661–62.

⁶⁹ *Id.* at 662.

⁷⁰ 237 F.2d 789 (D.C. Cir. 1956).

⁷¹ See Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 *U. ILL. L.F.* 78, 126–28, especially n.224.

will do the same thing in off-beat cases that they do in routine ones—they will exclude it.

AN EXERCISE IN FUTILITY?

Whatever may be said for the courts "preserving the judicial process from contamination"⁷² or against the government playing "an ignoble part"⁷³ or about it being the "omnipresent teacher,"⁷⁴ I, for one, would hate to have to justify throwing out homicide and narcotic and labor racket cases if I did not believe that such action significantly affected police attitudes and practices.⁷⁵ At this point, however, I run smack up against Professor Inbau's grim, gray "facts":

"Although a trial judge or prosecutor may well be sensitive to a reversal on appeal, and consequently the reversal may serve to discipline him to avoid error and misconduct in the future, such a reaction cannot reasonably be expected from the police. They are generally insensitive to a court's rejection of evidence merely because of the impropriety of the methods used to obtain it."⁷⁶

* * *

"[T]he average police officer whose confession [and presumably whose search] is declared invalid suffers no embarrassment or loss of prestige. . . . The clearance of a case by arrest . . . is all that really matters so far as the average policeman is concerned; what happens thereafter is the responsibility of the prosecutor and the courts."⁷⁷

⁷² *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, H., dissenting).

⁷³ *Id.* at 470 (Holmes, J., dissenting).

⁷⁴ *Id.* at 485 (Brandeis, J., dissenting). Compare Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 257-58 (1961), with George, *supra* note 62, at 785-93, and McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L., C. & P.S. 266, 267 (1961).

⁷⁵ "[I]t would seem that the ultimate test of the exclusionary rules is whether they deter police officials from engaging in the objectionable practices. For if, as some assert, reversals of convictions in this area have had no substantial effect on police conduct, then the consequent gains even in terms of popular respect for law are tenuous, indeed." Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 34 (1953).

⁷⁶ Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 78 (1957).

⁷⁷ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 461-62 (1948). But cf. INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 198 (3d ed. 1953) ("a practical and useful manual for criminal interrogators," according to p. ix): "A criminal interrogator should always remember that it is his function not only to obtain a confession from a guilty subject, but also to

Coming from one with Professor Inbau's practical experience, these are telling blows. But more impressive, I submit, are the recent words and deeds of high law enforcement officials to the contrary. Evidently, there are jurisdictions where *somebody up there*—the attorney general or the district attorney or the chief of police—cares enough to make the average policeman care too.

Consider the post-Cahan observations of the Attorney General of the State of California:

"I believe . . . that because of this decision the police are doing better work. Their investigations are more thorough and within American constitutional concepts. More guilty pleas have resulted because of the intensive pre-arrest work. For example, District Attorney Tom Lynch of San Francisco has advised me that in gambling and narcotic raids, as well as in other cases, the police discuss the facts with him and he is able to advise in advance just what is necessary in order to make a good case.

"In a great many instances, prior to the Cahan decision the police were satisfied with an arrest. They were not too concerned with conviction because the apprehension of the individual was sufficient in their minds. In these cases the defendant, upon his dismissal, would feel that the State was an equal violator of the law.

"In the field of narcotics, much more intensive work is being done with the peddler, the wholesaler and the seller. Prior to the Cahan case, the officers, in order to justify their existence, felt it necessary to make a certain number of arrests. It was always easy to arrest a known addict upon mere suspicion rather than do the tough, thorough work of getting to the wholesaler and peddler.

"I believe the over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more co-operation with the District Attorneys and this

obtain one which meets all the necessary legal requirements—so that it can be used as evidence at the trial of the accused. For this reason, familiarity with the law concerning criminal interrogations is in many respects equally as important as a mastery of the psychological tactics and techniques employed in eliciting the confession." (Emphasis added.) This passage opens a 35 page discussion of "The Law Concerning Criminal Confessions."

will make for better administration of criminal justice."⁷⁸

What of the experience in the District of Columbia, site of the *McNabb-Mallory* rule, as well as the *Weeks* doctrine? In large measure, the hopes and expectations of exponents of the exclusionary rule have been fulfilled on two counts.⁷⁹ Listen to Oliver Gasch, in his fifth year

⁷⁸ Excerpts from letter from Governor Edmund G. Brown, then Attorney General of the State of California, to the *Stanford Law Review*, Dec. 7, 1956, on file with the *Stanford Law Review*, quoted in part in *Elkins v. United States*, 364 U.S. 206, 220-21 (1960), and in part in Note, 9 STAN. L. REV. 515, 538 (1957). I am indebted to the editors of the *Stanford Law Review* for sending me a photostatic copy of the letter, which is on file in the Minnesota Law Library. The *Cahan* reference is to *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), which saw the California Supreme Court overturn precedents of more than 30 years standing to adopt the exclusionary rule.

As Professor Barrett has pointed out, Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 587 (1955), prior to the *Cahan* decision, "the California situation was most unsatisfactory. . . .

"The rules were ill-defined. There was little direct pressure upon the police to conform to the rules. In practice, police discretion in determining the reasonableness of searches was rarely subject to check. The possibilities of the situation improving appeared slight. Law enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action."

The *Cahan* case led to the appointment of an Attorney General's Committee, whose recommendations in turn led to extensive new legislation, in many respects clarifying and codifying the case law on arrest and search and seizure, although not without raising some new problems. See 32 CALIF. STATE B.J. 607-10 (1957). Furthermore, as Professor Weinstein has recently noted, the state has compiled applicable California decisions in "a simple but well-written training publication for California peace officers that makes clear by hypothetical and rule what the police can and cannot do." Weinstein, *supra* note 60, at 169-70.

⁷⁹ I am indebted to Bernard Weisberg, a member of the Chicago Bar and General Counsel of the Illinois Division of the American Civil Liberties Union, for alerting me to much found in the succeeding text by his careful summary of the District police's adaption to the *McNabb-Mallory* rule in Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 33-34 (1961).

I want to make it quite clear that my reliance on the striking District of Columbia experience does not mean that I quarrel with the proposition that the desire to obtain convictions (as opposed to police "harrassment") and "the policeman's remediable ignorance of the law" "constitute only a part of the explanation for American police misconduct." Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 37. See also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 54-55. But to concede that the exclusionary rule is not always decisive is hardly to agree it is never significant.

Professor Allen has pointed to "a large middle-

as United States Attorney for the District of Columbia at the time:

"In view of the widely divergent views concerning the meaning and effect of the *Mallory* decision, we felt that it was highly desirable to initiate a series of lectures to which supervisory officials of the Police Department and the detective force would be invited. These lectures were given about two years ago and in substance they have been repeated on a number of occasions both to the retraining classes of policemen as well as to the new men. We have encouraged questions both during the lectures and at the conclusion thereof. Our *Mallory* lectures have been printed by the congressional committee studying this subject.

* * *

"At the present time, due largely to the conscientious cooperation of our Chief of Police and in accordance with the teaching of the decisions and our lectures on it, the police are making better cases from the evidentiary standpoint. Extensive investigation prior to arrest of suspects has resulted. The accumulation of other evidentiary material has become standard operating procedure. It has been emphasized to the force that they may arrest only on probable cause and that persons arrested should be

western city in a jurisdiction which for almost forty years has applied the exclusionary rule" where—until recently—the police department did little to inform itself of current search and seizure law. See Allen, *supra* at 39. What does this necessarily prove other than that the exclusionary rule *per se* is not a "cure-all"? Other than that the exclusionary rule *ipso facto* cannot override the ill effects of poor leadership and tradition and/or low general quality and inadequate general training? That the exclusionary rule is wasted on some police departments scarcely establishes that it fails significantly to affect the work of better ones.

Is there any doubt that prior to *Mapp* the police departments of many more exclusionary states than admissibility states (if any) did demand extensive training in the rules of arrest and search and seizure? See, e.g., the late Justice Murphy's mail questionnaire study of police practices in *Wolf v. Colorado*, 338 U.S. 25, 44-46 (1949) (dissenting opinion). Denver is the only specific example given of a city in an admissibility jurisdiction providing fairly comprehensive instructions on search and seizure, *id.* at 46. But the Denver instruction manuals Justice Murphy evidently referred to do not bear him out. As was recently observed in Weinstein, *supra* note 60, at 159 n.45, "the second edition of MELVILLE, *MANUAL OF CRIMINAL EVIDENCE IN COLORADO* (1954) [written for Denver Police Academy] contains an extensive discussion of how confessions should be obtained in order to make them admissible (pp. 16-21); it ignores the search and seizure problem, thus furnishing striking evidence of the impact of an exclusionary rule on police training programs."

given a preliminary hearing without unnecessary delay. Even though a panel of our Appellate Court decided... that the Mallory decision does not require a preliminary hearing in the middle of the night, we have followed the practice of having preliminary hearings in the middle of the night in those cases in which question may arise as to the imposition of a sanction because of failure to comply with Rule 5a of the Federal Rules of Criminal Procedure.

* * *

"With respect to search and seizure... about two years ago, it became very evident to me that the time had come for training and retraining in the field of search and seizure.... This project was one of the most useful activities of our office in my judgment. These four lectures were recorded, carefully annotated, and have recently upon order of the Attorney General been distributed to all Federal law enforcement officers. You may be interested in how we set up these lectures. We asked the Chief of Police to circularize his entire force and to solicit from them questions in the field of search and seizure which gave them difficulty. We broke these questions down into three groups. Searches and seizures with warrants, searches and seizures incident to lawful arrests, and emergency situations. Using entirely for problem material the questions of the police force, we developed this series of four lectures. We in the prosecutor's office benefitted greatly by the need to go to the books and to analyze the rationale of the decisions for answering the questions presented.

"I am sufficiently optimistic to report to you that most of the policemen benefitted as well by these lectures. My men have given me a number of examples which indicate quite clearly that our policemen are thinking in terms of these decisions and our lectures, and to that extent their work has materially improved. Searches and seizures as far as possible are now bottomed upon a search warrant. The police realize that it renders more effective their work to check out the legal basis for the warrant with legally trained persons before attempting to accomplish a search or seizure."⁸⁰

⁸⁰ Gasch, "Law Enforcement in the District of Columbia and Civil Rights" pp. 2, 3, 5, unpublished address of March 25, 1960, to Twelfth Annual Conference, National Civil Liberties Clearing House,

I am hardly in a position to appraise the general effect *Mapp v. Ohio* has had in those jurisdictions which used to admit illegally seized evidence. I think I do know that in at least one such jurisdiction, my home state of Minnesota, law enforcement training has already been substantially affected by the exclusionary rule and will continue to be so. Witness the attitude of the Attorney General of the State of Minnesota at one of several post-*Mapp* conferences on police procedures relating to the law of arrest and seizure:

"It is my personal opinion that the *Mapp* case is sound law. Years of experience demonstrate that the only way in which the Fourth Amendment can be made meaningful is to declare illegally-obtained evidence inadmissible—in short, to remove the incentive for obtaining evidence through illegal means and to make it essential for police officials to become skilled in the proper legal methods by which their cases can be built. The very fact that these institutes are being held is eloquent testimony, it seems to me, of the basic wisdom of the Court's decision. We are doing today, because of the Court's ruling, what we should have done all along. We are studying ways in which we can bring our police methods and procedures into harmony with the constitutional rights of the people we serve.

* * *

"Some persons claim the Supreme Court has gone too far. Others claim to know how constitutional protections may be avoided by tricky indirection. Both viewpoints are wrong—this Institute was called to assist us in better fulfilling our sworn duty to uphold the Constitution. It was not called to second guess the Supreme Court.

"For those who seek techniques to circumvent the constitutional rights of the people, I say that it is not only illegal, but contrary to our oath and destructive of the basic principles of a free society to do so. As Attorney General of this state, I do not propose to permit our Constitution to be circumvented and I serve notice upon anyone so inclined."⁸¹

in Washington, D. C., reported in the Washington Post, March 26, 1960, p. D1, col. 7 (hereinafter referred to as "Gasch"). I am indebted to Bernard Weisberg of the Chicago Bar for sending me a copy of this address, which is now on file in the Minnesota Law Library.

⁸¹ Mondale, *The Problem of Search and Seizure*, 19 BENCH & BAR OF MINN. 16, 19 (Feb. 1962).

To observe that the deterrent effect of the exclusionary rules has fallen far short of expectations in jurisdictions other than those mentioned above is hardly to condemn. So—for millennia—has the deterrent effect of the laws against murder, rape, and robbery.

The recent experience in the State of California and the District of Columbia, and the post-*Mapp* prospects in Minnesota, by no means constitute conclusive evidence of the efficacy of the exclusionary rules. But they do, I think, rudely dislodge the notion that these rules are merely an exercise in futility.

MIGHT THERE BE A BETTER WAY?

If the jaded debate over the exclusionary rules has accomplished anything, it has illustrated once again that "answers are not obtained by putting the wrong question and thereby begging the real one."⁸² What are the *real* questions? One of them, surely, turns on what we should appraise the exclusionary rule *against*.

The fact that there is disagreement and inconclusive evidence that the exclusionary rule substantially deters police lawlessness is a good deal less significant, I think, than the fact that there is much agreement and abundant evidence that all other *existing* alternatives do not.⁸³ Thus, proponents of the rule are in good position if one major question is whether or not the exclusionary rule is the best *presently available, politically feasible* means of effectuating the constitutional safeguards. Evidently, this is not good enough for opponents of the rule. The question they like to ask is whether the exclusionary rule is the very best approach to police misconduct that man ever conceived, or ever will! Why does it have to be?

Suppose it can be shown that the present system of criminal law administration is irrational and illogical. That "punishment for a period of time and then letting him go free is like imprisoning a diphtheria-carrier for awhile and then permitting him to commingle with his fellows and spread the

germ of diphtheria?"⁸⁴ If so, it is imperative that we strive for improvement, but does it follow we should burn up the statute books *in the meantime—before* we have attained the requisite number of trained "social physicians" who can determine and remove the cause of crime with the same degree of accuracy that the surgeon finds and cuts out an inflamed appendix?⁸⁵

Suppose it can be demonstrated that "fiendish perpetrators of horrible crimes on children could be reformed by being sent first for several years to a special hospital" and that "a certain social environment or . . . an elaborate college course will reform a burglar or gunman?"⁸⁶ Suppose, further, all hands agree that *logically, theoretically, ideally*, this sort of "treatment" and "re-education" is much to be preferred over "punishment?" Does it follow that we scrap what we have *now* in exchange for the hope or promise that ten or twenty or fifty years from now we might have the community support, the large funds, and the necessary psychiatric know-how to make the theoretically superior alternative a reality?⁸⁷

I share Wigmore's view that the *Weeks* rule is "illogical."⁸⁸ I agree, too, that "the natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed . . . marshal who had searched without a warrant, imposing a thirty day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."⁸⁹ But what does all this mean? It means, I take it, that we are afforded the opportunity to repeal the exclusionary rule *now*.⁹⁰ But *when—if ever*—do we get the chance to vote for legislation authorizing courts to send for the transgressing marshal and imprison him for his "contempt of the Constitu-

⁸⁴ A criticism quoted in Cardozo, *What Medicine Can Do for Law*, in *LAW AND LITERATURE* 90 (1931).

⁸⁵ See M. R. Cohen, *Moral Aspects of the Criminal Law*, in *REASON AND LAW* 45 (1950).

⁸⁶ *Id.* at 45-46.

⁸⁷ See *id.* at 46; Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 *YALE L.J.* 319, 332-35 (1938).

⁸⁸ 8 WIGMORE 35.

⁸⁹ *Id.* at 40.

⁹⁰ The debate has long been bottomed on the premise that the exclusionary rule is a rule of evidence which the Congress or the state legislatures could "repeal." *Mapp* changed all that. See Weinstein, *supra* note 60, at 155. For purposes of discussion, however, I am assuming that either a constitutional amendment or judicial overruling has occurred, so that we are still "free" to "repeal" the rule.

⁸² Frankfurter, J., dissenting in *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 420 (1947).

⁸³ A number of vigorous *opponents* of the exclusionary rules have recognized the futility of *existing* alternatives. See, e.g., remarks of former federal prosecutor T. J. Curran, *NEW YORK CONVENTION* 529; McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 *J. CRIM. L., C. & P.S.* 266, 268 (1961) (another former federal prosecutor); Plumb, *Illegal Enforcement of the Law*, 24 *CORNELL L.Q.* 337, 386-88 (1939).

tion?" And what do we use to effectuate the Fourth Amendment *in the meantime*?

Those seeking the repeal of the exclusionary rule have often conceded the inadequacy of *existing* alternative remedies.⁹¹ As a *quid pro quo* for the abolition of the rule, they have proposed, e.g., the establishment of a civil rights office, independent of the regular prosecutor, "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law enforcement officials";⁹² "shifting the financial responsibility for improper conduct of policemen, on a *respondent superior* basis, to the municipality or sovereign which employs them."⁹³

Have we ever known an opponent of the exclusionary rule to introduce a bill spelling out such proposals? Have we ever heard of a peace officers or sheriffs or district attorneys association "lobbying" for such a proposal? When—if ever—they do, the case for the exclusionary rule will be much weakened. I ask again, what do we do in the meantime?

I am sure that Professor Inbau and many people in law enforcement work would guffaw at the suggestion that adoption of the "British System" of narcotics control (permitting doctors to furnish narcotics to addicts in certain cases) is the way to eliminate *our* narcotics problem. Inbau, no doubt, would share the view that the "British System" is inapplicable to the United States. No doubt, he would retort, as others have, that the favorable narcotic situation in England is not the result of the "British System" at all but "the British people themselves.... [They] have a definite abhorrence of narcotic drugs, which has become incorporated into their mores and culture."⁹⁴

Fine. But why, then, does Professor Inbau so blithely point 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?"⁹⁵ Why does he not touch

on "the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke?"⁹⁶ Why does he not allude to recent observations that—

"It must be surprising to any student who is not thoroughly immersed in English ways of thought to find that in a country where so much importance is attached to the liberty of

modern case bearing on the point, *Elias v. Pasmore*, [1934] 2 K.B. 164, 173, (a decision of a judge of first instance at that) and a survey of Commonwealth authority at that time revealed no uniform rule on the admissibility of evidence procured through illegal searches and seizures. See Cowen & Carter, *The Admissibility of Evidence Procured Through Illegal Searches and Seizures*, in *ESSAYS ON THE LAW OF EVIDENCE* 82-83, 100 (1956). That year, when, according to one commentator, "the lower courts in the United Kingdom seemed ready to revise [the rule of admissibility] if not to reject it," Franck, Comment, 33 CAN. B. REV. 721, 722 (1955), a decision of the Privy Council in *Kuruma v. The Queen*, [1955] 1 All E.R. 236, sanctioned the admissibility of evidence illegally obtained.

Professor Glanville Williams, the English participant in the Northwestern Law School's recent International Conference on Criminal Law Administration, criticized *Kuruma* on numerous counts: the opinion indicates that evidence obtained by "trickery" should be ruled out, but not that obtained by unlawful force—seemingly a "more flagrant breach of the law"; one of the possible reasons for excluding induced confessions—"to hold the police and prosecution to proper behaviour"—"would equally suggest the exclusion of evidence obtained by an illegal search"; American decisions to the contrary were omitted and "quite possibly misunderstood" [only *Olmstead* was cited; not, for example, the earlier *Weeks* case nor the later *Nardone* cases]; Scottish decisions to the contrary "were misinterpreted and misstated." Williams, *The Exclusionary Rule Under Foreign Law: England*, 52 J. CRIM. L., C. & P.S. 272, 273 (1961). Professor Williams notes wistfully that "since decisions of the Privy Council are not absolutely binding in future cases even upon the Privy Council itself, this important question of public policy cannot be regarded as finally settled." *Ibid.* Most English and Canadian writers share Williams' dissatisfaction with the *Kuruma* result. See, e.g., Cowen & Carter, *supra* at 103-05; DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 64-65 (1958) (criticizing the earlier *Pasmore* case); Franck, *supra* at 723-31.

⁹⁶ JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 81-82 (1955).

See also Martin, *The Exclusionary Rule Under Foreign Law: Canada*, 52 J. CRIM. L., C. & P.S. 271, 272 (1961): "The problem of deliberate violation of the rights of the citizen by the police in their efforts to obtain evidence has not been as pressing in Canada as in some other countries.... In addition, the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages."

⁹¹ See note 83 *supra*.

⁹² Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. Rev. 46, 62 (1957). The disadvantages of this proposal are considered in Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 261 (1961).

⁹³ McGarr, *supra* note 83, at 268. See also Plumb, *supra*, note 83, at 387.

⁹⁴ See CALIF. SPECIAL STUDY COM'N ON NARCOTICS, FINAL REPORT 101 (1961).

⁹⁵ Inbau 86. To say that England has "always" admitted unreasonably seized evidence is to be somewhat misleading. As late as 1955, there was only one

the subject, the power of search is left so vague and unregulated. But as always the preference is for the unwritten law. The police are expected to act reasonably; and so long as they do so, the accused is as unlikely to insist upon his right to immunity from search as he is on his constitutional right to silence. The absence of judicial regulation suggests the lack of need for it; no situation has yet arisen in which anything corresponding to the Judges' Rules has been called for.

"Cases in which the right of search has been considered are from the lawyer's point of view lamentably few."⁹⁷

It may well be that at this time the imposition of the exclusionary rule is neither necessary nor proper in certain other lands. How does this resolve *our* problem? I concede that we are *intellectually* capable of formulating better alternatives; I merely doubt that at the moment we are *politically* capable of effectuating them. I confess, further, that I am not enthused about scrapping the exclusionary rule *today* in exchange for assurances that these other potentially superior alternatives will undergo further study *next year* or the year after.

I agree that the exclusionary rule is not the best of all possible approaches in the best of all worlds, but is there a real alternative in the present state of affairs? After all, as Reinhold Niebuhr has put it, "democracy is a method of finding proximate solutions for insoluble problems."⁹⁸

As Niebuhr has also observed, however, "any definition of a proper balance between freedom and order must always be at least slightly colored by the exigencies of the moment which may make the peril of the one seem greater and the security of the other therefore preferable."⁹⁹ Thus, to establish that the exclusionary rule is the best means at hand for effectuating liberty and privacy is to make a point, but hardly to win the debate. A host of questions—*real* questions, I admit—remain to be answered. In one way or another, they ask: *What price*, exclusionary rule?

"CRIME WAVES" AND RULES OF EVIDENCE

Professor Inbau implies, if he does not assert, that the 98% increase in the crime rate since 1950—five times the increase in population—is

⁹⁷ DEVLIN, *op. cit.* *supra* note 95, at 64.

⁹⁸ NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1944).

⁹⁹ *Id.* at 78.

the product of recent "'turn 'em loose' court decisions and legislation."¹⁰⁰ He hints, none too gently, that his and his daughter's freedom to walk home after dark turns on whether or not we rid law enforcement officers of "the strait jacket placed upon them by present day court and legislative restrictions."¹⁰¹

Chief William Parker of the Los Angeles Police Department, another vigorous critic of the exclusionary rule, is not content with innuendo:

"Following the Cahan decision, there was a departure from the trend of an accelerating nature with such a skyrocketing effect that December 1955 reflected the worst crime experience in the history of Los Angeles. In attempting to determine cause, it must be concluded that the greatest single factor representing a change in the current situation was the imposition of the exclusionary rule at the close of April 1955. As the criminal army became familiar with the new safeguards provided to them, the acceleration in crime was an inevitable result."¹⁰²

* * *

"[I]n Los Angeles during 1956 there was a 30 percent increase over the year before, after we had experienced a downward trend. The Cahan decision reversed the trend, and the 1957 rate is 14 percent over 1956. . . .

"They are the facts. These are the things they don't like to talk about. That is what is happening throughout America.

"Q. Do you think the *Mallory* decision will have a similar impact?

"Yes. I will show you how the *Mallory* decision will put the *Cahan* decision to shame, as far as effect upon serious crimes is concerned."¹⁰³

Professor Inbau, Chief Parker, and others in their camp raise real *questions*, all right. But do they supply real *answers*? It may be my own shortcoming, but I find so much so wrong with their reasoning that I am not quite sure where to begin.

¹⁰⁰ Inbau 86. Professor Inbau is referring to FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES 1* (1960) (hereinafter referred to as "*UNIFORM CRIME REPORTS*" for given year). In 1960, the crime rate for seven major offenses—murder, forcible rape, robbery, aggravated assault, larceny (\$50 and over), and auto theft—"was 24 per cent above the average for the past 5 years; 66 per cent over 1950; and 96 per cent higher than 1940." *Id.* at 2.

¹⁰¹ Inbau 99.

¹⁰² PARKER, *POLICE 120* (Wilson ed. 1957).

¹⁰³ 1957 *House Committee Hearings* at 76.

Perhaps the way to begin is to ask some questions of my own. What was the increase in the crime rate from 1940 to 1950, when fewer jurisdictions utilized the exclusionary rule? From 1930 to 1940? Rises in crime, Chief Parker tells us, are "happening throughout America." But until the summer of 1961, the courts of half our states let in illegally seized evidence. Were these admissibility jurisdictions undergoing "crime waves" too? Or were the exclusionary states running well ahead of the national average?

Take, for example, the District of Columbia and its surrounding Maryland and Virginia suburbs. Until *Mapp* was handed down in the summer of 1961, Maryland admitted illegally seized evidence in all felony prosecutions; Virginia, in all cases. On the other hand, the District's law enforcement officers are not only "handcuffed" by the federal exclusionary rule in search and seizure cases but weighed down, too, by the *McNabb-Mallory* rule—the dread "ball and chain" which hampered no other police force during the 1950–1960 period. One would expect the District, then, to set the pace in crime acceleration, certainly far to outdistance Virginia and Maryland.

The "facts" that fellows like me are not supposed to want to talk about reveal that *the District's incidence of rapes, aggravated assaults and grand larceny was lower in 1960 than in 1950.*¹⁰⁴ On a per 100,000 population basis, the overall felony rate increased a puny one per cent in the District, but a redoubtable 69% in the three major Maryland and Virginia suburbs for which generally complete figures were available.¹⁰⁵

No, I am not suggesting that the way to diminish crime is to *adopt* exclusionary rules of evidence. I only suggest that to point to a spectacular rise in national crime or in a particular state's crime is hardly to prove that restrictive rules of evidence have "caused" this increase.

¹⁰⁴ See Mintz, *Serious Crime Rate Down Here Despite Furor Raised by Congress*, Washington Post, July 5, 1961, p. B1, col. 6.

¹⁰⁵ *Ibid.* Nation-wide, the crime rate for seven major offenses rose 66 per cent during this period. See note 100 *supra*. Preliminary figures compiled by the police departments of the District and surrounding suburbs for the 1961 calendar year indicate that the incidence of serious crime in the suburbs is continuing to rise at a greater rate than in the District. The seven-category felony increase in the District from 1960 to 1961 was 9 per cent; suburban increases for that period were: Fairfax, 21 per cent; Prince Georges, 20 per cent; Arlington, 15 per cent; Montgomery, 14 per cent; and Alexandria, 6 per cent. See Goshko, *Major Crime Rate Growing Faster in Suburbs Than D. C.*, Washington Post, Mar. 11, 1962, p. B5, col. 1.

Opponents of the exclusionary rules will hasten to point out, no doubt, that the above figures do not tell the whole story. Of course they don't. But why do they overlook the point when they trot out the figures on California and Illinois crime?

The explanation for the disparity in the crime acceleration between the District and its suburbs may lie in the explosive growth of the suburbs and the concomitant slight decline in the District's population. Or in the superior training of the District police. Or in the undermanned suburban police forces. Perhaps the key to the disparity is that the suburbs compile more complete records of crime than does the District, or better records than they did back in 1950.

I must confess, therefore, that I don't think these figures are decisive. Evidently, the critics of the *Weeks* and *McNabb-Mallory* rules don't either. For they have never had a word to say about them. If I may be permitted to ask, what dark inferences would Inbau, Parker & Co. draw if these statistical disparities had been reversed? If the District's crime had shot up 69% and the suburbs but one per cent. Can you hear those trumpets now?

Perhaps the peremptory answer to this "numbers game" may be found in a masterful, critical analysis of the current sad state of criminal statistics appearing in this very *Journal* a short time ago. On that occasion, Ronald H. Beattie, long-time Chief of the California Bureau of Criminal Statistics, made an impressive showing that various cities in the *same* state, to say nothing of different states, are using such disparate methods in crime reporting that "the differences observed in *Uniform Crime Reports* simply cannot be accepted as possessing any degree of reliability for showing true differences in crime rates among the states."¹⁰⁶

Though I believe Mr. Beattie's critical analysis makes the "real facts" about the impact of rules of evidence on crime somewhat fanciful, Chief Parker has a right to be proud of Beattie's comments:

"California, in particular, has a history of police development over the past forty years, stemming from the leadership of August Vollmer, which means not only high levels of police efficiency and professional performance but also better and more complete records. This

¹⁰⁶ Beattie, *Criminal Statistics in the United States*, 51 J. CRIM L., C. & P.S. 49, 54 (1960).

latter fact in itself causes California to appear to have a high crime rate. States where in general there are many police agencies with poor record systems, incomplete reporting, and lower standards of police proficiency should not be accredited as having less crime simply because the statistical data reported show less crime."¹⁰⁷

* * *

"Los Angeles showed an over-all crime rate two and one-half times as great as San Jose, and this difference appears in all offenses. The widest difference occurs in aggravated assault, where the rates reported were 13 times greater for Los Angeles than for San Jose.

"Sacramento and Fresno, which represent valley metropolitan areas presumably not too different in general composition, showed rather strange differences in crimes reported....

"This kind of comparison vividly demonstrates the wide differences in reporting from departments and areas within the same state. Actually, no conclusions about crime rates can possibly be made with any certainty from this kind of information. The Los Angeles area in particular has been named in public releases as having the highest crime rate in the country. The Los Angeles Police Department has been an outstanding department for many years. It has been recognized as one of the most effective and efficient large metropolitan police agencies in the country. It would appear that because this department is effective and efficient, and has complete records, the area is being identified as one with a high crime rate in comparison with other cities that do not have police departments of the standard and quality that Los Angeles possesses and do not keep as efficient and complete records of the incidence of crime."¹⁰⁸

Mr. Beattie *could* be wrong; the statistics may truly reflect the extent of crime in various cities and states. However, I fail to see how this possibility aids the critics of the exclusionary rules.

Suppose Los Angeles really does have 1300% the aggravated assault San Jose has? *Why?* They are both in the state of California and both subject to the same rules of evidence. What if the crime rates in the comparable cities of Sacramento and Fresno vary as much as the published figures

indicate? Suppose Sacramento does have nearly twice the forcible rape rate of Fresno, and Fresno a much higher aggravated assault rate than Sacramento. Whatever the reason, how can it be the *Cahan* decision?

Similar questions can be raised about the state of crime in Illinois. Why is Chicago's burglary rate less than twice that of Champaign-Urbana, Peoria, and Rockford, but its robbery rate about five times that of Champaign-Urbana and Peoria and more than *twenty* times that of Rockford? Why is it that Peoria and Champaign-Urbana are about the same in total offense rate, but Champaign-Urbana has about three times the murder-voluntary manslaughter and aggravated assault rates of Peoria?¹⁰⁹ If these striking intra-state statistical disparities at all approximate the "real facts," don't they serve to illumine the insignificance, if not irrelevance, of the state-wide exclusionary rule?

The 98% crime rise which Professor Inbau glibly tosses into the fray is a familiar figure. This is how J. Edgar Hoover opened an interview early this year.¹¹⁰ Perhaps this is the place to begin. Midway in this interview, the Director of the FBI was asked to account for the sharp rise in crime. He spoke of the "steady decline of parental authority," the disintegration of "moral standards in home and community," the "highly suggestive, and, at times, offensive, scenes" on TV and in the movies, "public indifference to organized vice," the number of people who "lack the courage to aid the victim personally, or the interest to summon help," and the "abuse and maladministration of the systems of parole and probation".¹¹¹

Nary a word about rules of evidence.

Mr. Hoover's discussion of the problem was comprehensive, but hardly exhaustive. Other "causes" of crime and "crime waves" advanced from time to time are "tensions" from two world wars and/or the "cold war," the "strain" of modern living; the crowding of rural people unaccustomed to urban ways into the big cities; the population movement of the Negroes, the demise of the billy club, the displacement of the foot patrolman with the squad car, more laws, better crime reporting, comic books, cigarette

¹⁰⁹ Based on Table 4—Index of Crime, 1960, Standard Metropolitan Statistical Areas, UNIFORM CRIME REPORTS for 1960 at 53-77.

¹¹⁰ U.S. News & World Rep., Jan. 1, 1962, p. 34.

¹¹¹ *Id.* at 35-36.

¹⁰⁷ *Id.* at 53-54.

¹⁰⁸ *Id.* at 55.

smoking, poor housing, overcrowded schools, "bad blood," *ad infinitum*.

While crime in the District of Columbia is still down from the peak years in the early 1950's it is up from the ten-year low set in 1957.¹¹² What "caused" this increase? The U.S. Attorney pointed to the "woefully and demonstratively understaffed" Juvenile Court, ill-equipped to "win away from a life of crime those border-line juvenile delinquents."¹¹³ One District Commissioner found the "main reason" in "more probations," "earlier paroles" and the fact that "drunks are sometimes sent home rather than to jail."¹¹⁴ This was immediately disputed by another Commissioner, who suggested "the cutback in the activities of the Metropolitan Police Boys Club [from 17,000 boys served, down to 5,000 in two years] may have contributed."¹¹⁵

He who links "crime waves" with rules of evidence is a bold man. Bolder than Oliver Gasch, former U.S. Attorney for the District of Columbia, who after wrestling with the *McNabb-Mallory* rule and the *Weeks* rule for six years, dismissed this suggestion as "much too speculative."¹¹⁶ "He must be a bold man indeed who is confident that he knows what causes crime. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the various 'alleged' 'causes' of crime."¹¹⁷

Perhaps this is not the way to start answering the "crime wave" argument. Perhaps we should begin further back, by asking: *What* "crime wave"?

¹¹² See Mintz, *supra* note 104, at p. B2.

¹¹³ Gasch, *supra* note 80, at 6.

¹¹⁴ Washington Post, Mar. 27, 1960, p. A27, col. 6 (Comm'r Robert F. McLaughlin).

¹¹⁵ *Ibid.* (Comm'r David P. Karrick).

¹¹⁶ Gasch *supra* note 80, at 7, quoted in MacKenzie, *Mallory Ruling Held Blameless in Crime Rise*, Washington Post, Mar. 26, 1960, p. D1, col. 7. But more recently Deputy Police Chief Edgar E. Scott blamed the "rise" in District "street crimes" (as against the ten-year low-point of 1957) partly on "civil libertarians who scream about the Constitution, due process and the Bill of Rights," centering his criticism of the Courts on the *Mallory* decision. At the same time, Scott insisted that "the fight to maintain moral standards and good law enforcement is tied with the fight against communism, because... nations fall from weakness and corruption from within, rather than power from without." MacKenzie, *Scott Blames 'Civil Libertarians' for Street Crime*, Washington Post, Mar. 27, 1962, p. B1, col. 2. Chief Scott did not explain why crime is increasing more rapidly in the suburbs of Virginia and Maryland—which have no *McNabb-Mallory* rule.

¹¹⁷ Frankfurter, J., dissenting in *Winters v. New York*, 333 U.S. 507, 526-27 (1948).

As Professor Herbert Wechsler, Chief Reporter for the Model Penal Code, and a former state and federal assistant attorney general, observed awhile back: "We cannot even be certain that the statistics on crimes 'known to the police' actually indicate an increase in the amount of crime."¹¹⁸ For "better attention to complaints, more careful and systematic efforts to record and count offenses, more arrests, will make your crime rate go up higher on paper than in actual fact."

This is not mere speculation. There are striking examples of "crime waves" which turned out to be nothing more than "statistical reporting waves." When a Philadelphia reform mayor's police commissioner assumed office in 1952, he discovered that for years records had been distorted in order to "minimize" crime, e.g., one center-city district in one month handled 5,000 more complaints than it had recorded. When a new central reporting system was installed, the number of "crimes" went up from 16,800 in 1951 to 28,600 in 1953—"for the record" a staggering climb of over 70%.¹¹⁹ In New York City, similar faking had gone on for years. Following a survey by police expert Bruce Smith, a new system of central recording was established for 1952. Assaults immediately jumped 47%, robberies 73%, and burglaries 118%.¹²⁰

I have little doubt that Superintendent Orlando W. Wilson, if he were not the careful student of crime he is, could contrive an enormous increase in the amount of Chicago's crime. For shortly after he became head of the Chicago force he undertook a drastic revamping of the department's methods of reporting crime and maintaining records. For the first time, a crime analysis section at police headquarters now works from complete records on all crimes, big or small.¹²¹ Common practices of the pre-Wilson era, it seems, were not to report stolen cars as stolen in statistical records if they were recovered within three days, and for a commander to "follow a practice of ignoring a lot of the little stuff to save work and make the district look better on paper."¹²²

¹¹⁸ U. S. News & World Rep., Sept. 26, 1960, p. 64.

¹¹⁹ Bell, *What Crime Wave?* Fortune, Jan., 1955, pp. 96, 99. See also Bell, *The Myth of Crime Waves*, in *THE END OF IDEOLOGY* 138-39 (1960).

¹²⁰ *Ibid.*

¹²¹ See Gowran, *Wilson Plea: More Radios, More Records*, Chicago Daily Tribune, Nov. 8, 1961, pt. 1, p. 8, col. 1.

¹²² *Ibid.*

DID THE CAHAN CASE "CRIPPLE" CALIFORNIA LAW ENFORCEMENT?

Not only do critics of the exclusionary rule in search and seizure cases argue that its imposition swells the ranks of the "criminal army" but they also indicate that it has "rendered the people powerless to adequately protect themselves against the criminal army." The two contentions can be separated and distinguished. The first contention—the rule breeds more crime—may not be true, but the second contention—the rule seriously diminishes the capacity of law enforcement to cope with whatever crime is bred—may nevertheless be true.

Chief Parker found evidence of the severe blow dealt to efficient law enforcement by the *Cahan* decision in the reduction of narcotic arrests: "During 1954 the comparative [seasonal] periods reflected a 15.7 per cent increase in [narcotic] arrests, while a 4.5 per cent decrease followed the *Cahan* decision."¹²³

Again, I venture to suggest that the chief has skipped a premise or two. For example, what are the comparative figures on narcotic offenses reported? On suspects released after arrest? On narcotic offenders formally charged? Convicted?

In any event, assuming Chief Parker's reliance on the arrest data is well placed, what *does* the "record" show? Adult felony arrests for narcotic law violations in California did drop slightly in 1955, from 7,457 to 7,313, but they were over 9,000 in 1956, over 10,000 in 1957, and, rising steadily and substantially every post-*Cahan* year, passed the 14,000 mark in 1960.¹²⁴ True, California's population has boomed, but the rate of adult felony arrests for narcotics per 100,000 population, which dipped from 60 to 56 in 1955, rose to 67 and 73.1 in 1956 and 1957, respectively, and reached 89.2 in 1960.¹²⁵ If the 1955 decline in narcotic arrests illustrates the blow *Cahan* dealt law enforcement, what do these more recent figures evidence?

J. Francis Coakley, District Attorney for Alameda County, California, also sounded the alarm in the summer of 1956 by reporting that

¹²³ PARKER, POLICE 121 (Wilson ed. 1957).

¹²⁴ See CALIF. SPECIAL STUDY COM'N ON NARCOTICS, FINAL REPORT 53 (1961) (hereinafter referred to as "FINAL NARCOTICS REPORT"); CALIF. DEPT. OF JUSTICE, BUREAU OF CRIMINAL STATISTICS, CRIME IN CALIFORNIA 1960, at 47 (hereinafter referred to as "CRIME IN CALIFORNIA" for given year).

¹²⁵ CRIME IN CALIFORNIA 1956, at 35; 1957, at 32; 1960, at 45.

"the *Cahan* decision establishing the Exclusionary Rule in California has broken the very backbone of narcotics enforcement."¹²⁶ The only statistical support I can find for this sweeping statement is that the rate of felony narcotic complaints per 100,000 population filed in California Superior Court fell from 22 to 18 in 1955¹²⁷ and the percentage of narcotics convictions in California Superior Courts dropped from 86.6 to 77.6 in 1955, and to a still lower 76.8 in 1956.¹²⁸

In 1957 the rate of narcotic complaints reached 23 per 100,000,¹²⁹ passing the pre-*Cahan* rate, and climbed to 25 in 1959, where it has remained.¹³⁰ But critics of the exclusionary rule can find some solace in the percentage of convictions in narcotics cases. Following the *Cahan* case, this percentage dropped for three successive years to a low of 74.3 in 1957.¹³¹ While it has climbed back slowly to 77.5 in 1960,¹³² this is still considerably short of the pre-*Cahan* figures of 82.5 (1952) 84.4 (1953) and 86.6 (1954).¹³³ Why?

In 1957, looking at the narcotics and book-making, the two offenses whose conviction percentage had dropped substantially since the *Cahan* case, the California Bureau of Criminal Statistics suggested the obvious: "Evidently, the adoption of the exclusionary rule has had some effect on these two offense groups."¹³⁴ Two years later, however, the Bureau was more cautious. Indeed, it balked at linking the *Cahan* rule with these lowered conviction rates, noting that "the large number of cases in Los Angeles County often distorts the picture for the rest of the State."¹³⁵

The 1954 Los Angeles 85 per cent conviction rate in narcotic offenses fell to 67 percent in 1957, before it rose somewhat to 70 in 1958 and 73 in 1959, but there was "very little change in other areas of the state."¹³⁶ From 1954 to 1959, for example, "the nine other Southern California counties in contrast varied only between a high

¹²⁶ ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 58 (1956).

¹²⁷ CRIME IN CALIFORNIA 1955, at 42.

¹²⁸ CRIME IN CALIFORNIA 1954, at 60; 1955, at 60; 1956, at 61.

¹²⁹ CRIME IN CALIFORNIA 1957, at 53.

¹³⁰ CRIME IN CALIFORNIA 1960, at 95.

¹³¹ CRIME IN CALIFORNIA 1957, at 66.

¹³² CRIME IN CALIFORNIA 1958, at 62 (75.1%); 1959, at 67 (77.3%); 1960, at 104 (77.5%).

¹³³ CRIME IN CALIFORNIA 1952, at 38; 1953, at 47; 1954, at 60.

¹³⁴ CRIME IN CALIFORNIA 1957, at 66-67.

¹³⁵ CRIME IN CALIFORNIA 1959, at 68.

¹³⁶ *Id.* at 68-69.

and a low of 88 and 85 percent convicted, respectively."¹³⁷ The same patterns held for bookmaking. The only conclusion the Bureau could reach was:

"Many things, other than the *Cahan* decision may be affecting the statistics on narcotics and bookmaking convictions in Los Angeles County. What has just been reported does not, in itself, prove or disprove any aspect of the multifaceted problem. All that can be said, with validity, is that convictions for narcotics and bookmaking in Los Angeles County have decreased since 1954 and that they continue to remain at a relatively low level."¹³⁸

Further illumination is furnished by a six month study (Aug. 1, 1960, through January 31, 1961) made by the District Attorney's Office, County of Los Angeles, to determine the effect of the *Cahan* and *Priestly* decisions on narcotic cases. Of the total processed 1,420 narcotic cases which came to the attention of the District Attorney's Office during this period, those rejected by the District Attorney or dismissed by the Court because of *Cahan* or *Priestly* and those which resulted in an acquittal for the same reason came to a grand total of 128—"approximately eight percent."¹³⁹

During this same period, another 615 Los Angeles cases (140 in Superior Court) were dismissed, rejected, or otherwise "lost" for non-exclusionary rule reasons.¹⁴⁰ How does this compare with the pre-*Cahan* Los Angeles experience? If the California Attorney General's impression that *Cahan* led to "much more intensive [pre-arrest] work" in the field of narcotics is accurate,¹⁴¹ and these observations hold for Los Angeles as well as the rest of the state, shouldn't *Cahan* be credited with a few narcotic conviction "assists," too? And shouldn't these offset the "losses" a bit?

If not, let me suggest another reason for sup-

posing the "true figure" is probably lower than eight per cent. Some 439 other Los Angeles felony narcotic cases processed during the study period were not considered in the calculations because they had not yet reached "final disposition."¹⁴² According to the study, however, the *Cahan-Priestly* factor looms largest at the initial stages of a case. Thus, of the 128 "losses" due to the exclusionary rule, only 38 occurred after the cases were brought to Superior Court.¹⁴³ To look at it another way, the exclusionary rule was a factor in only 4.4% of the 866 cases which reached Superior Court. There is reason to believe, therefore, that if the other 439 cases were followed up and taken into account the eight percent figure would be appreciably lower.

Furthermore, whatever the true figure in Los Angeles, there is good cause for supposing the exclusionary rule is a significantly smaller factor in other California narcotic cases. For, as already noted, the narcotics conviction percentage runs about ten points higher outside Los Angeles. In any event, this much is *not* speculation: *ruling out* the exclusionary rule factor, the Los Angeles felony narcotics conviction percentage is still lower than most other California areas, *taking into account* the exclusionary factor.

This, too, must be said about the narcotics situation in California. When we stop thinking about narcotic offenses in lump form and start viewing the matter in terms of specific types of narcotic offenses we discover that while the 1960 statewide overall narcotics conviction percentage in California Superior Courts was 77.5, the statewide figures for both *sales* of marijuana and *sales* of narcotics other than marijuana were 88.2 and 88.7, respectively.¹⁴⁴ To look at it another way, of the 460 narcotic cases dismissed in 1960, "approximately four-fifths were possession cases"; "there were only a total of 33 sale cases and 9 sale to minor cases dismissed."¹⁴⁵

Finally, it should not be forgotten that while the overall narcotics conviction percentage is down substantially, from 85.5 in the 1953-1954 pre-*Cahan* years to 77.4 for the years 1959-1960, the rate of arrests as well as felony complaints filed in narcotic cases has risen appreciably. Thus, in 1959-1960, which experienced a substantially lower conviction *percentage*, some 5,696 were

¹³⁷ *Ibid.*

¹³⁸ *Id.* at 69.

¹³⁹ FINAL NARCOTICS REPORT 112. Eleven of the exclusionary rule releases were said to be due to the requirement established by *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P. 2d 39 (1958), that an informant's identity must be disclosed where this information is the only evidence to establish "probable cause." This rule was cut down significantly in May of 1961 when the California Supreme Court held that where a search is made pursuant to a warrant valid on its face, the informer's identity need not be revealed in order to establish the legality of the search. *People v. Keener*, 55 Cal. 2d 714, 12 Cal. Rep. 859, 361 P.2d 587 (1961).

¹⁴⁰ FINAL NARCOTICS REPORT 112.

¹⁴¹ See text at note 78 *supra*.

¹⁴² FINAL NARCOTICS REPORT 112.

¹⁴³ *Ibid.*

¹⁴⁴ CRIME IN CALIFORNIA 1960, at 122.

¹⁴⁵ *Id.* at 77.

convicted of narcotic offenses in California Superior Courts¹⁴⁶ as against 4,419 for the record conviction percentage years of 1953-1954.¹⁴⁷

I think I have demonstrated that the predictions and descriptions of near-disaster in narcotics law enforcement which greeted and followed the *Cahan* decision find precious little support in the available data. Until now, however, we have been dwelling on narcotic offenses—the *major category of crime most likely to be affected by the exclusionary rule*. But opponents of the rule have proclaimed its adverse effects on crime and law enforcement *generally*. Chief Parker reported its effect "catastrophic as far as efficient law enforcement is concerned";¹⁴⁸ he considered it "conceivable that the imposition of the exclusionary rule has rendered the people powerless to adequately protect themselves against the criminal army."¹⁴⁹ An assistant attorney general for the State of California called the *Cahan* rule "the 'Magna Carta' for the criminals."¹⁵⁰ "Crime statistics indicate he is right," declared Chief Carl Hansson of the Dallas Police Department. "Many states," he tells us, "have adopted the Exclusionary Rule to the joy of the criminal and the detriment of society."¹⁵¹ What can be gleaned from the records about the effect *Cahan* has had on California conviction rates generally?

The conviction percentage for murder, 67.1 in 1953, and 61.2 in 1954, was up to 69.8 in 1960; manslaughter, 81.1 and 90.2 in 1953 and 1954, respectively, is now at 93.2; felony assault, under 77.5 for the two pre-*Cahan* years, was 81.3 in 1960; rape, 76.5 and 79.3 in the two years immediately preceding *Cahan*, is now at 81.4.¹⁵² Variances in conviction percentages relating to robbery and burglary are barely discernible. Robbery, 84.8 in 1953 and 85.8 the following year, rose to 86.3 the year of the *Cahan* decision, and is now at 85.4. The conviction percentage for burglary, which increased four-tenths of one per cent from 1953 to the 1954 figure of 90.8, *decreased the same four-tenths* to 90.4 in the *Cahan* year and is now at 89.6.¹⁵³

The overall felony conviction percentage averaged 84.5 for the three years immediately preceding *Cahan*,¹⁵⁴ registered 85.4 for the *Cahan* year,¹⁵⁵ and has been at 86.4 (*including* the aforementioned lower narcotic percentage) for the last three years.¹⁵⁶ Of course, the *number* of felony defendants convicted in California Superior Courts has risen substantially; for example, from 17,359 in the last pre-*Cahan* year¹⁵⁷ to the 1960 total of 24,816.¹⁵⁸

DID THE MALLORY CASE "CRIPPLE" LAW ENFORCEMENT IN THE DISTRICT OF COLUMBIA?

Four years ago, in his testimony before a Senate subcommittee, Professor Inbau "suggested" that "we are paying a great price for the *Mallory* rule."¹⁵⁹ Last year, in the pages of this *Journal*, he was less cautious: "In the federal jurisdiction of Washington, D. C., which must cope with a variety of criminal offenses and problems similar to any other city of comparable size, this federal court rule has had a very crippling effect on police investigations."¹⁶⁰ Of course, Professor Inbau's voice has been but one of many raised in alarm. And the voices have been shrill indeed.

Thus, in his 1957 testimony before a House subcommittee, Robert Murray, Chief of the District's Police Department, stated flatly that "if the *Mallory* decision stands, it will result in complete breakdown in law enforcement in the District of Columbia."¹⁶¹ Chief Murray claimed, then, that "an overwhelming majority of these major crime cases, and maybe as much as 90 per cent, are solved after the subject has been brought in and questioned."¹⁶²

Deputy Chief of Police Edgar Scott picked up and amplified his superior's 90 per cent figure:

"The application of the Mallory rule would prevent the clearance of a majority of the planned crimes and serious crimes and those committed by professionals.

"I wish to emphasize that a little bit more because I think what the Chief meant on the 90

¹⁴⁶ CRIME IN CALIFORNIA 1959, at 67; 1960, at 104.

¹⁴⁷ CRIME IN CALIFORNIA 1953, at 47; 1954, at 60.

¹⁴⁸ PARKER, POLICE 114 (Wilson ed. 1957).

¹⁴⁹ *Id.* at 118.

¹⁵⁰ Reported in ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 54 (1956).

¹⁵¹ *Ibid.*

¹⁵² CRIME IN CALIFORNIA 1953, at 47; 1954, at 60; 1960, at 104.

¹⁵³ *Ibid.*

¹⁵⁴ CRIME IN CALIFORNIA 1955, at 44.

¹⁵⁵ *Ibid.*

¹⁵⁶ CRIME IN CALIFORNIA 1958, at 62 (86.6%); 1959, at 67 (86.4%); 1960, at 104 (86.3%).

¹⁵⁷ CRIME IN CALIFORNIA 1954, at 60.

¹⁵⁸ CRIME IN CALIFORNIA 1960, at 104.

¹⁵⁹ 1958 Senate Committee Hearings at 73.

¹⁶⁰ Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., C. & P.S. 16, 20 (1961).

¹⁶¹ 1957 House Committee Hearings at 42.

¹⁶² *Id.* at 43.

per cent was that 90 per cent of these types of crimes by professionals are planned crimes and could not be cleared.

"There's another type of crime [unplanned] that would bring the overall clearance to a better figure, and I would say it would still be a majority of the crimes that could not be cleared, but of the ones committed which are planned by professionals and that had planned them ahead of time, I think the figure of 90 per cent is all right."¹⁶³

* * *

"Mr. Cramer. As to that figure that Chief Scott indicated, that about 90 per cent of the cases require investigation, and fairly lengthy investigation, and a majority of the 90 per cent would require investigation within the lengthy period of time ruled out in the Mallory case, what you are saying is that of the planned crimes, planned by the professional criminal, 90 per cent would probably go free as a result of their knowledge of the Mallory case and their unwillingness to cooperate.

"Mr. Scott. Under the application of the Mallory case; yes, sir."¹⁶⁴

The 1957 *Mallory* decision *did* stand. Consider the testimony some time later of Howard Covell, Deputy Chief Executive Officer of the District Police Department:

"First, those tables will show that, viewed in its relationship to the long-term trend in this city and nationwide, the present rate of crime in the District of Columbia is not excessive and, in fact, is favorably low.

"In brief, the calendar year 1958 crime rate of the District is only 6.7 per cent above the all-time low rate of the fiscal year 1957, is 31.5 per cent below the peak rate of calendar year 1952, and is 20.4 per cent below the rate of calendar year 1949, while the nationwide crime rate, as estimated by the Federal Bureau of Investigation, has increased steadily and by more than 50 per cent since 1949."¹⁶⁵

* * *

"Mr. Santangelo. As a matter of fact, it appears to me that the percentage of solutions of the major crimes has increased down through the years?

"Chief Covell. I would say yes.

¹⁶³ *Id.* at 45.

¹⁶⁴ *Id.* at 46.

¹⁶⁵ *Hearings on District of Columbia Appropriations for 1960* at 419.

"Mr. Santangelo. For the last 3 years let us say, the homicides, rapes, and aggravated assaults, your percentage of solutions has increased, has it not?

"Chief Covell. I would say yes, but that also comes from, and I say this with modesty, from an increased efficiency of the Police Department and better coordination of the law enforcement agencies throughout the entire metropolitan area. I think that the cooperation of all departments in this area reflects in each other's department to some extent. . . . During the fiscal year 1958 there was a total of 51 per cent of all part 1 crimes [major offenses] solved as compared with 49.5 during 1957. The rate of clearance in 1958 is second to the highest; that was 55.6 attained by the Department since the installation of the present system of reporting, which was made in 1948."¹⁶⁶

Consider, too, the testimony of Chief Murray the following year:

"Mr. Santangelo. . . . Can you tell us what your experience in 1959 was with respect to the solution of crimes of criminal homicide and the other major crimes?"

* * *

"Chief Murray. . . . The average is 52.5, which I think is perhaps about double or nearly double the national average. I think the national average on clearance of cases is about 27 per cent. It runs consistently about 27 per cent. "Mr. Santangelo. Last year, in 1958, the percentage of solution of crimes was 51 per cent, and in the year 1959 it was 52.5 per cent. So your percentage of efficiency has increased to that extent. Is that a correct statement?

"Chief Murray. Yes, sir; plus the fact that we have had a few more men to help us clear it. . . ."

* * *

"Mr. Santangelo. Your percentage of solutions has increased in the cases of robbery.

"Chief Murray. Yes, sir; we have, I think, a very good record in the clearance of robberies, 65 per cent.

"Mr. Santangelo. That rose from 61.3.

"Chief Murray. Yes, sir."

* * *

"Mr. Santangelo. In aggravated assault, you also have gone up from 84.3 to 88 per cent. In housebreaking, which is another difficult thing

¹⁶⁶ *Id.* at 440-41.

to solve, you have gone up from 50.5 to 54 per cent. Is that correct?

"Chief Murray. Yes, sir.

"Mr. Santangelo. For which I commend you, Chief Murray."¹⁶⁷

Remember the 90 per cent figure the District's police officials tossed out back in 1957? Listen to United States District Attorney Oliver Gasch three years later:

"Another point I should like to emphasize concerning this issue is that while Mallory questions are well publicized they do not occur in every case. In fact, *Mallory* questions, that is to say, confessions or admissions, are of controlling importance in probably less than 5% of our criminal prosecutions. At the present time, due largely to the conscientious cooperation of our Chief of Police and in accordance with the teaching of the decisions and our lectures on it, the police are making better cases from the evidentiary standpoint. Extensive investigation prior to arrest of suspects has resulted. The accumulation of other evidentiary material has become standard operating procedure."

* * *

"On the affirmative side, it can be said that police work generally is more thorough and exact. Reliance upon confessions generally has been minimized. It must be mentioned, however, that in some instances we have been unable to go forward with cases wherein we felt that we were largely dependent upon a confession and the confession was inadmissible under the *Mallory Doctrine*. Pleas to lesser included offenses have been accepted; and from the police standpoint, their ability to clear through interrogation other offenses of which the individual was believed involved has been reduced. The recovery of stolen property from such individuals has been hampered by reason of the need for arraignment without unnecessary delay. In short, the emphasis has been on according persons arrested a preliminary hearing with the utmost dispatch."

* * *

"To me, one of the important aspects of our local law enforcement pictures is this: Prior to the *Mallory* decision our police had an outstandingly high rate with reference to solving

crimes. That rate is still outstandingly high. This is a great tribute to Chief Murray and his men. They have worked hard and effectively. Lesser men would have thrown up their hands in despair."¹⁶⁸

CONCLUSION

It is true that the immediate effect of the *McNabb-Mallory* rule or the *Weeks* rule is often to free the "obviously guilty," but the rationale is these "hospital cases" have much more far reaching and much more salutary effects. This is neither a new nor a novel theory. The late Karl Llewellyn expressed it well a generation ago, talking about, of all things, the law of contracts:

"[M]y guess is . . . that the real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what 'is done'. If the contract dodger *cannot* be bothered, if all he needs is a rhinoceros hide to thumb his nose at his creditor with impunity, more and more men will become contract dodgers . . . [I]n this aspect each hospital case is a case with significance for the hundreds of thousands of normal cases."¹⁶⁹

How well this theory works—in the form of the *McNabb-Mallory* and *Weeks* rules—remains to be seen. At the moment it appears to be doing quite nicely in the District of Columbia, the jurisdiction which has felt the brunt of what Inbau calls "turn 'em loose" court decisions.

The work of the District police "generally is more thorough and exact," "reliance upon confessions generally has been minimized," "the accumulation of other evidentiary material has become standard operating procedure," "extensive investigation prior to arrest of suspects has resulted."¹⁷⁰ This, as the song goes, is the whole idea.

If you are against the exclusionary rules it is helpful to think they exact an exorbitant price in increased crime and diminished law enforcement. This makes resolution of the issue easy. But in the two jurisdictions which have held the spot-

¹⁶⁸ Gasch *supra* note 80, at 3, 4, 7.

¹⁶⁹ Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704, 725 n.47 (1931).

¹⁷⁰ Gasch *supra* note 80, at 3-4.

¹⁶⁷ *Hearings on District of Columbia Appropriations for 1961* at 619-20.

light in recent years, the District of Columbia and the State of California, there is no tangible evidence that the rules have done any thing of the kind. Of course, if you are for the exclusionary rules, it is comforting to believe that their cost in "letting alone" or "freeing" criminals is *de minimis*. This also makes resolution of the debate easy.

I do not know (and I doubt) that the cost is or will be *de minimis*. I do think I know that opponents of the rule have not established the contrary. They have made loud noises about the "disasterous" and "catastrophic" prices we are paying to effectuate constitutional liberties, but they have yet to furnish convincing evidence that the price is even substantial.

Even if by some miracle we could cleanly disentangle the exclusionary rule from the many other factors which "cause" crime or reduce the efficiency of police and prosecutors, I suspect Professor Inbau and I would still disagree. I suspect he would contend the data proves "we can't afford" the rule and I would maintain—unless the data greatly surprises me—that "it's cheap at the price." For we would still differ over the *value* of the commodity purchased.¹⁷¹ It

¹⁷¹ And, no doubt, as to the objective standards by which "police efficiency" can be judged. See Weisberg,

makes a lot of difference whether one views the fourth amendment as a fundamental safeguard against serious abuses or whether one thinks of it as merely a provision dealing with a formality.¹⁷²

I am for the exclusionary rule as the best means available or presently feasible for enforcing guarantees of liberty and privacy. Professor Inbau tells us he believes in these rights, too.¹⁷³ How does he propose to effectuate them?

He suggests that in the *McNabb* case the Court might have "contented itself with an incidental reprimand to federal officers for failing to comply with statutory requirements regarding arraignment."¹⁷⁴ As for illegal search or seizure, he feels that "an effective way to teach a policeman a lesson is by bringing a civil suit directly against him."¹⁷⁵

I leave it to the reader to decide which of us is "starry eyed."

Police Interrogation of Arrested Persons: A Skeptical View, 52 J. CRIM L., C. & P.S. 21, 37 (1961).

¹⁷² See Frankfurter, J., dissenting in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

¹⁷³ See Inbau 86.

¹⁷⁴ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 451 (1948).

¹⁷⁵ ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 60 (1956).