

# A Look Back On a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure\*

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When I look back at my academic career, I realize that, as hard as I tried to plan things, various events often overrode my plans.

## I. THE EFFECTS OF UNPLANNED EVENTS

When I went into law teaching, and I started at the University of Minnesota in the fall of 1957, I wanted to teach antitrust law more than anything else. For I had spent a considerable amount of time in practice helping DuPont defend itself against various antitrust charges. Unfortunately for me, Minnesota had hired someone else to teach antitrust law two months earlier. I was not able to teach my second favorite course (conflicts) either, because Minnesota had hired another person to teach *that* subject a month earlier. So I had to settle for my third choice—substantive criminal law.

What about criminal procedure? As hard as it may be for some young law teachers to believe, in the 1950s *there were no* separate courses on criminal procedure. Nor were there any casebooks devoted solely to what we now call “criminal procedure” or “constitutional criminal procedure.”

Parts of what we teach today in one or two, or even three, criminal procedure courses were then taught in various courses with different names. At some law schools, part was taught in evidence. At other schools, part was taught in the last few class hours of first-year criminal law. At still other places, part, but not a great deal, was taught in constitutional law.

Constitutional law was how I first got involved in criminal procedure. The Dean of Minnesota Law School, William B. Lockhart, had asked Jesse Choper and me to join him in publishing a casebook on constitutional law. My assignments included a chapter called “The Nature of Due Process” and another chapter entitled “Due Process, Equal Protection and the Rights of the Accused.”<sup>1</sup>

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\* This article is based on a talk given at the Criminal Justice Luncheon at the annual meeting of the Association of American Law Schools in Atlanta, Ga., on January 3, 2004. I am indebted to Professor Stuart Green, Chair of the Criminal Justice Section, for inviting me to give this talk on the occasion of my retirement from teaching at the University of Michigan Law School. I shall, however, continue to teach at the University of San Diego Law School.

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<sup>1</sup> See WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPER, CONSTITUTIONAL LAW: CASES, COMMENTS & QUESTIONS (1st ed. 1964). The due process chapter included such cases as *Palko v.*

I managed to persuade the people at West Publishing Company to pull the two aforementioned chapters out of the constitutional law casebook and market them separately as materials for a seminar or short course on constitutional criminal procedure. The sales for the first year were not impressive—something like 250 copies. The next year I joined forces with Livingston Hall, added a few new cases that had been handed down since the cut-off date for the constitutional law casebook (notably *Massiah v. United States*<sup>2</sup> and *Escobedo v. Illinois*<sup>3</sup>), and tried again. We sold another 200 or 300 copies, but, again, the sales were quite disappointing. Then *Miranda*<sup>4</sup> came down from on high. Our post-*Miranda* edition sold more than 10,000 copies.<sup>5</sup> (Of course, in subsequent years, as more and more criminal procedure professors published their own casebooks, our sales declined.<sup>6</sup>)

All over the country, law professors desirous of teaching criminal procedure were finally getting an enthusiastic response. All over the country, law school deans began to say, “If nobody on our faculty wants to teach criminal procedure, we better go out and find somebody who does.”

I am well aware that reasonable people can differ about whether, and to what extent, the Warren Court really brought about a “revolution” in American criminal procedure. But I do not believe anybody can dispute the fact that the Warren Court’s criminal procedure decisions (especially *Miranda*) worked a revolution in the American law school curriculum.

When I first started teaching, I did not plan to write a casebook on either criminal procedure or constitutional law. I *did* plan to write one on substantive criminal law, but it never came about.

My criminal law teacher at Columbia Law School had been the redoubtable Herbert Wechsler. Among other things, he was the Chief Reporter for the American Law Institute’s Model Penal Code. As might be expected, my classmates and I used the Michael & Wechsler casebook.<sup>7</sup> I thought it was a wonderful casebook. But by the time I started teaching it was already quite old.

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*Connecticut*, 302 U.S. 319 (1937), *Adamson v. California*, 332 U.S. 46 (1947), and the “stomach pumping” case, *Rochin v. California*, 342 U.S. 165 (1952). The chapter on the rights of the accused was divided into sections on the right to counsel, confessions, search and seizure, wiretapping, trial by jury, double jeopardy and trial by newspaper and television.

<sup>2</sup> 377 U.S. 201 (1964).

<sup>3</sup> 378 U.S. 478 (1964).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>5</sup> The Hall-Kamisar casebook was really a casebook on selected problems in criminal procedure. It was not until Wayne LaFave and Jerold Israel joined us on the third edition, and we added ten new chapters, that we really had a full-fledged casebook on criminal procedure. See LIVINGSTON HALL, YALE KAMISAR, WAYNE LAFAVE & JEROLD ISRAEL, MODERN CRIMINAL PROCEDURE (3d ed. 1969). Professor Hall, who was close to retirement, then withdrew from future editions.

<sup>6</sup> The last time I counted, there were more than thirty criminal procedure casebooks. At one time or another, I have studied them all. I have found most of them quite good. I have learned something from every one of them.

<sup>7</sup> JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940).

If Professor Wechsler had asked me to help him publish a new edition of his casebook, I think I would have been the happiest law professor in the country. But he never did. So I decided to publish my own criminal law book. I worked on my own materials, and taught from them for three years. When I thought the manuscript was in good enough shape to be published, I sent it to West Publishing Company (as it was then called). But the people at West turned me down. I was crushed. I never submitted the manuscript to another publisher.<sup>8</sup>

## II. HOW MY FIRST ARTICLE CAME ABOUT

Although I never did publish a casebook on substantive criminal law, the first article I ever wrote was on a substantive criminal law topic of some controversy—euthanasia (and assisted suicide as well) or, as it was called then, “mercy-killing.”<sup>9</sup> The topic struck me as a good illustration of a very interesting and important question: As a matter of policy, what activities ought to be prohibited by the criminal law? When I first wrote about this subject forty-six years ago, I lacked the perspicacity and imagination to foresee that I was addressing a question of *constitutional law*. (Then again, so did pretty much everyone else.)

Once again, I did not plan to write an article on “mercy killing.” The subject found me. Only a few weeks after I had started teaching criminal law, the Research Editor of the *Minnesota Law Review*, Bruce Clubb, dropped into my office. He informed me that Glanville Williams, the noted British legal commentator, had just written a new book that should greatly interest me (and many others teaching criminal law): *The Sanctity of Life and the Criminal Law*.<sup>10</sup> Since the book contained chapters on a range of criminal law topics, including abortion, artificial insemination, sterilization, euthanasia and suicide, Mr. Clubb thought a review of this book would be a nice way for a first-time criminal law teacher to “break into” the criminal law literature.

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<sup>8</sup> A year after the first edition of our constitutional law casebook had been published, and had sold fairly well, the head of West’s law school division, Hobart Yates, asked me whether I was still working on criminal law teaching materials. I told him I had never stopped working on those materials and never stopped trying to improve them. (I must confess this was a lie of considerable proportions. After the manuscript had been rejected by West, I had simply set it aside.)

Mr. Yates then asked me if I would send him the most current version of the criminal law materials. I sent him exactly the same manuscript West had rejected several years earlier.

A short time thereafter, Mr. Yates phoned me. He was effusive in his praise. He told me that the materials had improved markedly and he was now prepared to offer me a contract to write a criminal law casebook for West.

I initially agreed to do so, but soon became so busy revising the constitutional law casebook and working on the criminal procedure casebook that I finally decided two casebooks were enough.

<sup>9</sup> See Yale Kamisar, *Some Non-Religious Views Against Proposed “Mercy-Killing” Legislation*, 42 MINN. L. REV. 969 (1958).

<sup>10</sup> GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957).

I agreed. At first, I thought the best way to proceed would be to write two or three pages on each chapter. I started with the chapter on euthanasia . . . and ten months and 100 typed pages later I was still writing about *that one chapter*.

So, rather than writing a book review, I wound up writing a long article on euthanasia (and related subjects, such as assisted suicide).<sup>11</sup> (I always wondered what would have happened if I had started out with Williams's chapter on abortion or sterilization.)

After writing that article, I never thought I would write about the "mercy-killing" subject again. I certainly never planned to do so. But then, some thirty years later, when I had been teaching at the University of Michigan for a long time, a fellow named Jack Kevorkian started getting busy in my backyard. As a result, I spent a number of years writing and speaking about almost nothing else but euthanasia and assisted suicide.<sup>12</sup>

I had reached the point where I was trying hard to stop writing about death and dying when—in the space of six weeks—two federal courts of appeals ruled that, under certain circumstances at least, people had a constitutional right to physician-assisted suicide.<sup>13</sup> It was plain that this issue was headed for the U.S. Supreme Court. And it was a battle I was not about to "sit out."<sup>14</sup> So I kept speaking and writing about the subject for another few years.<sup>15</sup>

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<sup>11</sup> Astonishingly, my article was only the second or third article on the subject that had appeared in an American law journal since 1900. However, a considerable number of short articles had appeared in the medical and popular literature.

My first article on confessions also started out as a book review—a review of the Fred Inbau-John Reid police interrogation manual. See Yale Kamisar, *What Is an "Involuntary" Confession?*, 17 RUTGERS L. REV. 728 (1963). After that, I declined all invitations to write book reviews for many years.

<sup>12</sup> See, e.g., Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in EUTHANASIA EXAMINED 225 (John Keown ed., 1995); Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, 23 HASTINGS CENTER REPORT 32 (May/June 1993); Yale Kamisar, *Pondering the Kevorkian Question*, CHI. TRIB., May 6, 1994, at 15.

<sup>13</sup> See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997). Until the Second and Ninth Circuits had handed down these rulings, no American appellate court, state or federal, had ever held that there was a constitutional right to assisted suicide.

<sup>14</sup> Although the Supreme Court rejected the claim that there is a constitutional right to physician-assisted suicide, it would not be surprising if the Court revisited the question. See generally Susan M. Wolf, *Symposium, Physician-Assisted Suicide: Facing Death after Glucksberg and Quill*, 82 MINN. L. REV. 885 (1998).

<sup>15</sup> See Yale Kamisar, *Physician-Assisted Suicide: The Problem Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998); Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998); Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQUESNE L. REV. 481 (1996); Yale Kamisar, *Details Doom Assisted Suicide Measures*, N.Y. TIMES, Nov. 4, 1998, at A27.

## III. AUDIENCES I HAVE FACED

Most of my writing, of course, has been in constitutional criminal procedure, especially police interrogation and confessions. And the same holds true for most of the speaking and debating I have done.

The most unfriendly audience I ever faced was made up of those attending the annual meeting of the National District Attorneys Association in the early 1960s. One could easily tell which city the prosecutors in the audience came from because they were grouped by cities and carried signs and placards reading “Boston” or “Philadelphia” or “Chicago.” At this particular meeting, I was debating Northwestern Law School’s Fred Inbau, a law professor who was a strong critic of the Supreme Court for what he would call its criminal-coddling rulings.<sup>16</sup>

As became painfully clear to me during the debate, Inbau was a great favorite of law enforcement officers. His remarks evoked cheers and applause. For the most part, my remarks met a heavy silence. However, there was one exception.

One of Professor Inbau’s pervasive themes was that, no matter how the officer misbehaved, so long as his or her misconduct did not affect the reliability of the evidence, the evidence should be admissible. It should suffice that the offending officer was disciplined in a separate proceeding. I hurled what I thought were several good hypotheticals at Inbau. But he stood his ground. Finally I asked him: What about a situation where the suspect asks whether he can meet with a priest, and the police send him a detective dressed as, and pretending to be, a priest? Suppose further that the suspect confesses to the phony priest? That’s certainly a reliable confession. Would you admit it into evidence?

Without blinking, Inbau said he would. He made clear that he thought a law enforcement officer who impersonated a priest had committed a deplorable act for which he should be disciplined. But yes, he would admit the confession. Following his answers—if not quite interrupting them—a roar went up from the Boston delegation: “No, Fred! No!” That was the only time in the debate anybody in the audience came close to agreeing with me.

The most friendly audience I ever appeared before was made up of the judges and lawyers attending the annual conference of the U.S. Court of Appeals for the Third Circuit. This event took place in the fall of 1965, about nine months before *Miranda* was handed down. The reason the audience greeted me so warmly requires a little background information.

I was one of four panelists discussing the Supreme Court’s recent criminal procedure rulings. The first two panelists had finished speaking and the third panelist,

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<sup>16</sup> For more on Professor Inbau, see Ronald J. Allen, *Tribute to Fred Inbau*, 89 J. CRIM. L. & CRIMINOLOGY 1271 (1999); Yale Kamisar, *Fred E. Inbau: “The Importance of Being Guilty”*, 68 J. CRIM. L. & CRIMINOLOGY 182 (1977); James B. Zagel, *Fred Inbau: A Comment on His Work and His Character*, 89 J. CRIM. L. & CRIMINOLOGY 1285 (1999).

Michael Murphy, the former police commissioner of New York City,<sup>17</sup> was about halfway through his remarks when the door to the room we were in opened. Standing in the doorway—unscheduled and unexpected—were Chief Justice Earl Warren and Associate Justice William Brennan. (I have always assumed that Justice Brennan, a former New Jersey state supreme court justice and the member of the Supreme Court assigned to the Third Circuit, had decided to attend the conference at the eleventh hour and had persuaded the Chief Justice to accompany him.)

The moderator stopped the proceedings and insisted that Warren and Brennan be escorted to the front row. When the two justices were seated, the moderator asked Mr. Murphy to resume his remarks.

Aside from calling the criminal defendants whose convictions the Court was overturning “vicious beasts,” I do not remember the exact words the former police commissioner uttered next. But I do remember the substance of his remarks quite well. It went pretty much like this: On the basis of procedural technicalities, the Supreme Court is letting loose “vicious beasts” to roam the streets, raping our women and killing our children.<sup>18</sup>

A New York Times reporter, Sidney Zion, happened to be in the audience. The next day, the Times ran a front-page story that began:

Standing 10 feet from Chief Justice Earl Warren and before a roomful of Federal judges, former New York Police Commissioner Michael J. Murphy today accused the Supreme Court of “unduly hampering” the administration of justice, while “vicious beasts” were loose on the streets. The Chief Justice, who is known for his cheerfulness, sat stony-faced during the attack. At his side, Associate Justice William J. Brennan Jr. looked equally impassive.<sup>19</sup>

A reader of the *Times* article might have thought that on spotting Chief Justice Warren and Justice Brennan nearby, the former police commissioner seized the moment to rebuke the Court for siding with the enemy in the “war against crime.” But I very much doubt that was what happened. I was sitting right next to Mr.

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<sup>17</sup> Mr. Murphy had stepped down from his position as police commissioner three months earlier amidst criticism from civil rights advocates for his strong opposition to a civilian police-review board. See *The Court & the Cop*, TIME, Sept. 17, 1965, at 74.

<sup>18</sup> I was unaware of this at the time, because I had not been reading the *Times* regularly, but four months earlier, when he was still police commissioner of New York City, Mr. Murphy had launched a sharp attack on the Supreme Court at another conference of federal judges, this time those of the U.S. Court of Appeals for the Second Circuit. On that occasion he protested: “What the Court is doing . . . is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite.” Sidney E. Zion, *High Court Scored on Crime Rulings*, N.Y. TIMES, May 14, 1965, at 39. Mr. Murphy made the identical statement at the Third Circuit Conference in September. See Sidney E. Zion, *Attack on Court Heard by Warren*, N.Y. TIMES, Sept. 10, 1965, at 1.

<sup>19</sup> Zion, *supra* note 18. Although Mr. Zion was the only reporter present, his story was retold in other publications. See *The Court & the Cop*, *supra* note 17; *Judges Hear Critics of High Court*, WASH. POST, Sept. 11, 1965, at A2.

Murphy when the two members of the Supreme Court entered the room. I could see the former commissioner fidget and start to turn red. I could also see the sweat rolling down his neck.

I have always been of the view that Mr. Murphy was reading a script somebody else had written for him. When he saw the two justices coming down the aisle, he knew he was in for a difficult time, but I do not believe he was sufficiently familiar with the Supreme Court cases he was discussing to improvise on the spot. I think he concluded that the best course of action was to grit his teeth and forge ahead with his prepared remarks.

Premeditated or not, extemporaneous or not, Murphy's critical remarks—made in the presence of two of the most liberal members of the Supreme Court—flustered the audience. There was a good deal of coughing and squirming in seats. You could hear people gasping. I have no doubt that some members of the audience were wondering where they could find a hole to crawl into or a rock to crawl under. When Mr. Murphy finally sat down, about ten minutes later, there was a deathly silence—a mortified silence. The audience was waiting for *someone* to defend the Supreme Court. That is where I came in. I was the next (and the last) speaker.

The coughing and the shifting in the seats ceased. The audience applauded wildly every time I made a point. The audience laughed uproariously at my jokes (some of which, I must admit, were not *that* funny). It was a once-in-a-lifetime set of favorable conditions for someone trying to defend the Warren Court.<sup>20</sup> I was lucky to be in the right place at the right time.<sup>21</sup>

One of the things that struck me later was how calm and detached the Chief Justice appeared to be about the talks he had heard. When asked for his reaction, he replied: “No matter how thin you make a pancake, it always has two sides.”<sup>22</sup>

Justice Brennan was less reticent. He took me aside and suggested that the next time I defended the Supreme Court's confession rulings, I should consider spending some time on the *Whitmore* case, a reference to a 1964 New York case in which an African-American of limited intelligence confessed to two highly publicized murders that, it turned out, he did not commit.<sup>23</sup>

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<sup>20</sup> The *New York Times* invited Mr. Murphy and me to write up our remarks in article form for the Sunday magazine section. Murphy declined to do so, but I readily accepted. For the resulting article, see Yale Kamisar, *When the Cops Were Not “Handcuffed”*, N.Y. TIMES, Nov. 7, 1965 (Magazine), at 34.

<sup>21</sup> I should add that my memory of this event is somewhat tarnished by the fact that many years later I discovered that my defense of the Court had caused the FBI to start building a file on me. The first entry in my file is a copy of a *Washington Post* article recounting my exchange with Mr. Murphy at the Third Circuit conference. In the margin is a handwritten note by J. Edgar Hoover: “What do we know about Yale Kamisar?”

<sup>22</sup> According to one of his biographers, this was one of Chief Justice Warren's favorite sayings. See JOHN D. WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* 347 (1967).

<sup>23</sup> The *Whitmore* case is discussed briefly in *Miranda v. Arizona*, 384 U.S. 436, 455 n.24 (1966).

## IV. MORE ON POLICE INTERROGATION AND CONFESSIONS

I shall never forget my exchange with Mr. Murphy at the Third Circuit Judicial Conference. Nor will I ever forget the first article I wrote on police interrogation and confessions. As noted earlier,<sup>24</sup> I had not planned to write an article on the subject. I had agreed to write a review of a new edition of a police interrogation manual. In the course of writing my review, I began to read other interrogation manuals. These manuals were very illuminating—in fact, I really do not believe anyone could write intelligently about this subject without making use of them—but at the time they were not to be found in most law libraries. In the calendar year 1964, I taught at three law schools that were blessed with great law libraries—Harvard, the University of Michigan and the University of Minnesota.<sup>25</sup> None of these libraries contained any interrogation manuals. (Of course, this soon changed.)

For a long time, law enforcement officials have done their best to “sanitize” the proceedings in the interrogation room. (Many law enforcement officials like to call these rooms “interview” rooms.) As long ago as 1910, a time when everybody *now* agrees that it was not uncommon for police interrogators to treat suspects quite brutally,<sup>26</sup> the president of the International Association of Chiefs of Police assured the public that a confession “preceded by the customary caution” and “obtained through remorse or a desire to make reparation for a crime” is “all there is to the so-called ‘Third Degree.’”<sup>27</sup> For a long time law enforcement spokespersons were able to mislead us this way because for a long time the police were able to prevent any objective recordation of the proceedings in the “interview” room.<sup>28</sup> But the interrogation manuals, many written by people who trained police interrogators or who had been well-respected interrogators themselves, refuted the notion that things were friendly and low-keyed in the interview rooms.

Six pages of the opinion of the Court in *Miranda* are filled with extracts from various interrogation manuals.<sup>29</sup> Among other things, the Court observed that these manuals teach the police how to “persuade, trick or cajole [a suspect] out of exercising

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<sup>24</sup> See *supra* note 11.

<sup>25</sup> I taught the spring semester at Minnesota, summer school at Michigan, and the fall semester at Harvard.

<sup>26</sup> See, e.g., NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

<sup>27</sup> Major Sylvester’s comments are reported in J. A. Larson, *Present Police and Legal Methods for the Determination of the Innocence or Guilt of the Suspect*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY & POLICE SCI. 219, 222–25 (1925), and reported in part in 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 316–17 (3d ed. 1940).

<sup>28</sup> See Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21, 44–45 (1961).

<sup>29</sup> See 384 U.S. at 449–54. The *Miranda* dissenters criticized the majority for its reliance on the manuals. However, because of the secrecy surrounding the proceedings in the “interview” room, transcripts and tape recordings of police interrogations were not at hand. The manuals constituted the best evidence available. In the land of the blind, the one-eyed person is king.

his constitutional rights.”<sup>30</sup> What if persuasion or trickery fails? Then, as one manual puts it, the interrogator “must rely on an oppressive atmosphere of dogged persistence . . . and must dominate his subject and overwhelm him with his inexorable will to obtain the truth.”<sup>31</sup>

Astonishingly, a short five weeks *after* the *Miranda* Court had quoted from various interrogation manuals at great length, a veteran Kansas detective, Alvin Dewey, the hero of Truman Capote’s best-selling book, *In Cold Blood*, continued to mislead the public about what really went on in the “interview” room. He told a Senate Subcommittee: “What is wrong with [a police interrogator] exercising persistence or showing confidence? Isn’t that what any good salesman demonstrates selling insurance or a car? And a law enforcement officer should be a good salesman in selling a suspect on telling the truth . . . .”<sup>32</sup>

However, continued Detective Dewey, “a salesman cannot do a good job if a competitor is standing by.”<sup>33</sup> (Mr. Dewey made clear that by “competitor,” he meant a defense lawyer.) As for an “interrogation room,” Detective Dewey assured us, “it is simply a room in which people can talk in privacy—which is nothing more than what an attorney desires in talking to his client or a doctor desires in talking to his patient.”<sup>34</sup>

I did not think any police spokesperson could top Detective Dewey. But last December Professor Steve Drizin sent me a newspaper article quoting the head of the Newark, New Jersey police department. Like other law enforcement officials in his state, the Newark police chief is resisting a proposal to require tape-recording of police questioning *from the outset* (as opposed to simply recording the confession itself).<sup>35</sup>

The Chief maintains that “jamming a camera” in the “interview” of a suspect right off the bat might hamper police efforts to obtain a confession.<sup>36</sup> Why so? Because a police “interview” of a suspect is often “like a courtship.”<sup>37</sup> And why is that? An “interview” with a suspect often requires a lot of “small talk” to win the

<sup>30</sup> *Miranda*, 384 U.S. at 455.

<sup>31</sup> *Id.* at 451 (quoting CHARLES O’HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 112 (1956)).

<sup>32</sup> Statement of Alvin A. Dewey before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, July 21, 1966, at 2 (on file in the University of Michigan Law Library). Mr. Dewey’s statement is quoted at length in Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 87 (1966).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Robert Schwaneberg, *N.J. Lawmen Resist Drive to Tape all of an Interrogation*, NEWARK STAR-LEDGER, Dec. 9, 2003, at 25.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

subject's trust and to get the subject to "open up."<sup>38</sup> "Like a courtship"? All I can say is that if I had a daughter I would not want this fellow to date her.

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So far as I can tell, defense lawyers, civil libertarians and legal commentators were unaware of the interrogation manuals, or did not appreciate their significance until the early 1960s.<sup>39</sup> In some respects, the "discovery" of these manuals was like the discovery, quite recently, of a California police training videotape and other materials instructing the police to go "outside *Miranda*," i.e., to continue to question a suspect who asserts his rights because, for example, *Miranda* does not have a "fruit of the poisonous tree" doctrine attached to it.<sup>40</sup>

I only hope that the discovery of, and publicity about, these more recent police training materials have the same impact on the Supreme Court as did the "discovery" of the interrogation manuals some forty years ago. This brings me to the *Miranda* "fruit of the poisonous tree" cases recently argued in the U.S. Supreme Court. But before getting to these cases, let me provide a little background.

#### V. WHY TAKING THE "MIDDLE PATH" IS NOT ALWAYS THE BEST COURSE

Over the years, I could not help noticing that quite a few people like to take the "middle path"—to "split the difference" between what they would call the extreme positions at either end. This approach is understandable. It is tempting to "split the difference." It makes one appear to be moderate—even wise. The trouble is that sometimes the best solution to a problem is not to go down the middle, but to one end or the other. Sometimes splitting the middle does not make much sense.

Consider, for example, a relatively old case, *United States v. Janis*.<sup>41</sup> Los Angeles police illegally seized wagering records and a certain amount of cash from defendant. The police then notified the Internal Revenue Service (IRS) that defendant had been arrested for bookmaking activities. The IRS assessed defendant for wagering excise taxes and levied upon the cash seized by the local police in partial satisfaction. (This is routinely done when local police uncover a gambling operation involving a substantial amount of cash.)

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<sup>38</sup> *Id.*

<sup>39</sup> The first commentator to grasp the importance of these manuals and to make significant use of them, appears to be Chicago civil liberties lawyer Bernard Weisberg. See Weisberg, *supra* note 28. As fate would have it, a few years later Mr. Weisberg argued *Escobedo v. Illinois*, 378 U.S. 478 (1964), for the ACLU as *amicus curiae*. His brief on behalf of Mr. Escobedo made extensive use of the interrogation manuals. Following his lead, a short time later the ACLU brief in *Miranda*—primarily the work of Professors Anthony Amsterdam and Paul Mishkin—reprinted a full chapter from one interrogation manual.

<sup>40</sup> For the full transcript of the videotape urging the police to go "outside *Miranda*", see Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 189 (1998).

<sup>41</sup> 428 U.S. 433 (1976).

In the subsequent state prosecution against defendant, the evidence obtained by the police was thrown out and the seized items returned to the defendant—except for the cash held by the IRS. Defendant filed a refund claim for the cash, but the government counterclaimed for the unpaid balance of the assessment.

A 5–3 majority balked at extending the search-and-seizure exclusionary rule to a federal civil tax proceeding. “Splitting the difference” (my words, not the Court’s) appealed to it. It sufficed that the illegally seized evidence was excluded from the state or criminal prosecution. Why so? Because “the additional marginal deterrence” provided by excluding the illegally seized evidence in a federal civil proceeding “surely does not outweigh the cost to society of extending the rule to that situation.”<sup>42</sup>

The principal dissent was written by Justice Stewart.<sup>43</sup> By underscoring the close relationship between state law enforcement authorities and the IRS in these matters, I believe Justice Stewart made a convincing argument that a cost-benefit analysis should lead to *the opposite* result:

Federal officials responsible for the enforcement of the wagering tax provisions regularly cooperate with federal and local officials responsible for enforcing criminal laws restricting or forbidding wagering. Similarly, federal and local law enforcement personnel regularly provide federal tax officials with information; obtained in criminal investigations, indicating liability under the wagering tax. The pattern is one of mutual cooperation and coordination, with the federal wagering tax provisions buttressing state and federal criminal sentences.<sup>44</sup>

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[U]nder the Court’s ruling, society must not only continue to pay the high cost of the exclusionary rule [in criminal prosecutions] . . . but it must also forfeit the benefit for which it has paid so dearly.

If state police officials can effectively crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning the illegally seized evidence over to [IRS] agents on the proverbial “silver platter,” then the deterrent purpose of the exclusionary rule is wholly frustrated.<sup>45</sup>

In short, in a *Janis*-type situation, the “social cost” of *admitting* the evidence in the federal civil tax proceedings is *the wiping out* of any deterrent benefit that is gained by excluding the illegally seized evidence in the *state* criminal prosecution.

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<sup>42</sup> *Id.* at 453–54 (Blackmun, J.).

<sup>43</sup> Justice Brennan, joined by Justice Marshall, also wrote a short dissenting opinion.

<sup>44</sup> *Id.* at 461–62.

<sup>45</sup> *Id.* at 463–64.

*The only way to prevent the exclusion of evidence in the state prosecution from becoming a completely wasted effort is to prohibit the use of the illegally seized evidence in a federal civil proceeding as well. Otherwise, whatever “benefits” the operation of the exclusionary rule in the state prosecution produces as a disincentive to violate the Fourth Amendment are reduced to the vanishing point.*

The Supreme Court should have realized that the next time the occasion arises, the local police are highly likely to do *the very same thing* they did in the *Janis* case—“crack down” on gamblers by violating their Fourth Amendment rights and then turn the illegally seized evidence over to the IRS. If I am right, the “middle road” position the Court took in *Janis* was the worst possible resolution of the problem it faced.

#### VI. THE *MIRANDA* “POISONED FRUIT” CASES

This brings me to the two *Miranda* “poisoned fruit” cases the Court will decide this Term: *Patane v. United States*<sup>46</sup> and *Missouri v. Seibert*.<sup>47</sup> I fear that these cases will provide another illustration of the allure—and the perniciousness—of the “split-the-difference” approach.

I suspect that many a lawyer (and, for that matter, many a professor as well) who does not work in criminal procedure will ask: Why isn’t excluding every incriminating statement obtained in violation of the *Miranda* rules enough? Why do we have to throw out all the evidence *derived from* the incriminating statement as well? I submit, however, that admitting the derivative evidence makes little sense.

Nietzsche once observed that the commonest stupidity consists in forgetting what one is trying to do.<sup>48</sup> What was the *Miranda* Court trying to do? It was trying to get police interrogators to stop utilizing the methods they had used for a long time in order, in effect, to compel suspects to incriminate themselves—by implying that they, the police, have a *right* to an answer and that the suspect *had better answer or else*—or else matters would become so much the worse for him.<sup>49</sup> How can we expect (or even hope) to take away the police’s incentive to engage in such tactics if we exclude *only* the incriminating statements obtained in violation of the *Miranda* rules, but permit the use of *everything else* these statements bring to light?

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<sup>46</sup> 304 F.3d 1013 (10th Cir. 2002), *rev’d*, 124 S. Ct. 2620 (2004).

<sup>47</sup> 93 S.W.3d 700 (Mo. 2002), *aff’d*, 124 S. Ct. 2601 (2004).

<sup>48</sup> *Quoted in* LON J. FULLER, *THE LAW IN QUEST OF ITSELF* 41 (1940).

<sup>49</sup> Although the warnings are the best-known feature of the *Miranda* case, they are not the most important. As Professor Stephen Schulhofer has emphasized, *Miranda* contains a series of holdings: (1) informal pressure to speak can constitute “compulsion” within the meaning of the privilege against compulsory self-incrimination; (2) this element of informal compulsion is present in custodial interrogation; and (3) the now-familiar warnings (or some equally effective alternative) “are required to dispel the compelling pressure of custodial interrogation.” Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987). I share Professor Schulhofer’s view that “the core of *Miranda* is located in the first two steps.” *Id.*

At this point, a close discussion of the two *Miranda* “poisonous fruit” cases before the Supreme Court seems in order. One case grew out of the prosecution of Samuel Patane for being a convicted felon in possession of a firearm. Without administering a complete set of *Miranda* warnings,<sup>50</sup> a detective questioned Mr. Patane about the location of a Glock pistol he was supposed to own. The defendant responded that the weapon was on a shelf in his bedroom. This admission led almost immediately to the seizure of the weapon where the defendant said it was. The prosecution conceded that Patane’s admission in response to the questioning was inadmissible under *Miranda*, but argued that the physical fruit of the *Miranda* violation—the Glock pistol itself—should be admitted. A unanimous panel of the Tenth Circuit disagreed, concluding that “*Miranda*’s deterrent purpose would not be vindicated meaningfully by suppression only of Patane’s statement.”<sup>51</sup>

I can hear one argument for admitting the Glock pistol: A weapon or other physical evidence derived from an inadmissible statement is reliable, even though the statement itself may not be. At one time (a long time ago) that argument would have worked—but not anymore.

As the pre-*Miranda* due process/“voluntariness”/“totality of the circumstances” test evolved over the years, the concern that an “involuntary” or “coerced” confession might be unreliable—at one time the principal factor—became less important. As Illinois Supreme Court Justice Walter Schaefer, a leading criminal procedure commentator at the time, noted on the eve of *Miranda*, although the concern about unreliability “still exert[ed] some influence” in coerced confession cases, it had “ceased to be the dominant consideration.”<sup>52</sup> Indeed, added Justice Schaefer, “the Supreme Court has sometimes insisted upon the exclusion of confessions where reliability was not at all in doubt.”<sup>53</sup>

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<sup>50</sup> When the officer started to advise Mr. Patane of his *Miranda* rights, he interrupted the officer, informing him that he knew his *Miranda* rights. At this point, instead of continuing to advise Patane of his rights, the officer began questioning him. Some professors I have discussed this case with maintain, despite the prosecution’s concession that a violation of the *Miranda* rules did occur, that this was a hyper-technical violation at worst. But the error the officer made was failing to give Patane a chance to assert his rights. Even if an officer does give a suspect a complete set of *Miranda* warnings, questioning him immediately thereafter without offering him an opportunity to assert or to waive his rights would constitute a significant error.

<sup>51</sup> *Patane*, 304 F.3d at 1029.

<sup>52</sup> WALTER SCHAEFER, THE SUSPECT AND SOCIETY 10 (1967) (text of a lecture delivered *before* the *Miranda* case was decided).

<sup>53</sup> *Id.* at 10–11. Perhaps the most emphatic pre-*Miranda* statement of the point that the “untrustworthiness” of an “involuntary” or “coerced” confession is *not* the primary reason for excluding it may be found in *Rogers v. Richmond*, 365 U.S. 534 (1961), where the Court, per Frankfurter, J., stressed that the admissibility of an alleged involuntary confession must be determined “with complete disregard of whether or not petitioner in fact spoke the truth” and that “a legal standard which took into account the circumstances of probable truth or falsity . . . is not a permissible standard under the Due Process Clause . . .” *Id.* at 543–44.

(And in *Miranda* and its companion cases, of course, the Court *dwelt* not on whether the defendant's statements had been made under circumstances that rendered them untrustworthy, but whether they were obtained under circumstances that were inconsistent with the privilege against self-incrimination.<sup>54</sup>)

The other *Miranda* "poisoned fruit" case before the Supreme Court is a Missouri case that does not involve physical evidence, but a "second confession." When Patricia Seibert was arrested for murder, she was taken to the "interview room" where she was subjected to what might be called a two-stage interrogation. During the first-stage, which lasted at least thirty minutes, the officer who did the questioning deliberately failed to give her the *Miranda* warnings. Mrs. Seibert made several incriminating statements. After a twenty-minute break, the officer resumed the questioning. This time he did administer the *Miranda* warnings. The defendant signed a waiver form. During the second stage, the officer reminded the defendant of the statements she had made before the twenty-minute break. Thus, he was able to link together the unwarned questioning during the first stage with the warned questioning during the second. As hoped and expected, the defendant made more incriminating statements.

In an unusual display of candor, the interrogating officer testified that, as a result of the "interrogation training" he had received at an institute, he had made a "conscious decision to withhold" the *Miranda* warnings during the first session, hoping to obtain incriminating statements then, and hoping to get the defendant to repeat these statements during the second session.<sup>55</sup> Evidently the officer was counting on the fact that the incriminating statements made earlier (and his reminding her that she had made these statements earlier), would override the impact of the *Miranda* warnings given later.

The trial court suppressed only the unwarned portion of the interrogation and Ms. Seibert was convicted of second-degree murder. A 4–3 majority of the Missouri Supreme Court reversed, ruling that the statements made in the warned portion of the interrogation should have been excluded as well. "Were police able to use this 'end run' around *Miranda* to secure the all-important 'breakthrough' admission during the first stage of the interrogation," observed the majority, "the requirement of a warning would be meaningless."<sup>56</sup>

I can hear an argument for admitting the derivative evidence in both the *Patane* and *Seibert* cases. It is a two-part argument that runs as follows:

(1) As most of the justices recognized in *Chavez v. Martinez*,<sup>57</sup> a "completed" constitutional violation does not take place when a police officer questions a suspect in violation of the *Miranda* rules. For the *Miranda* violation to be "completed," the incriminating statements obtained by the police must be used against the defendant *in a criminal case*. Similarly a violation of the privilege against compelled self-

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<sup>54</sup> See *Miranda*, 384 U.S. at 491–99.

<sup>55</sup> *Seibert*, 93 S.W.3d at 702.

<sup>56</sup> *Id.* at 707.

<sup>57</sup> 538 U.S. 760 (2003).

incrimination, the constitutional provision upon which *Miranda* is based, is not “completed” unless and until the person who was compelled to speak is compelled “to be a witness against himself” in a “criminal case.”<sup>58</sup>

(2) Since questioning someone in violation of the *Miranda* rules does not *without more* violate the Constitution, a “stand-alone” violation of the *Miranda* rules does not constitute a “poisonous tree.” Since there is no “poisonous tree,” the “fruits” doctrine has no application. Indeed, *there is no* “poisoned fruit.” Therefore, evidence produced by, or brought to light as a result of, a statement obtained in violation of the *Miranda* rules should be admissible.

This is a clever argument. But I hope it does not work. I am convinced that it should not.

It must be kept in mind that the person who brought the Section 1983 action in *Chavez v. Martinez* was never prosecuted. Therefore no illegal evidence—direct or derivative—was ever used against him. But in both *Patane* and *Seibert* the evidence used against the defendants *was* derived from a violation of the *Miranda* rules. And ever since the 110-year-old case of *Counselman v. Hitchcock*<sup>59</sup> was decided, it has been plain that the privilege prohibits the derivative use, as well as the direct use, of compelled utterances.<sup>60</sup>

Although *Murphy v. Waterfront Commission*<sup>61</sup> upheld use and derivative use immunity (as opposed to transactional immunity), no member of the *Murphy* Court suggested that the Fifth Amendment permitted *anything less* than use and derivative use immunity; no justice challenged the view first expressed in *Counselman* that, as Justice White has described it, “the coverage of the privilege extend[s] to not only a confession of the offense but also disclosures leading to discovery of incriminating evidence.”<sup>62</sup> As I have observed elsewhere:

[W]hether the poisonous tree doctrine is regarded as an intrinsic part of the Fifth Amendment itself or as a doctrine that originated in the search and seizure cases and spilled over into the Fifth Amendment area, or whether, as

<sup>58</sup> U.S. CONST. amend. V.

<sup>59</sup> 142 U.S. 547 (1892).

<sup>60</sup> The essence of *Counselman* is its determination that the privilege protects against the derivative use, as well as the use, of compelled utterances. See Robert Dixon, Jr., *Comment on Immunity Provisions*, in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS at 1405, 1430–31 (1970). To quote *Counselman*, 142 U.S. at 586, the privilege prevents the government from using compelled testimony to gain “knowledge of . . . sources of information which may supply other means of convicting” a defendant. This portion of the opinion is, as the Court later called it, “the conceptual basis of *Counselman*.” *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

<sup>61</sup> 378 U.S. 52, 105 (1964).

<sup>62</sup> *Murphy*, 378 U.S. at 105 (White, J., concurring). “Following *Murphy*, Congress adopted a new immunity provision for federal witnesses, replacing transactional immunity with a prohibition against use and derivative use as to both federal and state prosecutions.” 3 WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY KING, CRIMINAL PROCEDURE § 8.11(a) (2d ed. 1999). The new federal provision was upheld in *Kastigar*, which quoted portions of Justice White’s concurring opinion in *Murphy* with approval. *Kastigar*, 406 U.S. at 461.

was said on the eve of *Kastigar*, the poisonous tree doctrine and *Murphy v. Waterfront Commission* . . . “seem to coalesce in result,” it is clear that both the Congress that enacted the 1970 immunity statute and the Court that upheld it operated on the premise that the poisonous tree doctrine applied to compelled statements.<sup>63</sup>

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Still another argument for admitting the derivative evidence in both *Patane* and *Seibert*—and the most formidable one—is that the Supreme Court has *already* made it clear that the “fruits” doctrine does not apply to violations of the *Miranda* rules. The key precedent, one that the government will be reading expansively and defense lawyers will be trying hard to minimize, is a 1985 case called *Oregon v. Elstad*.<sup>64</sup>

In that case two police officers went to the house of an 18-year-old burglary suspect and, without administering the *Miranda* warnings, asked him about his involvement in the burglary. The defendant replied, “Yes, I was there.” About an hour later, after he had been taken to the sheriff’s office, the defendant was advised of his *Miranda* rights for the first time. He waived his rights and gave the police a statement detailing his participation in the burglary. The Oregon Court of Appeals suppressed the statement made at the sheriff’s office as well as the one the defendant made in his own home. The U.S. Supreme Court reversed, rejecting the argument that the initial failure to advise the defendant of his rights when questioned in his home “tainted” his confession at the sheriff’s office. The Oregon court, pointed out Justice Sandra Day O’Connor for a 6–3 majority, had “misconstrue[d]” the protections afforded by *Miranda* by assuming that “a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’”<sup>65</sup>

There is, emphasized Justice O’Connor, “a vast difference between the direct consequences flowing from coercion of a confession by physical violence . . . and the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but noncoercive question, as in this case.”<sup>66</sup> At one point she described a person whose *Miranda* rights had been violated, but whose statements had not been actually coerced, as someone “who has suffered no identifiable constitutional harm.”<sup>67</sup>

The *Elstad* Court seemed to say—it certainly could plausibly be read as saying—that because a violation of *Miranda* is not a violation of a *real* constitutional right (but

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<sup>63</sup> Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 987–88 (1995). The quoted phrase is from Dixon, *supra* note 60, at 1424.

<sup>64</sup> 470 U.S. 298 (1985).

<sup>65</sup> *Id.* at 304.

<sup>66</sup> *Id.* at 312.

<sup>67</sup> *Id.* at 307.

only a rule of evidence designed to implement the privilege against self-incrimination), it is not entitled to, or worthy of, the “fruit of the poisonous tree” doctrine. Thus, unlike evidence obtained as the result of an unreasonable search or a coerced confession (which *are* real constitutional violations), secondary evidence derived from a *Miranda* violation, need not, and should not, be suppressed as the tainted fruit.

*Elstad* was one of the post-Warren Court cases that encouraged critics of *Miranda* to believe that some day the new Court would overrule that much-maligned case.<sup>68</sup> But that day never came. Instead, three and a half years ago, in the *Dickerson* case,<sup>69</sup> the Court struck down a federal statute purporting to abolish *Miranda*. Speaking for a 7–2 majority, Chief Justice William Rehnquist removed any doubts that “*Miranda* is a constitutional decision of this Court”<sup>70</sup> and reminded us that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”<sup>71</sup>

What about *Oregon v. Elstad*? Oddly, the Court had nothing negative to say about it. As for the argument that *Elstad* rested largely on the premise that *Miranda* is not a constitutional decision, the Chief Justice replied: “Our decision in [*Elstad*]—refusing to apply the traditional ‘fruits’ doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.”<sup>72</sup>

Showing uncharacteristic restraint, dissenting Justice Antonin Scalia retorted that the Court’s statement “is true but supremely unhelpful.”<sup>73</sup> Professor Susan Klein was less kind. She opined that the Chief Justice’s attempt to explain why the “fruits” doctrine operates differently in search and seizure and *Miranda* contexts “comes dangerously close to being a non sequitur.”<sup>74</sup>

If, as appears to be the case, *Dickerson* repudiated the premises on which *Elstad* and other *Miranda*-debilitating decisions are based, why didn’t the Court overrule *Elstad* or do a better job of explaining how *Elstad* can be reconciled with the view that *Miranda* is a constitutional decision? Probably because all the qualifications and exceptions to *Miranda* are going to remain in place.

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<sup>68</sup> See, e.g., *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

<sup>69</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>70</sup> *Id.* at 432.

<sup>71</sup> *Id.* at 437.

<sup>72</sup> *Id.* at 441.

<sup>73</sup> *Id.* at 455.

<sup>74</sup> Susan Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Criminal Procedure*, 99 MICH. L. REV. 1030, 1073 (2001).

Shortly after *Dickerson* was decided, I participated in a two-day conference on the meaning and significance of that case.<sup>75</sup> There appeared to be a strong consensus among criminal procedure professors that the majority opinion in *Dickerson* was a compromise opinion designed to obtain the largest majority possible on the narrow questions of *Miranda*'s continued vitality. There also seemed to be a consensus (one that I share, although I am quite unhappy about it) that what *Dickerson* reaffirmed (certainly as far as the Chief Justice and at least one or two other members of his majority are concerned) was not the robust *Miranda* that burst on the scene in 1966, but the *Miranda* that was bloodied and bruised by the Burger and Rehnquist Courts in the subsequent years. As one law professor who participated in the conference, Laurie Magid, expressed it, the *Dickerson* Court reaffirmed *Miranda* with all the exceptions it has acquired since 1966 "frozen in time."<sup>76</sup>

It is no secret that I think *Elstad* was wrongly decided.<sup>77</sup> However, if the consensus about the meaning of *Dickerson* is well-founded, it would be unwise to launch a frontal assault on *Elstad*. Nevertheless, it can be distinguished from the fact situations in *Patane* and *Seibert*.

*Elstad* does contain some sweeping language indicating that the Court was stripping, or prepared to strip, remedies for *Miranda* violations of the "fruits" doctrine entirely.<sup>78</sup> But *Elstad* may plausibly be read more narrowly than that.

At one point, the *Elstad* majority disparaged the causal connection between any psychological disadvantage created by a suspect's admission when not advised of his rights and his ultimate decision to cooperate with the police after being advised of his rights as "speculative and attenuated at best."<sup>79</sup> At another point the majority seemed to cast its holding in terms of a suspect's freedom to decide his own course of action: "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."<sup>80</sup> In short, as Justice William Brennan observed in his dissenting opinion, the *Elstad* majority relied in considerable part on

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<sup>75</sup> The papers that grew out of this conference were published in Symposium, *Miranda After Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

<sup>76</sup> It would be hard to deny that the various exceptions imposed on *Miranda* have made it a much less formidable doctrine than the Warren Court contemplated. The possibility cannot be ruled out, however, that one reason *Miranda* has endured as long as it has is that the narrow, grudging interpretations it has received in the past three and a half decades have so subdued its impact that many law enforcement officials now feel they can live comfortably with it.

<sup>77</sup> Indeed, two decades before *Elstad* was decided, at a conference held shortly after *Miranda* was handed down, I maintained that excluding statements obtained in violation of the *Miranda* rules, but admitting the evidence derived from such statements, would make little sense in light of the *Miranda* Court's goals. See A NEW LOOK AT CONFESSIONS: ESCOBEDO—THE SECOND ROUND 147–51 (B. James George, Jr. ed., 1967) (remarks of Yale Kamisar), *quoted with approval* by Justice Brennan, dissenting in *Elstad*, 470 U.S. at 358 n.40.

<sup>78</sup> See 470 U.S. at 305–09.

<sup>79</sup> *Id.* at 313–14.

<sup>80</sup> *Id.* at 318.

“individual ‘volition’ as an insulating factor in successive-confession cases”—a factor “altogether missing in the context of inanimate evidence [such as a Glock pistol].”<sup>81</sup>

This attempt to distinguish *Elstad* may not succeed. It certainly has not persuaded the many lower courts which have allowed the government to use physical evidence derived from *Miranda* violations.<sup>82</sup> (But few lower courts are enamored of *Miranda*.)

Judge Henry Friendly, probably the nation’s most eminent critic of *Miranda* (and the Warren Court’s criminal procedure cases generally), may have been the first commentator to argue that the fruits of *Miranda* violations should be admitted into evidence. He proposed this course of action as a way of reducing the impact of a rule that he believed tilted the criminal process too far in favor of criminal suspects. But he recognized his proposal posed substantial dangers. “It has been said,” he noted, that “‘what data there are’ suggest that the obtaining of leads with which to obtain real or demonstrative evidence or prosecution witnesses is more important to law-enforcement than getting statements for use in court.”<sup>83</sup>

If this is so (and it is hard to believe it is not in at least a considerable number of cases), and the Court informs the police they may use the physical evidence *Miranda* violations turn up, why would the police bother to comply with *Miranda*? Why would a police officer bent on obtaining a weapon or drugs or valuable documents care that a failure to give the *Miranda* warnings produces unusable answers if the answers yield usable fruits?

Although the challenged evidence in the *Patane* case is “derivative,” the line between the initial illegality and the derivative evidence is quite short. As Judge David Ebel, author of the Tenth Circuit opinion in *Patane* observed:

From a practical perspective, we see little difference between the confessional statement “The Glock is in my bedroom on a shelf,” which even the Government concedes is clearly excluded . . . and the Government’s introduction of the Glock found in the defendant’s bedroom on the shelf as the result of his unconstitutionally obtained confession. If anything, to adopt the Government’s rule would allow it to make *greater* use of the confession than merely introducing the words themselves.<sup>84</sup>

I find Judge Ebel’s point quite persuasive, but it may not impress a judge with a “legal mind.” What do I mean by that? A famous law professor of old, Harvard’s Thomas Reed Powell, used to say that if you can think about something that is related

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<sup>81</sup> *Id.* at 347 n.29.

<sup>82</sup> See David Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 835–36 (1992).

<sup>83</sup> Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 712 n.176 (1968); see also Henry J. Friendly, *A Postscript on Miranda*, in BENCHMARKS 266, 282 (1967); Wollin, *supra* note 82, at 845.

<sup>84</sup> 304 F.3d at 1027.

to something else without thinking about the thing to which it is related, then you have the “legal mind.”<sup>85</sup> Supporters of *Miranda* are hoping that there are not five members of the Supreme Court with that sort of mind.

The Court is more likely to affirm the Missouri case, *Seibert*, than to agree with the Tenth Circuit that the Glock pistol should be excluded. Although *Seibert* is a “successive confession” case like *Elstad*, it is different in an important respect—the gravity of the *Miranda* violation. (Courts are much more inclined to apply the “fruits” doctrine when the underlying illegality is purposeful or flagrant.)

The failure to administer the *Miranda* warnings to Mr. Elstad the first time the police talked to him seems to have been inadvertent. Indeed whether the defendant was in police “custody” (a precondition to triggering the *Miranda* warnings) when he made an incriminating statement to a police officer in his own living room, with his mother only a few steps away, is questionable. But the prosecution conceded Elstad was in custody (perhaps because it was eager to reach the “fruits” issue) and therefore the Supreme Court assumed that he was. The *Miranda* violation in *Seibert*, on the other hand, was quite deliberate. In fact, the officer who withheld the *Miranda* warnings admitted that he did so purposely. Indeed, he testified that he had been *trained* to use these tactics in order to get an admission of guilt.

Moreover, unlike *Elstad*, after the officer gave Ms. Seibert the *Miranda* warnings he reminded her of the statements she had made at the earlier questioning session, when she had not been advised of her rights. Thus, unlike the situation in *Elstad*, Ms. Seibert’s post-warning statements were closely tied to her earlier unwarned interrogation.

As those who have come with me this far are well aware, I believe that the Supreme Court ought to affirm both *Patane* and *Seibert*. But the need to exclude the derivative evidence in *Seibert* is especially compelling. For there the officer violated the *Miranda* Rules—as he was trained to do—for the very purpose of obtaining derivative evidence.

On the other hand, *because* the facts of *Seibert* are so extraordinary—the attempt by the police to circumvent the *Miranda* rules so deliberate and blatant—there is much to be said for the view that as a practical matter *Patane* is the more important case. As Judge Ebel observed in rejecting the argument that “there is a strong need for deterrence only where the officer’s actions were deliberate rather than negligent”:

Deterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect—and properly are trained to protect—the constitutional rights of citizens. The call for deterrence may be somewhat less urgent where negligence rather than intentional wrongdoing is at issue, but in either case we conclude that the need is a strong one.

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<sup>85</sup> So reported (in somewhat different form) in LON L. FULLER, *THE MORALITY OF LAW* 4 (1964) and Paul A. Freund, *Rationality in Judicial Decisions*, in *NOMOS VII RATIONAL DECISION* 109, 116 (Carl J. Friedrich ed., 1964).

Moreover, we conclude that a rule limiting . . . suppression of the physical fruits of a *Miranda* violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose. Even in cases where the failure to administer *Miranda* warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* would often be difficult or impossible . . . . An exclusionary rule turning on the subjective motivation of the police officer would burden courts with the difficult task of discerning, from the particular facts of each case, the thought processes of the officer that resulted in the *Miranda* violation . . . . We believe a rule that provides certainty in application and clarity for the officers charged with operating under it better serves the interests of citizens, officers, and judicial efficiency.<sup>86</sup>

There is a distinct possibility that the Supreme Court will disagree with me and admit the evidence in both the Missouri and Tenth Circuit cases. It should not be overlooked that three members of the seven-judge Missouri Supreme Court dissented in *Seibert*, emphasizing that "*Elstad* is still binding precedent"<sup>87</sup> and insisting that, according to that precedent, the traditional "fruits" doctrine developed in Fourth Amendment cases does not apply to unwarned questioning "so long as the initial unwarned statement is not actually coerced."<sup>88</sup> (On similar facts, one federal court of appeals recently reached the same conclusion.<sup>89</sup>)

If the Court agrees with the *Seibert* dissenters, we can be sure that police training instructors will call the decision to the attention of their students. Indeed, as the testimony of the interrogating officer in *Seibert* itself demonstrates, the police are *already* being instructed in how to exploit the loopholes provided by current *Miranda* law.

Missouri police are not alone. Five years ago, lawyers seeking to prohibit officers in two California police departments from questioning custodial suspects after they asserted their rights came upon police training materials that instructed officers to "go outside *Miranda*," that is, to continue to question someone who has asserted his right to remain silent or his right to counsel, so that the police could use the "fruits" of these violations.<sup>90</sup> Among the items discovered was a police training videotape on which a deputy district attorney told California police officers:

The *Miranda* exclusionary rule is limited to the defendant's own statement out of his mouth. That is all that is excluded under *Miranda*. It doesn't

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<sup>86</sup> 304 F.3d at 1028–29.

<sup>87</sup> 93 S.W.3d at 710.

<sup>88</sup> *Id.*

<sup>89</sup> See *United States v. Orso*, 266 F.3d 1030 (9th Cir.) (en banc), *full en banc rehearing denied*, 275 F.3d 1190 (9th Cir. 2001). *But see* the powerful opinion by Judge Trott, dissenting from the denial of the full court rehearing, *Orso*, 275 F.3d at 1192.

<sup>90</sup> See Weisselberg, *supra* note 40, at 189.

have a fruit of the poisonous tree theory attached to it . . . . [When we question someone who has invoked his *Miranda* rights] all we lose is the statement taken in violation of *Miranda*. We do not lose physical evidence that resulted from that. We do not lose the testimony of other witnesses that we learned about only by violating his *Miranda* invocation.<sup>91</sup>

The California deputy district attorney could turn out to be right. The Supreme Court could make it clear sometime during its new term that *Miranda* violations have no “fruits” doctrine—even when police officers deliberately violate *Miranda* pursuant to the “training” that instructors like the California deputy district attorney give them. If so, we should simply give *Miranda* a respectful burial.

#### VII. “ACTIVISTS,” “ADVOCATES” AND “SCHOLARS”

Whatever the outcome in the *Patane* and *Seibert* cases, the defense has certainly had its “day in court.” I have studied all the briefs with some care. I believe the defense lawyers in these cases did an excellent job. Moreover, thanks to the important contributions of three criminal procedure professors (Steve Schulhofer, Jim Tomkovicz and Charles Weisselberg), the defense (and the Supreme Court) had the benefit of several splendid *amicus* briefs—briefs of the same high quality as the famous ACLU brief written largely by Tony Amsterdam and Paul Mishkin in the *Miranda* case.

No doubt some will ask: Are law professors who write *amicus* briefs (or, for that matter, op-ed pieces, or who state their views on NPR) “activists,” “advocates” or “scholars”?

Is David Cole, who has challenged the Bush Administration’s post-9/11 grudging view of (or indifference to) the “rule of law” at almost every turn,<sup>92</sup> an advocate or a scholar? What about Steve Drizin, whose hard work to get Illinois to enact legislation requiring the electronic recording of police interrogation under certain circumstances finally paid off last year?<sup>93</sup> Can one live the life of an advocate or activist and still live the life of the teacher and scholar?

As many of you know, a great judge, Learned Hand, thought not. As he expressed it, “[y]ou may not carry a sword beneath a scholar’s gown . . . . You cannot

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<sup>91</sup> *Id.* at 191–92.

<sup>92</sup> For a concise summary of Professor Cole’s important contributions to maintaining civil liberties during a “war on terrorism,” see David Rudovsky, *Human Rights Hero: David Cole*, 31 HUM. RTS. 24 (Winter 2004). *Human Rights* is an official publication of the ABA Section on Individual Rights and Responsibilities.

<sup>93</sup> See Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogation Is the Solution to Illinois’ Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

leap into the breach to relieve injustice and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt.”<sup>94</sup>

The best of us make mistakes some times, and I submit that this is one of the times Learned Hand did.

Of course a law professor who addresses a problem or a cluster of problems should *start out* with an open mind or, as Judge Hand puts it, “an open ear to the cold voice of doubt.” But after hundreds of hours of reading and thinking about critical issues—such as the search-and-seizure exclusionary rule; the appropriate balance between police officer and suspect in the interrogation room; the relationships, if any between the crime rate and court decisions; the death penalty; and (to take some very recent examples) the distinction, if any, between prisoners of war and “unlawful enemy combatants” and the rights if any, of the hundreds of people detained in Guantanamo Bay—aren’t law professors *bound to reach some pretty firm conclusions*? And shouldn’t they tell the public, if the opportunity arises, *what* their conclusions are and *how* and *why* they reached them?

I would put it more strongly. I believe that in the past one hundred years the media has proclaimed so many “crime crises,” and law enforcement officials and politicians have warned us so often that “we cannot afford a civil liberties ‘binge’ at this perilous time” or expressed lack of confidence so many times in the capacities of our established institutions and traditional procedures to cope with the particular “emergency” of the day, that members of the academy who are knowledgeable about these matters have an *obligation* to enter the fray.<sup>95</sup>

Interestingly, one of Judge Hand’s close friends demonstrated by his own conduct that one *could* lead the life of the advocate as well as that of the scholar, and do both very well indeed. I have in mind Felix Frankfurter (not one of my favorite Justices,<sup>96</sup> but truly a remarkable law professor).

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<sup>94</sup> Learned Hand, *On Receiving an Honorary Degree*, in *THE SPIRIT OF LIBERTY* 134, 138 (Irving Dilliard ed., 1960).

<sup>95</sup> The attacks on the Warren Court for “coddling criminals” are well known. But I believe many would be surprised to learn that, according to the media, and many law enforcement officials and many politicians, the first two-thirds of the twentieth century was also a time when the nation was plagued by “crime crises”—caused or aggravated by ignorant and malleable juries, unscrupulous defense lawyers, and soft-hearted probation and parole officers and social workers. See Kamisar, *supra* note 20; Yale Kamisar, *The Rights of the Accused in a “Crime Crisis”*, in *POSTMORTEM: THE O. J. SIMPSON CASE* 211 (Jeffrey Abramson ed., 1996).

<sup>96</sup> From my vantage point, Felix Frankfurter had a mixed record as a Supreme Court justice. To his credit, he wrote the opinion of the Court in *McNabb v. United States*, 318 U.S. 332 (1943), establishing a rule, fashioned quite apart from the Constitution and in the exercise of the Court’s supervisory authority over the administration of federal criminal justice, that operated to exclude from federal prosecution all incriminating statements obtained during prolonged (and hence illegal) pre-arrest detention. Despite strong criticism, from law enforcement officials and politicians, the rule was reaffirmed in *Mallory v. United States*, 354 U.S. 449 (1957). Once again, Justice Frankfurter wrote the opinion of the Court. The *McNabb-Mallory* rule was a valiant effort to bypass conflicts over the nature of the secret interrogation and to minimize both the “temptation” and the “opportunity” to obtain confessions by impermissible means. Even before congressional dissatisfaction with the rule culminated in legislation that crippled it, however, the rule met a hostile reception in the lower federal courts.

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To his credit as well, in my view, was Justice Frankfurter's championing of what has been called the "police methods" approach to coerced confessions—the view, as Justice Frankfurter observed as early as 1952 for a majority of the Court in *Rochin v. California*, 342 U.S. 165, 173 (1952), that the use of coerced confessions "is constitutionally obnoxious not only because of their unreliability. They are inadmissible [in state as well as in federal courts] . . . even though statements obtained in them may be independently established as true [because they] offend the community's sense of fair play and decency." Although this approach to coerced confessions was resisted by some members of the Court, it is now widely accepted. *See, e.g.*, *Rogers v. Richmond*, 365 U.S. 534, 540–44 (1961); *Jackson v. Denno*, 378 U.S. 368, 376–77, 385–86 (1964); *Lego v. Twomey*, 404 U.S. 477, 485 (1972).

Moreover, Justice Frankfurter was the author of some of the most memorable lines ever uttered by a Supreme Court Justice. For example:

*McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J., for the Court): "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

*Fisher v. United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting): "A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt."

*United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting): "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment."

On the other hand, however, I believe Justice Frankfurter's opinion for the Court in *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding that state courts are free, if they wish, to admit evidence seized in violation of the prohibition against unreasonable search and seizure), *overruled in* *Mapp v. Ohio*, 367 U.S. 643 (1961), deserves all the criticism it has received—and it has received quite a lot.

"The function of an advocate," Justice Frankfurter once observed, "is to seduce, to seize the mind for a predetermined end, not to explore paths to truths." Felix Frankfurter, *Mr. Justice Jackson, in FELIX FRANKFURTER AND THE SUPREME COURT* 509, 511 (Philip Kurland ed., 1970). Few, if any, knew better than Frankfurter how powerful a form of advocacy the formulation of the "questions presented" could be. *See generally* Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257. By framing the issues and shaping the analysis the way he did in the *Wolf* case, Frankfurter, I venture to say, seduced many of us. *See generally* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 606–21 (1983).

Justice Frankfurter's *Wolf* opinion never satisfactorily explains why the demands of federalism do not prevent the Supreme Court from reversing state convictions based on coerced confessions (even when the confessions are independently corroborated and thus trustworthy), but these demands are strong enough to prevent the Court from reversing state convictions based on violations of the Fourth and Fourteenth Amendments. Nor does the opinion tell us why the Court considers it so significant that there are other ways of "enforcing" the protection against unreasonable searches and seizure (other *theoretical* ways, anyhow, such as tort actions and criminal prosecutions against offending police officers), when the Court never gave any weight to the fact that there are ways of "enforcing" the ban against coerced (but reliable) confessions (at least other theoretical ways) other than excluding the confessions.

Justice Frankfurter did not seem to realize that once you take the position that coerced confessions must be excluded even though they are indisputably trustworthy because they were obtained in violation of constitutional restraints on the police or under circumstances that offended "a sense of justice" or "our sense of fair play," it is very difficult to distinguish between violations of the Fourth Amendment and violations of the Fifth for purposes of "federalism."

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The *Wolf* opinion points out that the exclusion of evidence “is a remedy which *directly* serves only to protect those upon whose person or premises something incriminating has been found.” 338 U.S. at 31 (emphasis added). But the very same thing may be said of the ban against the use of coerced confessions. That prohibition, too, *directly* serves only to protect the victim of police misconduct who actually confesses (and, in many instances, only the victim of police misconduct whose confession actually “checks out”). Most victims of impermissible interrogation practices never do confess or never make a confession that leads to a prosecution. But the courts’ response has been, “So what? *This* defendant was the victim of impermissible police methods.”

Even though *Wolf* was overruled twelve years later, its influence still lingers. As I have observed elsewhere, *see* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, *supra*, at 616 (quoting William J. Mertens & Silas Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365(1981)):

By “driving a wedge between [the protection against unreasonable search and seizure] and the exclusionary rule,” “inject[ing] the instrumental rationale of deterrence of police misconduct into [the Court’s] discussions of the exclusionary rule,” and “using the empirically-based, consequentialist rationale of deterrence as support for [the Court’s] refusal to apply the exclusionary rule to the states,” the *Wolf* opinion not only made the result reached in that case more palatable, but it planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.

*Id.* at 379–80.

I cannot resist the temptation to go outside the criminal procedure field and mention two other opinions by Justice Frankfurter that I found quite disappointing: his opinion for the Court in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled in* *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and his concurring opinion in *Dennis v. United States*, 341 U.S. 494, 517 (1951). The *Gobitis* case is a good illustration of how Frankfurter often asked “loaded questions,” *i.e.*, framed the questions presented in such a way that they impelled the reader to want to answer them the way he did. In ruling that children of Jehovah’s Witnesses could be expelled from public schools for refusing to salute the flag, Justice Frankfurter inflated the governmental interests at stake enormously. These students could be compelled to salute the flag, Frankfurter told us, in the name of “promot[ing] national cohesion,” *id.* at 595, and because “[w]e are dealing with an interest inferior to none in the hierarchy of legal values.” *Id.* “National unity,” Frankfurter reminded us, “is the basis of national security.” *Id.*

Justice Frankfurter also instructed us that “[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment” and that “[t]he flag is the symbol of our national unity, transcending all internal differences.” *Id.* at 596. Moreover, to prevent the expulsion of these students, warned Frankfurter, “would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.” *Id.* at 597–98.

The *Dennis* Court rejected all freedom of expression challenges and upheld the convictions of various Communists for violating the Smith Act. What he would call judicial humility, and what others (including me) would call an inclination to abdicate the Court’s responsibility to interpret the Constitution, pervades Frankfurter’s concurring opinion in that case. Consider, for example, 341 U.S. at 551, 552:

Can we . . . say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government’s protection? . . .

The too easy transition from disapproval of what is undesirable to condemnation as unconstitutional, has led some of the wisest judges to question the wisdom of our scheme in lodging such authority in courts. But it is relevant to remind that in sustaining the power of Congress in a case like this nothing irrevocable is done. The democratic process at all events

Not only was Professor Frankfurter a leading administrative law and constitutional law scholar, he was also “the first systematic student of the Supreme Court as an institution.”<sup>97</sup> But he did not choose between the active and the contemplative life. As one who knew Frankfurter well said of him, “[h]e lived two lives without skimping either one—the life of the teacher and scholar and the life on the firing line of all the conflicts of his time . . . . Significantly one of his first efforts was with other lawyers to indict the witch-hunting excesses of Attorney General A. Mitchell Palmer.”<sup>98</sup>

Professor Frankfurter wrote editorials and articles for the *Atlantic*, the *Boston Herald* and the *New Republic*. “He it was, as much as any single man, who threw the country into a turmoil over Sacco and Vanzetti.”<sup>99</sup>

### VIII. SOME FINAL REMARKS

When I first began writing about criminal procedure I relied heavily on the foundational work of the commentators of the 1950s, such as Frank Allen, Caleb Foote, Bernard Meltzer, and Monrad Paulsen. In the '50s things were rather grim for criminal defense lawyers and their civil liberties allies. In some states, non-capital defendants who couldn't afford to hire a lawyer had to fend for themselves. State courts were free to admit illegally seized evidence and most did so. State courts and the Supreme Court, too, were upholding the admissibility of confessions obtained under circumstances that would jolt most of us today.

In the 1960s, things changed quite a bit. Those who share my views about the administration of criminal justice enjoyed some important victories. Unfortunately, events in the past thirty-five years have reminded us that here, as elsewhere, “there is no *final* victory.”<sup>100</sup> No matter how great the triumph, without further struggle—and sometimes *despite* further struggle—the triumph may fade away.

But we would do well to remember what Allen, Paulsen and the other criminal procedure commentators of the 1950s never forgot: there is no final *defeat* either.

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is not impaired or restricted. Power and responsibility remain with the people and immediately with their representatives.

*Id.*

<sup>97</sup> *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Frankfurter*, 382 U.S. XIX at XXXIV (remarks of Attorney General Nicholas Katzenbach).

<sup>98</sup> *Id.* at XXIV–XXV (remarks of Dean Acheson).

<sup>99</sup> Alexander M. Bickel, *Felix Frankfurter*, 78 HARV. L. REV. 1527, 1527 (1965).

<sup>100</sup> Francis A. Allen, *On Winning and Losing*, in LAW, INTELLECT, AND EDUCATION 16 (1979) (emphasis added).

## POSTSCRIPT

Several months after the preceding pages were written, the U.S. Supreme Court handed down its decisions in the *Patane* and *Seibert* cases.<sup>101</sup> I discuss these rulings in another article that appears elsewhere in this issue of the *Journal*.<sup>102</sup>

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<sup>101</sup> See *United States v. Patane*, 124 S. Ct. 2620 (2004); *Missouri v. Seibert*, 124 S. Ct. 2601 (2004).

<sup>102</sup> See Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004).