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## FRED E. INBAU: "THE IMPORTANCE OF BEING GUILTY"\*

YALE KAMISAR\*\*

"The scholar may lose himself in schools, in words and become a pedant; but when he comprehends his duties, he above all men is a realist."

—Emerson

### I

As fate would have it, Fred Inbau graduated from law school in 1932, the very year that, "for practical purposes the modern law of con-

\*[Another] general trend has been the Burger Court's concern with what I call the importance of being guilty. . . . From the defense point of view this means that in the argument of a case at the appellate level it is extraordinarily important today, as it really was not in the 1969's, to try to establish for the client a tolerable claim of innocence. Looking at the same litigation from the State's point of view, the State representative in appellate litigation today should be clear in arguing that regardless of what occurred in the proceedings, the individual defendant before the court is a guilty individual. . . . That kind of argument is likely to be persuasive with the Burger Court in a way that it clearly would not have been with the Warren Court.

Whitebread, *Trends in Constitutional Law: A Forecast*, in CONSTITUTIONAL LAW DESKBOOK 9-1 (National College of District Attorneys ed. 1977). See also Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

The argument that "the individual defendant before the court is a guilty individual" can carry only so far. That it did not prevail in the recent case of *Brewer v. Williams*, 97 S. Ct. 1232 (1977), hardly refutes Professor Whitebread's point. If anything, the fact that "Williams is guilty of the savage murder of a small child; no member of the Court contends that he is not," *id.* at 1248 (Burger, C. J., dissenting), persuaded, or helped persuade, four Justices to uphold the admissibility of the confession in the face of "so clear a violation of the Sixth and Fourteenth Amendments as here occurred," *id.* at 1248 (Stewart, J., majority opinion) tends to support Whitebread's view.

Inbau, of course, would have no trouble at all upholding Williams' confession. Indeed, the detective's "Christian burial speech" ("[Y]ou yourself are the only person that knows where this little girl's body is. . . . I feel [that the parents] should be entitled to a Christian burial for [their] little girl [and that] we should stop and locate it on the way . . .")

stitutional criminal procedure [began], with the decision in the great case of *Powell v. Alabama*."<sup>1</sup> In "the 'stone age' of American criminal proce-

reads like an Inbau hypothetical. The "speech" would only get results if Williams were guilty; it "did not, and was not likely to, jeopardize the fairness of [Williams'] trial or in any way risk the conviction of an innocent man" 97 S. Ct. at 1259 (White, J., joined by Blackmun and Rehnquist, JJ., dissenting). And Inbau's "test of confession admissibility" has long been:

"Is what I am about to do or say apt to make an innocent person confess?"

If the answer to the above question is "No," the interrogator should go ahead and do or say whatever was contemplated. . . .

In our judgment this is the only understandable test of confession admissibility. . . . Moreover, it is also the only test that is fair both to the public and to the accused. . . .

F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 157 (1st ed. 1962). Although this was the original meaning of the "voluntariness" test, it cannot be squared, I submit, with what the Court had been doing in the fifteen years preceding *Escobedo v. Illinois*, 378 U.S. 478 (1964), nor even, perhaps, what it did as early as *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). See A. BEISEL, *CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 70-86 (1955); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 20-25 (1953); Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 233-40 (1959); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 326-29, 343, 347-49 (1954); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 417-23 (1954). See generally Kamisar, *What Is an Involuntary Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963). See also Kamisar, *A Confession's Trustworthiness, It is Argued, Isn't Enough*, N.Y. Times, May 14, 1977, at 19, col. 2.

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<sup>1</sup> Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 521.

ture,"<sup>2</sup> Inbau began his long fight to shape or to retain rules that "make sense in the light of a policeman's task,"<sup>3</sup> more aware than most that so long as the rules do so, "we will be in a stronger position to insist that [the officer] obey them."<sup>4</sup>

Inbau was a pioneer in American constitutional criminal procedure and something of a prophet. He discerned events in their beginnings, he foresaw what was coming and he forewarned others.

This is evident in his 1942 book, *Lie Detection and Criminal Interrogation*,<sup>5</sup> where he sought to classify the kinds of cajolery and deception to which the police interrogator might and must not resort—and to explain why—an issue which at this late date is still "largely unresolved."<sup>6</sup> It is evident, too, in Inbau's famous 1948 article, *The Confession Dilemma in the United States Su-*

*preme Court*,<sup>7</sup> where, drawing upon his rich law enforcement background, he roundly condemned the *McNabb* decision<sup>8</sup> on the very grounds upon which the *Mallory* case<sup>9</sup> was criticized fourteen years later and for the very reasons that the so-called *McNabb-Mallory* rule was repealed, more or less, some twenty-five years later.<sup>10</sup>

Inbau's pioneering spirit was also evident in his very first classes at the Northwestern University School of Law. So one of his most illustrious students, Frank Allen, himself a great explorer and early pathfinder in this field, has often told me. Inbau wrung dry the relatively few Supreme Court cases then on the books, perceiving and fretting over all their "dangerous" implications. Long before there were any courses or casebooks bearing that title, Inbau taught criminal procedure and its constitutional dimensions—all the while he yearned for, and fought for, the day when criminal procedure would have no (or at least very few) constitutional dimensions.

How did his students receive him? How did the world receive him? Inbau is — well, Inbau. In the classroom, no less than outside, he was (depending upon your point of view), amusing or exasperating, sensible or outrageous, inspiring or infuriating. Whatever the various reactions he engenders, however, I doubt that any of his students could forget him or his subject matter or how deeply he cared about it. Many of his students, hopefully, were less impressed than he with "the importance of being guilty," but (long before this could be said of most law faculties) all of his students, happily, were bound to be impressed with the importance of constitutional criminal procedure.

*McNabb* (1943) and *Ashcraft* (1944)<sup>11</sup> greatly worried Inbau. Although the *McNabb-Mallory* rule, which held inadmissible in federal courts incriminating statements made during unlawful detentions, was fashioned "quite apart from the Constitution"<sup>12</sup> and in the exercise of the Court's "supervisory authority over the administration of [federal] criminal justice,"<sup>13</sup> Inbau feared that some day the Court would find it

<sup>2</sup> Kamisar, *Kaufer's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 16 (1974).

<sup>3</sup> Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 66 (1957).

<sup>4</sup> *Id.* But Inbau also told the police, very early in his career, that they themselves "must share a large portion of the blame for the unfortunate practical result of decisions such as those in the *McNabb* [case]. Known instances of miscarriages of justice resulting from the use of force and threats in obtaining confessions have rightfully induced the courts to view with caution all criminal confessions. Better interrogation practices on the part of the police profession as a whole would undoubtedly result in sounder and more practical legal decisions involving criminal confessions." Inbau, *The Courts on Confessions*, THE POLICE DIGEST, Dec. 1943, at 13, 15.

<sup>5</sup> F. INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 119-33 (1st ed. 1942).

<sup>6</sup> H. UVILLER, *THE PROCESS OF CRIMINAL JUSTICE: INVESTIGATION* 569 (1974). "Oddly," notes Professor Uviller, "the few [post-*Miranda*] lower court decisions addressing deception in interrogation seem reluctant to forbid all forms of misrepresentation, particularly [when] neither shocking nor of the sort which creates the hazard that the innocent suspect might be induced to confess falsely." *Id.* See *Frazier v. Cupp*, 394 U.S. 731 (1969) (admitting a confession in a pre-*Miranda* case although the police had falsely told the defendant that another had confessed and had also "sympathetically" suggested that the victim's homosexual advances may have started the fight). See also *Oregon v. Mathiason*, 97 S. Ct. 711 (1977) (per curiam) (holding that *Miranda* warnings need not have been given under the circumstances). "Whatever relevance [the interrogator's false statement to defendant that his fingerprints had been discovered at the scene] may have to other issues in the case, it has nothing to do with whether [defendant] was in custody for purposes of the *Miranda* rule." *Id.* at 714.

<sup>7</sup> 43 ILL. L. REV. 442 (1948).

<sup>8</sup> *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>9</sup> *Mallory v. United States*, 354 U.S. 449 (1957).

<sup>10</sup> 18 U.S.C. § 3501(c) (1970).

<sup>11</sup> *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

<sup>12</sup> 318 U.S. at 341.

<sup>13</sup> *Id.*

mandated by the "minimal historical safeguards . . . summarized as 'due process of law,'"<sup>14</sup> and thus binding on state courts as well as federal. *Ashcraft* alarmed him no less than *McNabb*. The *Ashcraft* Court had branded thirty-six hours of continuous police interrogation "inherently" or "conclusively" coercive, and Inbau feared that some day the Court would regard all extended police questioning—maybe even any police questioning—"inherently coercive." To Inbau, then, *McNabb* and *Ashcraft* were unexploded grenades rolling around in the interrogation room—and he reacted accordingly. Inbau thought, as did I (arriving on the scene much later), that *McNabb* would explode first,<sup>15</sup> but we now know that it only fizzled. The live bomb, and the bigger one, turned out to be that contained in *Ashcraft*.<sup>16</sup>

The only thing I have ever found surprising about the *Ashcraft* case is that three Justices dissented.<sup>17</sup> I wish a tape recording of this long

<sup>14</sup> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law'. . . ." *Id.* at 340 (Frankfurter, J.). Inbau often referred to the *McNabb* case or the *McNabb-Mallory* rule as the "civilized standards" rule. See note 48 *infra*.

<sup>15</sup> See, e.g., *Watts v. Indiana*, 338 U.S. 49, 57 (1949) (Douglas, J., concurring): "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. . . . We should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil."

<sup>16</sup> Cf. Brief for the State of Illinois, *Escobedo v. Illinois*, 378 U.S. 478 (1964), reprinted in Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 522 (4th ed. 1974):

'To push the right to counsel back to the point of arrest and to exclude all incriminating statements obtained from an uncounselled defendant anytime thereafter as a product of a fourteenth amendment violation would be, in effect, to impose the *McNabb-Mallory* rule on the states.' [quoting Kamisar, *The Right to Counsel and the Fourteenth Amendment*, 30 U. CHI. L. REV. 1, 9 (1962).] Indeed, it would be to go beyond the *Mallory* rule which forbids the admission in evidence only of those statements taken during a period of unlawful detention which may not, in any given case, begin at the moment of arrest.

<sup>17</sup> 322 U.S. at 156 (Jackson, J., joined by Roberts & Frankfurter, J.J., dissenting).

stretch of questioning had been available and that the Justices had listened to it, much as they view "dirty movies" in a screening room set up for that purpose. Whether or not a Justice can intelligibly define "coercive questioning," I think he would "know it" when he heard it.<sup>18</sup>

I have often played portions of the tape-recorded six-hour interrogation in the *Biron* murder case<sup>19</sup> to my students. The interroga-

<sup>18</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>19</sup> *State v. Biron*, 266 Minn. 272, 123 N.W.2d 392 (1963), noted in 48 MINN. L. REV. 160 (1963).

Biron was questioned by members of the homicide division of the Minneapolis police department. The decision to tape record the questioning was not made with the intent to offer the tape in evidence (or with any expectation that it would wind up in evidence), but on the premise that the suspect would "crack" quickly and that the playing of Biron's taped confession to his accomplices would lead them to do likewise. But Biron "held out" longer than expected and various detectives took turns questioning him, some of whom did not know they were on tape.

Biron's defense lawyer somehow learned that a tape of his client's police interrogation existed and when a member of the homicide division so admitted, the tape was put into evidence. Copies are on file in the University of Minnesota and University of Michigan law libraries.

The five detectives who questioned Biron at one time or another were veteran interrogators. Shortly thereafter, one of them became head of the police department. Some of their tactics, such as those the Minnesota Supreme Court held invalidated Biron's confession, would be sharply condemned by Inbau, e.g., the misrepresentation that despite the fact Biron was slightly "over-age" he might be treated as a juvenile offender if he "cooperates." As the extracts in the next footnote illustrate, however, many of their interrogation techniques were recommended by the standard manuals, e.g., keeping the "subject" on the defensive, displaying an air of confidence in the "subject's" guilt, stressing the futility of resistance, sympathizing with the offender, and minimizing the moral seriousness of his offense. See the discussion in *Miranda v. Arizona*, 384 U.S. 436, 449-55 (1966). See also Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 729-32 (1963); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L.C. & P.S. 21, 23-26 (1961), reprinted in *POLICE POWER AND INDIVIDUAL FREEDOM* 153, 155-58 (C. Sowle ed. 1962).

There is no reason to think that the tactics employed by Biron's experienced interrogators were any different than those they had utilized in scores of other cases over the years. So far as I know, this was the only "confession" they ever lost (at least up to that point), and it was also the only time a tape of their interrogation appeared in the record.

tors neither engaged in nor threatened any violence but their urging, beseeching, wheedling, nagging Biron to confess is so repetitious and so unrelenting<sup>20</sup> that *two hours of listening* is about all most students can stand. Thirty-six hours? Breathes there a police interrogator who can *question* anyone for that length of time? Small wonder that Ashcraft's interroga-

tors questioned him "in relays"; that "*they* became so tired they were compelled to rest."<sup>21</sup> I venture to say that if there had been a tape recording of the Ashcraft interrogation and the Justices had listened to it in a "hearing room" set up for that purpose, long before the tape had ended they would have rushed out the door aghast—or staggered out, in a near-catatonic state.

Maybe not. Maybe Justice Jackson, for one, would have stayed there, to the bitter end, pondering: "Did Ashcraft do it? Did he kill his wife?"

There is reason to think Ashcraft did. The man he named as his wife's killer reminded him that he did not intend to take the entire blame, promptly admitted the killing and accused Ashcraft of hiring him to do the job. After the interrogation, when examined by his family physician, Ashcraft neither complained of his treatment nor avowed his innocence. Instead he made what this friendly doctor described as an "entirely voluntary" statement *explaining why* he had killed his wife.<sup>22</sup>

Ashcraft is a great case only because Jackson's dissent made it so. The dissent is worth quoting at length. No piece of writing by Jackson better illustrates this self-described "country lawyer's" famed powers of advocacy and his "extraordinary quality of freshness and directness of approach."<sup>23</sup> And no opinion by any judge, I think, better captures both the style and substance of Inbau's views on police interrogation and confessions:

Interrogation *per se* is not, while violence *per se* is, an outlaw. Questioning is an indispensable instrumentality of justice. It may be abused, of course, as cross-examination in court may be abused, but the principles by which we may adjudge when it passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply. And they call for a more responsible and cautious exercise of our office. For . . . we cannot read an indiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.

<sup>21</sup> 322 U.S. at 149 (emphasis added).

<sup>22</sup> See *id.* at 165-67 (Jackson, J., dissenting).

<sup>23</sup> John Lord O'Brien, in MR. JUSTICE JACKSON 9 (Legal Studies of the William Nelson Cromwell Foundation, 1969) (introduction to speech by Hon. Charles S. Desmond in honor of Justice Jackson).

<sup>20</sup> A representative sampling follows:

All we're interested in is the truth, John. . . . We'll *know* when you're lying. . . . You don't know *what* we know, do you? You don't know *one bit*. . . . Now, we know you didn't *intend* to kill this woman. . . . You ain't the *only* guy who ever made a mistake. . . . All we want is the *truth*, John. . . . Well, were you drinking? You didn't *deliberately* set out to kill a woman. You aren't that kind of a kid. We know that. . . . You're in trouble, John; let us help you. . . . Just get it off your chest. We know you didn't *mean* to kill her. . . . You've already told us part of the story. You've gone part way, now go all the way. . . . All we're interested in is the truth. . . . Why you've got to lie to cover a lie, *you know that*. . . . You've gone part way, why not go all the way? Help yourself for a change. . . . Make it easy on yourself, make it easy on everybody. . . . *Everybody* makes mistakes. This isn't John the Baptist you're talking to, you know. . . . Quit lying. We know when you're lying. . . . This is *your opportunity* to help yourself. We don't have to waste our time with you. We *know* you did it. You're in the crap—right up to your ears. This is your opportunity. We've got you—we've got you *good*. . . . Quit lying. . . . If you're not lying, how come you're so nervous? . . . You just can't bring yourself to admit it. . . . It takes a lot of guts to tell the truth. . . . You'll feel a lot better when you get it off your chest. You're not stupid. You *know that*. . . . Were you drinking? All it takes is a couple of drinks and your mind gets woozy. Is that how it happened? . . . It's not unusual for a kid like you to get into trouble. You're *in trouble*, my friend; this is your chance to get out of it. . . . This has happened before; you're not the first kid to get into trouble. . . . Look, I've heard everything in this business. There isn't *anything* you can tell me which will shock me. . . . Now, we know you're not a killer. You aren't that kind of a kid. We know you didn't *deliberately* kill this woman. . . . Help yourself for a change. *Let us* help you. . . . All we're interested in is the truth. . . .

The Minnesota Supreme Court reversed Biron's conviction on the ground that false legal advice vitiated the confession. The court never suggested that the gnawing police questioning might be inherently coercive or inherently violative of Biron's right to counsel or the privilege against self-incrimination; indeed it repeatedly referred to the interrogation sessions as "interviews." On this latter point, see note 24 *infra*.

It probably is the normal instinct to deny and conceal any shameful or guilty act. Even a "voluntary confession" is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him. The term "voluntary" confession does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt. "Voluntary confessions" in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial. To speak of any confessions of crime made after arrest as being "voluntary" or "uncoerced" is somewhat inaccurate, although traditional.

A confession is wholly and uncontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention . . . .

But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive"? . . .

That the inquiry was prolonged and persistent is a factor that in any calculation of its effect on Ashcraft would count heavily against the confession. But some men would withstand for days pressures that would destroy the will of others in hours. Always heretofore the ultimate question has been whether the confessor was in possession of his own will and self-control at the time of confession . . . .

This evidence shows that despite the "inherent coerciveness" of the circumstances of his examination, the confession when made was deliberate, free, and voluntary in the sense in which that term is used in criminal law. This Court could not, in our opinion, hold this confession an involuntary one except by substituting its presumption in place of analysis of the evidence and refusing to weigh the evidence even in rebuttal of its presumption.

. . . .

I am not sure whether the Court denies the State all right to arrest and question the husband of the slain woman. No investigation worthy of the name could fail to examine him. Of all persons, he was most likely to know whether she had enemies or rivals . . . .

Could the State not confront Ashcraft with his false statements and ask his explanation? He did not throw himself at any time on his rights, refuse to answer, and demand counsel, even

according to his own testimony. The strategy of the officers evidently was to keep him talking, to give him plenty of rope and see if he would not hang himself. He does not claim to have made objection to this. Instead he relied on his wits. The time came when it dawned on him that his own story brought him under suspicion, and that he could not meet it. Must the officers stop at this point because he was coming to appreciate the uselessness of deception?

Then he became desperate and accused [Ware]. Certainly from this point the State was justified in holding and questioning him as a witness, for he claimed to know the killer. That accusation backfired and only turned up a witness against him. He had run out of expedients and invention; he knew he had lost the battle of wits. After all, honesty seemed to be the best, even if the last, policy. He confessed in detail.

At what point in all this investigation does the Court hold that the Constitution commands these officers to send Ashcraft on his way and give up the murder as insoluble? If the State is denied the right to apply any pressure to him which is 'inherently coercive' it could hardly deprive him of his freedom at all.<sup>24</sup>

<sup>24</sup> 322 U.S. at 160-69. See also *Watts v. Indiana* 338 U.S. 49, 57, 60-62 (1949) (Jackson, J., concurring). See generally, Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U. L. REV. 77 (1957); Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16 (1961), reprinted in *POLICE POWER AND INDIVIDUAL FREEDOM* 147 (C. Sowle ed. 1962). Inbau, *Law Enforcement, the Courts and Civil Liberties*, in *CRIMINAL JUSTICE IN OUR TIME* 97 (A. Howard ed. 1965).

Inbau, I am certain, also applauded Justice Jackson's criticism of the *Ashcraft* Court's use of emotive words: "This questioning is characterized as a 'secret inquisition,' involving all of the horrendous historical associations of those words . . . [A]ny questioning may be characterized as an 'inquisition,' but the use of such characterizations is no substitute for . . . detached and judicial consideration . . ." 322 U.S. at 168. Cf. *Hearings on H.R. 7525 and S. 486 Before the Senate Comm. on the District of Columbia*, 88th Cong., 1st Sess. 323, 329-30 (1963) (statement of Fred E. Inbau distinguishing between "persuad[ing]" a person to confess or "play[ing] upon his sympathies to get him to tell you the truth" and "extracting" a confession or "put[ting] [someone] through the wringer to get it"). [hereinafter cited as *1963 Senate Hearings*].

Of course, few advocates of any position are able to eschew emotive language. See, e.g., *THE MEDIA AND THE LAW* 2-3 (H. Simmons & J. Califano ed. 1976) ("gag" orders vs. "protective" orders; "national security" vs. "the right of the public to know"). Critics of police interrogation do use threatening and perjorative terms, but defenders of the system are no slouches themselves in the art of wordsmanship. The

Justice Black, who wrote the opinion for the Court in *Ashcraft*, no less than Justice Jackson, who authored the ringing dissent, knew full well that in 1944 neither the Court nor "the country" was "ready"<sup>25</sup> for an affirmative answer to the question, "[D]oes the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'?" As we now know, it was not until 1966 that the Court, if not "the country," grew "ready."<sup>26</sup> There is cause to wonder whether "the country" will ever grow "ready." And there is reason to think that the present Court is growing weary.<sup>27</sup>

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veteran special agent of the Kansas Bureau of Investigation, Alvin A. Dewey of *In Cold Blood* fame, likened a police interrogator to a "good salesman . . . selling insurance or a car [who] cannot do his job if a competitor is standing by, and that is the situation for the [interrogator] with the presence of an attorney." Statement before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, July 21, 1966, at 2 (mimeo) (on file in the University of Michigan Law Library). He also defined the "interrogation room" as a place "where people can talk in privacy which is nothing more than an attorney desires in talking to his client or a doctor in talking to his patient." *Id.* Similarly, Chief Stanley Schrotel of the Cincinnati Police Department, then the immediate past president of the International Association of Chiefs of Police, told a Senate Committee that "in the interrogation room . . . you have something akin to a lawyer-client relationship, a doctor-patient relationship." 1963 *Senate Hearings, supra* at 286, 294. He also pointed out that "it takes a very skillful kind of interview, a proper kind of environment, in order to establish the rapport" necessary to get a heinous offender to confess. *Id.* at 293. Inbau himself has likened effective police interrogation to an "unhurried interview" and sought legislative authority "for a reasonable period of police detention" for the interrogation of suspects "not unwilling to be interviewed." Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16, 18-21 (1961), reprinted in *POLICE POWER AND INDIVIDUAL FREEDOM* 147, 149-52 (C. Sowle ed. 1962).

Do not those who use such clean, soft words to describe what typically must be a grim, unpleasant (frightening? cruel?) experience contribute to "linguistic pollution, upsetting the ecological balance between words and their environment"? See Schlesinger, *Politics and the American Language*, 43 AMERICAN SCHOLAR 553, 556 (1974).

<sup>25</sup> Cf. A. LEWIS, GIDEON'S TRUMPET 221-22 (1964).

<sup>26</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>27</sup> It is probably true that today "nobody, 'liberal' or 'conservative,' is happy with *Miranda*," Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U.L. Rev. 516, 526 (1976), and there is substantial cause for viewing it as "at best a tense, temporary, ragged

## II

It is well known, and it is quite understandable, that the forthright and occasionally irreverent Inbau is greatly admired—adored may not be too strong a word—by the thousands of law enforcement officials who flock to his "short courses" or applaud his hard-hitting speeches at their conferences and conventions. And it is also no secret, and again not surprising, that many of his fellow law professors do not hold him in the same regard.

Inbau is an expert, make no mistake about that, but he is an expert with a maverick strain. He was, and always will be, the spokesman for the plain man, no less than for the police officer and the prosecutor. But the typical expert does not understand the plain man. "What he knows, he knows so thoroughly that he is impatient with men to whom it has to be explained."<sup>28</sup> The typical expert "lacks contact with the plain man. He not only does not know what the plain man is thinking; he rarely knows how to discover his thoughts. He has dwelt so austere in his laboratory or his study that the content of the average mind is a closed book to him."<sup>29</sup>

Inbau can, and does, stir the multitudes. His writing and speaking is "blood-warm";<sup>30</sup> his words are "loaded with life."<sup>31</sup> One of his weapons is "the homely illustration which makes its way and sinks deep by its appeal to everyday experience."<sup>32</sup> This, written on the eve of the "stop and frisk" cases,<sup>33</sup> is typical Inbau:

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truce between combatants," *Id.* Nevertheless, I doubt that *Miranda* will be formally overruled. But see F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE 355 (1974). If *Miranda*, or some form of it, does survive, however, it will probably be only because niggardly interpretations of it, e.g., *Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Mathiason*, 97 S. Ct. 711 (1977), have sufficiently soothed its critics on the Court.

<sup>28</sup> Laski, *The Limitations of the Expert*, 162 HARPER'S MONTHLY 101, 104 (1930).

<sup>29</sup> *Id.* at 106.

<sup>30</sup> Emerson, *The American Scholar*, in THE PORTABLE EMERSON 44 (M. Van Doren ed. 1946).

<sup>31</sup> *Id.* at 32.

<sup>32</sup> Cardozo, *Law and Literature*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 18 (1931).

<sup>33</sup> *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968).

Several months ago I received a notice from the Internal Revenue Service to come to its Chicago office to explain a couple of business expense deductions. One related to a deduction for "an office in home." That referred to a deduction I listed for 1/6 of my apartment rent — for a sizeable den used exclusively for my book writings and various other writings, which, incidentally, account for a third of my total income.

It seemed odd that there should be any question about this. It also seemed odd that any question would be raised as to the other modest items of expense charged against these extra-curricular income producing activities.

Anyway, I spent several hours locating checks and records to substantiate these deductions — time I would have preferred to use in writing new books or articles. I also appeared in the IRS office at the designated time of 9:30 A.M. I sat in a waiting room for my name to be called — all the while feeling like a charity patient in a health clinic. At 10:05 my name was called, and as I walked by, some of the other assembled suspects, one of them — whom I did not know but who obviously knew me — exclaimed: "Inbau; you too!"

This was not an exhilarating experience, I assure you. Nor did I enjoy baring my financial soul to the young lady who grilled me for about twenty minutes.

I hasten to relieve you of any concern over my future; I was "exonerated"; my return was approved.

The various tax reports and various other kinds of reports which a business man has to make to the Federal and State Governments require many disclosures of a private nature and a failure to disclose may incur severe penalties or even a discontinuance of the business itself. Safety and health inspectors of businesses call for privacy intrusions. In the labor relations area, a company has to subject itself to a lot of disclosures, and to the demands of labor unions — privacy invasions, they may be fairly called.

Those of you who have travelled abroad and have had to submit to a customs inspection of your luggage know what it is to have your privacy invaded.

Now don't misunderstand me. I am not saying, or even intimating, that it is wrong for the Internal Revenue Service to ask me to explain my return. Spot checks, or checks based upon suspicion of a false return, are necessary and in the public interest. The same holds true for the disclosures and inspections required of businesses and travellers. *The point I want to make, however, is that if we so-called law abiding citizens have to submit to these indignities and invasions of*

*our privacy — all in the interest and welfare of the public at large — I find it hard to understand why anyone, or any group, should complain so vociferously when a police officer, acting upon reasonable suspicion and in a reasonable manner, requests the identity of, or an explanation from, a person on a dark street at 3 A.M. in a neighborhood which has been experiencing a high incidence of serious crimes. And why, once the officer does this, should he not be permitted, for his own protection, to frisk the detained person in order to be sure he is not armed with a dangerous weapon.*<sup>34</sup>

Yes, Inbau could stir the multitudes. He wrote (horrors) for the *Reader's Digest*<sup>35</sup> as well as the *Police Digest*,<sup>36</sup> the *Police Journal*<sup>37</sup> and the *Police-Law Review*.<sup>38</sup> He addressed not only the Conference of Chief Justices<sup>39</sup> and various annual conventions of the National District Attorneys Association,<sup>40</sup> but the National Association of Independent Insurers,<sup>41</sup> the Chicago Association of Commerce and Industry<sup>42</sup> and a gathering of college alumni at "homecoming."<sup>43</sup>

<sup>34</sup> Unpublished address by Fred E. Inbau, "Misconceptions Regarding Lawlessness and Law Enforcement," Northwestern Law Alumni Annual Luncheon, Chicago, Ill. (Sept. 26, 1967) at 4-6 (on file in the Northwestern and Michigan law libraries).  
<sup>35</sup> Inbau, *Behind Those "Police Brutality" Charges*, 89 *READER'S DIGEST* 1 (July 1966).

<sup>36</sup> See note 4 *supra*.

<sup>37</sup> Inbau, *Misconceptions Regarding Lawlessness and Law Enforcement*, *THE POLICE JOURNAL*, Oct. 1969, at 458.

<sup>38</sup> Inbau, *Lawlessness Galore*, *POLICE-LAW REVIEW*, Aug.-Sept. 1965, at 3.

<sup>39</sup> Address by Fred E. Inbau, "The Arrestee and Legal Counsel," Annual Conference of Chief Justices, Washington, D.C., (Aug. 9, 1963) (on file in the law libraries of Northwestern University and the University of Michigan).

<sup>40</sup> See, e.g., Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 *J. CRIM. L.C. & P.S.* 85 (1962). This paper, also discussed at 192 *infra*, had been the keynote address at the 1961 Annual Conference of the National District Attorneys' Association in Portland, Oregon.

<sup>41</sup> Address by Fred E. Inbau, "Misconceptions Regarding Lawlessness and Law Enforcement," 23rd annual meeting of National Association of Independent Insurers, New York, N.Y. (Oct. 29, 1968) (on file in the law libraries of Northwestern University and the University of Michigan).

<sup>42</sup> Address by Fred E. Inbau, "Crime in Our Streets — and What Can Be Done About It?," Governmental Affairs Council, Chicago Association of Commerce and Industry, Chicago, Ill. (Jan. 25, 1968) (on file in the law libraries of Northwestern University and the University of Michigan).

<sup>43</sup> See *Lawlessness Galore*, *THE TULANIAN*, Dec. 1966, at 15.



(How many law professors could hold that audience?) But the typical expert "mistrusts his fellow-specialist when the latter can reach [the] multitude. For [the typical expert] the gift of popular explanation is a proof of failure in the grasp of the discipline. His intensity of gaze makes him suspect the man who can state the elements of his mystery in general terms."<sup>44</sup>

Inbau takes strong positions and is given to strong words. On occasion, he is even known to have voiced rage and indignation. These qualities are not calculated to enhance his status in the law teaching ranks. Professors, it seems, are supposed to tiptoe, not crash. They are supposed to be troubled and tentative, not take very strong and very clear positions on anything (except, perhaps, right down the middle). Their stock in trade is not supplying answers but asking questions (and criticizing *others* who have the audacity to propose solutions). They earn points, it seems, by showing how *agonizingly subtle and complex* an issue or a problem actually is, not by suggesting how *simple* it might really be.<sup>45</sup>

The safe course for a law professor, it seems, is to set forth all imaginable arguments (or, better yet, some unimaginable ones, too) on both sides (or better yet, on four or five sides), lament the lack of sufficient data, deplore the "single-minded thinking" which has characterized the field (and probably add that it has generated "much heat but little light"), recognize that valid principles are "in collision," stress that there are no "absolutes," and wind up troubled (or, better yet, tortured and paralyzed) by doubts and uncertainties. The preferred model, in short, is Tevye the dairyman:

... On the other hand, what kind of match would that be, with a poor tailor? On the other hand, he's an honest, hard worker. On the other hand, he has absolutely nothing. On the other hand, things could never get worse for him, they could only get better.<sup>46</sup>

<sup>44</sup> Laski, *supra* note 28, at 108.

<sup>45</sup> One notable exception is C. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). But see C. Black, *Civil Rights in Times of Economic Stress—Jurisprudential and Philosophic Aspects*, 1976 U. ILL. L.F. 559.

<sup>46</sup> *Fiddler on the Roof*, Act I, Scene VI, in BEST PLAYS OF THE SIXTIES 283 (S. Richards ed. 1970).

Hopefully, those who *arrive* at strong conclusions engage in "on the one hand—on the other hand—but on the other hand" thinking somewhere along the

Although Inbau is well aware that his views, and his colorful manner of expressing them, might irritate, even infuriate, his fellow law professors, this has not swayed him from his course.<sup>47</sup> Indeed, one of his missions, as he sees it, is to straighten out "the mess" the law professors, ex-law professors on the bench, and other "sensitive souls" have gotten us into.<sup>48</sup>

way. It seems, however, that the preferred style is not to do so *before* the speech is delivered or the article is published, but "out loud" in one's speech or article—better yet, perhaps, in one's conclusions.

<sup>47</sup> In an "editorial," "Playing God": 5 to 4, 57 J. CRIM. L.C. & P.S. 377-78 (1966), Inbau, then Editor-in-Chief of the *Journal*, ripped into "the Court's one-man majority" for continuing to "play God" when the ALI, ABA, various governmental commissions and other groups were:

seeking to find a proximate solution to some very difficult problems. . . . But a one-man majority of the Court in *Miranda* "pulled the rug" from underneath all of these studies and research groups, and effectively foreclosed a final evaluation of their ultimate findings and recommendations. . . . Considering the complexity of the interrogation-confession problem, a summary 5 to 4 nullification of much of the aforementioned group efforts . . . is awesomely inconsistent with fundamental democratic concepts. It's more like "Playing God: 5 to 4."

A year and a half later, Inbau took cognizance of the fact that his "Playing God" editorial had "infuriated many of my colleagues in the law school world," but "[w]hat I said then may be appropriately repeated now, although I regret whatever infurcation it may again arouse among my law professor colleagues who may be in the audience tonight." Unpublished address by Fred E. Inbau, "Crime and the Supreme Court," Symposium by the Council of Graduate Students, Ohio State University, Columbus, Ohio, (April 24, 1968) (on file in the law libraries of Northwestern University and the University of Michigan).

<sup>48</sup> In *Hearings Before a Subcomm. 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 (1968) [hereinafter cited as 1958 *Senate Hearings*], Inbau (who stressed at the outset that he did not appear "just" in "his capacity" as a law professor, but as one with much "practical experience") "explained" how the *McNabb* innovation came about:

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 these 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.

Inbau came to the podium from the crime lab, the interrogation room and the trial courts,<sup>49</sup> not the library. Not only was he a pioneer in the development of the polygraph and in the "psychology" of obtaining confessions, but in his younger days he had been the premier lie-detector examiner and just about the craftiest interrogator around. In the course of obtaining hundreds of confessions, he had been known to spill over with such "sympathy" for a murder suspect that he had had to "pause to wipe away a tear."<sup>50</sup> He prefers to represent himself (and perhaps think of himself) as a "practical man" rather than a "law professor."<sup>51</sup> Most professors (and too many judges), I think he would say, are "too naive and otherworldly to intervene in a brass-knuckle world."<sup>52</sup>

If Inbau much cared about how his brethren in the law teaching ranks regard him, however, I think he would be puzzled by the "chilling" effect of his strong positions and strong words. After all, John Henry Wigmore, his idol, mentor, friend, associate and ideological ally,<sup>53</sup> was

known for his "sharp and uncompromising" criticisms.<sup>54</sup> Although a person of elegant man-

Northwestern University School of Law as being given the highest honor that could be bestowed on any student of criminal law and evidence. Wigmore was the organizer and founder of the Scientific Crime Detection Laboratory, to which Inbau devoted the first decade of his professional life. Wigmore also launched *The Journal of Criminal Law and Criminology* in 1910 and contributed "a forthright comment . . . upon a recent criminal case" to its first issue. Inbau, *The Innovator* (Editorial), 32 J. CRIM. L.C. & P.S. 263, 264 (1941) (editorial). Inbau, of course, was deeply devoted, and a frequent contributor, to the *Journal* all of his professional life. He served as its Managing Director from 1945-65, and then its Editor-in-Chief until 1971, when student editors took complete charge of the publication.

The last activity in Wigmore's extraordinary career was participation, along with Inbau, in a regular meeting of the Board of Editors of the *Journal* (April 20, 1943). He died a few hours later. Inbau was the last person to talk to Wigmore. He hailed the cab in which Wigmore met his death.

Wigmore's "last words" on the U.S. Supreme Court were words of reproachment for its recent decision in the *McNabb* case: "He shook his head slowly as he said prophetically that he could see neither sense nor reason in it; that it is bound to cause trouble for it makes it almost impossible for either the police or the prosecutor to get anywhere with their cases; and that he did not know what the Supreme Court could have been thinking about when it wrote that opinion." Curran, *Dean Wigmore at His Last Meeting of the Editorial Board*, 34 J. CRIM. L.C. & P.S. 93, 94 (1943).

The decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964), was hard enough for Inbau to take, but for Justice Goldberg, author of the opinion of the Court, to find support for his viewpoint in the writings of Wigmore was almost more than Inbau could bear. See his remarks in *The Supreme Court's Decisions on Defendants' Rights and Criminal Procedures*, 39 F.R.D. 423, 441 (1966) (panel discussion):

I think it is a serious mistake to say that when we ask for an interrogation opportunity on the part of the police we are asking for the abolition of the privilege against self-incrimination. Unfortunately, Justice Goldberg made the same error in his opinion in the *Escobedo* case. If you recall, . . . he quotes Dean Wigmore's reasons in support of the privilege [378 U.S. at 489, quoting from 8 J. WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940)] and then equates that with his approval of the exclusionary rule and the present rules with respect to confession admissibility. Justice Goldberg, I think, should have known better. He was a student of Wigmore's. And Wigmore's treatise very clearly indicates his violent opposition to the exclusionary rule and to any rule of confession admissibility other than one based upon the trustworthiness factor.

I not only know that from Wigmore's writings, but I knew the gentleman very well. . . . I am quite sure he would be greatly disturbed to

<sup>49</sup> Immediately after earning a master's in law at Northwestern University in 1933, Inbau became a member of the Scientific Crime Detection Laboratory at the Northwestern University School of Law, the first such laboratory in the country. When the Chicago Police Department took over the laboratory in 1938, he became its first director and served in this capacity until 1941. For the eight years he was associated with the crime detection laboratory, "criminal interrogation" was his "special interest." See 1958 *Senate Hearings*, *supra* note 48, at 58. From 1941 until 1945, when he returned to Northwestern as a professor of law, Inbau was a trial attorney. At one time or another he was president of the Illinois Academy of Criminology, the American Academy of Forensic Sciences and the American Academy of Polygraph Examiners.

<sup>50</sup> See Lewellen, *How to Make a Killer Confess*, SAT. EVE. POST, Mar. 31, 1956, at 33.

<sup>51</sup> I do not come here to visit with you in my capacity as a criminal-law professor. I know from my own practical experience, both as a trial lawyer and by reason of my work in the police field, that there is an allergy toward professors on the part of people who are out on the firing line. I prefer to represent myself to you as one who has had experience in this area of interrogation.

Inbau, in *A Forum on the Interrogation of the Accused*, 49 CORNELL L. Q. 382, 387 (1964) (panel discussion sponsored by the District Attorney's Association of the State of New York). See also 1958 *Senate Hearings*, *supra* note 48, at 58.

<sup>52</sup> See S. KRISLOV, *THE SUPREME COURT AND POLITICAL FREEDOM* 2 (1968).

<sup>53</sup> Inbau, I am sure, regarded his being named the first John Henry Wigmore Professor at the

ners, when he thought the occasion demanded it, "the Colonel" could strike with the force of an army mule (or the "bite" of a first sergeant),<sup>55</sup> yet this did not prevent him from being acclaimed as "our first legal scholar."<sup>56</sup> Indeed, Wigmore's *Treatise on Evidence*, "unrivaled as the greatest treatise on any single subject of the law,"<sup>57</sup> contains a generous amount of scathing, colorful criticism of the courts—often for the very reasons that Inbau has never stopped reproaching them:

Does the *illegal source* of a piece of evidence taint it so as to exclude it, when offered by the party who has shared in the illegality?

. . . An employer may perhaps suitably interrupt the course of his business to deliver a homily to his office-boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a streetcar to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law.<sup>58</sup>

....

see himself quoted in the *Escobedo* case as though he were supporting that viewpoint.

As I read the 130-page discussion of confessions in volume 3 of the *Treatise on Evidence*, a volume to which the *Escobedo* opinion never refers, Inbau is plainly right about Wigmore. See 3 J. WIGMORE §§ 22-24, 826, 841-43, 856-59, 865, 867 (3d. ed. 1940).

<sup>54</sup> Roalfe, *John Henry Wigmore—Scholar and Reformer*, 53 J. CRIM. L.C. & P.S. 277, 280 (1962).

<sup>55</sup> In addition to the examples furnished by Roalfe, *supra* note 54, see especially Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920) (blistering attack on Holmes-Brandeis position). See also note 57 *infra* and text accompanying notes 58-61 *infra*.

<sup>56</sup> Kocourek, *John Henry Wigmore*, 27 AM. JUD. SOC'Y 122, 124 (1943).

<sup>57</sup> Frankfurter, *John Henry Wigmore: A Centennial Tribute* 58 NW. U.L. REV. 443 (1963), reprinted in F. FRANKFURTER, OF LAW AND LIFE & OTHER THINGS THAT MATTER 256 (P. Kurland ed. 1965). In the controversy growing out of the Sacco-Vanzetti case, Professor Frankfurter had been a target of Wigmore's biting tongue. "He never referred to Frankfurter by name but called him the 'plausible Pundit' or 'contra-canonical critic' because of his alleged violation of the [canons of ethics]." Roalfe, *supra* note 54, at 280.

<sup>58</sup> 8 J. WIGMORE, EVIDENCE § 2183, at 4-5 (3d ed. 1940).

[T]he heretical influence of *Weeks v. United States*, 232 U.S. 383 (1914), establishing the exclusionary rule in federal search and seizure cases] spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals.

. . . After the enactment of the Eighteenth Amendment and its auxiliary legislation, prohibiting the sale of intoxicating liquors, a new and popular occasion was afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of easy complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.<sup>59</sup>

....

. . . If the officials, illegally searching, came across an infernal machine, planned for the city's destruction, and impounded it, shall we say that the diabolical owner of it may appear in court, brazenly demand process for its return, and be supinely accorded by the Court a writ of restitution, with perhaps an apology for the "outrage"? Such is the logical consequence of the doctrine of *Weeks v. U.S.* . . .

[T]he essential fallacy of [*Weeks*] and its successors is that it virtually 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*. The doctrine of such an exception rests on a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way. . . .

[This view] puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.<sup>60</sup>

....

. . . Holmes, J., in his dissent [in *Olmstead v. United States*, 277 U.S. 438 (1928)] refers to this act of wiretapping as "dirty business." But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is "dirty business," normally viewed. But if a gunman assails you, and you know enough of the French art of "savatage" to kick him in the stomach and thus save your life, is that "dirty business" for you? . . .<sup>61</sup>

<sup>59</sup> *Id.* § 2184, at 32-34.

<sup>60</sup> *Id.* at 35-37.

<sup>61</sup> *Id.* § 2184b, at 50 Cf. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16, 19 (1961), reprinted in POLICE POWER AND INDIVIDUAL

## III

In the March, 1962, issue of this *Journal*, Fred Inbau published one of his many "prosecutors' convention" speeches, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*,<sup>62</sup> but one whose criticism of the Warren Court struck me as especially bitter and scathing—even for Inbau. I regarded it, and I think it may be fairly termed, an "intemperate" piece. I expressed my sense of outrage to Claude Sowle, then Editor-in-Chief of the *Journal*, who encouraged me to respond. I then dashed off what may fairly be called an "intemperate" reply.<sup>63</sup> I was furious. Inbau had ripped into the Court I loved and my thinking then was that "[t]o war against the Court was to war against the Constitution itself."<sup>64</sup> Up to that time, I had never met Inbau and it would hardly have surprised me if, after reading my biting reply, Inbau had vowed to keep it that way. Instead, he invited me to attend the next Northwestern University School of Law Conference on Criminal Justice.

The Conference (held in November of '62) turned out to be a memorable occasion. It was there that I first made contact with many law enforcement officers. It was there, too, that I first met James R. Thompson, Claude R. Sowle, and Bernard Weisberg, as well as Inbau.

I expected Thompson, then a very recent graduate of Northwestern and a lecturer in Inbau's Short Course for Prosecutors, to be very much under the influence of his mentor,

but that was not at all the case. Thompson even had some nice things to say about the *McNabb-Mallory* rule and thought there was much to be said for the Supreme Court of Illinois adopting such a rule.<sup>65</sup> Inbau didn't seem to mind at all. If anything, he seemed to be proud of the fact that Thompson was his "own man."

Claude Sowle, another former Inbau student and then Inbau's junior colleague on the Northwestern Law Faculty, gave a stirring talk, striking at the heart of Inbau's position on police interrogation and confessions. He attacked the hypocrisy pervading the criminal justice system; measured the proceedings in the "interrogation" room against the standard of a public trial and found the former sorely wanting—indeed, based upon nullification of the privilege against self-incrimination and the right to the assistance of counsel—and spelled out how all too often the "legal courts" are reduced to the position of merely ratifying the verdict obtained by the police-conducted "out-law tribunals." Sowle's remarks had a stunning impact on the audience and inspired me, some years later, to write my "Gatehouses and Mansions" paper.<sup>66</sup>

While Sowle was speaking, I studied Inbau closely. I half expected him to shout, "That's enough, Claude!" Instead, Inbau seemed to be basking in the brilliance and independence of his junior colleague. He seemed pleased that Sowle had the rapt attention of the audience, especially the many police officers in attendance.

Another speaker, Bernard Weisberg, also attacked the Inbau position. The contention that all statements made after a suspect's request to contact counsel has been denied should be barred on that ground alone had been rejected in *Crooker*, the Court maintaining that such a rule "would effectively preclude police

FREEDOM 147, 151 (C. Sowle ed. 1962):

[T]he interrogation [of the murder suspect in an actual case within Inbau's "own professional experience"] was "unethical" according to the standards usually set for professional, business and social conduct . . . But, under the circumstances involved in this case, how else would the murderer's guilt have been established? Moreover, . . . [f]rom the criminal's point of view, any interrogation of him is objectionable. To him it may be a "dirty trick" to be talked into a confession, for surely it was not done for his benefit.

<sup>62</sup> See note 40 *supra*.

<sup>63</sup> Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962). We then went another round: Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L.C. & P.S. 329 (1962); Kamisar, *Some Reflections on Criticizing the Courts and "Policing the Police,"* 53 J. CRIM. L.C. & P.S. 453 (1962).

<sup>64</sup> Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 265 (1962).

<sup>65</sup> Some years later, then Assistant Professor Thompson spelled out his views on the subject in *Detention After Arrest and In-Custody Investigation: Some Exclusionary Principles*, 1966 U. ILL. L.F. 390, 402-14.

<sup>66</sup> Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME*. (Howard ed. 1965). Unfortunately, on the erroneous assumption that Professor Sowle's remarks would later be published, I took no notes at the time, only to discover later that the speaker had destroyed his. I again acknowledge my large debt to Sowle. See also, *id.* at 20 n.53.

questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney.”<sup>67</sup> Inbau, of course, applauded this stand. But Weisberg argued most persuasively that in the real world “fair” or “proper” or “reasonable” police questioning was virtually non-existent—and he quoted extensively from Inbau’s interrogation manual to make his point. Moreover, pointed out Weisberg, even if the courts could decide when “reasonable” interrogation had come to an end (which he doubted), they could not hope to do so unless full records of these essentially unsupervised proceedings were available for review—and they almost never were.

Weisberg’s remarks infuriated many of the police in attendance. One captain leaped to his feet and growled at Weisberg that someone who had never conducted an interrogation himself had no business talking about the subject—and couldn’t have anything worthwhile to say. Inbau rushed to the microphone. A good argument could be made, he smiled, that only someone who had been on the *receiving end* of a police interrogation was qualified to talk about the subject. He had neglected to invite such a person, but Weisberg, he suggested, was the next best thing. Weisberg was a thoughtful, articulate spokesman for the accused. True, evidently Weisberg believed that the established practice of police questioning was fundamentally and hopelessly irreconcilable with the adversary system of justice and the Constitution, but so did some members of the Supreme Court. Some day—and not in the too distant future—Weisberg’s views might command a majority of the Court. A major purpose of the conference, Inbau reminded the many police officers in the audience, was not just to entertain them with speakers they liked to hear, but to present speakers who would tell them what they ought to know and had to think about. (*This*, I asked myself, was the zealous, pugilistic Fred Inbau? *This* was the fabled “Freddy the Cop?”)<sup>68</sup>

<sup>67</sup> *Crooker v. California*, 357 U.S. 433, 441 (1958) (emphasis in original).

<sup>68</sup> A few months earlier, although I did not discover this until many years later, Inbau had done more than simply defend the civil libertarian’s right to have his say before a police audience. See unpublished and untitled address of May 28, 1962 (emphasis added), at Willamette College of Law, Salem, Ore. (on file in the law libraries of Northwestern University

Weisberg was indeed a thoughtful, articulate spokesman. Two years earlier, again in the setting of a conference conceived and planned by Inbau, he had delivered what I consider the most probing and most useful paper ever written on the subject, *Police Interrogation of Arrested Persons: A Skeptical View*.<sup>69</sup> Of all the contributors to this “International Conference on Criminal Law,” Weisberg’s criminal justice credentials were the least impressive. He had no law enforcement background. He was a general practitioner, engaged mostly in corporate and business law. But Inbau had “discovered” Weisberg when the latter had co-authored a 1959 report by the Illinois Division of the ACLU,

sity and the University of Michigan). He had told a group of police officers:

Too often there is the tendency on the part of the police to criticize all that the courts do—to label as technicalities the reasons given for any particular case decision that the individual police officer dislikes. There are times, to be sure, when that is true. But there are many times when the reasons are substantial and basically valid . . .

As a police officer you may feel that the courts should leave you alone in your efforts to enforce the law, to apprehend criminals and to protect the public. Many courts would also like to be left alone to do as they please. Many legislators would also like to be left alone and unchecked. Many members of the executive branch . . . would also like to function as they please. But in a democratic system, no branch of government, can be permitted to exercise unbridled authority and power. . . .

In any democratic society individual rights and liberties must be preserved and we are willing to do so at the expense of efficiency in government itself. To relate this principle to your situation, let me put it this way. We would rather that some criminals escape detection and punishment—even though you, as a police officer, know positively he is guilty—rather than sacrifice or even jeopardize the rights and liberties of the great mass of individuals who make up this democratic society of ours. This concept is essential. *It is different in Russia, of course. There, efficiency is paramount* [emphasis added].

Parts of this speech read as if they came right out of a Hugo Black opinion or Professor Louis B. Schwartz’s ringing civil liberties article, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

<sup>69</sup> 52 J. CRIM. L.C. & P.S. 21 (1961), in *POLICE POWER AND INDIVIDUAL FREEDOM* 153 (C. Sowle ed. 1962) [hereinafter referred to as Weisberg]. This article reproduces a paper Weisberg delivered at Northwestern University School of Law on Feb. 19, 1960.

*Secret Detention by Chicago Police*—and he had given him a wide stage.

Weisberg had the advantages of the amateur—"the freedom from traditional limitations and perspectives, the ability to raise fundamental questions which professionals in the field have long since forgotten to consider."<sup>70</sup> When he came to examine police interrogation, Weisberg was astounded by the virtually unbridled discretionary powers wielded by the "administrative agencies" (police departments) and "administrative officials" (police officers) in this field and by their ability "to prevent objective recordation of the facts":

The modern police function of preliminary criminal investigation and interrogation of suspects is an unusual instance of discretionary administrative power over persons unregulated by judicial standards. . . . In large measure police station questioning . . . is governed only by the self-imposed restraints of the police and by limited judicial action in the small number of cases in which police conduct becomes a litigated issue.

Whatever the reasons for their circumspection, the failure of the courts to assume supervisory powers over police interrogation practices remains an anomaly. It is sometimes grounded on the American separation of judicial and executive powers. But this doctrine has not prevented the courts from developing judicial standards for other administrative agencies.

Measured by legal standards, the most unique feature of the police station questioning is its characteristic secrecy. It is secrecy which creates the risk of abuses, which by keeping the record incomplete makes the rules about coercion vague and difficult to apply, which inhibits the development of clear rules to govern police interrogation and which contributes to public distrust of the police. Secrecy is not the same as the privacy which interrogation specialists insist is necessary for effective questioning. Inconspicuous recording equipment or concealed observers would not detract from the intimacy between the interrogator and his subject which is said to increase the likelihood of confession.

No other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts. . . . It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If the need for

some prejudicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground.<sup>71</sup>

Weisberg deemed it important to "give some content to the generalities [one might say, 'euphemisms'] in which the subject [of police questioning] is usually discussed."<sup>72</sup> He thought it "playing Hamlet without the ghost to discuss police questioning without knowing what such questioning is really like."<sup>73</sup> So he turned to "the leading police manual by Professor Fred Inbau and John Reid" to supply the content.<sup>74</sup>

So far as I know, Weisberg was the first law review writer to make extensive use of the interrogation manuals. And, as I have suggested elsewhere, each of these manuals may have been "equal to a dozen law review articles in its impact on the Court."<sup>75</sup> For "one of the

<sup>71</sup> Weisberg *supra* note 69, at 44-45.

Of course, Weisberg's criticism of the old "voluntariness" test applies to *Miranda* as well, at least as it has generally been applied. Although language in *Miranda*, 384 U.S. at 475, strongly suggests that, at least where feasible, the police must stenographically or, better yet, electronically record the warnings given to the suspect, as well as his response, so that they may be played back or shown to the court, "most courts have held that the testimony of an officer that he gave the warnings is sufficient and need not be corroborated." ALI MODEL CODE OF PRE-ARREST PROCEDURE 140 (commentary) (Tent. Draft No. 6, 1974).

Weisberg's extraordinary 1960 paper also anticipates and voices grave doubts about the efficacy of a system based on *police-issued* cautions or warnings:

[A]ny rule which requires a caution inevitably invites avoidance. Even if it is tied to an objective event such as the commencement of interrogation or the time of arrest, the probable conflict of testimony about whether a required caution was in fact given makes satisfactory judicial enforcement doubtful. Any rule requiring a warning is also likely to be ineffectual since the significance and effect of a warning depend primarily on emphasis and the spirit in which it was given. A warning can easily become a meaningless ritual . . . . The notion that [the interrogator] should precede questioning with a caution suggests that the interrogator should act to protect the interests of the suspect at the same time that he is attempting to obtain damaging statements from him. But this cannot effectively substitute for the loyalty of counsel or the disinterestedness of a judge.

Weisberg, *supra* note 69, at 40-41.

<sup>72</sup> Weisberg, *supra* note 69, at 22.

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

<sup>74</sup> *Id.* at 22-23.

<sup>75</sup> Kamisar, *A Dissent from the Miranda Dissents*, 65 MICH. L. REV. 59, 86 (1966).

<sup>70</sup> Rostow, *Book Review*, 56 YALE L.J. 412, 413 (1947) (referring to Morris R. Cohen).

most powerful features of the Due Process Model," as the late Herbert Packer observed, "is that it thrives on visibility. People are willing to be complacent about what goes on in the criminal process as long as they are not too often or too explicitly reminded of the gory details."<sup>76</sup>

As fate would have it, Inbau's former student, Jim Thompson, was to argue the *Escobedo* case for the State of Illinois, and Inbau's "adopted" student, Bernie Weisberg, was to argue the case for the ACLU, as *amicus curiae*.<sup>77</sup> In his *Escobedo* brief, Weisberg maintained that since police interrogation of arrested persons is characteristically conducted in privacy and without a record being made, "the best sources" for understanding police questioning "are the published manuals."<sup>78</sup> Weisberg

urge[d] the Court to examine these books [which he extracted at considerable length in his brief]. They are not exhibits in a museum of third degree horrors. Indeed they carefully advise the police interrogator to avoid tactics which are clearly coercive under prevailing law. They are invaluable because they vividly describe the kind of interrogation practices which are accepted as lawful and proper under the best current standards of professional police work.<sup>79</sup>

Weisberg's great paper on confessions and his powerful *Escobedo* brief set the fashion for civil libertarians. The ACLU brief in *Miranda* (a magnificent performance by Professors Anthony Amsterdam, Paul Mishkin, et al.) reprinted a full chapter from O'Hara's *Fundamentals of Criminal Investigation* (1956). In turn, the majority opinion in *Miranda* devoted six full pages to extracts from various police manuals and texts<sup>80</sup> "document[ing] procedures employed with success in the past, and . . . recommend[ing] various other effective tactics."<sup>81</sup> Many of the examples selected by the Court are

<sup>76</sup> Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 64 (1964).

<sup>77</sup> Inbau didn't gain a "clean sweep." Barry L. Kroll, a Michigan Law School graduate, argued the cause for Danny Escobedo.

<sup>78</sup> See the extracts from the brief in Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 519 (4th ed. 1974).

<sup>79</sup> *Id.*

<sup>80</sup> *Miranda v. Arizona*, 384 U.S. 436, 449-54 (1966).

<sup>81</sup> *Id.* at 448. The *Miranda* dissenters criticized the Court for failing to establish that any of the manuals were the "official manuals" of any police department or even that they were widely used by police interrogators, and voiced doubts that they were, 384 U.S. at

the same ones Weisberg used in his 1960 article and in his 1964 *Escobedo* brief.

Now the curious thing about Weisberg's important contribution to the law of confessions is that, as he readily admits, he never would have pursued his interest in this field *but for Inbau's encouragement*. It is a delicious irony that when Inbau urged Weisberg to think more deeply about the vexing problems of police interrogation and confessions—when back in 1960 he invited this relatively obscure general practitioner to deliver a major paper articulating his "skeptical views" on the subject—Inbau did what some think the privilege against self-incrimination is supposed to prevent—he pulled the lever which sprung the trap on which he stood.<sup>82</sup>

The *Miranda* opinion quotes from or cites the 1953 and 1962 Inbau-Reid manuals no less than ten times—and never with approval.<sup>83</sup> It is plain that these publications "vented Chief Justice Warren's judicial ire."<sup>84</sup> The day after *Miranda* was handed down, Inbau should have been a beaten man. But he wasn't.<sup>85</sup>

He knew, no less than did our most brilliant civil liberties lawyer, that "the judgments" that these issues require "are too large, too ungov-

499, 532-33. Two weeks after *Miranda* was handed down, however, Thomas C. Lynch, then Attorney General of California, reported that a preliminary survey indicated "wide use" in his state of the criticized manuals and that he was considering a "purge" of all such publications. Professor Philip Zimbardo, a psychologist greatly troubled by various interrogation techniques, also reported that he had "verified that these manuals are used in training [police] interrogators by calling several police academies." See Kamisar, *supra* note 75, at 86 n.109.

<sup>82</sup> See, e.g., E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

<sup>83</sup> See 384 U.S. at 449-55. The references are to F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962); F. INBAU & J. REID, *LIE DETECTION AND CRIMINAL INTERROGATION* (3d ed. 1953).

<sup>84</sup> Broderick, *Book Review*, 53 CORNELL L. REV. 737, 741 (1968).

<sup>85</sup> Indeed, a year after *Miranda*, the irrepressible Inbau-Reid team published a new edition of their interrogation manual, retaining, after the prescribed warnings have been given, many of the tactics and techniques that seem to have chagrined the author of the *Miranda* opinion. See Broderick, *supra* note 84. But *Miranda* "did not condemn any specific techniques or hold that evidence obtained by use of them would be inadmissible. Reliance was placed on warning and counsel to protect the suspect." Elsen & Rosett, *Protections for the Suspect under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 667 (1967). See also note 6 *supra*.

erned by a commanding text or clear institutional dictates, to be laid solidly to rest."<sup>86</sup> He knew, too, that "[p]recedents upon such issues are particularly fragile under the buffeting of rapid historical developments that incessantly place unprecedented strains upon the Court."<sup>87</sup> As it turned out, a period of "social upheaval, violence in the ghettos, and disorder on the campuses"<sup>88</sup> had already begun. The political assassinations and near-assassinations of the late 1960's; more urban "riots"; the presidential campaign of 1968; the "obviously retaliatory" provisions of the Crime Control Act of 1968 and other political exploitation of the "law and order" issue; the ever-soaring crime statistics;<sup>89</sup> and the ever-spreading fears of the breakdown of public order soon "combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."<sup>90</sup>

I was one of those who implored the Court to "exercise leadership," to be "bold" and "innovative." Yet I was outraged when "its decisions arouse[d], as they must, resentment and political attack."<sup>91</sup> At this point, I became a lawyer "marching behind the solemn, sacrosanct banner of the law. [I] want[ed] it both ways."<sup>92</sup> It seems much clearer to me today than it was fifteen years ago, or even ten, that—although he was wrong on the merits—Inbau was perfectly within his rights in deploring, and arguing against, *McNabb*, *Mallory*, *Mapp* and *Miranda*.

Although I happen to think that most of Inbau's ideas deserve to be rejected, he nevertheless furthered, or should have furthered, the thinking of all of us. As one of the "Crime Control model's" "few full-fledged academic defenders,"<sup>93</sup> Inbau not only presents the po-

liceman's view of recent cases, but articulates the officer's critical needs and deep concerns. Too many of us are content to point out what the policeman *cannot* or *must not* do. Inbau, on the other hand, will pepper you with hypothetical fact situations and ask: "You are the policeman; *what would you do in this case?*" More times than I like to admit, I have felt that the price of remaining faithful to the "Due Process model"<sup>94</sup> was to appear rather foolish. What *can* the policeman do? What *should* he be able to do? How can the legislature be *of assistance* to him? I don't think I am the only law professor who finds it more exhilarating to confine himself to what the policeman *cannot* or *must not* do. But the time has long since passed when we can afford that luxury.

Most people know Inbau only from the rousing talks he gave at the local Rotary Club or from the fighting speeches he delivered at countless prosecutor and police conventions, exhorting the troops to victory in the great "war against crime." But there is more than one Inbau. There is also the Inbau who, in the privacy of his office or over a drink, can dispassionately and masterfully dissect the latest Supreme Court opinions; who can laugh as hard at himself as he does at the "law professors" on and off the bench. There is also the Inbau whose goal at each of the many conferences he conceives and directs is to bring to bear upon problem areas "the greatest possible breadth of viewpoint and depth of insight"<sup>95</sup> and to have

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term he was, of course, referring to Professor Packer's famous article, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Packer subsequently rather summarily described the "polar extremes" which represent "competing value choices" as follows:

The Crime Control model sees the efficient, expeditious and reliable screening and disposition of persons as the central value to be served by the criminal process. The Due Process model sees that function as limited by and subordinate to the maintenance of the dignity and autonomy of the individual. The Crime Control model is administrative and managerial; the Due Process model is adversary and judicial. The Crime Control model may be analogized to an assembly line, the Due Process model to an obstacle course.

Packer, *The Courts, The Police and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238, 239 (1966).

<sup>94</sup> See note 93 *supra*.

<sup>95</sup> See the introduction to the collection of conference papers in *POLICE POWER AND INDIVIDUAL FREEDOM* (C. Sowle ed. 1962).

<sup>86</sup> Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).

<sup>87</sup> *Id.*

<sup>88</sup> Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539.

<sup>89</sup> But see Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

<sup>90</sup> Allen, *supra* note 88 at 539.

<sup>91</sup> Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111 (1963).

<sup>92</sup> *Id.*

<sup>93</sup> The late Alexander Bickel so described Inbau. See Bickel, *The Role of the Supreme Court of the United States*, 44 TEX. L. REV. 954, 962 (1966).

When Bickel used the "Crime Control model"



all in attendance leave with their swords and banners lowered and their sensitivities raised. As an "expert in controversy," this iconoclastic law professor, no less than the "iconoclast from Baltimore," "welcomed attacks on himself, partly because they showed that his thrusts had gone home, partly because he defended everyone's right to have his say, and partly because he felt that destructive criticism, even of his own work, was much more stimulating than

acclaim."<sup>96</sup>

Fred would be quick to deny that he is "the professor." If anything, he sees himself as the "anti-professor"—or so he says. Methinks he does protest too much. *One* of the Inbaus, at least, is more "the professor" than a considerable number who profess to be, more "the professor" than any of the Inbaus would ever care to admit.

<sup>96</sup> D. Stenerson, H. L. MENCKEN: *ICONOCLAST FROM BALTIMORE* 226 (1971).