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Tributes to Fred E. Inbau

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TRIBUTE TO FRED E. INBAU

NOTE FROM THE EDITORS

The *Journal of Criminal Law and Criminology* is proud to dedicate this issue to Professor Fred E. Inbau, who passed away on May 28, 1998. Professor Inbau's influence on criminal law was tremendous, but his influence on the *Journal of Criminal Law and Criminology* was even more significant. He was the *Journal*'s Editor-in-Chief for many years, and contributed a significant number of articles and editorials to the *Journal.* Several of these articles are reprinted here,[1] along with a few thoughts from those scholars who knew him best, and a review of his excellent book, *Criminal Interrogations and Confessions.*

Professor Inbau was unafraid to traverse roads not taken by many of his colleagues. In many ways, his views of forensics, criminology, and police practice were ahead of their time. He was most outspoken in his criticism of the Supreme Court's decision in *Miranda v. Arizona.* This term, the Supreme Court will revisit the *Miranda* holding and the 1968 Congressional attempt to override that holding[2] in *United States v. Dickerson,* a controversial case in which the Fourth Circuit held that section 3501 supercedes the *Miranda* holding.[3] Professor Inbau's perspective on this turn of events will be sorely missed.

We hope you will find that revisiting Professor Inbau's work intellectually stimulates you as much as it did us while putting this issue together. He will be greatly missed by the *Journal of Criminal Law and Criminology,* but the imprint he left on the *Journal* will not be forgotten.

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[1] In order to preserve the integrity of the original articles, the footnotes deliberately have not been updated to reflect currently-accepted Bluebook formatting.

[2] *See* 18 U.S.C. 3501 (1999).

[3] *See* United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999), *cert. granted,* 120 S. Ct. 578 (1999).

FRED E. INBAU
1909-1998

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TRIBUTE TO FRED INBAU

RONALD J. ALLEN*

I was in Italy when I received the news of Fred's death, and I learned a few days later that I had been asked to pay homage to his scholarly contributions. Lacking the natural eloquence of many of my colleagues and the other speakers today, I fear that I come to you armed only with the simple truth rather than art. Yet perhaps circumstances conspire to make a virtue out of vice, for the simple truth best describes and reflects the contributions of this simple, direct, and insightful scholar. Let me give you a partial list of some of the simple truths that capture his career. He saw before anyone else the risks attendant upon the Supreme Court being captured by a narrow ideology uninformed by a deep knowledge of the reality of law enforcement and its implications and that focused excessively on the rights of the accused to the exclusion of all other costs and benefits in the complex social structure comprising the criminal justice system. He predicted the explosion in crime rates that came to pass, although it came to pass for many reasons in addition to that of the Court's work product. He predicted the social unrest that would result from a declining sense of personal security generated by dramatic increases in criminality, and that it would be destructive of the legitimacy of any branch of government to fail to take appropriate action. And he predicted that constitutional adjudication more personally willful than respectful of traditional modes of constitutional decision making could not survive, that either the Court would have to abandon the implications of its decisions in what has come to be known as the procedural revolution, or else it would be forced from the field by opposing political forces more driven by that innate common sense typically so instrumental to American political decision making but sorely lacking in the Supreme Court's constitutional criminal procedure decisions in the 1960s.

* John Henry Wigmore Professor, Northwestern University School of Law.

I could literally spend hours giving example after example of the power and significance of these insights, and how current law in large measure reflects them. I will limit myself to just one, Fred's favorite. In his introductory remarks in his casebook preceding *Miranda v. Arizona*, he predicted the case's demise, yet he nonetheless presented it to the students because it represented the then existing law of the land. I note that the more recent editors of his casebook have eliminated these introductory remarks, which I fear demonstrates the truism that the sins of the disciples should not be visited on the master, for, in one of the great ironies in the field, he has been proven largely, although to be sure indirectly, right.

Fred knew that neither the actual holding of *Miranda* nor the implications of its astonishing rhetoric could long survive, and that its intellectual foundations would not bear the weight of any extensions. Fred is often thought to have been proven wrong by the failure of the Court to explicitly overrule *Miranda*, but in fact, it is Fred, not his high powered intellectual opponents, such as Yale Kamisar of the University of Michigan, who has actually won the day. Not, by the way, that Fred would ever think in terms of winning or losing; he never personalized any of his professional life, so far as I can tell, but I digress. Let me finish with *Miranda* first. Immediately following the case, the Supreme Court under the immense political pressure that Fred anticipated would arise, began its retreat—pressure whose bedrock, by the way, was common sense, a quality Fred possessed in great abundance and in indirect proportion to his academic opponents. In any event, the Court refused to extend the case retroactively; it held it created only prophylactic rules, not constitutional commands; the rules could be flexibly administered; waiver could occur simply and directly without the need of a well defined script; the rule did not apply at all to on the scene questioning or when a serious question of public safety was at stake. And so on. The Court never even came close to taking the next logical step quite evident in *Miranda* itself and urged on it by its academic supporters of forbidding all confessions resulting from police interrogation. We have now reached the point, in fact, where the police have largely stopped objecting to *Miranda*. They have adapted to it, and the Court has adapted its rules to the police. It undoubtedly still comes with a price, but the price is bearable, and its overruling might possibly be worse than the disease.

Now, let me tell you another great irony, one that again shows the depth of insight possessed by this simple, direct man. Fred once agreed with me that he doubted *Miranda* should be explicitly overruled. He, like me, feared that it would be taken as a symbol by the police that, so to speak, all bets were off, and a return to the days of the third degree was acceptable. Well, you might be wondering, for all the good sense of that concern, where is the irony? It lies here. Fred has often been vilified by his opponents in the academy as though he were in favor of anything that forced words out of a suspect's mouth. The truth of the matter is that Fred was one of a handful of individuals most responsible for the civilizing and professionalization of the police. Unlike his single minded critics who see only the costs imposed by the police and who value only abstract intellectualization, which by the way is why they have become largely irrelevant and Fred's views more and more transcendent, Fred saw the whole picture, and he saw it as it really was, not how some theory predicted it should be. When he first looked at the system in the earliest years of his career—and here is the irony—what he saw was police forces out of control, and he undertook to civilize them. You have heard of his contributions to the science of forensics, but his contributions far exceeded those. Whenever he instructed the police, and remember, that was all the time, he harped on one point over and over again—you cannot do anything that would make an innocent person confess. Violence and threats of violence were simply out of the question. Cruelty designed to break the will, whether physical or mental, could not be employed. Could the police exploit the weaknesses of suspects, if doing so would lead to the solving of serious crime? Yes, of course, he would reply, this is not a game we are playing. People are actually hurting other people, and we must do whatever we can within the bounds of civilization to maintain peace and security.

Some have rebuked Fred for raising lies and deception to constitutional status. But never if there was a risk of generating an erroneous confession. And when you step back from the all too often arid ratiocinations of Law Professor Land and the New York Times, for that matter, which is to be preferred, taking advantage of the thankfully often present weaknesses of those accused of serious crimes in a way that will not lead to wrongful convictions or freeing, without punishment, those who commit

such acts? When discussing such a question, I can almost hear Fred say:

> Yes, I am sure that it is bad thing to deceive anyone, but maybe some things are worse. Take *Brewer v. Williams* as an example. Pamela Powers was abducted in Des Moines, Iowa, by Robert Williams. A day or so later, Williams turned himself in to the police in Davenport, Iowa, approximately a three hour drive from Des Moines. As Williams was being driven by the police back to Des Moines, a snow storm started up. The police had some hopes that Pamela was still alive, and were fairly certain that she was somewhere between Des Moines and Davenport. In the hope of finding her before she died, one of the officers transporting Williams, knowing that he some peculiar religious beliefs, asked Williams to reflect that the snowstorm covering Pamela's body would make it impossible to give her a Christian burial. After some reflection, Williams took the police to the site where he had left her body.

Now, Fred would say, what should the police have done? Just how important is it that they deliberately manipulated a known weakness of Robert Williams? And perhaps most tellingly of all, what would you want done if you were Mr. or Mrs. Powers?

But, his opponents would argue, really Fred, the matter is a bit more complicated than you make out. Police interrogation is inherently compelling, and compulsion is at the heart of the fifth amendment's guarantee that a person has a right to be free from compelled self-incrimination. "And how does that right weigh in the balance with the need to enforce the criminal law?" Fred would reply. Well, you really cannot balance such things, his opponents would respond, for after all it is a Constitution we are expounding. "Well, yes," would reply Fred, "and in my view the Constitution was explicitly dedicated to such matters as insuring domestic tranquility and promoting the general Welfare, and frankly I don't see anything in here," as he metaphorically thumbed his Constitution, "about the document being dedicated solely to protecting the rights of the accused. Surely that's important, but it can hardly be the only criterion. Convicting guilty people, and protecting innocent ones, must matter also."

Well, yes, that's true, comes the response, but the fifth amendment does forbid coercion, and all we're trying to do is implement that command. Now, note Fred's response to this. I linger on it because it so well represents the power of his intellect presented in a simple and direct way. "How, exactly," he would ask, "do the *Miranda* rules eliminate coercion? Isn't merely being arrested coercive? Isn't being charged with a serious crime coercive? Isn't it coercive to be asked questions by

the police whether you're arrested or not?" The answers to all these questions are obviously, yes, they are coercive, and yet they are all allowed. Without ever invoking the high theoretical apparatus of modern philosophy, Fred had put his finger right on the core issue. Without a means of sorting out coercive from non-coercive settings, the *Miranda* rules made no sense. And those means don't exist.

But, now in a fit of exasperation, his opponents would say that leaves us with no rule at all, which is worse than the intellectual bankruptcy of *Miranda.* Quite wrong, said Fred. The right rule, the rule that makes sense and that optimizes the various competing interests, is that the police cannot do anything likely to lead an innocent person to confess. It is that simple. It is that profound. Throughout the decades, Fred's intellectual opponents have never devised an answer to this point. The reason is because he was right and they were wrong, and as a not very surprising consequence, the law today is much more sympathetic to Fred's views than those of his opponents. Sometimes the most powerful, and correct, ideas come without lots of intellectual baggage. Fred's career is an embodiment of that point.

I could give many more analogous examples of the deep significance of Fred's work to the modern landscape of criminal justice—for example, Fred filed an amicus brief in *Brewer v. Williams* that was joined by the attorneys general of 21 states. *Terry v. Ohio* largely brought the procedural revolution to a close, and again a brief filed by Fred was apparently critical to the outcome. But time is short and one other point of a different cast deserves attention—the manner in which Fred went about his task. As many of you know, Fred was the object of serious attacks by his less well mannered colleagues in the professorate. He was the embodiment and central figure of what they conceived of as the opposition. Yet, for all the provocation that he had, to my knowledge he never once acted out of personal anger or spoke an uncivil word. He knew that we were all in this together and that disagreement did not mean venality. In the early days of the creation of the field of constitutional criminal procedure, he was in fact its central figure. It was Fred choosing who to invite to conferences and the like, and it was Fred who always insisted that his opponents be given an equal opportunity to speak. He set the standard not only by the quality of his work but by its civility. One last example. As I mentioned, Yale Ka-

misar was Fred's chief intellectual opponent, yet Fred time and time again gave Professor Kamisar the opportunity to present his views at important conferences and urged the police and prosecutors present to listen to them. They were, and I speak here from intimate personal knowledge, the best of friends.

In all respects, Fred's was a life well lived, and all of us here are honored by our association with him.

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THOUGHTS ABOUT FRED E. INBAU

MARVIN E. ASPEN*

As was the case with so many of his students, Fred Inbau was an integral part of my professional life. He was my teacher—and was the first to kindle my interest in criminal law and the criminal justice system. He was my mentor and—after law school and a short term in the military—recommended me for my first job as a lawyer.

He was my colleague—both as a professor of law and as a co-author. Fred wrote 18 legal texts. I co-authored three. I was thrilled when Fred first asked me to be his co-author. At the time I suspected it was not without design that Fred usually worked with a co-author; I expected to do 90% of the work and to receive 10% of the royalties. To be truthful, as a young lawyer, I would have done all of the work without pay just to be listed as Fred's co-author. But typical of Fred's work ethic and generosity, he did more than his share of the work, and I received more than a fair percentage of the royalties.

Fred became a life long friend. When we lunched together two weeks before his death, notwithstanding some of the minor physical glitches that inevitably visit with age, Fred, as always, was upbeat. He spoke with enthusiasm of the current revisions of his legal books and the novel he had been working on for several years. He told me again the story of how 60 years ago, he bid goodbye to his friend and colleague John Henry Wigmore and watched as Wigmore entered the loop taxi that was to crash and take Wigmore's life and how proud he was to be the John Henry Wigmore Professor of Law Emeritus. As always, he asked about my wife and children.

Fred was a part of a golden age at Northwestern law school. His colleagues were among the giants of legal academia of the times: Wigmore, Green, Havighurst, Wirtz, Nathanson, Allen, McChesney, Pedrik, Schaefer to name but a few. But Fred stood out to so many of his students, not only because he was perhaps

* Chief Judge, United States District Court for the Northern District of Illinois.

the lonely conservative in a typical 1950s liberal law school faculty but because—whether or not you agreed with all of his tenets—his personal qualities of intellectual integrity and courage—and the passion of convictions—were genuine and special.

Fred was an outspoken conservative on many criminal constitutional issues (during an era when legal thinking was dominated by a liberal majoritarian view). Because of his views, Fred was affectionately referred to by my classmates as "Freddy the Cop." Fred's student code name was reinforced and legendized when Fred's actions matched his student image during an incident at the law school. It seems that there was a series of minor thefts from faculty offices at the law school. One evening Fred sat alone in his office with the lights out, apparently staking out the suspect. Sure enough Fred's office door opened. Fred chased the offender through the law school and with the help of a burly ex-marine law student, apprehended and subdued him and made a text book citizen's arrest. The nomenclature "Freddy the Cop" was here to stay.

But Fred was no dogmatic conservative. The Fred Inbau known by those who took the time to do so often was at odds with his public persona. In many respects Fred's views were trend-setting and even quite liberal.

Before Fred founded and administered the Northwestern Short Course for Prosecutors in 1936, continuing legal education had yet to become a staple of every major law school program. Fred's Short Course was the first national continuing legal education program for prosecutors. In 1957, he added the Northwestern Short Course for Defense Attorneys. Fred founded the Americans for Effective Law Enforcement, a private not-for-profit organization, espousing many of the now trendy victims rights causes.

Law schools of the 1940s and 1950s were rigid in their curricula. Students were for the most part taught theoretically in a limited number of traditional law school subjects. Although it is now popular to teach interdisciplinary subjects in law school, Fred combined non legal subjects—criminology and police science—in his criminal law curriculum, at a time when legal purism was the rule.

His law enforcement orientation aside, Fred was extremely wary of eye witness identification. One lasting law school memory is the annual staged "incident" during Fred's freshman

criminal law class. For example, a stranger might enter the classroom, perhaps, carrying a cap pistol or a knife, cause a disruption and quickly flee the classroom. All of this would take place in a matter of seconds. The class reaction would invariably be one of stunned silence. Then Fred would ask each of us to write a written description of the incident and of the provocateur. Invariably, the man would be described as anywhere from 20 to 40 years of age, 150 to 250 pounds, and 5'6" to 6'2". Half the class would have him wearing glasses. Some would describe him with a moustache. The liberal lesson taught by this conservative law professor was that you should be wary of basing a prosecution on single eyewitness identification alone.

Fred remained a man for all seasons. His views did not change with prevailing political winds. What he passionately believed in at the time of the Warren Court, he still advocated when later some of his teachings were legitimized by the Burger and Rehnquist Courts. Fred always respected opposing views. Indeed, during his last years of teaching, his closest faculty colleague was probably the late and beloved Jim Haddad whose take on many constitutional issues were opposite to his own. Fred was puzzled when others were less tolerant. He was almost naive in his dismay and disappointment when the dialogue of disagreement became disagreeable and personal.

Fred has left the greatest legacy of any teacher. His work will live on in the accomplishments of the students whom he inspired and who respected him: the governors, legislators, judges, prosecutors and law enforcement officials, law school deans and professors, and other leaders of our profession—many of whom are with us today.

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MEMORIES OF PROFESSOR FRED E. INBAU

JOHN F. KEENAN*

It is with great honor that I join the Editors of the *Journal of Criminal Law and Criminology* in remembering the late Fred E. Inbau.

Professor Fred Inbau was a giant in the field of criminal law who left a legacy that will be remembered well into the next millennium. He was a dear friend with whom I had the pleasure of visiting whenever I came from New York to Chicago.

It was in the summer of 1968 when I first met Professor Inbau at the Short Course for Prosecuting Attorneys at Northwestern University Law School. Fred had contacted the New York District Attorney, Frank S. Hogan, and asked him to recommend someone from his office to participate on the panel to teach trial techniques to prosecutors. I was fortunate to be chosen for the Short Course faculty and continued to participate each year until Fred retired from the Law School faculty in 1977. For that ten years and after his retirement, I would see Professor Inbau every summer and came to appreciate his fine mind, his keen wit, and his self-effacing modesty. A native of New Orleans, he possessed a combination of southern charm and mid-western practicality.

Fred believed that trial lawyers should never talk down to jurors and, each year at the Short Course, he would tell the attending prosecutors the following story which pointed-up in graphic terms the folly of demeaning jurors. Professor Inbau would start the trial techniques panel by saying:

> It seems that there was a defense lawyer whose client was charged with a homicide. The defendant had been provoked by a verbal insult from the deceased. The deceased had called the defendant, who was carrot-topped, a "red-headed son-of-a-bitch." This so infuriated the defendant that he stabbed the deceased to death. In his summation, the defense lawyer looked at the jury and said to Juror number 1, who wore heavy and thick eyeglasses, "How would you like to be called a four-eyed son-of-a-bitch?" and then the lawyer looked at Juror number 5, who was bald, and inquired "How would you feel if you were called a bald-headed

* Senior Judge, United States District Court for the Southern District of New York.

son-of-a-bitch?" Then gazing intently at the remaining ten the apocryphal lawyer asked "And as for the rest of you, how would you like to be called the various kinds of sons-of-bitches you are?"

Some might have found the story offensive, but all who heard it left the Short Course for Prosecuting Attorneys with one practical admonition which they would never forget—"DON'T TALK DOWN TO JURORS." Fred made sure his attendees learned that important lesson of trial lawyering.

Professor Inbau began the Short Course for Prosecuting Attorneys in 1936 and it continues with great success even after his passing. In devising the Course, he created a program of continuing legal education for prosecutors from all over the United States who, for one week each summer, came to the great city of Chicago where they received formal training in areas of forensics and the art of persuasion which they never would have learned in their individual offices. The concept of a course just for prosecutors was decades ahead of its time and it gave those young men and women who attended the opportunity to exchange ideas and approaches to the trial of a case. All who attended benefited from the richness of the experience and the professionalism of Fred and his lecturers.

Not only was Professor Inbau an outstanding scholar, he was a prolific writer. His "Criminal Interrogation and Confessions," written with John E. Reid, has been referred to by the *New York Times* as "the undisputed bible of police interrogation since its initial publication in 1962."

More than being a renowned professor and an accomplished author, Fred was a dedicated family man, a warm and thoughtful human being and a supporting and caring friend. He had a great love for Northwestern University Law School and his contributions to it will long be remembered and appreciated.

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FRED INBAU: THE NATION'S SENIOR POLICE LEGAL ADVISOR

WAYNE W. SCHMIDT*

For many years, Fred Inbau gave up much of his summer to prepare for and host two intensive programs. One was for prosecuting attorneys; the other was for defense counsel. But Fred realized that even an effective prosecutor could not correct an "illegal" search or preserve a tainted confession.

During the activist years of the "Warren Court," Fred thought that law enforcement officers would be better equipped to perform their duties if they had access to an in-house lawyer, to guide them through the pitfalls of the Fourth and Fifth Amendments.

Fred wanted to help the police make their charges stick in court. He approached the Ford Foundation, which had a reputation for funding liberal causes. One of his contacts at the Foundation was a man who later would become the executive director of the United Negro College Fund. That man understood the importance of providing the police with timely and competent legal advice, because he wanted to prevent police abuses. It was a marriage of ideals—the protection of constitutional rights and the increase of convictions that could withstand appellate review. Thus began the Police Legal Advisor Program of Northwestern University's Graduate School of Law.

With his young associate, James R. Thompson, they started searching for young lawyers who were willing to come to Chicago for a year and pursue an LL.M. at Northwestern, while working part-time with the Chicago Police, as a legal intern.

Fred also embarked on the task of encouraging police chiefs and sheriffs to employ these attorneys, after they completed their on-the-job training and post-graduate education. His efforts were later noticed by the Justice Department, and its Law Enforcement Assistance Administration assisted by funding

* Executive Director, Americans for Effective Law Enforcement.

dozens of law enforcement agencies that wanted to employ a legal advisor.

In 1966, Fred hosted the first annual conference of police legal advisors. Beginning in 1971, the annual conference sponsorship was assumed by the International Association of Chiefs of Police (IACP). The 33rd annual conference (in October 1998) was attended by many of the more than 160 members of the IACP Legal Section.

Although the Ford Foundation funding ended in 1971, intensive training for police attorneys continues at the FBI Academy's annual National Law Institute.

Two of the first graduates of that program still actively serve as police legal advisors; I am one of them. I had the privilege of later serving as director of the law school's Police Legal Advisor Program, and with Fred's guidance and encouragement, starting in-house legal services, or providing training for new legal advisors, in more than 70 law enforcement agencies, that employed in excess of 100,000 police officers.

Fred Inbau's vision to train and employ police legal advisors has left an indelible imprint on criminal justice in America. His name will not be known to the thousands of victims of crime, who were assisted by officers with access to in-house counsel. His name will not be known to the innocent, who were not arrested or prosecuted, because police officers had a better understanding of criminal law and procedure. His name will not be known to the guilty, who lost their appeals because investigating officers did not violate their constitutional rights. Nor will his name be known to the many thousands of Americans who did not become victims of violent crime, because the perpetrator was already in custody, or had been rehabilitated.

Fred Inbau's influence will last long beyond the three decades after he had the foresight to spawn the police legal advisor concept.

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FRED INBAU: A COMMENT ON HIS WORK AND HIS CHARACTER

JAMES B. ZAGEL*

In 1933, shortly after his law school graduation yet before his admission to the bar, Fred Inbau wrote an article with Newman Baker, a professor at the Northwestern University School of Law. The two men wrote of the lack of attention paid to promising techniques for the scientific detection of crime: the development of scientific proof of guilt or innocence. They remarked upon the prevailing reliance on the common sense and experience of police officers; the reasoning or intuition of these officers was then thought to be the key to the apprehension of criminals, and no one asked too many questions about the methods of reasoning. In the end, they wrote:

> Every step in the promotion of scientific crime detection is a step toward the abolition of the cruel and ineffective methods of establishing criminal identity such as the "third degree," and also a step toward the realization of a criminal trial unhampered by technical procedure and unreliable evidence. The use of brutality by the police in securing confessions, the reception of flimsy evidence as to identity, and the ineffectiveness of circumstantial evidence may be curtailed by more reliance upon scientific data and less reliance upon individual "reasoning."[1]

Fred Inbau was a Raymond Fellow in Criminal Law at the Northwestern University School of Law when the article saw the light of day. In due course, he became an expert in scientific evidence, a practicing lawyer, a professor of law, then the first occupant of the John Henry Wigmore chair in law, and finally emeritus professor. In time, he became very well known; indeed, he became almost incalculably influential in his field. To his end, he remained faithful to the important principles he and Baker outlined in 1933.

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* United States District Judge, Northern District of Illinois and co-author with Fred E. Inbau (and others) of several editions of CRIMINAL LAW AND ITS ADMINISTRATION and CASES AND COMMENTS ON CRIMINAL PROCEDURE.

[1] Newman F. Baker & Fred E. Inbau, *The Scientific Detection of Crime*, 17 MINN. L. REV. 602 (1933).

What he believed in 1933 came to be believed by all the best minds in his field. As the century proceeded, the basic principles did not change, but some of the definitions did. What some thought was technical, others came to think of as substantive. What constituted brutality in securing confessions became a subject of debate. Even the systemic values of preserving individual rights and the dignity of government, which might trump the use of reliable, non-brutal methods, became controversial in the field of criminal justice. Virtually all of Fred Inbau's professional life, from about 1943 (when *McNabb v. United States* was decided)[2] until his death, was enmeshed in the debate between those who spoke as though the primary (but not the sole) role of the criminal justice system was the reification, or, at least, the reflection, of broad social values and symbols[3] and those who thought its primary (but not the sole) role was to condemn the guilty and exonerate the innocent.[4]

For more than a half-century, Fred Inbau explored criminal justice as a scholar. He did not much care for polemics. He was often the target of polemics, but I cannot recall Fred Inbau ever attacking the character or politics of anyone who disagreed with him. He would say they were wrong or mistaken, he would not call them names. And I write here of his private conversations when even the most reserved of persons often let loose the invective that so often mars public debate. Intellectual opponents often become "fascists," "communists," "bigots," "oppressors," "toadys," "liars," "sexists"; perhaps this works in political debate (or in high level philosophical debate in France)[5]; it is worse than useless in trying to discover a good solution to any social issue on which reasonable persons might disagree.

I do not mean to say that Fred Inbau did not think badly of some people. He served in a quasi-judicial capacity on the Illi-

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[2] 318 U.S. 332 (1943).

[3] *See* United States v. Calandra, 414 U.S. 355, 356 (1974) (Brennan, J., dissenting) ("[U]nless we are to shut our eyes to the evidence that crosses our desks every day, we must concede that official lawlessness has not abated since creation of the exclusionary rule.").

[4] See Fred E. Inbau, *The Perversion of Science in Criminal and Personnel Investigations*, 43 J. CRIM. L. CRIMINOLOGY & P.S. 128 (1952) (criticizing doctors and forensic experts for acceding to police demands to pump the stomach of an unwilling suspect or otherwise to invade the body of an un-consenting individual to gain evidence).

[5] For the sake of correctness, I note that I write here with irony. I do not mean to accuse all academic philosophers in France of using low invective. I speak only of the one, whom I do not name, whom I heard refer to the serious work of a 20th century English philosopher as "merde." That single word was all that he had to say on the subject.

nois State Police Merit Board and made judgments about the worth and integrity of police officers and, sometimes, of hearing officers. What Fred Inbau understood is that dispassion is a virtue if one is searching for the truth. Often the truth is hard to see and strong emotions usually cloud vision. Even when he thought his opponents were fools, he thought it worth the effort to try to persuade them of his position. He did not inhabit a world that so many lawyers do, a world where the only goal is to win the argument, for winning's sake alone.

While Fred's emphasis was not on winning arguments, he knew that he was a scholar in the law. You can see what this means if you look at the three essays published together in 1965 for The Magna Carta Commission of Virginia under the title "Criminal Justice in Our Time."[6]

One essay written by Thurman Arnold recounted three cases in which either he or his partner (Abe Fortas) had served as counsel.[7] Judge Arnold closed in this way:

> The tremendously important result of the moral values implicit in the *Durham, Pound* and *Gideon* cases . . . is that these moving dramas on the courtroom stage tend to create a compassionate society. Only a compassionate society can take the measures which will solve the problem of crime and violence in the slums of our great cities.[8]

I doubt that Judge Arnold would write the same words today after the nation's experience with the moving dramas on the courtroom stage brought to us live and in color on television. But it is not the merit of his argument that I wish to address. I simply note that it is the argument of a cultural anthropologist/semiotician/criminologist.

Another essay written by Yale Kamisar noted the difference in constitutional protections afforded to the defendant at trial in the "mansion" of justice, and those afforded to the criminal suspect at the police station in the "gatehouse" of justice, where he is "subjected to 'interrogation tactics and techniques most appropriate for the occasion.'"[9] In the latter, Kamisar wrote, "ideals are checked at the door, 'realities' faced, and the pres-

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[6] CRIMINAL JUSTICE IN OUR TIME (A.E. Dick Howard ed., 1965).

[7] Gideon v. Wainwright, 372 U.S. 335 (1963); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); United States v. Ezra Pound (D.D.C. 1958).

[8] Thurman Arnold, *The Criminal Trial as a Symbol of Public Morality, in* CRIMINAL JUSTICE IN OUR TIME, *supra* note 6, at 161.

[9] Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIME, *supra* note 6, at 20 (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 20 (1st ed. 1962)).

tige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion' . . . the enemy is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated."[10] One can agree with this or reject it, but it is at bottom an argument of a philosopher of ethics and politics. The passage, indeed much of the article, would fit right in with a collection of philosophers from Bacon to Mill.

Fred Inbau began his essay as follows:

> A law-abiding citizen is on his way home at night when an unseen assailant hits him over the head, rendering him unconscious because of a fractured skull. His wallet containing $50 is taken from him, and his assailant flees into the darkness. No one witnesses this occurrence; only the victim's condition, the missing wallet, and perhaps the sound of running footsteps heard by a nearby resident reveal what occurred. That same night a young woman is forced into an alley and raped. She cannot describe her assailant to the police except in a vague and general way; she tells the police she cannot identify him; all she can say is that he was tall, white, and that he wore a light-colored jacket, that she scratched his face, and that she herself bled as a result of the attack. In another similar case the victim is killed and there are no witnesses known to the police.
>
> By what means can these cases be solved?[11]

The answer to this question was determined (in the pre-DNA testing days and, often, even now) by means of police interrogation. In turn, Fred Inbau discussed stop and frisk practices, the exclusionary rule and wiretapping; each time he used a case example. Eventually, he concluded that courts ought not try by indirection to force police to behave properly by releasing obviously guilty criminals. Rather, he thought the answer was direct action to improve police quality, efficiency and respect for individual civil liberties by proper selection of personnel, training, non-political promotion, competent supervision, and adequate compensation.[12] One could accept or reject this view, but it arose from his legal analysis of the problem at issue. Fred Inbau analyzed cases, reasoned from cases, drew inferences from the study of cases. He remained committed to the methods of law and lawyers in which he was trained and practiced. You might answer Thurman Arnold with a quote from Clifford

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[10] *Id.*

[11] Fred E. Inbau, *Law Enforcement, The Courts, and Individual Civil Liberties, in* CRIMINAL JUSTICE IN OUR TIME, *supra* note 6, at 99.

[12] *Id.* at 134-35.

Geertz or Umberto Eco. You might answer Yale Kamisar with a quote from Hobbes or Bentham. You can answer Fred Inbau only with other cases, with counter-examples. This is, in my view, one of his great virtues.

Fred Inbau thought the United States Supreme Court had made errors in its confession jurisprudence. One of the errors was in its judgment, implicit in *Miranda v. Arizona*,[13] that the practical necessity for confessions to solve criminal cases was not as great, anywhere near as great, as Fred Inbau knew it to be. In *On Lee v. United States*, the Supreme Court could quote the famous dictum that "it is far pleasanter to sit comfortably in the shade rubbing red pepper in a poor devil's eyes than to go about in the sun hunting up evidence,"[14] because it was filled with judges who had rarely spent anytime themselves in the hot sun looking for evidence that did not and could not exist. Fred also knew that this was a fake dichotomy and that facts are blurred in the service of dry wit, as one does not need to torture in order to interrogate. Nevertheless, this was an error that he could understand.[15] What he did not understand was the attempt of the Court and its defenders to portray the costs of the decision in *Miranda* as relatively slight. Fred Inbau knew that, because of *Miranda*, many guilty persons would go unpunished and some of those would commit more crimes. One can argue that the percentage of such cases is very small compared to the universe of criminal investigations but it is difficult to argue that the absolute number of cases is small or that the crimes they involve are trivial.

Indeed, the Supreme Court's carelessness about the basis and effects of its decisions had been profoundly distressing to Fred Inbau for many years. In 1948, he had established that the legislative and factual basis for the decision in *McNabb v. United States* was deeply flawed and yet the Court seemed to ignore these truths.[16] Fred Inbau was committed to the truth. He could have comprehended and respected (if not agreed with)

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[13] 384 U.S. 436 (1966).

[14] On Lee v. United States, 343 U.S. 747, 761 (1952) (Frankfurter, J., dissenting) (quoting 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND n. 442 (1803)).

[15] One of the great ironies in *Miranda* is that the majority in the Supreme Court implicitly criticized Fred Inbau's book on interrogation techniques, *see* 384 U.S. at 1614 n. 9, despite its clear instruction to police to "investigate before you interrogate." FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 10 (1st ed. 1962).

[16] See Fred's close analysis of *McNabb v. United States*, 318 U.S. 332 (1943), in Fred E. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

an opinion that said, "We realize that some criminals will go free and even more persons may be victimized by those we free, but the value to society of this control on police is worth the price some of us must pay for our limitation on the police." Indeed, this is one explicit rationale of the burden of proof beyond a reasonable doubt in criminal cases and a rationale that he accepted.

Fred Inbau thought that the truth was the most important thing. He believed in exonerating the innocent, in convicting the guilty, and in honest, realistic reasons for judicial opinion. I never heard him criticize the constitutionalization of the right to a fair eyewitness identification procedure, although he did wonder how the Supreme Court could say the doctrine was a recognized ground of attack when only one federal court in one case had adopted it.[17] In the political world there are plenty of people who are willing to suppress the truth if the truth would embarrass some distinguished person or some worthy cause. The French government's unwillingness swiftly to exonerate Dreyfus was probably rooted less in the belief that Dreyfus was guilty and more in the desire not to subject the military establishment to political loss of face. The defense of Stalinism in the West was grounded less in approval of his barbarous acts and more in the fear that any admission of wrongdoing would damage the sacred cause of the proletariat. Fred Inbau was a man who wanted the truth out, no matter which way it would cut. If he had been in the French right wing, he would still have stood up for Dreyfus. If he had been the leader of the French communist party, he would still have condemned the show trials.

Before his death, Fred Inbau had seen two developments of significance. Those who do not know Fred well would be wrong about which of the two pleased him.

The first was the apparent public approval of police methods of interrogation that are far tougher than most of us would have thought defensible just a few years ago. I have in mind *NYPD Blue* (but it is not the only example) in which police officers portrayed as heroes regularly use violence or the threat of violence to secure confessions. This television show, and others like it, would not be as popular as it is absent public approval of

[17] Stovall v. Denno, 388 U.S. 293, 302 (1967) (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)).

the police methods it portrays. And, indeed, it also portrays the use of psychological techniques, which Fred Inbau advocated. Nonetheless, Fred found nothing admirable about the portrayal of police violence as justifiable or worthy, and he was not pleased by the public acceptance of it. Fred Inbau was not pro-police, he was pro-truth, and he knew that violence leads to false confessions.

The second was the new emphasis on looking at interrogation practices in light of their likelihood of inducing false confessions. There is a debate now as never before about whether police secure false confessions, how often and why, and what to do about it. Some of the writers identify Fred Inbau's own techniques as the culprit in some false confession cases.[18] Fred Inbau was pleased with this debate and would have been more pleased if he could have seen it develop. This is so for two reasons. First, he knew that if the goal of the process is to eliminate the techniques that produce falsehood, then an inevitable consequence of the process will be to approve the techniques that produce truth. So, the debate is finally being conducted in the way Fred Inbau always thought it should be conducted. Second, no one would have been more willing to listen to evidence that his own techniques were flawed. It was not rhetoric, it was bedrock morality that led Fred Inbau to say that the guideline for all confession practice is: "Is what I am about to do or say apt to make an innocent person confess?"[19]

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[18] *Compare* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) *with* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998).

[19] FRED E. INBAU, JOHN E. REID, & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATIONS AND CONFESSIONS 217 (3rd ed. 1986).