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# THE MAN WHO SWAM UPSTREAM

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It has been described, accurately, as the "Warren Revolution": that period, roughly between 1960 and 1969, during which the Supreme Court of the United States under the leadership of Earl Warren chose to revolutionize the enforcement of the criminal law. In this ten-year period the Court's rulings, in the words of Senator John L. McClellan (D.-Ark.), threatened: "to alter the nature of the criminal trial from a test of the defendant's guilt or innocence to an inquiry into the propriety of the policeman's conduct."[1] To back up this contention, Senator McClellan noted the Court's record of reversals of criminal convictions between 1960 and 1969: 63 of 112 federal criminal convictions were reversed—a figure of almost 60%; 113 of 144 state criminal convictions were reversed—a figure of almost 80%.[2]

Of far greater importance than the actual number of reversals was the sweeping manner in which many of the Court's opinions were cast. Police procedures were scrutinized through a fine constitutional eyepiece. For example, the exclusionary rule[3] mandated that *any* evidence, no matter how relevant or probative of a suspect's guilt, must be excluded if the police committed any error in the search and seizure process; *Miranda v. Arizona*[4] dictated that no confession, no matter how voluntary, could be used against a suspect if law enforcement officers ran afoul of a prescribed litany of warnings to the accused of his rights; and the "line-up cases"[5] held that eyewitness identifications by witnesses to and victims of crimes were inadmissible if the suspect's attorney was not present (unless he waived the right). The thrust of the "Warren Revolution" was to elevate the rights of the criminal accused to a level hitherto unknown in this country, or, for that matter, in the world. If the rights of society to be reasonably free from criminal harm might, as a consequence, be correspondingly diminished, so be it.

Nowhere was the Court's revolution of the criminal law greeted with more enthusiasm than in academic legal circles. Not surprisingly, hymns of praise rang out from law school campuses across the nation. The rights of all citizens *are* extremely important, especially those of criminal suspects. Furthermore, it is the function of the academic to study the issue from a rather lofty plane, withdrawn from the hurly-burly of law enforcement on the street: the constant interplay, in real life, of policeman, criminal and victim. As Mr. Justice Black once stated: "It is always easy to hint at mysterious means available just around the corner to catch outlaws."[6]

The torrent of adulation from the groves of legal academe for the Warren Court and its pronouncements became pretty much a raging current. Few had the inclination to swim upstream against it. Of those who did, one name stands out preeminently: Fred E. Inbau.

A minor figure in the legal academic scheme of things might not have gotten away with it. He might have floundered in the current. But Fred Inbau was no minor figure. He was one of the most respected law professors in the nation. Students at the Northwestern University School of Law jockeyed to get into his classes. He was in demand in both national and international circles as a lecturer in criminal law and scientific crime detection. He had written so many casebooks and textbooks that most people (perhaps even Fred) had lost count of them; but thousands of law students had cut their criminal law teeth on them. An international authority, Inbau was not a man whose views could be easily brushed aside.

Inbau holds certain deeply-rooted beliefs about the criminal justice system. He is among

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[1] 115 CONG. REC. 23235 (1969) (remarks of Sen. McClellan).

[2] *Id.*

[3] Mapp v. Ohio, 367 U.S. 643 (1961).

[4] 384 U.S. 436 (1966).

[5] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

[6] Berger v. New York, 388 U.S. 41, 73 (1967) (Black, J., dissenting).

the first to champion the fundamental rights of criminal suspects. He is probably the leading national authority on criminal interrogations and confessions; his book on the subject has been a Bible for law enforcement officers for years; but he has always maintained that *any* interrogation techniques which might cause an *innocent* party to confess must be absolutely prohibited and any confession so obtained should be inadmissible.

His concerns, however, unlike many of his colleagues of a different persuasion, are not singlemindedly directed towards the rights of the accused. Others, he believes, also have rights; namely, the law-abiding citizen and the victim of crime. For Inbau, a system of law which raises elaborate safeguards around the accused, but does little or nothing to protect the innocent, is a system badly out of balance, and this was the direction in which he perceived our criminal justice system to be going.

So the swim upstream began. Fred Inbau never had any lack of invitations to lecture, to testify before state and national legislative bodies and to appear on television talk shows. He began to carry the message: we've gone overboard in favor of the criminal and some day the chickens are going to come home to roost. He was, of course, to be proven perfectly correct—at least to those who believe that the permissiveness shown towards criminals in the 1960's had a direct cause-and-effect relationship to skyrocketing crime rates during the same period.

As editor-in-chief of the prestigious *Journal of Criminal Law, Criminology and Police Science* published by Northwestern University Law School, he had a built-in platform from which to expound his views, and he did not hesitate to do so. His best effort was an editorial entitled *"Playing God": 5 to 4* in which he testily accused the majority of the Court in *Miranda v. Arizona* of going on a sort of constitutional rampage.[7]

Self-effacing and retiring, Inbau is nevertheless a man of action. (He has been known to chase down a fleeing robber on the street, collar him and hold him for the police—hence the appellation, "Freddy the Cop"). It would have been uncharacteristic of the man had he contented himself with speaking and writing on the drift which the law currently was taking. In 1965 he went into action and founded Americans for Effective Law Enforcement, Inc. (AELE).

Although AELE was Fred's brainchild, he assembled about him a blue-ribbon roster of cofounders: the late O. W. Wilson, then Superintendent of the Chicago Police Department; Richard B. Ogilvie, then president of the Cook County Board, and later Governor of Illinois; James R. Thompson, then a Professor of Law at Northwestern University who is currently Governor of Illinois; the late Harold A. Smith, past president of both the Chicago Bar Association and the Chicago Crime Commission; and two Chicago Attorneys, Alan S. Ganz and Daniel B. Hales.

AELE was founded as a national, not-for-profit citizens organization whose purpose was to represent the rights of the law-abiding citizen in the criminal justice system. Inbau has expressed his motivations: when he was called upon to testify in support of more effective law enforcement before various policy-making bodies he usually stood alone, while the room was filled with those calling for more rights for defendants. He felt that there should also be a responsible citizen's voice on the other side.[8]

AELE's principle program at the outset was the filing of briefs as *amicus curiae*, in the Supreme Court of the United States, on the side of law enforcement. The first such brief, written by James R. Thomspon, was filed in the case of *Terry v. Ohio*.[9] It was a masterful piece of legal draftsmanship which may well have assisted the Court in arriving at its eight-to-one decision upholding the right of the police to "stop and frisk" persons suspected of criminal activity in public places.

Since then, AELE *amicus curiae* briefs have been filed in twenty-one Supreme Court cases, with AELE on the winning side in fifteen out of the eighteen cases which have been decided. Significantly, many of these were cases in which the Burger Court narrowed, or at least de-

[7] Inbau, *"Playing God": 5 to 4*, 57 J. CRIM. L.C. & P.S. 377 (1966).

[8] Early in the course of AELE's endeavors, Mr. John P. MacKenzie, a staff writer for the *Washington Post*, wrote that Inbau had founded AELE to "get even" with the Warren Court for the *Miranda* decision. Whether this allegation was made spitefully or just in ignorance, it was totally unfounded. Inbau sent MacKenzie a copy of AELE's Articles of Incorporation dated March, 1966, three months *before* the *Miranda* decision. MacKenzie did not reply.

[9] 392 U.S. 1 (1968).

clined to expand, restrictions which the Warren Court had imposed upon law enforcement officers. Some measure of the importance of such *amicus* advocacy can perhaps be found in the fact that in the recently decided case of *Brewer v. Williams*,[10] the attorneys general of twenty-one states joined in AELE's brief.

Both of the authors of this article have been closely associated with Fred Inbau, personally and professionally, for over ten years. Our admiration for him is obvious and this article must, of necessity, be biased. But biased or not, the fact remains that Fred Inbau, once a lonely voice in the wilderness, has been vindicated and proven right about as much as a man can be. Inbau was almost alone in calling for a criminal justice system which considered the rights of the law-abiding, at a time when such a position was not in vogue in the legal—academic community. He had many detractors then; but when he predicted that a single-minded permissiveness towards criminals would lead to sky-rocketing crime rates he was, of course, right. He called for a balance in the system, and such a balance is slowly coming into being today. The impact Fred Inbau has had upon this improved situation cannot be measured with precision but in our opinion the contribution made by the man who swam upstream has been indeed significant.

[10] 97 S. Ct. 1232 (1977).