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Panelists' Comments

Comments by Richard H. Kuh*

Thank you Professor Batt, Professor Kamisar, fellow panelists, honored guests and friends.

I have been a prosecutor for about twelve years and until Professor Kamisar's remarks this morning, I had never previously heard myself spoken of as a hunter. If I am to be spoken of as a hunter, I'm darned glad it is in Dan Boone country. It might be less popular in my own city of New York.

Now your principal speaker, Yale, and I have been friends for many years. Despite a warm friendship, I don't think we have ever found anything we have agreed upon in these many years. Indeed, I met Yale on the plane in Cincinnati and we flew down here together. I think the stewardess was a little bit fearful that there would be a mid-air explosion. There was none and we both got here. So as to any remarks that I may make about Yale's paper —I know Yale is prepared to have me disagree with him—I hope that all of you will recognize they are not meant in any fashion to intrude on your graciousness and the hospitality that you've shown both sides of the fence.

Yale's paper—to my mind—is a magnificent, indeed I would say a monumental example of the constitutional inability of many law professors and indeed, I am sorry to say, many appellate judges, and critics of prosecutors and of police, to even momentarily place themselves in the role of a policeman or a prosecutor. And certainly the Attorney General of the United States is a prosecutor, as the number one law enforcement agent in this country. I think when we analyze, and criticize, and pick at what somebody has to say, we have an obligation in so doing to at least momentarily place ourselves in his shoes, and to say "what would I do had I that position." I urge that this is something that law professors and judges should do when they criticize law enforcement. Indeed, a prosecutor worth his salt must, in every case that he tries,

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project and say, "What will defense counsel do? Can I momentarily stand in his shoes and anticipate and see the logic or the illogic of what he does"?

What was the Attorney General's position last summer when he wrote this *horrendous* letter? He was faced with *Escobedo* having been the law for a year. He was faced with the existence—the happy existence—of a group of distinguished judges, law professors and a few police and prosecutors, in the American Law Institute, who were trying to put together a *reasonable* method, a method that would be fair to defendants and also fair to the people in the community, a method of protecting a defendant's rights and at the same time protecting the community. And I suggest to you that there were four cards, if I may talk in terms of a partial poker game, when this thing started that he had to keep in his hand. There were four facts that he had to face; then he proceeded from those four cards, those four facts.

What were the four cards?

One: *Escobedo* was the law. There is much speculation as to how broad *Escobedo* is, or how broad it isn't, but I think that one thing is clear: at the very least, *Escobedo* does say that if a defendant says, "Mr. Policeman, may I have a lawyer?," or if a lawyer is knocking at the station house door and saying "You've got my client up there and I want to talk to him," at the very least, at that point there may be no more questioning. So that's card number one. This is and was the law, regardless of whether warnings have to be given or not. That much was clear: a request to see counsel, or a request by counsel to see the defendant having been made, then questioning had to stop.

Card number two: This rule of law was not premised on general judicial supervision over the acts of policemen, or on any generalities. It was placed on constitutional grounds; namely, that the right to counsel—the sixth amendment—provided that defendants had the right to counsel, and that that right apparetly started at least at the station house, and for all we know, before. (I guess, probably, if the defendant, at the moment he was apprehended said, "Say, boys, I'd like to see my lawyer," under *Escobedo* that request would have to be honored at that point.) That's the second card: *Escobedo* rests on constitutional grounds, and hence is beyond the power of legislation to overturn.

The third card: Legislation, some sort of model legislation, was then being drafted by the American Law Institute, by the American Bar Association, by other groups that would (as I have suggested) create some balance—some adequate protection for the community while at the same time *fairly* protecting the defendant's rights.

And the fourth card and the ace card—if I may call it that—the most important card that the Attorney General faced, was, I assume his own conviction (and what is certainly my conviction, my solid and firm conviction) that interrogation of defendants in many, many cases, a statistically significant number of cases, was *absolutely, unequivocally necessary.* To phrase this card a little more crudely: that the Supreme Court, if you will, was wrong. The Justices of the Supreme Court, or at least five of the nine Justices, indicated—and let me quote Mr. Justice Goldberg, and this is from the majority opinion in *Escobedo*: "a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." That quote suggests—I grant it doesn't quite say it—but suggests, and others have said it, other appellate judges, and othe rlaw professors, and other newspaper commentators, that if only police will work a little harder they can get this extrinsic evidence; that *really, really* there is no need for confessions; all we need is a policeman who will be a policeman instead of a third-degreer under the bright lights, if you will.

I suggest to you that that conclusion is absolutely false. There is no nice way of putting it. Now, I'm a prosecutor, and I'm opinionated, and I'm not objective, and all that. Let me therefore discuss that with you just a moment—a little excursion.

I will concede (and there are police and prosecutors who won't concede this) that there are *many* cases in which police do rely on interrogation and cease doing proper investigation. How often has an assistant prosecutor in any county asked a policeman what he turned up (when the assistant first has the case to prepare for trial) and the cop says, "Gee, he made a full confession. I stopped there. No need for anything else. Hell, he admitted it." This happens, this is deplorable, this shouldn't happen, and it does

happen, and I do concede that there are many instances when police could go a step further and could get evidence other than confessions. Having said that—and having shown you how objective I am—now let me make some further comment about it.

I think that to expect police to push beyond the confession in every case loses track—and I'm sorry I don't know Kentucky as well as I should but I do know something about New York—of the fact that there are tens, nay hundreds of thousands of cases a year, and a police force in our city, the largest force in the country, of 27,000 men to man the city in three shifts round the clock. And I suggest to you that every time my apartment is broken into, or Yale comes to New York and is mugged, or somebody's wife gets attacked and is raped, you cannot have 27,000 policemen working around the clock on that investigation. Shortcuts *are* necessary. I'd be delighted if they weren't. The only alternative, of course, to recognizing the need for shortcuts is to have instead of 27,000 policemen, 54,000 policemen or 108,000 policemen and then each cop could put in twice or four times as much time on every case. Of course you couldn't recruit them, you couldn't pay them and if the fear is of a police state, I suggest that having four cops on each corner instead of one might make us look more like the "Dominican Republic," let us say, then New York City. And so I don't think the answer is to multiply our police force. I think it is to recognize that there are times when shortcuts will be needed. Nay indeed, I even know of law professors who have used short answer exams because its a shortcut to marking papers. (Interjection by Mr. Kamisar: "You struck a chord there.")

Now, put aside the need for shortcuts, let me get further into this interrogation miasma. There are cases which no matter how deeply investigated, no matter how completely not a stone is left unturned, in which *no clue* will be found without interrogation. Let me give two that very many of you here have read about, two current cases.

New York has just convicted a defendant named Richard Robles of two murders that, at least in my time in prosecution, I know of no crimes that so shocked any city. Two girls, one (the niece of a famous man), Janice Wylie, and her roommate, Emily Hoffert, were killed, their nude bodies trussed up, horribly slashed, were found in their apartment. And this wasn't an

apartment in the part of town that I live in. This was an apartment in one of New York's most fashionable, best protected, loveliest neighborhoods. Indeed, an apartment in which there was a protective doorman downstairs. Suddenly our city felt, and I am told the country felt, if this murder can take place on those well-guarded premises, nobody is safe from the crime wave. Nobody is safe. And so I tell you without any fear that anyone can contradict me, there wasn't a stone left unturned in that investigation. More cops were put on that investigation than it could possibly justify. "Screwball" leads of the strangest kind were followed and followed vigorously. Good cops, high ranking policemen, inspectors, captains, etc. were handling this investigation. It was no sloppy hurried investigation. And I ask you, with all of that, what turned up? You know what turned up: at first, the interrogation, and an alleged confession, from the wrong man, one Whitmore. Shocking? But it was the only evidence. And on that evidence, Whitmore was indicted. Happily, he didn't get near being tried; he was cleared long before trial. Second: Richard Robles was linked to the crime by two types of interrogation. The first type was one in which an informer came forward (and all civil libertarians know what "finks" informers are, and how terrible it is that prosecutors rely on informers, and many people would strip us of relying on informers by insisting that all informers be exposed—possibly having them killed—but that's another panel discussion). But the state's evidence against Robles was produced when an informer came forward and, whatever his motives, was equipped with certain secret recording equipment and then in effect, he, acting as an agent of the police, interrogated Richard Robles. And so this was one type of interrogation—and interrogation it was—that was used in evidence and helped convict Robles. The second type of interrogation was face-to-face police interrogation. And there was testimony to it and that convicted Robles. Thus the only evidence, virtually against Robles was these two types of interrogation —and then, having gotten the story, certain things that tended to corroborate the confessions. And how long was that jury out after a seven week trial? An afternoon. It came back and convicted the defendant of murder—two murders—in the first degree. I suggest to you that here is the classical case, the case showing both the weakness of the confession, namely the Whitmore confession, and

the case showing the *need* for confessions, the case that should tell the Supreme Court, you cannot say, "Fellows, work a little harder, and you won't need that confession."

Let me give you one more case, another classical case. *The New Yorker* magazine in September and October of this year [1965] had a serialized version of Truman Capote's story, (that will shortly appear as a book) called *In Cold Blood,* dealing with the murder in Kansas of an entire family—husband, wife, and two teen-age youngsters. (I hope you all have read it, and any of you that haven't, I recommend it to you. And I'm not in the book selling business.) I never knew Mr. Capote, and I don't know what his background was in crime before this, but I venture to say that, as a member of our literary set, he was not prosecution-police minded—if he was, he was most exceptional. He nonetheless, writes what I have found to be a most sympathetic picture of police: Kansas state police, some from the FBI, local police, and sheriffs, working themselves blue in the face, hunting for clues in this shocking murder and coming up with virtually—there were some clues, but virtually—nothing. Virtually nothing that is until (a) again, an informant appeared upon the scene (one of these "horrible" creatures), and then (b) on the basis of the informant having given certain tips, diligent follow-up produced two defendants. The two defendants made full and detailed confessions, and these confessions contained within them information that was subject to corroboration. The defendants were convicted and ultimately hung. I suggest to you that if you read that story with a balanced eye, you will see that here again is a story of a horrendous murder showing the need, the need for reasonable, not coercive, but reasonable interrogation. Argument One.

Argument Two: If I say, positively, "Interrogation is needed," some of you will say "Sure, you can pick and choose a few cases, but you don't prove a point by isolated cases." I say it is important, when you get shocking cases like these, important to the protection of the public and important to the confidence of the public in their police, that they be solved. Indeed it is important to the confidence of the public, not only in police, but in the courts. What would the confidence of the public be in the courts if in the *Robles* case, if in this quadruple Kansas murder case, in case after case, the public picked up their paper and read that the right

man had been arrested but, oh well, he must be turned loose because we cannot use against him the voluntary statement that he made. (We are talking now about voluntary statements only.) I suggest that even these few cases prove my point.

But let's go beyond the few cases. You heard Yale Kamisar cite Judge Sobel's statistics. As all judges, Judge Sobel is a very estimable gentleman, but that doesn't mean that he does not—like others—have his biases. I suggest to you that just three days ago someone—also with biases—my former boss (I'm former, he's still boss), the New York County District Attorney, Frank S. Hogan, gave some figures suggesting that 68 per cent of 91 murder cases then pending in New York County involved confessions, and that in 27 per cent of the cases he couldn't have even gotten an indictment (and one doesn't require an awful lot, actually, for an indictment), without using these confessions! But let me stick with Judge Sobel's figures. Suppose in only ten per cent of the cases—and I could talk here to you for an hour showing you the holes in Judge Sobel's figures—but let's assume he's right and in only ten per cent of the cases do you need confessions. Ten per cent of the crimes may not mean much to us sitting in this room, but if we are the tenth man who gets mugged on the way home tonight we might b ea little happier that there are ways of arresting and convicting that person who mugged us and not to be told by Judge Sobel, "Oh you are only the one of ten. Your fellow won't be convicted. Maybe we'll catch him when he muggs somebody else." I suggest to you that is not very satisfying. Ten per cent, in short, is a statistically significant figure. My own experience suggests a realistic figure would be more like sixty per cent.

And the last argument I advance in urging that confessions must be used, why they are absolutely necessary, is simply common sense. Murderers, rapists, muggers, burglars don't commit their crimes in front of this esteemed audience. They do it in quiet, they do it in silence, they do it with either no one present or with only the victim, and the victim is often rattled, injured, and his testimony is frequently questionable at best.

What are the four cards, then, that the Attorney General, Nicholas Katzenbach, had in his hand when he decided to write his letter to Judge Bazelon? (1) The card that at least he was convinced that confessions were absolutely necessary—fairly, non-

coercively obtained confessions; (2) The Supreme Court had said that when a request was made by either counsel or by the defendant, that confession couldn't be used; (3) This ruling rested on constitutional grounds that could not be overturned by statute; (4) Reasonable statutes where then in process of preparation and might, within the next six months or year, be released.

Now what does a man do getting into his shoes, what does one do in that position? One says, "All right, there's something that's over and done with. I can't make the Court turn back the clock. I can't repeal, in any way, what they have done. Once a defendant asks for a lawyer, once the lawyer asks for him, he gets it. *But let me limit it to these facts.*" And I suggest to you that that's all the Katzenbach letter was. It was an effort on his part to limit *Escobedo* to the facts of *Escobedo*. And he did a damned good lawyer-like job in doing it. He made arguments that apparently convinced much of the press. Yale Kamisar bewails that. I don't bewail that. In arguments that I found, with my pre-conditioning, fairly convincing arguments, that took an hour to be "nit-picked" at here and hopefully knocked down and I'm not sure how successfully. So that I suggest to you that if Yale had been in the Attorney General's boots, maybe he would have done just what Mr. Katzenbach did.

I do think that I owe it to you to give just a minute or two of my own interpretation of what might be done.

As a prosecutor of about twelve years standing, I agree with Yale that it's a pretty shoddy business, and something that shocks me, when the poor stupid "glom," the "dope" who gets picked up and doesn't know his rights and has nobody representing him, can be interrogated, and the really dangerous man who as been in jail six times before, and beaten five other cases and hence knows his rights (better than I as a lawyer know them), when he is picked up, he says, "Oh, I want counsel." Of course he knows that the moment counsel is there he's got somebody else running interference for him, and not a word will be said. I think that's shocking. The idea that the "dope" gets one brand of justice and the "sophisticated bum" gets another, bothers the daylights out of me.

There are only three ways of dealing with this, however, and I think Mr. Katzenbach picked the most realistic one.

One way—his way—is to limit the case to its facts and say, "O.K., in these cases we can't use the confession, but let's not extend that rule."

The second way, one that I would like to see used, but I doubt that I'll see in the next five years, (though I expect I may see it in ten or fifteen would be by constitutional amendment to come right to grips with the need for interrogation, and by a constitutional amendment to modify the fifth and sixth amendments to permit reasonable noncoercive interrogation of defendants, either in the absence of counsel but with other safeguards, or even in the presence of counsel but with some obligation on the part of defendants to answer questions put to them, or to risk that their silences may be used against them. This may sound shocking, but Dean Wigmore many, many years ago suggested that the fifth amendment was not sacrosanct. The great Justice Benjamin Cardozo suggested the same thing—that a reasonable method of interrogation with an allegation to respond or run the risks of silence would not turn our common law into a shambles. That's the second method. I don't think it's likely to be adopted—in the next six months—and so maybe the Attorney General's suggestion was the wiser.

The third method would be for the Supreme Court of the United States of America to do something about it. And I'm not now criticizing the Court. You know whenever a prosecutor or cop says anything about the Court, there's something "unpatriotic" about it. Happily, though, I've been here and I know that cats may look at kings. I've heard Yale Kamisar criticize Attorney General Katzenbach. I guess I too can be the cat criticizing the kings—the Supreme Court—without being disloyal, without being unpatriotic. And I suggest to you that what the Supreme Court can do is very simple. I don't think they're going to do it, but what they could do is simply to reverse *Escobedo*. Emerson, I remind you, said, "Consistency is the hobgoblin of little minds." I know there are no little minds in that temple of justice in Washington. I am sure that they are not worried by consistency. We've seen that over and over again. I suggest to you further that when one talks in terms of the Court reversing itself it sounds monolithic and difficult. But I think if one talks in terms of people it is easier. Five Justices in *Escobedo* said, in effect, "Four Justices

are wrong. They are not giving you the law. We five are right. We are giving you the law." And I suggest that all we need for reversal of *Escobedo* is that instead of *five* Justices saying *four* Justices *are* wrong, we need *five* Justices who will now say *five* Justices *were* wrong. And, this said, *Escobedo* is reversed! That is not impossible: We have a change in personnel. One of the five Justices the Justice who wrote the opinion, is no longer on the bench. We have in his place a Justice whom I do not know. I know nothing about him except what the papers have said. But I do know that when he came up for Senate confirmation, the *New York Times* quoted him as saying that he felt that reasonable interrogation by police of suspects was, in the words quoted in the *Time,* "absolutely essential." And so I think that if the Court will swallow hard, and will look at the chaos that has been created, I think the possibility of reversing *Escobedo* is not beyond hope. I think it would be sound. I won't get deeply into this on legal grounds, but I think that finding that the sixth amendment applies outside of the courtroom (in the station house) requires the straining of about a dozen separate words in the sixth amendment itself, words which clearly and unequivocably refer to a trial *in the courtroom.* So I suggest that a sound basis for reversal exists.

The Attorney General's letter would not have been necessary if either there were to be a constitutional amendment, or if the Supreme Court itself were to reverse its action in *Escobedo* and were to remove the constitutional strictures on legislation. Then we would be able to have that which I would love to see (and that which I think would be sound as a bell): orderly legislation, legislation that the American Law Institute or the American Bar Association or some other group may suggest; a legislative pattern for dealing with this balance of fairness to society and fairness to the defendants.

I remind you, in closing, that the great judge, Henry Friendly, in the October issue of the *California Law Review* wrote a brilliant article calling for *legislative* action in so many of these areas rather than *judicial* action. I suggest to you that a proper, strong Supreme Court opinion could remove this area of interrogation from sixth amendment strictures and simultaneously could insist upon legislation being enacted, "with all deliberate speed" to deal intelligently with the question of interrogation of defendants.

COMMENTS BY DEAN EDWARD L. BARRETT, JR.*

Mr. Chief Justice, ladies and gentlemen: I do not propose to talk this morning much about the substance of Yale Kamisar's paper. I think that debating about the Attorney General's letter is somewhat irrelevant though I realize that Yale loves debate. I suspect that the Attorney General's letter demonstrates two things. One is that there is great risk in writing letters, especially if you think they're going to be subjected to Mr. Kamisar's debating techniques. The other is that an academic who takes a public post puts himself in this very peculiar position that his academic friends regard him as too practical and his professional colleagues complain about his being in the "ivory tower." What I would rather do is to try just for a moment to look at some of the basic issues which underlie this whole controversy with respect to confessions and the role of counsel at the police station.

There are two fundamental questions here. One of them is just what the role of the lawyer is in our system of administration of criminal justice. What do we want to use the lawyer for? He is a scarce and, in this audience I can safely say, valuable commodity. The other and more fundamental question, of course, is the one which underlies all of this discussion—to what extent do we want, in the administration of the criminal law, to rely upon incriminatory statements made by people suspected of crime?

Now, just for a moment, let us look at the first question. The conventional rule of the lawyer as we've known it in the criminal process, of course, has been at the stage when the case gets to the court in some fashion. In modern times we all recognize that the lawyer may get into the case first in terms of negotiating, finding out the facts, the charge, talking to the prosecutor, trying to convince the prosecutor that there may be some reasonable disposition of this case short of the crime that was charged in the indictment. Or, he does his investigation and discussions and prepares to take the case to court to try it. The discussion more recently, however, has been about the lawyer as being a man who gets down to the police station as the policeman brings the suspect in to represent him at that point. Well, what can the lawyer do at that point? I suggest that really there is only one thing he can

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do and that is to say to his client whom he's just acquired, "Don't tell anybody anything until I find out what this is all about. And then after I have had a chance to find out what this is all about we will decide what we're going to do from this point on." If this is all that the lawyer can do and generally this will be all that he can do, is this what we want to use lawyers for and can we use them for it? I suggest that in the generality of cases, at least as we have organized our bar to date, we can't have the lawyer at the police station. And this is at least as true for the rich man as the poor man. If you have your counsel who represents you and a policeman picks you up at two o'clock this afternoon and takes you into the police station, you say, "I want to talk to my lawyer," and you get on the phone. In the first place, he may be in court so you won't even get to talk to him. If you do get to talk to him, he is apt to say, "Well, I can't come down and see you right now because I have to be in court. I have an appointment." His life as a lawyer means that he must be in other places and can't be in the police station at any particular point in time.

I had the privilege of being in Sweden a year and a half ago discussing some of these problems in a system in which the state provides lawyers to all people without regard to their financial means. I talked to the leading criminal lawyer in Stockholm and asked him, "Well, now under your system the defendant can get in touch with the lawyer almost immediately after his arrest. If your client calls you up, do you go down to the police station for the interrogation" He said, "No. If I did that I couldn't do the job I'm supposed to do of representing my clients in court because I can't do both of these jobs on any regular basis. Occasionally I do in a great case, a big case, an unusual situation but not in the generality of instances."

It is by no means clear that it would be useful for society to say that we have to train enough lawyers so that we can have lawyers that rush down to the police station or that, even worse, become real "jail-house lawyers" spending their days around the jails so that they can counsel people as they come in.

What we want to use the lawyer for depends on our goal. If our goal is to see that all persons are adequately advised that they have no need to talk, that they are not obligated to talk to the police, there are certainly much more efficient and economical

means of accomplishing this objective than providing the relative scarce commodity of lawyer time to communicate this message. Madison Avenue could suggest to us many means of communicating to all people who come into police stations the simple fact that they don't have to talk to the policeman. We could use signs, we could do all sorts of things, in fact we could even have a very persuasive lawyer record the message and play it for every defendant who comes in if all we want at that point is for him to be advised of his privilege not to talk.

Another problem which does relate to the equality point discussed by Professor Kamisar, if this is the goal, if all we are talking about is adequately advising the person who has been arrested of his rights, in that the net result is apt to be that the innocent, confused, average citizen who happens to come in contact with the law will hear the message and then proceed to talk to the policeman. Perhaps not the *rich* defendant but the *experienced* defendant will perceive the message much more clearly and perhaps will not talk to the police unless he is convinced that it's to his own advantage. Hence, if all we are talking about is advice, I'm not sure that advice gets us over the basic equal protection hurdle, because that mere advice is apt to leave the situation much as at present—the poor, more often than others, will, having been advised, persist in talking to the police.

All this suggests that probably our underlying problem here is not the lawyer problem, not the advice problem, but the second question posed above. It is our ambivalence on the basic question as to whether we think that we should use, at all, in the process of administration of criminal justice, inculpatory statements made by persons who are under arrest or in some form of police custody. The real question here is do we want confessions? Do we want police to interrogate? Do we want to have this kind of evidence? Now this question is one of the most extraordinarily difficult social questions that we have to face. It is made difficult by a host of things not the least of which is that we have relatively few facts from which to draw conclusions.

There are two general factual areas in which we are remarkably uninformed. The first is one that was alluded to by Mr. Kuh. To what extent can we cope with the problems of administration of criminal justice without the use of confessions? We do not

even know how many cases depend upon interrogation. We do not know what would happen in terms of the case load without confessions. We have very little data which is useful at this stage to help us to know what is the dimension of the problem. We can speculate but really don't know at all the extent to which alternative methods of investigation could take the place of interrogation and what these methods would cost. The economic cost could be very high. Not only would there be increased cost of policing, but also of maintaining a larger judicial establishment. One of the consequences of eliminating confessions would probably be a reduction in the cases disposed of on guilty pleas. I once did a little computing in California which suggested that if you reduced the guilty in felony cases by ten per cent, it would require an increase on the order of thirty per cent in all of the courts, prosecutors, public defenders and associated personnel dealing with the trials of felony criminal cases in California. In addition to economic cost there is another kind of cost, which is: probably the only effective way to deal with the situation would be to greatly increase police manpower to create a much more pervasive police establishment, in order to get the evidence which will solve crimes. Such an increase then disturbs other values of a civil libertarian concern. I must say my own reaction is that if there were a policeman on every corner, I would feel much more inhibited and much more as though I were living in some kind of a police state than the present system gives me. Hence, this is another problem worth worrying about.

So we have very few facts about what the present situation actually is and therefore even fewer facts about what are the predictable results of alternative courses of action. We start from the fact that, whether it has been legal or illegal, justified or not, the process of criminal investigation by interrogation of suspected persons in custody has always gone on, not only in this country, but in almost every other country, civilized or otherwise. An attempt to eliminate or drastically reduce the use of confessions is to change past practice whether it represents a change in past law or not. I would be happier about today's debate then, if we were talking as intelligently as possible about this direct issue. If you once decide that reasonable police interrogation is necessary, desirable and constitutional, then it would be unfortunate to

waste all the valuable time of lawyers trying to introduce them into police stations to tell people that they do not have to talk. We can communicate that message in other ways. But if we decide our real objective is to eliminate the use of interrogation in custody and resultant confessions, it would be much more economical and, on the whole, much more satisfactory to do it directly. We could just say that confessions obtained from people in police custody cannot be used in the prosecution of criminal cases, and then see what happens. Such a direct approach would also be more conducive to realizing the equal protection values that are being talked about than the indirect one of providing lawyers at the station.

One other comment on the equal protection problem—the only one I want to make—is that it is a little more complicated than we tend to view it. And it is suggested by the fact that even under the current case law, which entitles the person who has the money to hire a lawyer and to have him at his side if he requests him at the police station, the man with the money can always produce the lawyer as a matter of fact. As I suggested earlier, his lawyer may not be immediately available. Under the best of circumstances by the time he has called a lawyer and gotten one from some downtown office down to the police station to talk to him, a good deal of police interrogation may have taken place. If we say then that in order to satisfy equal protection a lawyer must be provided for the man who can afford to have a lawyer, the only practicable way really of doing this in large cities is going to be to station somebody like a public defender in the police station so that whenever a poor man comes in and is arrested, here will be this man to talk to him. Here the result would be the other way around. The man who didn't have the money would have a lawyer present immediately and the rich man ordinarily would not. If we went that route, the next step would likely be to forget all about equal protection and provide a lawyer at the station for everybody. If we really mean that arrested persons must have immediate advice, the only practicable way is to have some publicly or privately financed lawyer who is there all the time to provide this advice to everyone.

And, of course, the lawyer problem does illustrate another one of the equal protection problems which is always troublesome.

The man who has to pay for something makes the decision as to whether it is useful to him. A man will decide in particular cases whether it is worth spending his own money to have a lawyer under the circumstances. If the state is providing the lawyer, however, this factor is eliminated and you tend to have more of a waste of resources by the defendant asking for the lawyer in every case.

The problem of wasted resources was highlighted for me in a related context when I took a visiting prosecutor from Denmark to see a trial in Oakland, California. We went down to the municipal court to see a trial and we wandered into a court room where a man was being tried for the minor offense of public drunkenness. As a matter of fact, he had been arrested while drunk in the ladies room of a hotel. He had demanded, as he was entitled to under the California law, a jury trial and he had demanded the services of a public defender. So here was the whole panoply, the jury, judge, prosecutor, public defender, and defendant, and you didn't have to be in the room five minutes to realize that everybody, including the defendant, realized that this was just a show, that it would serve no useful purpose. He had gotten annoyed because he had been arrested several times, so he said, "the system is going to spin its wheels for me" and all of this was happening for no real purpose. I suspect that to a degree, provision of counsel at the station house for the sole purpose of advising a man not to talk until some later point at which a lawyer can look into the case is going to be somewhat as wasteful.

COMMENTS BY GERHARD O. W. MUELLER*

Mr. Chief Justice, ladies and gentlemen. Our friend, Professor Kamisar, has performed another neat forensic feat in proving to us the paradox that the Supreme Court has left the Attorney General behind, but that the Attorney General is not behind the Supreme Court. Professor Kamisar has operated with his usual high precision instrument, which is sort of a mixture of tomahawk and surgeon's scalpel. I think that on the issue of poverty and criminal justice, he has caught the Attorney General off guard. The General had it coming. But query: Is that the issue? Are we talking about poverty? No, we're not. Of course most criminal offenders are poor. We have to take it into consideration, but it is a collateral matter. Of course, poverty is an issue in this country in every matter. But in criminal justice we are not talking about poverty as such. We are talking about something completely different. Well then, are we talking about criminal interrogation? No. I'm suggesting we are not even talking about that, though perhaps criminal interrogation is that hole in the tire of Professor Kamisar's getaway car, through which the accumulated over-pressurized air comes out, and perhaps it has always come out at that spot. This is the sore spot in the administration of criminal justice. In fact, think back for a moment to medieval times when the entire system of criminal justice was tagged and identified by this one issue: the inquistorial system. That means the questioning system. And today, in comparative terms, we are talking about the inquisitorial system abroad, and the adversary system here. The system has never been one hundred per cent inquisitorial. (I should say one hundred proof, in this state.) For that matter, the adversary system in this country has not even been one hundred proof. Both systems have worked with the inquiry upon the defendant. It just so happens that we have professed in our Constitution, and perhaps we now mean it, that a defendant shall not be forced to incriminate himself.

Perhaps confessions are not statistically significant. I have a bit of experience in that. You see, I once was a police officer and I walked the beat and stalked my prey and I got my men and

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sometimes even my women. I haven't beat anybody up, though I was once terribly tempted to beat up an arrogant Nazi war criminal. There are, however, in my experience, situations in which a confession is necessary for conviction—not for medieval reasons: You see in the middle ages we needed confessions to cleanse the perpetrator's soul. At that time it was regarded as immoral to hang somebody unless he had cleansed his soul by confession. No, today we need some sort of verbal cooperation for purely investigatory reasons. How do we get it without amending the fifth amendment? And I should like to say it would be a worldwide shock if we were to amend the fifth amendment today because, at this moment, while we are talking about amending the fifth amendment, several countries abroad are following our example and are creating a fifth amendment. As of April of this year, [1965] German criminal procedure operates with new procedural safeguards, including a now virtually fool-proof self-incrimination privilege, with an exclusionary rule. Of course, we have indoctrinated them in this respect. Shall we reverse ourselves at this point?

Let me make a supposition. Let us suppose that *Escobedo* and the rest mean what some prosecutors fear: that no question may be asked absent counsel and that no questioning may take place absent a warning about the self-incrimination privilege. Let's add a third "bugaboo," and that is *McNabb-Mallory*, to wit: let us suppose that there must be prompt production before a magistrate. Now I didn't say that the *Escobedo* case must be interpreted or can be interpreted as saying that there must be no questioning. The Court held nothing of that sort. The fifth amendment does not prohibit questioning. That's one thing we have to keep in the back of our minds. But what is so frightening about *Escobedo* as understood in these terms? Is it so frightening that perhaps the great American public may wake up some day and learn, without being told by an attorney, that they have a self-incrimination privilege? How dumb do we think the great American public really is? Should we not suppose that the word will ultimately get around to the effect that there is a self-incrimination privilege, that there is a right to counsel? Well then, what are we really scared of?

I suggest that the one thing we are scared of is the negativeness

of the Supreme Court's pronouncements. Think back. The Supreme Court's pronouncements have always been negative because the Supreme Court does not write a code for us. The Supreme Court stakes outer limits. That is its task. It was designed to do that. Now it sounds, of course, terribly negative when all the time we are told, like we were told by mommy and daddy as little children, "don't do this and don't do that." Let me demonstrate with another example. Suppose you were to draw a map of a given countryside, say a map of the region between here and Spindletop Hall (which I missed several times), and let us suppose that this map were to be framed entirely in terms of quasi Supreme Court decision, *i.e.*, here it says "this is no road," there it says "this is no hill." Could we travel by that map; could we find Spindletop Hall? No, and for that matter, a few guiding stars coming from the Supreme Court are not enough for law enforcement operating with that kind of map. We need a good map. How do we get this map? I suggest we have to draft it—we, meaning those of us who are not judges.

What does such a map look like? Well, when it comes to map making in criminal law, I think we ought to take a look at the continental model because they have made criminal law and criminal procedure and other law maps for centuries. We have not. I would like to suggest, and I could spend an hour explaining it, that what is taking place in the American Law Institute in drafting a model pre-arraignment procedure code is "hack work." It does not amount to a law map. It is a record of a few highlights, badly drafted at that. No, I'm afraid we have to look to the continental system.

What are we likely to find in the continental system in terms of map making? We will find, first of all, that a map is something which is drafted on one and the same scale. In making it, some basic principles have been adhered to consistently. A map must not be inconsistent. I suggest that if we were to go out at this moment to solve the problem of self-incrimination, of questioning at the station house, without looking at the rest of the law, we would not be good map makers in law. We would be overemphasizing something and forgetting about the rest of it. I think in Dean Barrett's statement it came out quite nicely, what dangers we encounter when we are working on one thing without thinking

of the others. Comparison then, once again, may be of considerable help. Now, there is no fool proof system anywhere, but there are a few hints abroad that may be of great help to us. And now to the specific problem:

Firstly, I note that in almost every other system the moment of arrest is postponed. "Probable cause" is not enough for an arrest in either France or Germany or most other European countries. "Urgent suspicion" is required. In terms of their supreme court decisions, "urgent suspicion" means a little more than "probable cause." Such a jacked-up requirement may force the police to do a bit more leg work. Yes, it is possible to do more leg work.

Secondly, we have placed entirely too much emphasis on the arrest point. I submit that an invasion of personal privacy is much more serious than an invasion of property rights. Continental law emphasizes the possible invasion of property rights, *i.e.*, it prefers search and seizure over arrest. This is something we have never considered. If we were to consider that, I should think we might also cut down on the need for questioning.

Thirdly, the continental system has created a unique institution which bears looking into. Our own institution of the United States Commissioner, or the magistrate, or the hearing judge, has its counterpart in the continental system: the investigating magistrate. An investigating magistrate combines the adjuncts of an effective public defender with those of an effective police inquisitor. He is trained in law enforcement. He has taken courses is psychology. He is also a representative of the great public. He's all that wrapped in one. You might say, in his ideal form, he is an *"ombudsman"* of criminal justice. We lawyers have been talking about the *ombudsman* as a unique institution, as a fourth branch of government. But perhaps there is no point in government at which an *ombusdsman* is as much needed as in criminal procedure, immediately following arrest. I must warn that we could conceiveably turn this new officer of justice into the worst possible inquisitor. Here, as elsewhere, we must proceed with prudence. Fortunately, we have a Supreme Court set above us who occasionally will nudge us if we go too far. But we must become active. We must find a solution. I am suggesting, as a matter of fact, that developments are driving us to criminal procedure map making,

and to looking into the possibilty of an *ombudsman* of criminal procedure.

All this, of course, is likely to be expensive. I am fully aware of that. Yes, we may have to double or to triple our existing facilities. We may have to build an entirely new type of station house, one with consultation rooms for the public defenders, and a courtroom to which any arrested person (of a given category, say those charged with felony) is brought. Our present station houses do not permit either consultation or a judicial interview of the arrestee. The new criminal justice station house will permit the lawyer—client consultation which the Supreme Court has already granted to arrestees, and it would permit a judicial interview immediately subsequent to arrest, an interview with a magistrate, or, as I envisage, an *ombudsman* of criminal justice. This officer will extend to the arrestee all the rights a criminal defendant is entitled to. And I should think that the *ombudsman,* just as does the investigating magistrate in Europe, will ask questions. He is not entitled to any answers. But what in the Constitution tells him not to ask questions? Merely asking the questions may help solve a given crime. A whole school of psychiatric learning has gone into the theory of the soliloquy. The questioner may be talking to himself, but the reactions of the person addressed may well be of some significance. They may not be, particularly in the presence of counsel. But this is the ultimate limit we reach. We cannot force anybody to respond. I submit that in the hands of a judicial officer, and in view of the self-incrimination privilege, and an applied right to counsel, the extension of questions to an arrestee is perfectly proper. But I am afraid to extend this power to the police, absent counsel.

This is the end of my brief remarks. Obviously this is a curt summary of an enormously large topic, which requires attention to technical detail, and which cannot be solved by mere generalities. I should just like to add one thing: I have hopes that this conference may have an impact on the future. A few of you may be aware of the fact that more than one hundred and sixty years ago, just a few miles from here, in Frankfort, Kentucky, the first American book on criminal law was published, by Toulmin and Blair. In my opinion, this was one of the most significant events in the history of American criminal law. I should think, therefore,

that this state has started a tradition for good practices, and the tradition has been kept up at your faculty by a giant of our criminal law fraternity, Roy Moreland. All this leads me to conclude that perhaps this state would like to go forward and start experimenting in criminal justice in a constitutionally permissible manner, for the good of the whole nation.

COMMENTS BY JUSTICE WALTER V. SCHAEFER*

Thank you Professor Batt. Mr. Chief Justice, Mr. President: Perhaps I shouldn't say this, but the subject matter and the presence of the Chief Justice impels me to do so. John W. Davis once made a speech on "Appellate Advocacy" in the presence of one of the Justices of the Supreme Court and he started off this way: "Who would listen to the weary discourse of the fisherman as to the effectiveness of various types of lures if the fish himself could be induced to talk?"

I think that the subject before us is the most important problem that exists in our legal system today. I do not propose to discuss the correspondence between the Attorney General and Judge Bazelon. I read that correspondence some months ago. I do not propose to read it again during this incarnation. But that correspondence, as it was treated by Professor Kamisar today, serves a valuable function because it provides a basis for consideration of an extremely serious issue.

What is happening in this area of the law is not too different from what is happening in other areas of the law. Flesh and blood are being put on our ideals. This is true, for example, with respect to *Brown v. Board of Education.* This is true with respect to *Baker v. Carr,* and is true in all areas of criminal procedure. And putting on flesh and blood—coming face-to-face with our ideals and looking them in the teeth—is not always a comfortable process, nor is it always an easy one.

There is no harder job for any judge, from the Chief Justice of the United States down through every judge of this state and every state, than to vindicate procedural rules when you are sometimes fully aware that the defendant is guilty. Yet the procedural rules must be maintained if we are to have the kind of legal system that we want, and that our Constitution demands.

In this area of criminal law the relevant ideal has been that an officer may not arrest without a warrant unless he knows that an offense has been committed and has reasonable cause to think that the arrested person committed it. Most of the states have provided by statute that an arrested person must be taken "immediately," "forthwith," "at once," "without unreasonable delay"

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* Justice, Illinois Supreme Court.

before a magistrate who is to determine whether or not probable cause existed for the arrest. It is no secret that in Illinois the statutory command has been disregarded, and I think the same is true of almost all of the other states. The *McNabb-Mallory* rule, which requires immediate production, or something very close to immediate production, has simply not been followed generally in the state courts. There has been delay, and during that period of delay there have been confessions, and those confessions have been admitted in evidence in the state courts. That is the condition as it exists today.

Now, lets pause and consider where we are with respect to the right to counsel and how we got there. Parenthetically it always surprises me a little that discussion of this problem always seems to focus on the right to counsel, although it would seem to me that the privilege against self-incrimination might also have been an available starting point. But considering the right to counsel: Until 1938 in the federal courts in the United States, the constitutional right to counsel meant no more than the right to employ counsel if the defendant was able to afford to hire a lawyer. It meant no more than that. Then in 1938 *Johnson v. Zerbst* was decided. I think Mr. Justice Black wrote that opinion. That's 1938, which is not very long ago. Of course, most of the states, and I can't resist saying this, most of the states had been furnishing counsel to indigent defendants long, long before 1938 and *Johnson v. Zerbst.* The federal government lagged behind. Then came *Gideon v. Wainwright* which applied *Johnson v. Zerbst* to the states. And then *Escobedo,* which projected (and no one knows just how far) the right to counsel into the police station under certain circumstances, and under just what circumstances has not yet been determined.

I think of another paper that Professor Kamisar has written. I should say that I interrupted him during his talk so that he might explain his reference to "the mansion house and the gate house," because I was afraid that it might otherwise be lost on those of you who do not live intimately with new developments in criminal law. In that paper he pointed out as he explained today, that very often the elaborate procedure that we set up for the conduct of a criminal trial is realistically meaningless, because the guilt of the defendant has already been determined in

the station house in the process of station house interrogation. While we assign counsel when the defendant comes into court, and give him all of the other protections, the most significant part of the trial has, in a sense, been concluded.

When it is suggested that the right to counsel be projected into the station house, there is an immediate response. Many voices answered—some stridently, but I think none more eloquently than Mr. Kuh answered this morning—saying that it is not possible to enforce criminal law unless station house interrogation in the absence of counsel is permitted. I think I share that view, but I don't know. As Dean Barrett pointed out, there is no empirical data. There just isn't anything very worthwhile to indicate what has happened and what would happen if station house interrogation were not permitted save in the presence of counsel. It scares me, but I don't know.

The other evening coming to Lexington I read something written by David Acheson, formerly United States Attorney for the District of Columbia, where they have been operating under *McNabb-Mallory*, strictly enforced. He said this: "The effect of Supreme Court reversals on crime in the street cannot be demonstrated merely by the indignant protest of a prosecutor or police official whose pride has been understandably hurt by judicial criticism." And he commented further, "The war against crime does not lie on this front. Prosecution procedure has at most only the most casual connection with crime. Changes in court decisions and prosecution procedure have about the same effect on the crime rate as would have an aspirin on a tumor of the brain."

I wish I could offer a solution. There is no problem that has troubled me more, that has made me more unhappy than this one in these recent years. My own notion is that effective prosecution, as I indicated, is not compatible with a prohibition of station house interrogation or with the presence of a lawyer during station house interrogation. I'm not so much interested in this equal protection point, because I do not believe that a rich man can get a lawyer to go to the police station at the relevant times. I know that I would not often have gone when I was practicing. It would have to be someone very close to you—a personal friend rather than just a client—because you have other work to do. You don't come to the office and sit there and wait for the phone call to go

to the station. Moreover, the notion of a disadvantage between rich and poor at the station house does not cover the whole problem, especially when we consider that many statements are made in the squad car on the way to the police station house. At least, that is what the records which come to us show.

Now, I am troubled. I think alternatives are needed. I think some have been suggested here: police interrogation in the open, in the presence of a magistrate, with tape recording, with television. I see no reason why we should limit a magistrate or a United States Commissioner to the sole function of determining probable cause on arrest. I think that such a judicial officer could be utilized effectively in the solution of this problem.

It would be wise, I think, to look to other legal systems. I suggested a year or so ago to a meeting of some of your judges here in Kentucky that perhaps the fifth amendment might have to be modified with respect to comment, if the right to counsel was to be projected into the police station and one judge responded, "Let's do this the American way." Well, I went home feeling rather uncomfortable. I do see an impasse that I find difficult of solution, given our existing constitutional doctrines.

But I do think that there is tremendous value in attempting to put flesh and blood on our ideals, rather than in keeping them up there inscribed on the walls, to be pointed at with pride on ceremonial occasions. And if the ideas are too broadly stated to meet essential practical objectives, then I would suggest that the *ideals* must be modified and that we ought to be frank. This is the significance of the work that the Supreme Court of the United States is doing, establishing and enforcing rules of criminal procedure. It is hard for state court judges to realize it, but I think that the Court is writing one of the finest chapters in its history. We are so close to it, that we do not have the necessary perspective. The perspective, I would venture, would come fifty to one hundred years from now when it is realized that the Court has frankly faced up to extremely difficult problems and has done its utmost to enforce the ideals that we profess.

BIOGRAPHICAL NOTES ON SYMPOSIUM PARTICIPANTS

Yale Kamisar, Professor of Law, University of Michigan School of Law. Professor Kamisar holds the LL.B. degree from Columbia University and at one time practiced with the distinguished Washington, D.C. firm of Covington and Burling. He is, of course, well known to students of constitutional law as co-editor of a widely respected constitutional law casebook. He is also co-editor of an extensively used casebook on modern criminal procedure. Moreover, his periodical publications in the field of constitutional-criminal procedure are recognized nationally as authoritative scholarly contributions. Professor Kamisar has, however, been more than a scholar. He has carried his crusade for a better system of criminal justice into the pages of such popular publications as the *New York Times Sunday Magazine.*

Richard H. Kuh, Lecturer in Law, New York University School of Law. Mr. Kuh formerly held a major administrative position in the office of the District Attorney of New York City. He is well-known as a writer on problems of criminal law from the perspective of the practicing public prosecutor. Recently his views on the proposed *Model Penal Code* appeared in the *Columbia Law Review.* Presently, Mr. Kuh is working under the sponsorship of a Walter Meyer Foundation Group and will soon publish a book dealing with some of the major problems of criminal justice.

Edward L. Barrett, Jr., Dean of the School of Law, University of California at Davis and former Professor of Criminal Law and Criminology at the University of California. Dean Barrett holds an LL.B. degree from the University of California. He has edited a casebook on constitutional law and published an analysis of the Tenney Committee and its activities. He is reporter for the Advisory Committee on Criminal Rules of the Judicial Conference of the United States and associate reporter for the American Law Institute's Model Code of Pre-Arraignment Procedure project. His 1962 article "Police Practices and the Law" published in the *University of California Law Review,* is a much cited contribution to the scholarship in the field of criminal justice.

Gerhard O. W. Mueller, Professor of Law, New York University School of Law and Director of the Comparative Law Project

at N.Y.U. Professor Mueller holds the J.D. degree from the University of Chicago and an LL.M. degree from Columbia University. He has authored books on the *French and German Penal Codes* and published a number of periodical pieces on criminal procedure. His article-length works have been included in such selected collections as *Police Power and Individual Freedom* issued under the aegis of the International Conference on Criminal Law Administration.

Walter V. Schaefer, Justice of the Illinois Supreme Court since 1951 and former Professor of Law, Northwestern University. Justice Schaefer holds the J.D. degree from the University of Chicago. He is co-author of a book on Illinois civil practice and ten-times contributor to legal periodicals. His article "Federalism and State Criminal Procedure" published in the *Harvard Law Review* in 1956, is widely-acclaimed by those working in the field of criminal procedure. Moreover, the article has the competitive distinction of being reprinted in Professor Kamisar's casebook on modern criminal procedure.