2013

A Rejoinder to Professor Schauer's Commentary

Yale Kamisar
University of Michigan Law School, ykamisar@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles
Part of the Constitutional Law Commons, Criminal Procedure Commons, and the Supreme Court of the United States Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
A REJOINDER TO PROFESSOR SCHAUER’S
COMMENTARY

Yale Kamisar*  

It is quite a treat to have Professor Frederick Schauer comment on my *Miranda* article.1 Professor Schauer is a renowned authority on freedom of speech and the author of many thoughtful, probing articles in other areas as well, especially jurisprudence. I am pleased that in large measure, Schauer, too, laments the erosion of *Miranda* in the last four-and-a-half decades2 and that he, too, was unhappy with the pre-*Miranda* due process/“totality of circumstances”/“voluntariness” test.3 I also like what Schauer had to say about “prophylactic rules,” a term that has sometimes been used to disparage the *Miranda* rules.4 As Schauer observes, the use of such rules is “ubiquitous in constitutional law”5 and “there is no special category of prophylactic rules . . . . The phrase ‘prophylactic rule’ is accordingly best seen as a simple redundancy, sort of like ‘null and void.’”6

However, when Schauer maintains that (1) the right to remain silent “existed independent[ly] of *Miranda,*”7 and that (2) “the right to counsel during interrogation” also “preceded *Miranda,*”8 I have to part company with him on both counts. (I readily admit that whether there was a right to counsel during interrogation prior to *Miranda* is a much closer question than whether there was a right to remain silent.) Much turns on what one means by “rights.”

---

* Clarence Darrow Distinguished University Professor Emeritus of Law, University of Michigan; Professor of Law Emeritus, University of San Diego.

2. See Schauer, supra note 1, at 156.
4. See Kamisar, supra note 1, at 985–90, 992–95.
5. Schauer, supra note 1, at 160 n.30.
6. Id.
7. Id. at 156.
8. Id.
I. THE RIGHT TO REMAIN SILENT

Let us look first at the right to remain silent.

Schauer believes that Justice Frankfurter’s 1949 plurality opinion in *Turner v. Pennsylvania* supports his view that the right to remain silent preceded *Miranda* by many years. At one point Frankfurter does say that Turner “was not informed of his right to remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it.” Schauer might have cited the 1963 case of *Haynes v. Washington* as well. In that case, too, writing for a 5-4 majority, Justice Goldberg noted that the defendant had never been “advised . . . of his right to remain silent.”

But what does it mean to say that even before Miranda one had a right to remain silent? In both the aforementioned Turner case and in *Watts v. Indiana*, a companion case to Turner, state law required that arrested persons be given a prompt preliminary hearing. However, neither in Indiana nor Pennsylvania (nor in the great majority of states) was this requirement taken seriously. Unless other circumstances added up to a deprivation of due process, the mere fact that an arrestee failed to obtain a prompt preliminary hearing did not keep out any resulting confession or incriminating statement. Did arrestees in these states have a right to a prompt preliminary hearing? I would answer in the negative. The police did not believe arrestees had such a right and they acted accordingly. Arrestees soon found out that, as a practical matter, the police’s understanding of the situation was the correct one.

At no time prior to Miranda did suspects have a “right” to remain silent, at least as I define “right” and as I believe that term should be defined. It is plain that most suspects did not know they had such a right (or, to put it another way, did not realize that the police lacked any lawful authority to compel an answer). Moreover, the great majority of police officers did nothing to correct this misimpression. Nor is that all. The typical police interrogator proceeded as if he or she did have a right

10. Schauer, supra note 1, at 155 n.5.
13. *Id.* at 510–11.
17. *Id.* at 1000.
to an answer and would often persist in questioning suspects until some answers were obtained.

Against this background, I would maintain that in the years before the police were required to inform suspects that they had a right to remain silent—and the police did not have to do so until Miranda instructed them that, in the absence of other protective measures, they must do so—such a right did not exist. To put it somewhat differently, I would say that requiring the police to warn custodial suspects that they had a right to remain silent—which Miranda did for the first time—established such a right.18

As Professor Tracey Maclin has recently reminded us,19 Justice Holmes once said that “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”20 Until Miranda was decided, however, the failure to inform a custodial suspect that he or she had a right to remain silent carried no consequences.

Despite the failure of the police to inform suspects that they had a right to remain silent, any resulting confession or incriminating statement was still admissible unless the police did something much worse—such as subjected the suspect to protracted relay interrogation21 or, when the suspect refused to “cooperate,” pretended to “bring in” his ailing wife for questioning.22

18. As Professor Gerald M. Caplan has observed: “That many suspects [in the pre-Miranda era] might erroneously believe that they were obligated to answer police questions or that the police acted as if such were the case did not trouble the Supreme Court. All understood that the government’s obligation was not to counsel the accused but to question him.” Gerald M. Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417, 1423 (1985).


20. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). As the principal Reporters for the American Law Institute’s Model Code of Pre-Arraignment Procedure pointed out almost a half-century later, although different traditions and history may have led other countries to different approaches, “in America it is almost inevitable that the draftsman will place heavy reliance on the exclusionary rule as a sanction for violations.” Paul M. Bator & James Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62, 77 (1966) (pre-Miranda).

Unfortunately, the prosecution can use evidence derived from a failure to give the Miranda warnings although it cannot use the statements themselves. See, e.g., Kamisar, supra note 1, at 998–1002 (discussing Oregon v. Elstad, 470 U.S. 298 (1985)).


II. THE RIGHT TO COUNSEL

Let us look next at the “right to counsel during interrogation, whose recognition and enforcement,” according to Schauer, “again preceded Miranda.”

As long ago as 1949, in the aforementioned Watts case, Justice Frankfurter noted that during the entire period of interrogation, the defendant was “without advice as to his constitutional rights.” In context, this could only have meant both the right to counsel and the right to remain silent. But surely Frankfurter did not mean—more than a decade and a half before Miranda—that a suspect had a right to counsel in the sense that a failure to know, or to be advised of, such a right without more barred the use of any resulting confession.

Justice Jackson, too, used “right to counsel” language in 1949. He noted in Watts and two companion cases that one factor stood out: “[t]he suspect neither had nor was advised of his right to get counsel.”

But what did Justice Jackson mean by his reference to the “right to get counsel”? When it came to police interrogation and confessions, Justice Jackson was the Rehnquist of his era. He would have admitted the confession in a companion case to Watts although the defendant had neither been advised of his so-called right to remain silent nor his so-called right to counsel and even though the defendant had been interrogated over a five-day period for a total of twenty-three hours.

Five years earlier, in the notorious case of Ashcraft v. Tennessee, where the defendant had been subjected to thirty-six hours of “relay interrogation” by various officers, Justice Jackson (who was convinced the defendant had actually committed the crime) urged the Court to admit the resulting confession into evidence. At no point during Jackson’s long, forceful dissent did he indicate that the defendant had either been warned of his right to remain silent or his right to counsel.

23. Schauer, supra note 1, at 156 (emphasis added).
26. See id. at 61; see also Turner, 338 U.S. at 63–64.
27. 322 U.S. 143 (1944).
28. According to the opinion of the Court, written by Justice Black, “[f]or thirty-six hours after Ashcraft’s seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite.” Id. at 153. “Testimony of the officers shows that the reason they questioned Ashcraft ‘in relays’ was that they became so tired they were compelled to rest.” Id. at 149.
29. Id. at 156–74 (Jackson, J., dissenting).
It did not seem to matter. Whatever the Justices who talked about “the right to counsel” or “the right to get counsel” meant in the 1940s, it soon became clear that the failure to honor this right, without more, did not affect the admissibility of any resulting inculpatory statement. A decade after Watts and its companion cases had been decided, the “right to counsel” issue was graphically presented in Crooker v. California. Without being advised of his right to counsel, a custodial suspect on his own initiative asked to talk to a lawyer (naming a specific attorney), but was not permitted to see one. The confession he made soon afterwards was allowed into evidence.

To rule otherwise, the Crooker Court told us, “would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney.” (Mr. Crooker maintained that it was unfair to continue to question a custodial suspect, especially one facing the death penalty, who was trying to contact a lawyer. Did a majority of the Court address this issue?)

True, the Court underscored the fact that Mr. Crooker had an impressive educational background. He was a college graduate who had attended a year of law school (including criminal law). But a companion case made it clear that Mr. Crooker’s educational background was not the decisive factor in his case.

The same day it decided Crooker, the Court handed down Cicenia v. La Gay, another case involving a defendant who had specifically asked to see his lawyer, but was not allowed to do so. The Court told us that the defendant’s right to counsel argument “is disposed of by Crooker v. California, decided today.” But surprisingly the Court had nothing to say about Mr. Cicenia’s education. As it turned out, however, petitioner and respondent agreed that Cicenia only had a grade school education and two years of vocational school training.

When Schauer tells us that “the right to counsel during interrogation . . . preceded Miranda” he relies primarily on Escobedo v.

---

30. 357 U.S. 433 (1958) (Justice Clark writing for the Court).
31. See id. at 436–40.
32. Id. at 441 (emphasis added).
33. See id. at 435, 438, 440.
34. 357 U.S. 504 (1958).
35. Id. at 508.
36. See Brief of Petitioner at 3, Cicenia, 357 U.S. 504 (No. 177), 1958 WL 92004 at *3; Brief of Respondent at 5, Cicenia, 357 U.S. 504 (No. 177), 1958 WL 91858 at *5.
37. Schauer, supra note 1, at 156.
Illinois. This is a plausible reading of Escobedo (especially when one takes into account the way the Miranda Court looked back at Escobedo), but it is by no means the only way to read that case. The trouble with Justice Goldberg’s opinion for the Court in Escobedo is that it has an accordion-like quality.

At some places the opinion rejects the argument that the police need an “effective interrogation opportunity” so forcefully and so peremptorily that it promises (or threatens, depending upon one’s viewpoint) to extinguish all police interrogations as we know them. When I read the following, for example, I hear the crashing of cymbals:

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly. . . . This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a “stage when legal aid and advice” are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. . . .

We have learned the lesson of history, ancient and modern, that 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 . . . .

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and

39. The accordion-like quality of Escobedo may not be solely the fault of its author. The four members of the Court who joined Justice Goldberg’s opinion—Chief Justice Warren and Justices Black, Douglas, and Brennan—all had strong views about police interrogation and confessions. It would not be surprising if one or more of these Justices urged (or even insisted upon) the addition, or deletion, of certain language.

Justice Holmes is supposed to have complained that when he circulated his opinions one or more of his colleagues would pick out “a plum here, and the other . . . a plum there, and they send it back to me with nothing but a shapeless mass of dough to father!” See HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 299 (1960). It may be that Justice Goldberg’s colleagues picked out too many plums or added too many.
40. Escobedo, 378 U.S. at 488.
41. Id. at 488–89.
exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.42

Toward the end of its opinion, however, the Escobedo majority is a good deal more restrained. (This is the part of the opinion that many in law enforcement work probably underlined or highlighted.) When I read this portion of the Escobedo opinion, I hear only the playing of the piccolo:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution as “made obligatory upon the States by the Fourteenth Amendment,” and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.43

Do all these conditions have to be satisfied before Escobedo applies? At what point does a “general inquiry” begin to “focus” on a particular suspect? Is there any interrogation process that does not lend itself to eliciting incriminating statements? Is Escobedo limited, as the immediately preceding paragraph suggests, to situations, such as the one that occurred in Escobedo itself, “where the suspect has requested and been denied an opportunity to consult with his lawyer”? (If so, Escobedo is greatly limited for that reason alone, because even when advised of a right to counsel, most suspects decline to see a lawyer.)44

There is reason to think that not allowing the suspect to consult with his lawyer when he repeatedly asks to do so is a highly significant feature of Escobedo. The Court mentions it four times.45 And the very first sentence of the Escobedo opinion begins:

42. Id. at 490.

43. Id. at 490–91 (internal citation omitted). Although the block quotation begins: “We hold therefore . . .”, “We hold only, however” would seem a more appropriate way of expressing it.

44. See Kamisar, supra note 1, at 980.

45. See Escobedo, 378 U.S. at 479, 481 (twice), 485. Moreover, in the penultimate paragraph of the opinion, the Court tells us that “when the process shifts from investigatory to accusatory—when its focus is . . . to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.” Id. at 492.
The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner’s request to consult with his lawyer during the course of an interrogation constitutes a denial of “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution . . . and thereby renders inadmissible . . . any incriminating statement elicited by the police.46

Commenting on Escobedo a year after it was decided and a year before Miranda was handed down, Judge Henry Friendly thought it could be read fairly narrowly.47 So did the two principal Reporters for the American Law Institute’s Model Code of Pre-Arraignment Procedure. Writing about police interrogation and the right to counsel two years after Escobedo was decided and a short time before Miranda was handed down, they maintained that “a legislature would be justifiably reluctant to provide that in the few hours immediately following arrest questioning be delayed pending the arrival or appointment of counsel.”48 In many cases, they went on to say, “this would completely prevent any questioning at all at the very time such questioning is most necessary . . . .”49

III. A FEW WORDS ABOUT TERMINOLOGY

It may be my shortcoming, but I find it unhelpful, indeed confusing, when discussing Miranda, to talk about “voluntary,” “involuntary,” and “self-incrimination,” terms Schauer uses several times.50 The same may be said for “genuinely voluntary self-incrimination,” another term Schauer uses.51 I believe that “voluntariness” and “involuntariness” are so unfocused and unruly that the less often they are used the better. Moreover, I do not believe they are appropriate terms when talking about Miranda.

46. Id. at 479.
47. See Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 950 (1965) (Escobedo “can well be read as requiring the assistance of counsel only when the police elicit a confession at the station house from a suspect already long detained, whose case is ripe for presentation to a magistrate—in other words, that the police, by unduly deterring such presentation, may not postpone the assistance of counsel that would then become available.”).
48. See Bator & Vorenberg, supra note 20, at 75 (first emphasis added). Professors Bator and Vorenberg recognized, however, that if “custody continues for more than a very few hours, the claims for conditioning questioning on the presence of counsel seem to us considerably stronger.” Id.
49. Id.
51. See id. at 159.
As Professors Bator and Vorenberg once pointed out:

Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are “voluntary” in the sense of representing a choice of alternatives. On the other hand, if “voluntariness” incorporates notions of “but-for” cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.52

Although many thought the Miranda Court would focus primarily on the Sixth Amendment right to counsel, it turned out that the Court relied largely on the Fifth Amendment’s privilege against self-incrimination instead.53 Although, as I shall point out shortly, the “voluntariness” test continues to apply in a number of important situations, when Miranda does apply we should use the language of the Fifth Amendment’s privilege against self-incrimination rather than talk about “voluntariness,” “involuntariness,” or “overbearing the will.”

Although many people seem to find it quite difficult to talk about Miranda without discussing the warnings, I share Professor Schulhofer’s view that the warnings are only one of a series of holdings or steps, and that they are not the most important feature of Miranda:

First, the Court held that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute “compulsion” within the meaning of the fifth amendment. Second, it held that this element of informal compulsion is present in any questioning of a suspect in custody, no matter how short the period of any questioning may be. Third, the Court held that [in the absence of any other protective devices] precisely specified warnings are required to dispel the compelling pressure of custodial interrogation. The third step, the series of particularized warnings, raises the concerns about judicial legislation that usually preoccupy Miranda’s critics. But the core of Miranda is located in the first two steps.54

52. Bator & Vorenberg, supra note 20, at 72–73.
53. Even the lawyer who argued the case on behalf of Mr. Miranda was surprised by the Court’s heavy reliance on the privilege against self-incrimination. He confessed (if one may use that term) that he had written the briefs “with entire focus” on the Sixth Amendment right to counsel. See John J. Flynn, Panel Discussion of the Exclusionary Rule, 61 F.R.D. 259, 278 (1972). Flynn’s remarks came at a discussion before the 1972 Judicial Conference of the Ninth Circuit. Id. at 259 n.1.
Although it is sometimes said that *Miranda* displaced the old due process/“voluntariness” test (especially when one discusses *Miranda* hurriedly), this is not so. In a number of situations, the “voluntariness” test is still controlling.

For example, if a custodial suspect makes a valid waiver of his or her rights and agrees to answer police questions, the admissibility of any statement that follows must be determined on the basis of the voluntariness test. If suspects who are not in police custody are questioned by the police, once again the admissibility of any resulting statements is still governed by the “voluntariness” test.

As I have discussed at length elsewhere, if the prosecution seeks to use a confession or incriminating statement to impeach a defendant’s testimony at trial, or to use the “fruits” of the confession (but not the confession itself), here, too, the “voluntariness” test is controlling. Although statements obtained in violation of *Miranda* may still be used for impeachment purposes, “involuntary” or “coerced” statements may not. Although the Court will usually permit the use of evidence derived from a *Miranda* violation (but not the statement itself), it will exclude the “fruits” of an “involuntary” confession.

However, when the courts do grapple with a *Miranda* issue, I think it more helpful to talk about whether the statement was “compelled” within the meaning of the privilege against self-incrimination than to discuss whether the statement was “coerced” or the product of a “broken” or “overborne” will.

IV. ARE THERE BETTER WAYS TO DEAL WITH THE CONFESSION PROBLEM THAN *MIRANDA* WARNINGS?

Schauer wonders why there should be *Miranda* warnings “rather than a signed waiver, a witnessed waiver, an attorney-advised waiver, a witnessed or recorded interrogation, or any of some number of other devices that would more straightforwardly specify and make more

57. See Kamisar, supra note 1, at 980–83.
58. See id. at 1000–02.
59. See id. at 983.
First of all, a suspect who has already confessed orally is likely to sign a written waiver. In the *Miranda* case itself, the defendant signed a written confession containing a typed provision stating, to quote the Court, “that the confession was made voluntarily, without threats or promises of immunity and ‘with full knowledge of my legal rights, understanding any statement I make may be used against me.’”

However, it appears he was not read this provision until after he had confessed orally. A majority of the Court was convinced that, despite the typed statement in the written confession, Mr. Miranda was “not in any way apprised of his right to consult with an attorney . . . nor was his right not to be compelled to incriminate himself effectively protected in any other manner” before he confessed orally.

As for “a witnessed waiver,” whom would the witness be? A police officer or a defense lawyer? A second police officer is unlikely to make an impressive witness.

Schauer does specifically say that one alternative to the *Miranda* warnings might be “an attorney-advised waiver.” But why would a defense attorney or public defender advise his or her client to sign anything without exploring whether the client had been intimidated, or tricked or bluffed into confessing orally? Moreover, why would lawyers let their clients sign anything without learning as much as they could about the case?

It strikes me that in practice an “attorney-advised waiver” requirement might come to mean that a custodial suspect could not waive his or her rights without first getting the advice of counsel—a view that even the liberal *Miranda* majority rejected.

If the *Miranda* majority—consisting of Justices Warren, Black, Douglas, Brennan, and Fortas—were unwilling to go that far, it is hard to believe that any Supreme Court would do so in the foreseeable future. Nor would Congress or any state legislature.

There is much to be said for Schauer’s final specific suggestion—recording or videotaping the entire interrogation. However, I share

---

63. *Id*.
64. See Kamisar, *supra* note 1, at 970–71.
Professor Schulhofer’s concern that, although recording the interrogation would be an extremely valuable tool, “without clear substantive requirements against which to test the police behavior that the videotape will reveal, the objective record will lack any specific legal implications.”

V. SOME FINAL THOUGHTS

I am indebted to Professor Schauer for causing me to reread a goodly number of confession cases and to view them somewhat differently than I had before. When I reread the opinions in an old confession case, frequently because a recent Supreme Court decision has wrestled with a somewhat new fact situation, or because a commentator such as Schauer has raised new questions, I rarely see the old case in quite the same way I did before.

I like to think that I have read more Supreme Court cases dealing with confessions more times than anyone else. If so, it is because I have probably written about confessions for a longer time than anybody else. I wrote my first article on police interrogation and confessions exactly fifty years ago, shortly before Escobedo and Miranda were decided. In the decades that followed, I have tried to defend Miranda. But it would not be surprising if the rules governing police interrogation and confessions were to be changed in the foreseeable future. There has been too much criticism of Miranda and the rules it provides—both from the right and the left. But if and when the rules do change, no matter how they change, I venture to say that many people will be unhappy with the result. One reason is that many people approach what might be called the “police interrogation-confession” problem with different starting premises.

Miranda has much to say about the privilege against self-incrimination and the right to counsel. But that is not all it has to say. As Judge Henry Friendly once observed, the equal protection argument is “a ground bass that resounds throughout the Miranda opinion.” Continued Judge Friendly:

The involuntary confession rule afforded no benefit to the poor

---

and ignorant, who confessed without having been subjected to unfair tactics, whereas the rich and the knowledgeable remained silent. Equality could be established only by advancing the point at which the privilege became applicable and surrounding the poor man with safeguards in the way of warning and counsel that would put him more nearly on a par with the rich man and the professional criminal. 69

It seemed obvious to the Miranda Court that the rights it was establishing had to apply to “the indigent as well as the affluent.” 70 After all, “[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.” 71

However, others, such as Professor Gerald Caplan, who started out with different “first premises,” saw the issue differently:

[G]uilt is personal. That another, equally guilty, person got away with murder because of some fortuitous factor—he was more experienced in dealing with the police, he had a poorly developed sense of guilt, he had a smart lawyer, he knew his rights—or even because of discrimination, does not make the more vulnerable murderer less guilty. To hold otherwise is to confuse justice with equality. 72

I doubt that anybody has ever criticized the “equal protection” argument in the Miranda setting more forcefully than Nicholas deB. Katzenbach did when he was U.S. Attorney General. Responding to Judge David Bazelon’s criticism of the first preliminary draft of the proposed American Law Institute’s Model Code of Pre-Arraignment Procedure for failing to provide counsel for indigent custodial suspects 73 (in an exchange of letters that took place a year before Miranda was decided), Attorney General Katzenbach observed: “I have never understood why the gangster should be made the model and all others

69. Id.
71. Id. at 473.
72. Caplan, supra note 18, at 1457. See also Friendly, supra note 68, at 711 (maintaining that one can make a strong argument that the Miranda Court’s resolution of the equal protection argument “is too great a concession to egalitarianism. Equality, it can be forcefully contended, does not demand cessation of proper police practices that are valuable, perhaps essential, to the investigation and punishment of crime, simply because some segments of the population do not know they are not obliged to cooperate whereas others do.”).
73. At the time of his correspondence with Attorney General Katzenbach, Bazelon was Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit.
raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap.”

Although the Bazelon-Katzenbach correspondence started out as a private exchange of letters between the two men, the correspondence was soon “leaked” to the press and widely read by the public. I came away with the distinct impression that most people agreed with the Attorney General. For me, that was the sobering end of the story.75

74. Attorney General Katzenbach’s comments are quoted in Yale Kamisar, Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice, 54 Ky. L.J. 464, 474, 494 (1966). Katzenbach’s comments are criticized in Kamisar, supra, at 475–78, especially his use of the emotive words “beat the rap” and “gangster.”

75. Of course, although Attorney General Katzenbach most probably won in the court of public opinion, he lost in the Supreme Court. See generally Miranda, 384 U.S. at 436.