

2015

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Citation Information

William T. Pizzi, *Revisiting the Mansions and Gatehouses of Criminal Procedure: Reflections on Yale Kamisar's Famous Essay*, 12 OHIO ST. J. CRIM. L. 633 (2015), available at <http://scholar.law.colorado.edu/articles/55>.

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Citation: 12 Ohio St. J. Crim. L. 633 2014-2015

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Revisiting the Mansions and Gatehouses of Criminal Procedure: Reflections on Yale Kamisar's Famous Essay

William T. Pizzi*

I. INTRODUCTION

One of the most famous essays in constitutional criminal procedure is Yale Kamisar's *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to...*,¹ which was published in 1965. The essay is partly a scholarly review of the Warren Court decisions up to that point that were aimed at leveling the playing field for rich and poor citizens in our criminal justice system by providing stronger protections for all citizens accused of crimes against the power of the state. The essay thus discusses the major Right to Counsel cases, the Due Process cases, and the Fourth Amendment cases that had been decided up to that point and which constitute such a large part of what came to be known as "the criminal procedure revolution."

But the main thrust of the essay was to urge the Court to take the next logical step and do something about the questioning of suspects in police stations. The ellipsis at the end of the title makes the point that it was time for the Court, having become concerned about what was happening in interrogation rooms, in cases such as *Spano v. New York*² and *Escobedo v. Illinois*,³ to take stronger measures to protect suspects against the pressures that are brought to bear on them by the police in order to obtain incriminating admissions that will lead to their convictions.

The essay's title alerts the reader to the metaphors that Professor Kamisar uses to condemn the treatment of suspects being questioned at police stations after they have been arrested. The mansion, of course, is the courthouse, but it is the gatehouse—the back room of the police station—that is the focus of the essay. In his words:

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¹ The essay was one of three, the others having been written by Fred E. Inbau and Thurman Arnold, in a volume entitled, *CRIMINAL JUSTICE IN OUR TIME* (1965).

² 360 U.S. 315 (1959).

³ 378 U.S. 478 (1964).

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.⁴

Quoting from the infamous interrogation manual of Fred E. Inbau and John E. Reid⁵—later relied on heavily by the Supreme Court in *Miranda v. Arizona*⁶—Kamisar tells us that in the gatehouse: “the enemy of the state is a depersonalized ‘subject’ to be ‘sized up’ and subject to ‘interrogation tactics and techniques most appropriate for the occasion’; he is ‘game’ to be stalked and cornered. Here ideals are checked at the door, ‘realities’ faced, and the prestige of law enforcement vindicated.”⁷

Kamisar warns us that what takes place at the police station is tawdry and sometimes shocking, as police work on the suspect, often for hours, in an effort to break down the suspect and get him to admit to committing the crime in question. This conduct is possible because the interrogation room is hidden from public view, and there is no record of what goes on as officers cajole, trick, or directly coerce incriminating admissions from the suspect. In the gatehouse, there is no protection for suspects against the pressures the police can bring to bear on them.

But, continuing the metaphor, after arrestees have been cajoled, tricked, or coerced into making incriminating admissions, the case now moves to the courthouse where the situation is quite different: “Once [the suspect] leaves the ‘gatehouse’ and enters the ‘mansion,’ . . . the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.”⁸

In the mansion, there will, of course, be a lawyer to represent the accused and a judge who will warn defendants of their rights and make sure that any courtroom waiver by the accused is knowing, intelligent, and voluntary.

Physically, of course, the courtroom is very different from the interrogation room—the courtroom is open to the public, and there are court reporters to record all that is said—a marked contrast to the “bare back rooms and locked doors” the suspect encounters in the police station.

⁴ Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 1, 19 (Yale Kamisar, Fred E. Inbau & Thurman Arnold eds., 1965).

⁵ FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2011).

⁶ See *Miranda v. Arizona*, 384 U.S. 436, 449–55 (1966).

⁷ Kamisar, *supra* note 4, at 20 (quoting FRED E. INBAU ET AL., *supra* note 5).

⁸ *Id.*

The obvious point of the essay is that the protections of the Constitution mean so much in the courtroom, but “so little in the police station.” But the protections in the mansion arrive too late for the accused because his confession is powerful evidence of guilt, and the suspect will have difficulty convincing the judge or a jury that the confession was forced from him. Likely, it will be the suspect’s word against that of the officers, who will deny pressuring the suspect to confess and insist that the suspect readily answered their questions. Thus, the essay urges the Court to complete its work by requiring, at a minimum, that officers warn suspects in the interrogation room of their right to remain silent and require that counsel be provided to all suspects, rich or poor, who indicate they want counsel before being questioned.

II. THE ESSAY AND MIRANDA

This essay presaged *Miranda* and it was very clearly a dominant influence—some think it the dominant influence⁹—on the opinion of Chief Justice Warren. Just as Kamisar had cited to the interrogation manual co-authored by John E. Reid and Fred E. Inbau to support his claims about the way police size up suspects in order to pressure them to give incriminating statements, the Court took exactly the same approach in *Miranda*. The Chief Justice’s opinion quoted extensively from this manual to impliedly condemn interrogation tactics such as the good cop/bad cop routine, false claims to possess incriminating evidence proving the suspect’s guilt, and even rigged lineups in which people claiming to be witnesses are coached to pick the suspect out as the perpetrator so as to convince the arrestee to confess.¹⁰

Like the Court, Kamisar seemed a bit conflicted in his essay on whether any interrogation of arrestees should be permitted. On the one hand, he states that he would not bar all interrogation, but rather “would bar . . . the all too prevalent in-custody interrogation which takes place under conditions undermining a suspect’s freedom to speak or not to speak—and the all too prevalent questioning of those who are unaware and uninformed of their rights.”¹¹ But if suspects are truly made aware of their rights, why would they agree to answer questions that would be used to incriminate them? And if a suspect is to be protected from “conditions undermining a suspect’s freedom to speak or not to speak,”¹² shouldn’t an arrestee be spared the inherent pressures of being arrested and then put into a back room at

⁹ See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 *HARV. C.R.-C.L. L. REV.* 1, 10 (2011) (“Perhaps nothing was more influential in shaping the Court’s decision in *Miranda* than Yale Kamisar’s article, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*.”).

¹⁰ See *Miranda*, 384 U.S. at 449 nn.9 & 10, 450 nn.12 & 13, 452 nn.15–17, 454 nn.20–22, & 455 n.23.

¹¹ Kamisar, *supra* note 4, at 10.

¹² *Id.*

the stationhouse where officers clearly want answers to their questions? How aware and informed of their rights can an arrestee be who answers questions under such pressure?

Similarly, in *Miranda*, the Court seemed to think that knowing one's rights and even having an attorney present were not inconsistent with an arrestee choosing to answer police questions, with the Court even suggesting at one point that counsel might assist an arrestee wishing to answer questions in making sure answers are accurate. One can imagine the ghost of Justice Jackson reprimanding that of Chief Justice Warren in the Great Beyond: "Earl, what part of my statement, '[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances'¹³ did you not understand when you envisaged a defense lawyer assisting a suspect answering questions and incriminating himself in the bowels of the police station?"

Obviously, we now have *Miranda* and all the controversy over that decision as well as the decisions over the years that have interpreted aspects of that decision. Some decisions have broadened the opinion, but most have limited it in various ways. There was even the danger at one point that the Court might overrule *Miranda*, only to have the Court declare, in a very strange opinion in *Dickerson v. United States*,¹⁴ that perhaps the Court would not decide *Miranda* the same way in 2000 as it did in 1966, but, at this point, the decision has become part of our "national culture,"¹⁵ so the decision is here to stay.

III. RETHINKING THE MANSION

Kamisar's gatehouse essay is now close to fifty years old and in the ensuing years, Professor Kamisar has continued to be a prolific scholar on *Miranda* and on the post-*Miranda* decisions that have expanded or contracted aspects of the original decision.¹⁶ It is always a pleasure to read his articles, as they are not only invariably thoughtful, but also beautifully written.

I have my own thoughts on *Miranda* and its strengths and weaknesses. Suffice it to say that sometimes I am envious as I watch British crime procedurals and see a tape machine playing throughout interviews at the station and a defense solicitor sitting next to the suspect whispering advice on certain questions. But England had major advantages in constructing its system for the questioning of suspects. While England has had a long tradition of warnings given to suspects

¹³ *Watts v. Indiana*, 338 U.S. 49, 59 (1949).

¹⁴ 530 U.S. 428 (2000).

¹⁵ *Id.* at 443.

¹⁶ See, e.g., Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007); Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004) [hereinafter *Another Look at Patane and Seibert*].

(and Warren's opinion relied on the English tradition for support in *Miranda*¹⁷), the treatment of suspects in custody in England today is controlled by The Police and Criminal Evidence Act 1984¹⁸ (usually referred to as PACE), which governs almost every aspect of the treatment that must be accorded suspects at the station, including medical help for someone arrested, notice to families of the arrest and detention, the recording of questioning, and even the breaks that must be given to suspects during questioning. In short, it is a very broad piece of legislation covering many topics that has been followed up by detailed codes of practice on specific issues.

To compare such a broad piece of general legislation with what the Court did as a matter of constitutional interpretation in *Miranda* is thus a bit unfair. It was also to England's benefit, of course, that in considering the sweeping changes under PACE, Parliament had almost twenty years of the American experience under *Miranda* to draw upon in deciding to take a different path.

But the purpose of this essay is not to revisit *Miranda* and the gatehouse. There is obviously an enormous literature on the roads the Court might have taken in *Miranda*,¹⁹ on what police think of *Miranda*²⁰; and on the many decisions over the last four decades that have expanded or limited *Miranda*.²¹

Rather, it is time to take another look at the other metaphor in the essay, namely the mansion where "the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated."²²

This picture of the courthouse seems badly outdated today. If one went from courtroom to courtroom in most of our courthouses today, one would not find many events that resemble the picture painted in Kamisar's essay. If he was talking about trials when he spoke loftily about "the stirring ceremony of individual freedom from law enforcement" that is "celebrated" in the mansion, such events are increasingly rare today. In the federal system, our most prestigious system and the one with the greatest resources, courtrooms are dark most days. In a detailed study of the phenomenon that has come to be known as "the vanishing

¹⁷ *Miranda v. Arizona*, 384 U.S. 436, 486–89 (1966).

¹⁸ Police and Criminal Evidence Act, 1984, c. 60, (U.K.), available at <http://www.legislation.gov.uk/ukpga/1984/60/contents>. In addition to the law enacted by Parliament in 1984, there were several codes of practice approved in the years following that provide more specific guidance for police on their obligations under PACE, including PACE Code C dealing with the procedures to be followed in questioning those in police custody. See Policy Paper: PACE Code C 2012, available at <https://www.gov.uk/government/publications/pace-code-c-2012>. On the history of PACE, see generally Michael Zander, PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future (London Sch. of Econ. & Political Sci., Law, Soc'y and Econ. Working Paper 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1978372.

¹⁹ See, e.g., Gerald Caplan, Questioning *Miranda*, 38 VAND. L. REV. 1417 (1985).

²⁰ See, e.g., DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 193–97 (1991).

²¹ See, e.g., William T. Pizzi & Morris B. Hoffman, Taking *Miranda's* Pulse, 58 VAND. L. REV. 813 (2005); Another Look at Patane and Seibert, *supra* note 16.

²² Kamisar, *supra* note 4, at 20.

trial”²³ in the United States, Marc Galanter showed that while the number of district court judges in 2002 had doubled compared to 1962,²⁴ the absolute number of criminal trials was smaller in 2002.²⁵ Although the data is not as complete in state courts, Galanter showed that for the twenty two states that had data available, there was a similar trend.²⁶ Between 1976 and 2002, the number of trials had declined in both absolute numbers and as a percentage of dispositions. In fact, trials decreased from 8.5% of the dispositions to 3.3% of the dispositions during that period.²⁷

Obviously, that trials are increasingly rare events does not necessarily show that Kamisar’s idealized mansion no longer squares with reality. Since our country has a long history of plea bargaining, it may be that the decline in trials is largely a result of a system that is working well—with prosecutors and defense attorneys reaching agreements that fairly balance the interests of the state against the punishment the defendant deserves (with some discount for sparing the state the costs of a trial). Because plea bargains are largely hidden from view—the evidence of the crime remains hidden and untested, and courtroom admissions of guilt are often a means to an end—it is hard to evaluate how fair our plea bargaining system is to defendants.

There are, however, disturbing signs that substantial numbers of defendants are being put under tremendous pressure to waive their constitutional rights and plead guilty or face sentences that are brutal in their length and greatly disproportionate to the punishment they should receive for the crime charged.

Recently, the problem has come to the forefront in federal court, especially with drug laws. Many statutes carry very high mandatory minimum sentences if a certain amount of drugs were involved in the commission of a crime. Attorney General Holder has now told federal prosecutors not to charge crimes with these amounts unless the case clearly merits such harsh punishment.²⁸

But the crimes carrying mandatory sentences are a small subset of cases in which prosecutors have the power to mandate harsh sentences, even life sentences, if the defendant refuses to plead guilty. Another set of tools available to prosecutors involves what are referred to as “prior felony informations.”²⁹ These are informations filed for sentencing purposes by prosecutors under 21 U.S.C. § 851, which double the mandatory sentence for the crime or even mandate a life

²³ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

²⁴ *Id.* at 502 fig.30.

²⁵ *Id.* at 493 (noting a drop of 30% in the number of criminal trials in federal court between 1962 and 2002).

²⁶ *Id.* at 512 tbl.7.

²⁷ *Id.* at 510.

²⁸ Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?pagewanted=all&_r=1.

²⁹ See 21 U.S.C. § 851.

sentence if the prosecutor files an information indicating the defendant has a prior felony conviction.³⁰ The control of § 851 is in the hands of the prosecutor because the statute states that a defendant shall not have his sentence increased by virtue of a prior conviction or prior convictions “unless before trial . . . the United States Attorney files an information with the court . . . stating in writing the previous convictions to be relied upon.”³¹

A recent federal case, *United States v. Kupa*,³² shows how a prior felony information under § 851 works to coerce guilty pleas. In that case, the defendant, Lulzim Kupa, who had two prior felony convictions for conspiring to distribute marijuana, was charged along with other defendants with distributing more than five kilograms of cocaine.³³ The offense with this amount stipulated as an element, carried a mandatory minimum sentence of ten years in prison and a maximum of life in prison, often referred to as a “ten-life count” in the vernacular of federal drug laws.³⁴ While this law was intended for “drug kingpins,”³⁵ it fails to ask about the role of any defendant charged with the offense, and asks only about the amount of drugs involved.

The government offered Kupa the following plea agreement: if Kupa pled guilty to distributing cocaine, the government would withdraw the count charging the amount that would trigger the ten-life sentence and recommend a sentence of 110-137 months in prison, which would allow Kupa to be released after serving seven years and ten months in prison.³⁶ But, the government told Kupa that if he did not accept the plea, the government would file a § 851 information against him due to his criminal history and he would then get a mandatory life sentence without the possibility of parole.³⁷ Kupa was given a day to accept the plea offer.³⁸

When Kupa did not accept the offer, the government duly filed the § 851 information, which would have mandated life in prison upon conviction.³⁹ But the government gave Kupa another chance to plead guilty. If Kupa pled guilty, the government would withdraw § 851 information and recommend a sentence in the range of 130–162 months.⁴⁰ Thus, for not accepting the early plea agreement, Kupa was being offered a sentence that would allow his release in nine years and four months.⁴¹ He was again given a day to think it over.⁴²

³⁰ See 21 U.S.C. § 841(b).

³¹ 21 U.S.C. § 851(a).

³² 976 F. Supp. 2d 417 (E.D.N.Y. 2013).

³³ *Id.* at 432.

³⁴ *Id.* at 422.

³⁵ *Id.* at 454.

³⁶ *Id.* at 432.

³⁷ See *id.* at 432–33 (discussing how the government used Kupa’s prior felony informations to induce a guilty plea).

³⁸ *Id.* at 432.

³⁹ *Id.*

⁴⁰ *Id.* at 433.

⁴¹ *Id.*

When he did not accept the plea agreement quickly enough, the government forwarded another proposed agreement. This time the government ratcheted up the guideline range by removing a discount for “acceptance of responsibility” so that Kupa would serve ten years in prison if he pled guilty, as opposed to a mandatory life sentence if he were convicted at trial.⁴³ Kupa finally agreed to the proposal and told the sentencing judge he wanted to plead guilty “before things got worse.”⁴⁴

The reason we know so much about Kupa’s guilty plea is because the judge who accepted Kupa’s guilty plea, Judge John Gleeson—a former prosecutor of some note⁴⁵—wrote a scathing sixty-page opinion describing how the threat of a § 851 prior felony information was used in this case and how it is used in “countless others” to coerce guilty pleas from defendants.⁴⁶ Gleeson wrote that for those defendants who insist on exercising their right to trial, “prosecutors insist on the imposition of . . . unjust punishments when the threatened defendants refuse to plead guilty.”⁴⁷

In his opinion, Judge Gleeson describes the threatened use of a prior felony information as the sentencing equivalent of “a two-by-four to the forehead.”⁴⁸ Judge Gleeson went on to say that the government’s threatened use of prior felony informations “coerces guilty pleas and produces sentences so excessively severe they take your breath away.”⁴⁹

“Prior felony informations,” used as a weapon to force defendants to plead guilty, resemble the use of “three-strikes” laws passed in many states in the wake of the Polly Klaas murder in 1994.⁵⁰ These laws are often used to put tremendous pressure on defendants to enter guilty pleas or face long prison sentences, often life in prison. The use of habitual offender statutes to threaten a life sentence if the defendant refuses to plead to even a rather minor felony was upheld in *Bordenkircher v. Hayes*,⁵¹ where the prosecutor offered to recommend a five year sentence if Hayes pled guilty to uttering a forged instrument in the amount of \$88.30, but threatened to indict him as a habitual criminal if he refused to “save the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 434.

⁴⁵ When he was a prosecutor, Judge Gleeson was responsible for the conviction of John Gotti, the head of the notorious Gambino crime family. See Robert D. McFadden, *For Gotti Prosecutors, Hard Work And Breaks Pay Off in Conviction*, N.Y. TIMES, Apr. 3, 1992, at B3, available at <http://www.nytimes.com/1992/04/03/nyregion/for-gotti-prosecutors-hard-work-and-breaks-pay-off-in-conviction.html>. See also Jeffrey Toobin, *More Brains*, THE NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/brains-3> (discussing Judge Gleeson’s experience as a prosecutor in the Gotti case).

⁴⁶ Kupa, 976 F. Supp. 2d at 419.

⁴⁷ *Id.* at 420.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* 6–13, 17 (2001).

⁵¹ 434 U.S. 357 (1978).

court the inconvenience and necessity of a trial.”⁵² Hayes refused the offer, the prosecutor brought the habitual offender count, and Hayes received a life sentence.⁵³

While habitual offender sentences are the most obvious weapon available to state prosecutors to coerce guilty pleas, they have other ways to put pressure on suspects to plead guilty. Sentences for all crimes have gotten harsher over the years which makes plea bargains seem favorable to the risk of trial. Also, there are usually additional elements available to prosecutors that can be added to the basic charge—perhaps that the victim was elderly or that the defendant possessed a weapon—that will automatically increase the sentence minimum or mandate a certain sentence.

Today, Kamisar’s essay retains importance as a warning about the pressure in interrogation rooms, but the contrast between the gatehouse and the mansion is inaccurate. Defendants will often face much greater pressure to plead guilty in the mansions of our country than the pressure they face in police station interrogation rooms. The difference is that in the mansion the threats are delivered openly and in plain sight of defense attorneys and judges. Prosecutors do not need to play the games police are known to use in the interrogation room—bluffs about evidence, false promises of leniency, good cop/bad cop play-acting, etc. Instead, to use Judge Gleeson’s metaphor, they just put the two-by-four on the table and explain how it will be used if the defendant refuses to plead guilty.

How many defendants plead guilty who might have put forward strong defenses if given a chance at trial? Or how many defendants were actually innocent of the crime to which they were forced to plead guilty? Of course, we do not know the precise answer to these questions any more than we know how many suspects are pressured into false confessions in interrogation rooms. But some idea of the size of the problem is indicated by a recent report on exonerations that took place around the country in 2013. Of the eighty seven persons who were exonerated of their crimes in 2013, fifteen of them had pled guilty to avoid a harsher sentence.⁵⁴ This is consistent with other data on exonerations: of the nearly three hundred prisoners convicted in state cases who were later exonerated by DNA tests over the last two-plus decades, almost 10% of them had pled guilty.⁵⁵

Today, the risk of going to trial is often too great for defendants—when the choice is five years in prison versus a mandatory ten or twenty years, it is difficult for defendants to run the risk. Even a defendant with a colorable defense will have

⁵² *Id.* at 358.

⁵³ *Id.* at 358–59.

⁵⁴ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013 3 (2014), available at https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

⁵⁵ Gary Fields & John R. Emshwiller, Federal Guilty Pleas Soar as Bargains Trump Trials, *WALL ST. J.* (Sept. 23, 2012), <http://online.wsj.com/news/articles/SB10000872396390443589304577637610097206808>.

a tough time opting for trial if he considers how he will feel four or five years in the future when he would have been released if he had pled guilty but now faces ten or twenty additional years in prison for having risked trial and lost.

IV. CONCLUSION

What happens in interrogation rooms today is less important to convictions than it was forty years ago. This is not to say that there are not abuses of suspects in interrogation rooms or that the danger of false confessions has abated, but rather that if a suspect has the advice of counsel and says nothing to the police, the pressure to admit guilt will often be much greater in the courthouse than it was in the interrogation room. Professor Kamisar's image of prosecutors as "hemmed in at many turns"⁵⁶ in the courthouse is simply inaccurate. Today, it would be more accurate to say that it is judges who are "hemmed at many turns" because statutes and sentencing guidelines have shifted control over sentencing from judges to prosecutors.

Not surprisingly, as the percentage of cases going to trial has declined and sentencing power has shifted to prosecutors, the incarceration rate in the United States has climbed steeply. This is hardly a secret as it has been front-page news for several years in newspapers and magazines. In 2008, the *New York Times* published a feature article on the topic of the incarceration rate in the United States, complete with an interactive chart that allowed readers to click on different countries around the world and compare incarceration rates.⁵⁷ When one clicked on the United States and then on other countries, one saw quickly the reason the article was entitled *Inmate Count in U.S. Dwarfs Other Nations'*. While the United States' rate climbed to 751 citizens per 100,000,⁵⁸ the rates in other western countries were far, far lower. The incarceration rates of England, Canada, and Germany were only 151, 108, and 88 citizens per 100,000, respectively.⁵⁹

What is even more startling is that the article showed that historically from 1920 to 1970, the United States' incarceration rate was steady at about 150 citizens incarcerated per 100,000.⁶⁰ But in the late 1970s, the incarceration rate began its precipitous climb to a rate that is now four or even five times higher.⁶¹

Professor Kamisar's essay remains a classic both for its historical importance in spotlighting the problems in the gatehouse as well as for the grace and style with which he wrote. But its vision of the mansion is no longer accurate. If we are to rebuild and refurbish the mansion into a structure that is consistent with Kamisar's

⁵⁶ Kamisar, *supra* note 4.

⁵⁷ Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, *N.Y. TIMES* (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

image of what does and should take place there, we need to ask some very hard questions about charging, about plea bargaining, and about our trial system and the avoidance of that system. To examine what has happened to the mansion over the last forty years will be painful. But we really have no choice.

