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SEVEN HABITS OF A HIGHLY EFFECTIVE SCHOLAR

*Jerold H. Israel**

Yale Kamisar has been my friend and colleague for almost forty years now, and my first inclination was to write about those relationships, which have meant so much to me. But I know that other friends and colleagues participating in this tribute issue can bring to the description of those relationships far greater skill and far greater eloquence. I have been Yale's coauthor for roughly thirty-five years on his professional "pride and joy" — *Modern Criminal Procedure*¹ — and that is another relationship that I could describe with warmth and affection. But Wayne LaFave, who has shared this same role, is also

* Alene and Allan F. Smith Professor of Law Emeritus, University of Michigan; Ed Rood Eminent Scholar in Trial Advocacy and Procedure, University of Florida. B.B.A. 1956, Western Reserve University; L.L.B. 1959, Yale University. — Ed.

1. See YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *MODERN CRIMINAL PROCEDURE* (10th ed. 2002) [hereinafter *MODERN*]. The first edition of *Modern* was published in 1965. The listed authors were Yale Kamisar and Livingston Hall, but the work was entirely Yale's. The initial edition of *Modern* was derived from materials on constitutional criminal procedure that Yale had prepared for the revision of Walter F. Dodd's constitutional law casebook (a project undertaken by Bill Lockhart, Yale, and Jesse Choper, which subsequently was converted into their own constitutional law casebook now in its 9th edition, YALE KAMISAR, JESSE H. CHOPER, RICHARD H. FALLON, JR., and STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW* (9th ed. 2001)). Yale and Livingston Hall had intended to produce a substantive criminal law casebook, and therefore Livingston Hall was added as an author to *Modern*, which was viewed initially as a softbound companion to that more substantial criminal law casebook. However, *Modern* took on a life of its own, as the substantive criminal law book never materialized. Yale produced an expanded second edition of *Modern* in 1966, and Wayne LaFave and I joined the project for the third edition in 1969. Livingston Hall graciously withdrew from the project shortly thereafter, so the fourth through eighth editions (in 1974, 1980, 1986, 1990, and 1994) were coauthored by Kamisar, LaFave, and Israel. Nancy King joined us with the ninth edition in 1999.

Although Yale takes pride in both *Constitutional Law* and *Modern*, I have always thought that *Modern* was closer to his heart. He alone was responsible for its creation, and *Modern* deals with the subject matter to which Yale has devoted most of his energies (although *Constitutional Law* does contain a substantial section on physician-assisted suicide). Also, while *Constitutional Law* has done well in the marketplace, *Modern* has dominated its field. Although the publisher's records on adoptions are imprecise (referring to bookstore sales rather than adoptions per se), they indicate that *Modern* and its two spin-offs (*Basic Criminal Procedure* and *Advanced Criminal Procedure*, which are basically paperback editions of the first and second halves of *Modern*) have been used regularly every year since 1969 in at least eighty law schools, and very often, in more than 100 schools. Student use is more difficult to calculate because of the almost complete absence of data on students using used books. But even with a very conservative estimate as to used books, the number of law students who have used the book in one or more courses probably exceeds 400,000.

contributing to this issue,² and I know better than to compete with his wit, wisdom, and lexical expertise.³ There is, however, one relationship I have shared with Yale that is unique to the two of us. For most of Yale's time on the Michigan faculty, I have been his primary "sounding board" on matters of criminal procedure (as he has been mine).⁴ I was his coauthor-in-resident, the primary person with whom he divided Michigan's criminal procedure curriculum,⁵ and perhaps

2. Nancy King is also contributing to this issue, but she will be the first to acknowledge that, having joined the enterprise late in the game, her experiences with Yale as a coauthor have been considerably different from the experiences shared by Wayne and myself. By the time Nancy came on board, the basic issues as to the structure and feel of *Modern* had been worked out. Also Nancy took on two chapters (Appeals and Habeas Corpus) that had formerly been in my bailiwick, and Yale had little interest in either.

3. See, e.g., Wayne R. LaFave, *Livrebleu 17: Les Conséquences Tragiques Forgées Par Le Professeur Répugnant Nommé Grantmore*, 2001 U. ILL. L. REV. 857; Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 729 (according to LaFave, a title aimed at "these logomachists who pertinaciously anathematize polysyllabical sesquipedalianism as dysteleological"); Wayne R. LaFave, *Surfing as Scholarship: The Emerging Critical Cyberspace Studies Movement*, 84 GEO. L.J. 521 (1996).

4. Yale and I started bouncing ideas off each other even before he joined the Michigan faculty in the fall of 1965. Yale visited at Michigan in the summer of 1964, teaching criminal law. Sandy Kadish had just decided to move to Berkeley, and I was the designated pinch-hitter for Sandy's fall term criminal law course. Needing all the help I could get, I attended Yale's criminal law class that summer, and we often met after class to further my education. It was obvious to me and everybody else on the Michigan faculty that Yale was the person we needed to replace Sandy. However, Yale was about to start a year-long visit at Harvard, and there was concern that we would lose in a competition for his services with Harvard. Allen Smith, our Dean at the time, responded by having Michigan extend its offer early in the fall and insisting that Yale respond within a few weeks — knowing that Harvard would not even start its consideration of appointments until well after that. Fortunately for Michigan, this strategy worked, and Yale responded affirmatively within Allen's deadline. When Yale joined the Michigan faculty in the summer of 1965, we simply took up where we had left off the previous summer.

Under ordinary circumstances, when Frank Allen rejoined the Michigan faculty in the fall of 1966, Yale probably would have turned to him as his primary sounding board. Frank always has been accessible to younger faculty, and as Yale has noted, by 1966, Frank had established himself as a preeminent scholar in the fields of criminal law and criminal procedure. See Yale Kamisar, *Francis A. Allen: "Confront[ing] The Most Explosive Problems" and "Plumbing All Issues To Their Full Depth Without Fear or Prejudice"*, 85 MICH. L. REV. 406 (1986) [hereinafter Kamisar, *Francis A. Allen*]. Frank, however, did not return under "ordinary circumstances." He returned as Dean to preside over what was certainly one of the most tumultuous and trying periods in the history of the Michigan Law School (and every other law school). See Terrence Sandalow, *Francis A. Allen*, 85 MICH. L. REV. 385 (1986). While Frank was always most gracious with his time, even during this hectic period, we hesitated to add to his burdens. By the time Frank had finished his deanship and returned to regular faculty status, Yale and I had a well-embedded tradition of throwing arguments at each other, and Frank, in the meantime, had largely shifted in his interests away from constitutional criminal procedure.

5. Yale arrived at Michigan with the first edition of *Modern* having just been published. See *supra* note 1. However, at the time, Michigan, like most other law schools, did not regularly offer a criminal procedure course as a part of its curriculum. Criminal law was a four hour course, and roughly one fourth of that course was supposed to be devoted to criminal procedure, with a heavy emphasis upon the constitutional regulation of criminal procedure. The first edition of *Modern* could readily be used for that purpose, but Yale's

most importantly, the one person certain to challenge his views (whether or not I actually disagreed with him).⁶ Since both of us learn best from an oral exchange of viewpoints, these circumstances led to endless discussions/debates in a variety of different places within the confines of the Cook Law Quadrangle.⁷ Very often, these discussions

second edition, published in October 1966, dramatically expanded (by roughly 60%) the coverage and size of *Modern*. It clearly was a book to be used in a separate criminal procedure course, and Yale initiated such a course at Michigan (which I also occasionally taught). The third edition, however, which added Wayne LaFave and myself as coauthors, expanded the book still further. *Modern* went from 802 pages to 1399 pages (1448 with the appendices). It now included such topics as pleadings, venue, and joinder, and had considerably more material on non-constitutional regulation. What was needed, we concluded, was to remove criminal procedure from the criminal law course, and to establish two criminal procedure courses. The first would deal basically with the investigative procedures dominated by the police and the second would deal with the subsequent stages of the criminal justice process. Fortunately, the faculty agreed with this proposal and we began offering the two courses in 1971. They were officially titled "Criminal Justice: Administration of Police Practices and the Courts," and "Criminal Procedure: From Bail to Post Conviction Review," but the students simply called them "Police Practices" and "Bail to Jail."

Yale regularly taught Police Practices and I regularly taught Bail to Jail. On occasion, we would get other faculty members to take on an additional section of either course (or a separate survey course I had developed), but their interest was sporadic (although the peripatetic Peter Westen did stay with it long enough to dash off several outstanding criminal procedure articles). Until Debra Livingston arrived on the scene in 1992, we were the only faculty members who regularly taught criminal procedure courses and made that subject our primary research interest. Debra's return to New York (to teach at Columbia) in 1994 was a heartbreaker, but the blow was softened by Sam Gross's decision to devote more of his time to criminal procedure.

6. My wife recently called my attention to a passage in Benjamin Franklin's autobiography which quite appropriately takes to task my approach to discourse. Franklin notes that, as a youth, he developed the "bad Habit" of being "disputatious," which only operated to "mak[e] People often extremely disagreeable, by the Contradiction that is necessary to bring it into Practice." Seeking to rid himself of this bad habit, he turned to the Socratic method, but that also was unsatisfactory as it proved "very embarrassing to those against whom I used it." He finally took to expressing himself "in Terms of modest Diffidence," never directly disputing, nor giving "the Air of Positiveness to an Opinion," but noting only the possibility of another position. This habit, he noted, served better the "Ends of Conversation." THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 60-65 (Leonard W. Labree et al. eds., 2d ed. 1985).

In my defense, it should be noted that Franklin himself would not have expected me to follow his advice. For he noted that there were three groups who seemed to be inherently incapable of eliminating that bad habit of always challenging the ideas of the other person, often simply "for Dispute's sake" — "Lawyers, University Men, and Men of all Sorts that have been bred at Edinborough." *Id.* at 60. I am still checking possible family ties to Edinborough, but that seems most unlikely.

7. The tenor of our discussions/debates is most accurately captured in Debra Ann Livingston, *A Tribute to Jerry Israel: A Friend with a Messy Office*, 94 MICH. L. REV. 2443, 2448-49 (1996). Livingston noted that even when conducted in our offices, our "conversations" tended to be loud enough to disrupt all but our most hearing-impaired neighbors (neither Yale nor I have soft voices). *Id.* Yale has said that we sometimes debated "loudly and fiercely," Yale Kamisar, *Bouquets for Jerry Israel*, 94 MICH. L. REV. 2455, 2456 (1996) [hereinafter Kamisar, *Bouquets*], but my recollection is that "loudly" was an ever-present feature. As for the debate sometimes being "fierce," that term, in this context, is not meant to suggest "hostility," but simply "zeal" and perhaps, "aggressiveness." See also YALE KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS, at vi (1980) ("Jerry and I have spent literally hundreds of hours discussing, and *fighting* about, the law and policies of

focused on something Yale was writing or had written.⁸ Prior to my taking on the responsibilities of treatise-writing, our discussions centered most often on substantive matters, as I was able to keep up, in a general fashion, with major developments in the law regulating police practices, although my research and writing dealt largely with other aspects of the criminal justice process. Keeping a treatise current, however, made that more and more difficult, and our discussions often turned to another very interesting (and often potentially contentious) topic — why Yale was writing about a particular topic and how his viewpoint would be presented. This was a natural offspring of our discussions over the years of the role and character of law review articles (particularly in connection with the question of which articles should be noted in *Modern*).

The end result is that, of all his colleagues and coauthors, I probably stand in the best position to describe Yale Kamisar's *modus operandi* in the realm of scholarship. I initially hesitated to take on this topic because of the risks involved. I knew that I would miss some nuances here and there, and on some points, might even be "dead wrong." With Yale's penchant for setting the record straight,⁹ I ordinarily would expect a published response that would rip my description to shreds, and in the process, double the number of my footnotes.¹⁰ But I have been assured by the editors that a Kamisar response will not be a part of this issue, and that assurance (although it unfortunately does not extend to future issues) has given me sufficient fortitude to proceed with the venture. Besides, I actually look forward to the many hours Yale and I will spend over the next several months in discussing/debating whether I have it "right."

My format for presenting Yale's *modus operandi* is borrowed from Stephen Covey's *Seven Habits of Highly Effective People*.¹¹ Here, of

confessions") (emphasis added). Tempers were never lost because we both knew that the process was aimed simply at sharpening our thinking, and any incidental gibes were well intentioned even when razor sharp.

8. As with many law school faculty of our generation, Yale has never followed the practice of circulating drafts of his articles or presenting papers in workshops. Feedback would follow, whether or not desired, simply by mentioning your latest project in the presence of your colleagues.

9. See, e.g., Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962) [hereinafter Kamisar, *Betts v. Brady*]; Yale Kamisar, *Forward: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977) [hereinafter Kamisar, *A Hard Look*].

10. Compare Yale Kamisar, *In Defense of the Search And Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003) [hereinafter Kamisar, *In Defense of the Exclusionary Rule*], with Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003). Since this is a tribute to a "master" of substantive footnotes, I have made liberal use of the footnotes to convey far more than citations.

11. STEPHEN R. COVEY, *THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE: RESTORING THE CHARACTER ETHIC* (1990); see also STEPHEN R. COVEY, *THE SEVEN*

course, I am describing seven habits of a “highly effective scholar.” That Yale has been a highly effective scholar is beyond dispute. His various academic awards,¹² the citations to his publications in both academic literature¹³ and judicial opinions¹⁴ (including many that

HABITS OF HIGHLY EFFECTIVE FAMILIES (1997); SEAN COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE TEENS: THE ULTIMATE TEENAGE SUCCESS GUIDE (1998).

12. In 1996, Yale received the Annual Research Award of the Fellows of the American Bar Association (awarded “in recognition of his outstanding contributions to the law and the legal profession through his research and writing in law and government”). He was made a Distinguished University Professor at Michigan in 1992 — an honor bestowed on the University’s most distinguished scholars, which, as the University sees it, typically means no more than one or two faculty members with appointments solely in the law school. In 1979, Yale was awarded an honorary doctor of law degree by John Jay College of Criminal Justice, a preeminent institution in the education of future leaders in law enforcement. A year later he was awarded an honorary degree by the University of Puget Sound.

13. A search of the Westlaw database for Journals and Law Reviews produced 1647 different articles citing to the writings of Yale Kamisar. This search would not reach citations to coauthored work where Yale was not the first author listed and the number of authors was sufficient to call for the infamous “et al.” cite under the citation guidelines followed by the particular publication. That limitation, however, applies to only a handful of Yale’s publications. More significant is the limited coverage of the West database. For most of the journals included in the database, complete coverage doesn’t start until issues of the late 1980s or early 1990s; indeed, only the *Harvard Law Review* is covered for issues preceding 1981. Of course, by 1981, Yale already had been writing (and commentators had been citing his work) for slightly more than twenty years.

I did not seek to compare the number of Kamisar citations with the number for other scholars, but I did turn to Professor Leiter’s website, Most Cited Law Faculty (2002), at http://www.utexas.edu/law/faculty/bleiter/rankings02/top10_most_cited.html. That listing is based on a mid-July 2002 search of the Westlaw JLR database. Among criminal law and criminal procedure scholars, Leiter had Yale listed as 4th, with 1020 citations (suggesting that either Leiter and I count differently, or Yale is rapidly gaining in popularity, with 645 citings between mid-July 2002 and January 2004). Leiter’s number one citation-gatherer for this group of scholars (George Fletcher) was listed as not very far ahead of Yale in mid-July 2002, with 1220 citations at that time. For those who closely follow such listings (and I am not suggesting Yale necessarily does), a sigh of relief was in order when Wayne LaFave retired. A search of the JLR database with the term LaFave produces the response: “Your query has been intercepted because it may retrieve a large number of documents.”

14. Yale’s writings have been cited in over 500 published opinions. While that is an impressive number of citations for a writer of articles, even more impressive is the number of citations in Supreme Court opinions. Yale may very well hold the record for the number of different articles cited in opinions of the United States Supreme Court. By my count, twenty-two of his publications have been cited at least once. His articles have been cited altogether in twenty-seven Supreme Court cases. *Washington v. Glucksberg*, 521 U.S. 702, 733-34 n.23 (1997) (citing Yale Kamisar, *The “Right to Die”: On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481 (1996), and Yale Kamisar, *Against Assisted Suicide — Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735 (1995)); *id.* at 754-55 (Souter, J., concurring) (citing Petitioner’s Brief at 45, which cites Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, HASTINGS CENTER REP., May-June 1993, at 32 (1993)); *id.* at 777 (citing Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 225 (J. Keown ed., 1995)); *Arizona v. Evans*, 514 U.S. 1, 20 (1994) (Stevens, J., dissenting) (citing Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition?”*, 16 CREIGHTON L. REV. 565 (1983) [hereinafter Kamisar, *Exclusionary Rule*]); *California v. Acevedo*, 500 U.S. 565, 576-77 (1990) (citing Yale Kamisar, *The “Automobile Search” Cases: The Court Does Little to Clarify the “Labyrinth” of Judicial Uncertainty*, in 3 THE SUPREME COURT: TRENDS AND

DEVELOPMENTS 69 (1982) [hereinafter Kamisar, *The "Automobile Search" Cases*]]; *id.* at 597 n.11 (Stevens, J., dissenting) (citing Kamisar, *The "Automobile Search" Cases*, *supra*); Minnick v. Mississippi, 498 U.S. 146, 164 (1990) (Scalia, J., dissenting) (citing Yale Kamisar, *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, in 5 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 153 (1984)); Illinois v. Perkins, 496 U.S. 292, 297 (1989) (citing Yale Kamisar, Brewer v. Williams, Massiah and Miranda: *What is "Interrogation"?* *When Does It Matter?*, 67 GEO. L.J. 1, 67 (1978) [hereinafter Kamisar, Brewer v. Williams]); Moran v. Burbine, 475 U.S. 412, 430, 433 n.4 (1985) (citing version of Kamisar, Brewer v. Williams, *supra*, reprinted in YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 139 (1980) [hereinafter KAMISAR, POLICE INTERROGATION AND CONFESSIONS]); Miller v. Fenton, 474 U.S. 104, 116 (1985) (citing Yale Kamisar, *What Is An "Involuntary" Confession? Some Comments On Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 [hereinafter Kamisar, *What Is An "Involuntary" Confession?*], reprinted in KAMISAR, POLICE INTERROGATION AND CONFESSIONS, *supra*, at 1); Oregon v. Elstad, 470 U.S. 298, 353 n.34, 359, n.40 (1984) (Brennan, J., dissenting) (citing Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966) [hereinafter Kamisar, *Dissent from Miranda Dissents*], reprinted in KAMISAR, POLICE INTERROGATION AND CONFESSIONS, *supra*, at 41, and Kamisar commentary in A NEW LOOK AT CONFESSIONS: ESCOBEDO — THE SECOND ROUND 150, 156 (B. James George, Jr. ed., 1967); United States v. Leon, 468 U.S. 897, 916 n.14 (1984) (citing Kamisar, *Exclusionary Rule*, *supra*); *id.* at 938 n.6 (Brennan, J., dissenting) (citing Kamisar, *Exclusionary Rule*, *supra*); *id.* at 958 n.17 (citing Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984) [hereinafter Kamisar, Gates and Beyond]); Nix v. Williams, 467 U.S. 431, 453 n.2 (1984) (Stevens, J., concurring) (citing Kamisar, *A Hard Look*, *supra* note 9); United States v. Henry, 447 U.S. 264, 280 (1979) (Blackmun, J., dissenting) (citing Kamisar, *A Hard Look*, *supra* note 9); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1979) (citing Kamisar, *A Hard Look*, *supra* note 9); *id.* at 310 n.7 (Stevens, J., dissenting) (citing Kamisar, *A Hard Look*, *supra* note 9); United States v. Janis, 428 U.S. 433, 450 n.22 (1975) (citing Yale Kamisar, *On The Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L. REV. 436 (1964) [hereinafter Kamisar, *Tactics*]; Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171 (1962) [hereinafter Kamisar, *Public Safety*]; Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959) [hereinafter Kamisar, *Wolf and Lustig*]; Faretta v. California, 422 U.S. 806, 811 n.6 (1974) (citing YALE KAMISAR, WAYNE R. LAFAYE, & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE 57-60 (4th ed. 1974)); United States v. Hale, 422 U.S. 171, 177 n.5 (1974) (citing Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974) [hereinafter Kamisar, *Kauper's "Judicial Examination of the Accused"*]); Schneekloth v. Bustamonte, 412 U.S. 218, 267 n.24 (1972) (Powell, J., concurring) (citing Kamisar, *Public Safety*, *supra*, and Kamisar, *Tactics*, *supra*); Argersinger v. Hamlin, 407 U.S. 25, 60 n.26 (1971) (Powell, J., concurring in result) (citing Yale Kamisar & Jesse H. Choper, *The Right to Counsel in Minnesota: Some Field Finding and Legal Policy Observations*, 48 MINN. L. REV. 1 (1963) [hereinafter Kamisar & Choper, *The Right to Counsel in Minnesota*]); United States v. White, 401 U.S. 745, 771-72 n.4 (1970) (Harlan, J., dissenting) (citing Yale Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891 (1960) [hereinafter Kamisar, *The Wiretapping-Eavesdropping Problem*]); Alderman v. United States, 394 U.S. 165, 206 n.8 (1968) (Fortas, J., concurring in part and dissenting in part) (citing Yale Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L. REV. 78 [hereinafter Kamisar, *Illegal Searches*]); Berger v. New York, 388 U.S. 41, 100 (1966) (Harlan, J., dissenting) (citing Kamisar, *The Wiretapping-Eavesdropping Problem*, *supra*); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 300 n.6 (1966) (citing Kamisar, *The Wiretapping-Eavesdropping Problem*, *supra*); Miranda v. Arizona, 384 U.S. 436, 440 n.2, 474 n.41 (1965) (citing Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965) [hereinafter Kamisar, *Equal Justice*]); *id.* at 469 n.38 (citing Kamisar, Betts v. Brady, *supra* note 9); *id.* at 511 (Harlan, J., dissenting) (citing Kamisar, *Equal*

arguably suggest an actual influence on the court's reasoning¹⁵), and many other indicators of his influence¹⁶ readily earn him that

Justice, supra); Rinaldi v. Yeager, 384 U.S. 305, 310 n.5 (1965) (citing Kamisar & Choper, *The Right to Counsel in Minnesota, supra*); Ker v. California, 374 U.S. 23, 59 n.13 (1962) (Brennan, J., dissenting) (citing Kamisar, *Public Safety, supra*); Gideon v. Wainwright, 372 U.S. 335, 338 n.2 (1962) (citing Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962) [hereinafter Kamisar, "*The Most Pervasive Right*"]); Wong Sun v. United States, 371 U.S. 471, 485 n.11 (1962) (citing Kamisar, *Illegal Searches, supra*); Elkins v. United States, 364 U.S. 206, 208 n.2 (1959) (citing Kamisar, Wolf and Lustig, *supra*).

15. Of course, Yale would be the first to acknowledge that a citation in an opinion does not mean that the article necessarily contributed to the opinion's reasoning. A judge may well reach a conclusion and then seek support in the literature for the reasoning that brought the judge to that conclusion. In some instances, however, the article is cited in such a way as to strongly indicate it did contribute to the reasoning adopted in the opinion. Thus, the article may be cited as presenting information that is relevant to the proper shaping of doctrine. See, e.g., Rinaldi v. Yeager, 384 U.S. 305, 310 n.5 (1965) (citing Kamisar & Choper, *The Right to Counsel in Minnesota, supra* note 14). So too, the opinion may describe an article as presenting a characterization of a principle that is helpful in determining the appropriate scope of its application. See also *Miranda v. Arizona*, 384 U.S. 436, 440 n.2, 472 n.41 (1965) (citing Kamisar, *Equal Justice, supra* note 14).

Of course, a seemingly casual cite (e.g., as part of a string citation) may hide the very significant role played by the particular article. I know as a fact that was the case in *Elkins v. United States*, 364 U.S. 206 (1960), where Justice Stewart's opinion for the Court cited to Yale's article, along with articles by several other authors, in noting that the silver platter doctrine "has been the subject of much comment in legal periodicals." *Id.* at 208 n.2. I was clerking for Justice Stewart at the time, and my co-clerk, Jack Evans, was assigned the task of writing an extensive memo setting forth the possible lines of reasoning and caselaw support that might be used to reject the silver platter doctrine (the Court had already voted to do exactly that and the opinion had been assigned to Justice Stewart). Jack told me that the memo would be easy to prepare because he had come across a thoroughly researched article that set forth everything he needed to include in the memo (although his memo, he noted, would have to be a lot shorter than the article). What made the incident stick in my mind was Jack's comment about the author's first name (had his parents really named him after a college, and were his siblings named Harvard and Princeton). That was the first time Yale Kamisar's scholarship (or name) came to my attention.

16. On his retirement from "full-time teaching," Yale was the guest of honor at the annual section luncheon of the American Association of Law School's Criminal Justice Section. In announcing the luncheon in the Section's newsletter, Stuart Green, the Section's chair, noted that Yale is "one of the nation's leading authorities on criminal procedure having written many of the seminal articles and texts in the field," and that Yale's work on confessions and police interrogation "ha[ve] earned him the title, the 'Father of *Miranda*.'" See also DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENTS, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 83-84 (2003) (suggesting that Yale is better described as one of the saviors of *Miranda*). Professor Driggs argues that *Miranda*'s survival "is largely attributable to two intellectual developments that took place in the years immediately following the decision, one empirical and one doctrinal." *Id.* at 83. The doctrinal development, he notes, "was the publication of Yale Kamisar's essay, *A Dissent From The Miranda Dissents*", in volume 65 of the Michigan Law Review, which had "effectively demolished the dissenters' arguments," exposing their 'central premise . . . as altogether unconvincing if not mildly ridiculous.'" *Id.* at 84 (quoting Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 11 (1986), and Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981)). This so destroyed, as "hopelessly vague," the voluntariness-test alternative that even Justice White "had become a convert to the 'bright line rules' his *Miranda* dissent had disparaged." *Id.*

The respect of his peers also is reflected in the number of established criminal procedure scholars who have sought Yale's advice on their publication drafts. There are far too many "thank you" acknowledgments in books and articles to list and quote them here, but the

appellation. More troublesome is the question of which of Yale's publications should be considered in describing the habits of his "scholarship."

Yale's portfolio of writings goes far beyond traditional scholarship. It includes close to forty magazine articles, appearing in both publications aimed at lawyers generally (e.g., *The National Law Journal*) and publications aimed at the general public (e.g., *The Nation*).¹⁷ It also includes somewhere between fifty and a hundred op-ed pieces,¹⁸ written primarily for the *New York Times* and the *Los Angeles Times-Washington Post*. These writings are important to Yale (his second ranked career choice, after law, was newspaper columnist¹⁹), and have been most successful in expanding the audience for his ideas. Three of his magazine articles were key contributions to

following three evidence the special character of Yale's input. See WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON*, at vii (2001) ("And Yale Kamisar, to whom this book is dedicated, has contributed not only through his comments on some of my chapters but also through his own writings, which have illuminated the subject of interrogations and confessions and precipitated my interest in writing a book of this type"); Paul G. Cassel, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 898 n. (2001) ("I also want to extend a special note of thanks to Yale Kamisar for suggesting this Symposium and, more generally, for all the interest he has shown in my work over the years. In fact, my desire to pursue the *Dickerson* litigation was prompted, in part, by Yale's admission to me a few years ago that he 'wasn't sure' what the Supreme Court would do if it ever faced § 3501. Yale, I should never have let you convince me to throw *Miranda* into the briar patch!"); George C. Thomas III, *Separated at Birth But Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1081 n. (2001) ("Finally, special thanks to Yale Kamisar. The leading figure in the law of confessions for over four decades, Yale always gave generously of his time and wisdom when I send him a draft, as he did this time. He helps many in the academy in many other ways as well, large and small.").

So too, Yale was selected to assist in several distinguished law reform projects: American Law Institute, Model Code of Pre-Arraignment Procedure (1975) (advisor); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (1974) (co-reporter); National Commission on the Causes and Prevention of Violence (1969) (advisor); National Advisory Commission on Civil Disorders (1965) (consultant). See also *Ten Teachers Who Shape The Future*, TIME, Mar. 14, 1977, at 56 (profiling ten outstanding "mid career" law professors, selected "[w]ith the counsel of judges and lawyers, students and teachers"; the group included, in addition to Yale, Bruce Ackerman, Anthony Amsterdam, Guido Calabresi, Ruth Bader Ginsburg, W. Kenneth Jones, Herma Hill Kay, Robert Pitofsky, Laurence Tribe, and Franklin Zimring).

17. See *infra* note 20. I have included in this rough counting the several books reviews for the *New York Times Sunday Book Review* (a magazine of sorts). Not included are Yale's many pieces in the *Michigan Law Quadrangle Notes*, which usually were edited versions of articles published elsewhere.

18. Yale does not keep close track of these pieces, but his secretary gave me a partial listing of roughly fifty. In an interview with the student newspaper of the University of Michigan Law School, Yale noted that he may have written as many as a hundred op-ed pieces. Andy Daly & John Fedyński, *Caught on Tape: Yale Kamisar Talks About End of Teaching Career*, RES GESTAE, Oct. 28, 2003, at 1, 12.

19. Yale frequently has stated that, if he had not gone to law school, he would have strived to be a sports columnist (as he was during his college days at New York University). However, I can't help but believe that, if he had pursued that path, he eventually would have moved from sports to public affairs, becoming, at the least, a Nat Hentoff-type columnist.

special magazine issues that won the ABA's Silver Gavel Award,²⁰ and *Time* cited Yale's "many articles for magazines and newspapers" as one of his major accomplishments, when including him in its list of ten law professors who would "shape the future."²¹

These writings, however, although they may have contributed to Yale's effectiveness as a scholar,²² clearly fall outside even a liberal definition of "scholarship," and my focus here is on the habits that have shaped Yale's scholarship. Certain other parts of Yale's portfolio, such as articles in publications written for criminal practitioners,²³ and encyclopedia entries,²⁴ might be described as scholarship, but they are aimed at a different audience than the more traditional scholarship and reflect somewhat different habits. My focus is on the *modus operandi* that shapes the paradigm of legal scholarship — law review articles and essays published elsewhere that are similar to law review articles.²⁵ For Yale, that is a hefty body of writing,

20. Yale Kamisar, *Criminal Law: The Swing of the Pendulum*, NATION, Sept. 29, 1984, at 271 (part of an issue on Fifteen Years of the Burger Court, which won the Silver Gavel award); Yale Kamisar, *Drugs, AIDS, and the Threat to Privacy*, N.Y. TIMES, Sept. 13, 1987 (Magazine), at 109 (issue on Constitutional bicentennial receiving the Silver Gavel Award); Yale Kamisar, "The Right to Die": *Green Lights and Yellow Lights*, THE WORLD AND I, Sept., 1990 (another symposium that received the Silver Gavel Award), reprinted in MICHIGAN LAW QUADRANGLE NOTES, Fall 1990.

21. *Ten Teachers Who Shape the Future*, supra note 16.

22. Yale has noted that such pieces are helpful even in reaching academic audiences. Very often, one of these general audience pieces will overlap with one of his law review articles, and an academic who was sent a reprint of the article will comment in a subsequent e-mail not upon the law review article but upon the magazine article or op-ed piece. Yale is too polite to ask whether the person read the law review article as well as the shorter piece. But he recognizes that many of us will immediately read the one or two pages piece but put the law review reprint in a pile destined (hopefully) for reading at a later time.

23. See, e.g., JESSE H. CHOPER, YALE KAMISAR, & LAURENCE H. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS (1980-84) (including annual contributions from Kamisar); Yale Kamisar, "Custodial Interrogation" Within the Meaning of *Miranda*, in CRIMINAL LAW AND THE CONSTITUTION — SOURCES AND COMMENTARIES 335 (John Reed et al. eds., 1968); Herbert B. Cohen, George Edwards, Robert C. Finley, B. James George, Jr., Yale Kamisar, Thomas M. Kavanagh, Thomas C. Lynch, Duane R. Nedrud, Vincent W. Piersante, Edward E. Pringle, & John W. Reed, *Miranda's Impact on Police Practices: Panel Evaluation*, in A NEW LOOK AT CONFESSIONS: ESCOBEDO — THE SECOND ROUND, supra note 14, at 79; Yale Kamisar, *Poverty, Equality, and Criminal Procedure*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS DESKBOOK 79 (1977); Yale Kamisar, *Duckworth v. Eagan: A Little-Noticed Miranda Case That May Cause Much Mischief*, 25 CRIM. L. BULL. 550 (1989).

24. See Yale Kamisar, *Confessions*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 223 (Sanford Kadish ed., 1983); Yale Kamisar, *Police Interrogation and Confessions*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1400 (Leonard Levy ed., 1986).

25. This counting is conservative, as it excludes several shorter pieces that might be classified as article-equivalents. See, e.g., Yale Kamisar, *When Is There a Constitutional "Right to Die"? When Is There No Constitutional "Right to Live"?*, 25 GA. L. REV. 1203 (1991), reprinted in MODERN CONSTITUTIONAL THEORY: A READER 688 (John H. Garvey & T. Alexander Aleinikoff eds., 3d ed. 1994); Yale Kamisar, *The Rights of the Accused in a "Crime Crisis"*, in POSTMORTEM: THE O.J. SIMPSON CASE 211 (Jeffrey Abramson ed., 1996). It does include those tributes to retiring scholars that contain extensive discussions of

consisting of roughly fifty articles, published in academic law reviews and collections of essays aimed at an academic audience.²⁶ Although it does not provide a perfect fit, I will also make occasional reference to how the same habits are reflected in *Modern*.²⁷

Of course, focusing on only seven of the habits that contribute to Yale's scholarly writings also is somewhat arbitrary (although seven apparently is the magic number for best sellers of the self-improvement genre).²⁸ To stay within that limit, I have excluded the habits that are common to almost all successful scholars, such as extensive research and lucid writing. I have focused instead on habits which, although not unique to Yale Kamisar, clearly reflect his personality and his vision of the role of a scholar. The selected seven are presented not in order of significance, but in a sequence designed simply to reflect their interrelatedness.

1. *Concentrating on a small group of basic issues.* All but a handful of Yale's law-review-type articles deal with one of five basic issues: "mercy-killing"; the legitimacy and appropriateness of the Fourth

substantive issues. See, e.g., Kamisar, *Inbau Tribute*, *infra* note 43; Kamisar, *Francis A. Allen*, *supra* note 14; Yale Kamisar, *Edward L. Barrett Jr.: The Critic with "That Quality of Judiciousness Demanded of the Court Itself,"* 20 U.C. DAVIS L. REV. (1987); Kamisar, *Grano Tribute*, *infra* note 42.

26. While some of these collections of essays were designed for (or at least marketed to) an audience beyond academics, Yale's contributions always provided the depth, length, and close analysis associated with a law-review-type article. See, e.g., Yale Kamisar, *The "Police Practice" Phases of the Criminal Process And The Three Phases Of The Burger Court*, in *THE BURGER YEARS* 143 (Herman Schwartz ed., 1987) [hereinafter *THE BURGER YEARS*]; Yale Kamisar, *The Rise and Fall of the "Right" to Assisted Suicide*, in *THE CASE AGAINST ASSISTED SUICIDE* 69 (Kathleen Foley & Herbert Henden eds., 2002); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *the Burger Court (Is It Really So Prosecution-Oriented?) and Police Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983).

27. In describing the fit as less than perfect, I do not mean to suggest that either of Yale's major casebooks are not worthy of being treated as scholarship. Yale has been a strong proponent, in evaluating scholarship for tenure purposes, of giving major credit to those "casebooks" which clearly go beyond the traditional collection of edited cases, typically by including extensive author commentary and reflecting extensive research in the selection of materials beyond edited cases. Both of his casebooks, *supra* note 1, clearly fit that description. Indeed, the authors' commentary in *Modern* has been cited by courts in much the same way that a treatise would be cited. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 437 n.26 (1984); *Robbins v. California*, 453 U.S. 420, 451 n.12 (1981) (Stevens, J., dissenting); *Baker v. McCollan*, 443 U.S. 137, 154 n.13 (1979) (Stevens, J., dissenting); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Faretta v. California*, 422 U.S. 806, 811 n.6 (1974); *Gooding v. United States*, 416 U.S. 430, 464 n.1 (1973) (Marshall, J., dissenting). Similarly, a Westlaw search of the Journals and Law Reviews database revealed cites to *Modern* in 330 articles.

28. See, e.g., THOMAS ARMSTRONG, *SEVEN KINDS OF SMART: IDENTIFYING AND DEVELOPING YOUR INTELLIGENCE* (1993); DONNA BROOKS, *SEVEN SECRETS OF SUCCESSFUL WOMEN* (1997); SEAN COVEY, *supra* note 11; STEPHEN R. COVEY, *supra* note 11; ORAL ROBERTS, *SEVEN DIVINE AIDS FOR YOUR HEALTH* (1960). The "Seven Steps" books are probably the frontrunners in the use of that magical number. See, e.g., AL COKE, *SEVEN STEPS TO A SUCCESSFUL BUSINESS PLAN* (2002); MICHAEL FARR, *SEVEN STEPS TO GETTING A JOB FAST* (2002).

Amendment's exclusionary rule; the disadvantages that the criminal justice system imposes upon the indigent; the criticism (particularly on efficiency grounds) of the Supreme Court's regulation of police practices;²⁹ and, of course, police interrogation and confessions.³⁰ Yale took on each of these subjects early in his career³¹ and decided basically to stay with them and not branch out into other aspects of criminal law and criminal procedure³². This was not due to a lack of interest in other areas. His op-ed pieces have dealt with a far broader range of criminal procedure issues, and even such basic First Amendment issues as school prayer.³³ His chapters in *Modern* extend

29. The criticism on "efficiency grounds" argues that the restrictions imposed by the Supreme Court in its constitutional interpretations preclude police effectiveness in solving crimes and prosecuting offenders. See Yale Kamisar, *Public Safety*, *supra* note 14; Yale Kamisar, *Some Reflections on Criticizing the Courts and "Policing the Police"*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 453 (1962).

30. The tributes for Francis Allen, Edward Barrett, Joseph Grano, and Fred Inbau, *supra* note 25, review other aspects of their writings, but concentrate on the writings dealing with one or more of the four criminal procedure topics. The articles in the Burger Court symposia, *supra* note 26, discuss criminal procedure rulings that go beyond the four topics, but they also give primary attention to those topics, as do the two *Tulsa Law Journal* articles on the Rehnquist and Warren Courts. Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465 (1999) [hereinafter Kamisar, *Confessions*]; Yale Kamisar, *The Warren Court and Criminal Justice*, 31 TULSA L.J. 1 (1995). The article on *Gates* in the *Iowa Law Review*, Kamisar, *Gates and Beyond*, *supra* note 14, though it deals with the definition of probable cause, focuses on the relationship of that concept to a good faith exception to the exclusionary rule. The article on the use and abuse of crime statistics in the *Oklahoma Law Review*, Yale Kamisar, *How to Use, Abuse — and Fight Back With — Crime Statistics*, 25 OKLA. L. REV. 239 (1972) [hereinafter Kamisar, *How to Use Crime Statistics*], relates to a major postulate of the efficiency critics of the Court. Thus, the only articles that clearly go beyond these five topics are the wiretapping article in the *Minnesota Law Review*, Kamisar, *The Wiretapping-Eavesdropping Problem*, *supra* note 14, the article on *Brown* in ARGUMENT: THE COMPLETE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF TOPEKA* 1952-55 (Leon Friedman ed., 1969), and the article on illegal arrests and contemporaneous incriminating statements in the *University of Illinois Law Forum*, Kamisar, *Illegal Searches*, *supra* note 14. The last article, however, does relate to the proper scope of the exclusionary rule.

31. As to mercy-killing, see Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958). As to the exclusionary rule, see Kamisar, *Wolf and Lustig*, *supra* note 14. As to treatment of the indigent, see Kamisar, *"The Most Pervasive Right"*, *supra* note 14, and Kamisar, *Betts v. Brady*, *supra* note 9. As to confessions, see Kamisar, *What Is An "Involuntary" Confession?*, *supra* note 14. As to efficiency critics of the Court, see the articles cited *supra* note 29.

32. Yale did not intend initially to return to the topic of mercy-killing. That was the subject of his first law review article, and shortly thereafter, he was immersed in criminal procedure. He continued to take an interest in the mercy-killing issue, and developed some teaching materials on the issue for use in his criminal law course, but had no plans to write on it again. However, the events of the 1990s (i.e., Doctor Kevorkian's actions, constitutional challenges to state regulation, and proposals for authorizing physician-assisted suicides) brought renewed public interest in mercy-killing, and he was swamped with requests to participate in symposia, largely as a result of his first article. This produced a "temporary detour" from his criminal procedure agenda (producing eight articles), but Yale has said that criminal procedure will be the sole focus of his writing in the future.

33. See Yale Kamisar, *Attica: The Search for Causes*, DETROIT NEWS, Sept. 23, 1971, at 13B; Yale Kamisar, *Call It Double Jeopardy*, N.Y. TIMES, Feb. 14, 1997, at A37; Yale

substantially beyond the four criminal procedure topics that have been his law review specialties, and he has often called my attention to issues briefly noted in those chapters which, in his view, desperately needed better treatment in the literature.

Yale often was tempted to take on additional issues, but he recognized that, with his mode of research, that could well keep him from getting back to his specialties as often as needed. For when Yale looks at an issue for the first time, his research agenda, simply put, is "to leave no stone unturned."³⁴ He takes the cases as far back as they will go, scours the literature for anything of possible relevance, and where the occasion calls for it, even reviews the trial record that eventually led to a major Supreme Court ruling. The end result is that he has far more basic information than can possibly be crammed into a single article. Of course, information which is excluded as not directly relevant to the current article is not thereby lost. It remains in Yale's notes and in his memory, and he usually will find a place for it in his next article on a slightly different aspect of the issue or in revisiting the issue in light of some later development. Simply put, after one or two articles on an issue, Yale has a tremendous research investment, and if a new project would stand in the way of future use of that investment, it will be rejected no matter how tempting that project.³⁵

2. *Acknowledging personal values and personal engagement.* Yale Kamisar has never remotely suggested that he writes from a neutral,

Kamisar, *Fourth Amendment Hatchback*, WASH. POST, Oct. 15, 1981, at A29; Yale Kamisar, *Obnoxious It May Be, But It's Still Expression*, L.A. TIMES, June 30, 1989, at pt. 2; Yale Kamisar, *On Weapons Sweeps, Why Blame the Judge? Search Me*, DETROIT FREE PRESS, Apr. 23, 1987, at 13A; Yale Kamisar, *U.S. Should Respect Rights of War Prisoners*, DETROIT NEWS, Sept. 16, 2003, at 9A; Yale Kamisar, *When the Jury Was Told It Was Racist*, NEWSDAY, May 5, 1992, at 95; Yale Kamisar, *Will Capital Punishment Live Again?*, NEWSDAY, July 21, 1972, at 55; Yale Kamisar, *Yet Again School Prayer*, N.Y. TIMES, May 17, 1982, at 25.

34. Consider, for example, his description in the *Res Gestae* interview, Daly and Fedynsky, *supra* note 18, of his research on the then-prevailing rule that the fruit of the poisonous tree doctrine did not apply to a statement made contemporaneously with an illegal arrest:

Years later, [after first coming across the issue in practice] I wrote an article, probably worked on it for six or seven months. . . . [I] read everything. . . . I found unpublished opinions . . . and I finally wrote an article . . . arguing essentially that the courts ought to change the law. . . . All the law was against me, going back, I went through every edition of *Wigmore*, through every edition of *Greenleaf*, 16 editions of *Greenleaf*, but that statement [holding the contemporaneous statement admissible] appeared all the way back to the early 1800's.

Id. at 12.

35. This explains in large part why Yale did not join Wayne LaFare and myself when we decided to write a criminal procedure hornbook, expanding upon our research for a recent edition of *Modern*. Yale wished us well, but said the venture was too likely to take him away from his research agenda. He was absolutely right in this regard, as the "hornbook" grew so long that we first published, several years later, a three volume treatise (which we later edited to fit the space limits of a hornbook).

detached perspective. Yale acknowledges the Learned Hand model of the analyst who strips himself of the convictions that are a product of his past,³⁶ but he views that model as contrary to human nature (at the least, his human nature).³⁷ The better path is to openly acknowledge the overarching value judgments that guide the writer's analysis. Yale acknowledges that his own background leads him to be suspicious of governmental authority, particularly when that authority is exercised in low-visibility settings.³⁸ Thus, he quite naturally finds appealing a view of the Fourth, Fifth, and Sixth Amendments as provisions that impose broad restraints upon governmental authority, and thereby protect individual liberty. For him, the function of the Supreme Court, in particular, is to ensure that these restraints are applied in their basic thrust to new settings. The Supreme Court, he has noted, cannot permit constitutional protection to be reduced to an "empty gesture"³⁹ by allowing "logic to triumph over life."⁴⁰ The end product of this philosophy is not an analysis which finds unconstitutional every police practice that Yale himself finds distasteful,⁴¹ but certainly one which produces results that in large part would be considered "liberal" (a description which certainly does not offend Yale).⁴²

Yale also has acknowledged that he is emotionally as well as intellectually committed to the application of this philosophy.

36. See Kamisar, *Bouquets*, *supra* note 7, at 2458.

37. Of course, a writer can come closer to the Hand model when he really doesn't believe the issues are important, and that probably explains Yale's estimate of my capacity to approach particular issues as a "runner stripped for the race." Kamisar, *Bouquets*, *supra* note 7, at 2458 (quoting LEARNED HAND, *Mr. Justice Cardozo, in THE SPIRIT OF LIBERTY* 98, 101 (Irving Dilliard ed., 1959)). Yale, in contrast, believes the issues are very important and truly cares about how they are resolved.

38. In the *Res Gestae* interview, Yale suggests that his opposition to "authority" probably goes back to the rules and regulations imposed upon him as a child. Daly & Fedynsky, *supra* note 18, at 13. Still another explanation might be his love to test himself in debate, as the ultimate test would be debating teachers and other authority figures as to the scope of their authority. Somewhere along the way, he clearly developed a commitment to the proposition that "[t]he basic political problem of a free society is the problem of controlling the public monopoly of force." Kamisar, *Exclusionary Rule*, *supra* note 14, at 648 (quoting Monrad Paulsen, *The Exclusionary Rule and Misconduct By the Police*, in *POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE* 87, 97 (Claude Sowle ed., 1962)).

39. Yale Kamisar, *Equal Justice*, *supra* note 14, at 26 n.69 (quoting ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 55 (1955)).

40. *Id.* at 31 (citing EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 164 (1962) [hereinafter ROSTOW, *THE SOVEREIGN PREROGATIVE*]).

41. See, e.g., Kamisar, *Confessions*, *supra* note 30, at 465 (viewing *Moran v. Burbine* as presenting a "defensible reading of *Miranda*"); Kamisar, *A Hard Look*, *supra* note 9 (discussing government use of private persons as secret agents to illicit statements).

42. See Yale Kamisar, *Joe Grano: The "Kid From South Philly" Who Educated Us All*, 46 WAYNE L. REV. 1231, 1269 (2000) [hereinafter Kamisar, *Grano Tribute*] (implicating himself by using the phrase: "we liberal professors").

Practices presenting what he views as clear excesses of authority stir his “juices of indignation.”⁴³ He will not attempt, moreover, to mask that indignation by toning down his criticism of such a practice or the caselaw that permits it. Rather, he will set forth his criticism in strong terms (indeed, sometimes in stirring rhetoric).⁴⁴ At the University of Michigan, a “Distinguished Professorship” carries with it the right to choose the person after whom the professor’s chair will be named (provided that the person chosen had some connection to the University). For Yale, Clarence Darrow was an obvious choice, not so much because he was a defense lawyer, but because of the brilliance and fervor of his advocacy.⁴⁵

3. *Combining advocacy and scholarship.* For Yale Kamisar, the term “advocacy scholarship” is not an oxymoron. Scholarship requires thorough research and careful analysis of competing considerations, but having done that, why should the scholar avoid drawing a conclusion as to which side had the better of the argument, and forgo explaining in detail the grounding for that conclusion? As Yale noted in his tribute to Fred Inbau, combining advocacy with scholarship may not always be “in style” (at least as to advocacy that is clear and straightforward),⁴⁶ but that practice certainly has a long and honorable

43. See KAMISAR, *POLICE INTERROGATION AND CONFESSIONS*, *supra* note 14, at xii; see also Yale Kamisar, *Fred E. Inbau: “The Importance of Being Guilty”*, 68 J. CRIM. L. & CRIMINOLOGY 182, 192, 196 (1977) [hereinafter Kamisar, *Inbau Tribute*] (noting his “sense of outrage” at an “intemperate” criticism of the Court, and acknowledging that he finds it “more exhilarating” to discuss what the police cannot do than to discuss what they should be able to do).

44. As Yale has noted, “few advocates of any position are able to eschew emotive language.” Kamisar, *Inbau Tribute*, *supra* note 43, at 186 n.24.

45. Darrow attended the University of Michigan Law School, giving him the needed connection to the University (although Darrow did not finish law school). CLARENCE DARROW, *THE STORY OF MY LIFE* 29 (1932) (“[t]he full course was two years,” but, “[a]t the end of one year I was positive that I could make my preparation in another year in an office, which would cost much less money”).

Darrow has been described as a sentimental rebel, JOHN C. LIVINGSTON, *CLARENCE DARROW: THE MIND OF A SENTIMENTAL REBEL* (1988); ARTHUR WEINBERG & LILA WEINBERG, *CLARENCE DARROW: A SENTIMENTAL REBEL* (1987), and that is a fair description of Yale as well. Darrow also frequently acknowledged that he was “doubtful and suspicious of authority.” JAMES EDWARD SAYER, *CLARENCE DARROW: PUBLIC ADVOCATE* 103 (1978) (quoting Darrow). Yet Darrow is not altogether a perfect fit. Since Darrow commonly advocated causes that served the interests of his clients, *id.* at 3-4, in some respects, he might be viewed as a “hired gun.” Yale, in contrast, has for many years refused offers (often lucrative) to consult because he wants there to be no doubt that his views are shaped by his personal values, and not by the interests of a client.

Yale has long been intrigued by Darrow’s courtroom advocacy. In teaching criminal law, Yale used, in part, his own collection of materials, which included a substantial excerpt from a closing argument by Darrow. Darrow’s argument was included not so much for what it said about the legal doctrine Darrow was discussing as for the example it provided of the skill of an advocate.

46. Kamisar, *Inbau Tribute*, *supra* note 43, at 189 (noting that Inbau “takes strong positions and is given to strong words” which would hardly “enhance his status in the law teaching ranks” as professors “are supposed to tiptoe, not crash. They are supposed to be

tradition.⁴⁷ There is, of course, the concern that the scholar not be blinded by his conclusion, that full weight be given to the arguments on the other side. For Yale, his longstanding interest in debate ensures that the other side will not be slighted, for that would only detract from the strength of the debate.

Yale views combining advocacy with scholarship not only as acceptable, but as adding to the effectiveness (and for most people, the honesty) of the scholarship. I believe he set forth what he views as the paradigm of legal scholarship in his description of the work of Joe Grano. Professor Grano's articles, he noted, displayed:

exhaustive reading of the relevant literature and meticulously careful reading of the relevant cases; clear, crisp, vigorous writing; impressive use of historical materials and the available empirical data; a propensity to tackle hard questions; and a willingness, in the end to leave no doubt where he stood — but only after taking pains to state the best arguments against his ultimate position as well as he could."⁴⁸

4. *Making the debate all-inclusive.* In analyzing an issue in an article (or presenting an issue in a casebook), Yale has always sought to make the reader aware of the full range of arguments advanced by others. Thus, in analyzing the caselaw, he will often call attention to a lower court decision that made a particular point more decisively than the Supreme Court or that advanced an argument not considered by the Supreme Court.⁴⁹ In reviewing the academic literature, he

troubled and tentative, not take very strong and very clear positions on anything They earn points, it seems, by showing how *agonizingly subtle and complex* an issue or a problem actually is, not by suggesting how *simple* it really might be.").

47. See Kamisar, *Inbau Tribute*, *supra* note 43, at 190-91 (noting that John Henry Wigmore, often acclaimed as "our first legal scholar," took strong positions, often expressed in "scathing, colorful criticism of the courts") (quoting Albert Kocourek, *John Henry Wigmore*, 27 AM. JUD. SOC'Y 122, 124 (1943)).

Yale has always found particularly irksome the notion that a professor detracts from his status as a scholar when he carries his advocacy into popular journals, as Yale has done. See *supra* notes 17, 18; see also Kamisar, *Bouquets*, *supra* note 7, at 2460 (registering his dissent to Learned Hand's admonition that the scholar not become an advocate, as a person "cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt" (citing LEARNED HAND, *On Receiving an Honorary Degree*, in THE SPIRIT OF LIBERTY 102, 105 (Irving Dilliard ed., 1959))). To Learned Hand, Yale replied:

Of course a scholar who tackles a problem or a cluster of problems should *start* out with an open mind But after studying for hundreds of hours . . . and after thinking, writing, and speaking about these issues for many years, isn't the scholar likely to arrive at some pretty firm conclusions? If so why shouldn't scholars explain to noncriminal law specialists in the legal profession and to members of the public generally how and why they reached the conclusions they did and how and why arguments to the contrary by law enforcement officials and politicians are unsound or misleading? If this makes the scholar an "advocate" or "counteradvocate," so be it.

Kamisar, *Bouquets*, *supra* note 7, at 2460 n.24.

48. Kamisar, *Grano Tribute*, *supra* note 42, at 1232 (citations omitted).

49. See, for example, Chief Judge Weintraub's opinion in *State v. McKnight*, 243 A.2d 240 (N.J. 1968). Weintraub is quoted extensively in *Modern* from the third to the tenth

commonly will take note of articles published well before he ever entered teaching (and well before cases such as *Mapp* and *Miranda* changed the legal landscape)⁵⁰ along with articles so current that they may be available only in page proof.⁵¹ He sometimes goes beyond the traditional academic literature, calling the reader's attention to materials, published and unpublished, of limited circulation. Thus, Yale was one of the first (if not the first) to discuss extensively in the academic literature the exchange of letters between Attorney General Katzenbach and Judge Bazelon⁵² and the 1987 "Miranda Report" of the Office of Legal Policy of the Department of Justice.⁵³ I recall distinctly his pleasure in being able to include in *Modern* an extensive excerpt from a working paper by Phillip Johnson,⁵⁴ which proposed an exclusionary rule exception for cases in which searches were based on warrants (a position which Yale viewed as interesting, but erroneous). When the Supreme Court adopted that position four years later, in *United States v. Leon*,⁵⁵ Justice White's opinion for the majority cited the Johnson working paper, as quoted in *Modern*.⁵⁶

Of course, over the years, it has become somewhat easier for Yale to ensure that the debate is all inclusive. It is the rare academician who comments on any of Yale's topics of primary interest without sending

edition. See, e.g., LIVINGSTON HALL, YALE KAMISAR, WAYNE R. LAFAVE, & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE* 536 (3d ed. 1969); *MODERN*, *supra* note 1, at 489. Weintraub's opinion is also discussed in Yale's articles. See, e.g., Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 403 n.98 (2001) [hereinafter Kamisar, *Miranda Thirty-Five Years Later*].

50. See, e.g., Kamisar, *Kauper's "Judicial Examination of the Accused"*, *supra* note 14.

51. See, e.g., Kamisar, *Miranda Thirty-Five Years Later*, *supra* note 49, at 391 n.26, 394 n.38, 396 nn.55-56, 398 n.68 (noting forthcoming articles by Stephen J. Schulhofer, Donald A. Dripps, Susan R. Klein, William J. Stuntz, Welsh S. White, and David A. Strauss); Kamisar, *Gates and Beyond*, *supra* note 14, at 551 n. (thanking Thomas Y. Davies, Wayne R. LaFave, and Judge Charles E. Moylan for the opportunity to read their drafts of forthcoming articles on related topics).

52. 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 (1966).

53. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REFORM 437 (1989). Yale was largely responsible for having this report and others in the "Truth in Criminal Justice" series reprinted in a special issue of the *University of Michigan Journal of Law Reform*, with an introduction by Joseph Grano. 22 U. MICH. J.L. REFORM 393-1121 (1989); see also Yale Kamisar, *Remembering The "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537 (1990) [hereinafter Kamisar, "Old World"].

54. YALE KAMISAR, WAYNE R. LAFAVE, & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE* 229-30 (5th ed. 1981) (quoting from Phillip Johnson, *New Approaches to Informing the Fourth Amendment* 8-10 (Sept. 1978) (unpublished manuscript)).

55. 468 U.S. 897 (1984).

56. *Leon*, 468 U.S. at 916 n.14.

to Yale a reprint or copy of that commentary. Indeed, Yale appears to be on the mailing list of virtually every criminal procedure teacher and almost all of that substantial group of appellate court judges who have an interest in the academy and its literature. His mailbox is always full, and unlike most of us, a good part of his mail includes items actually worth reading.

5. *Respecting the other side.* Yale Kamisar will vigorously challenge the arguments on the other side, but he will never make that challenge personal. Indeed, he maintains a close relationship with many of the persons whose ideas he has challenged (including those challenged in the more charged atmosphere of a live debate). When the law reviews at their respective schools decided to honor Fred Inbau and Joe Grano, it was not at all surprising that they asked Yale to participate and he felt honored to do so.⁵⁷ For the academy, however, that was not a particularly unusual occurrence. Academics who cross swords intellectually often maintain good personal relationships.

What distinguishes Yale from many other scholar-advocates is that he respects the arguments on the other side as well as the persons making those arguments. He does not heap contempt upon a position he rejects. Very often he acknowledges that an argument rests on a point well taken, though he believes that certain counterarguments are somewhat stronger or more complete.⁵⁸ He may conclude that an argument is flawed, but he will not characterize it as “weak” or “foolish.”⁵⁹ He may criticize a position as failing to give sufficient weight to the possible misuse of authority by law enforcement officials, but that won’t lead him to characterize that position as naive, or “blind to reality.”

Yale recognizes that he has no pipeline to the truth, and that personal values shape perspective both as to facts and appropriate policies. Like any good debater, he wants to point to the inconsistencies and weaknesses in the other side’s arguments, but he recognizes that there is something to be said for the other side (at least

57. See Kamisar, *Inbau Tribute*, *supra* note 43; Kamisar, *Grano Tribute*, *supra* note 42. It was at Yale’s suggestion that we dedicated the tenth edition of *Modern* to the memory of Joe Grano.

58. See, for example, Yale’s discussion of the Kauper-Friendly-Schaeffer proposal in Kamisar, *Kauper’s “Judicial Examination of the Accused”*, *supra* note 14.

59. My reference here is to arguments advanced in the academic debate. In the political arena, arguments often are deceptive if not downright dishonest, and here Yale has not held back in so characterizing such arguments. See Kamisar, *How to Use Crime Statistics*, *supra* note 30; cf. Kamisar, *Tactics*, *supra* note 14 (analyzing law enforcement’s “cries of despair at ‘restrictive rules’ ” of evidence). Yale has acknowledged that his initial response to Professor Inbau, Kamisar, *Public Safety*, *supra* note 14, “may fairly be called an ‘intemperate’ reply,” Kamisar, *Inbau Tribute*, *supra* note 43, at 192.

from the perspective of persons with values that differ from his). If that were not the case, the debate would have been over long ago.

6. *Searching for the perfect description.* Yale always seeks to make his point in a way that will keep it in the mind of the reader. Thus, as he writes and rewrites and rewrites again, Yale is always searching for the perfect description of the concept that is central to his argument. In some instances, that will be a single word, as when he described *Miranda* as a “compromise.”⁶⁰ More often, it will be a phrase, as when he described the contention that police interrogation does not constitute compulsion under the Fifth Amendment (since there is no legal duty to respond to the police) as “permitting logic to triumph over life.”⁶¹ Sometimes, the perfect description will be an analogy, as in Yale’s now classic “gatehouse and mansion” comparison of the treatment of the accused in the police station and at trial.⁶²

As often as not, Yale has found that perfect description in the work of another author. That explains in part why Yale’s law review articles seem to have as many footnotes as sentences.⁶³ In some instances, the other author will have used the description in discussing the same topic. Very often, however, the description was used in discussing a different topic, but strikes Yale as particularly appropriate in making his point. Thus, in describing the appropriate context for evaluating the worthiness of the less-than-perfect exclusionary rule, Yale looked to Reinhold Niebur’s comment that “democracy is a method of finding proximate solutions to insoluble problems.”⁶⁴ So too, Yale has often turned to some classic discussion of judicial

60. Kamisar, *Kauper’s “Judicial Examination of the Accused”*, *supra* note 14, at 30; Yale Kamisar, *Miranda: The Case, The Man, and the Players*, 82 MICH. L. REV. 1074, 1077 (1984); Yale Kamisar, *The Warren Court and Criminal Justice*, in *THE WARREN COURT: A RETROSPECTIVE* 116, 120 (Bernard Schwartz ed., 1996).

61. Kamisar, *Equal Justice*, *supra* note 14, at 31 (citing ROSTOW, *THE SOVEREIGN PREROGATIVE*, *supra* note 40, at 164).

62. Kamisar, *Equal Justice*, *supra* note 14. As to the fame of this analogy, see RICHARD A. LEO & GEORGE C. THOMAS III, *THE MIRANDA DEBATE* 2, 21, 35 (1998).

63. Yale will use a citation even though the phrase borrowed from another is fairly common. *See, e.g.*, Kamisar, *Inbau Tribute*, *supra* note 43, at 187 (describing Inbau’s writing and speaking as “blood warm” and his words as “loaded with life,” Yale cites to the works of Harold Laski and Ralph Waldo Emerson respectively). So too, when the phrase comes from another source, but is slightly changed, Yale insists upon a “Cf.” citation. *See, e.g.*, Kamisar, *Equal Justice*, *supra* note 14, at 31.

The gatehouse and mansion analogy, *see supra* note 62 and accompanying text, evidences Yale’s sensitivity to acknowledging the borrowing of a phrase. He included a footnote of acknowledgement there simply because he thought that Claude Sowle might have used similar terminology in his remarks at a conference. Neither Sowle nor Kamisar could remember Sowle’s precise terminology, but Yale recalled it was something like “the gatehouse (or was it outhouse?) and mansion terminology.” Kamisar, *Equal Justice*, *supra* note 14, at 20 n.53.

64. Kamisar, *Public Safety*, *supra* note 14, at 184 (citing REINHOLD NEIBUR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1944)).

method to describe the essence of his characterization of a particular judicial ruling.⁶⁵

The quotations used by Yale Kamisar do not come from some reference book of quotations. They are a product of the breadth of his reading and his interest in the “art of wordmanship.”⁶⁶ For many years, whenever Yale came across a sentence or phrase that he thought particularly appealing in its description of some basic concept, he would copy it into what amounted to his own personal reference book of quotations. Very often, he later would use the same concept in his analysis of a particular case or particular argument, and he would find in that copied quotation (or a paraphrase of that quotation) the “perfect description” of the point he was making.

7. *Keeping the debate alive.* For Yale Kamisar, the debate never ends. If the Supreme Court adopts a position he has advocated, that hardly ends the matter. Initially, if the Court majority failed to respond adequately or fully to the dissenters, Yale takes up that task.⁶⁷ If a later opinion by an individual justice (or even worse, by the Supreme Court majority) suggests a potential withdrawal, either fully or partially, from the logical implications of that earlier ruling, Yale again sees a need to respond.⁶⁸ A suggestion by an esteemed lower court judge that the Supreme Court consider an analysis that will take it in a different direction (and, in Yale’s view, dilute the protection offered by the established ruling) also calls for a response.⁶⁹

Finally, there is the need to respond to the arguments of fellow members of the academy. Fortunately for Yale, as to criminal procedure, most of those fellow academicians share his viewpoint. However, academicians tend to be so prolific that even a comparatively small group taking a contrary position will produce so

65. See, e.g., Kamisar, *Francis A. Allen*, *supra* note 4, at 414 (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921)); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1859 (2002) [hereinafter Kamisar, *Writings of Waite and Davies*] (quoting MORRIS R. COHEN, *REASON AND NATURE* 421 (2d ed. 1953)); Kamisar, *Brewer v. Williams*, *supra* note 14, at 242 (quoting Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950)).

66. See Kamisar, *Inbau Tribute*, *supra* note 43, at 186-87 n.24.

67. See, e.g., Kamisar, *A Dissent From The Miranda Dissents*, *supra* note 14; Kamisar, *Miranda Thirty-Five Years Later*, *supra* note 49.

68. See, e.g., Kamisar, *Confessions*, *supra* note 30; Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000) [hereinafter Kamisar, *Can (Did) Congress “Overrule” Miranda?*].

69. See Kamisar, *In Defense of the Exclusionary Rule*, *supra* note 10 (responding to Judge Guido Calabresi of the Second Circuit); Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than “An Empty Blessing,”* 62 JUDICATURE 333 (1979) (responding to Judge Malcolm Wilkey of the D.C. Circuit); Kamisar, *Kauper’s “Judicial Examination of the Accused,”* *supra* note 14 (responding to proposals of Judge Henry Friendly of the Second Circuit and Justice Walter Schaefer of the Illinois Supreme Court).

many articles and arguments than even Yale Kamisar cannot singlehandedly respond to each and every one. Nevertheless, at least as to *Miranda* and the exclusionary rule, Yale has been able to respond to almost all of the most prominent counterproposals advanced in the academic literature.⁷⁰

In some instances, Yale has responded to new proposals that were countered by arguments he had advanced in his earlier articles. Yale thought it necessary, however, to respond directly to the new proposal. Today's readers may not have read those earlier articles, and even if they had, may not have connected the arguments advanced there to the new proposal. Each and every new proposal (and very often, prominent reworking of an old argument or old proposal) deserves, to his mind, a response speaking directly to that proposal. So too, where Yale's position has not won the day in the courts, even the slightest sign of weakened judicial support for the prevailing view is seen as an invitation to set forth once more the arguments against the prevailing view.⁷¹

Yale does not respond to each new development in his areas of primary interest simply because he enjoys the debate. At stake, to his mind, is the preservation of those judicial rulings he favors and the potential reconsideration of those he opposes. As he has noted, the basic issues that he discusses "are too large, too ungoverned by a commanding text or clear institutional dictates, to be laid solidly to rest."⁷² Moreover, the setting in which those issues are presented rarely stands still. New empirical research casts an issue in a somewhat different light. Technological advances may suggest a new practical solution to the basic problem (e.g., the videotaping of interrogations). Above all, a new generation of scholars will have developed, if not entirely new arguments, variations on the old that offer somewhat different perspectives.

Yale does not view the need to constantly renew the debate as a chore, even though it requires, to some extent, repeating what was said before. What must be remembered, to his mind, is that "there is

70. As to *Miranda*, see, for example, Kamisar, "Old World", *supra* note 53, and Kamisar, *Can (Did) Congress "Overrule" Miranda?*, *supra* note 68. As to the exclusionary rule, see, for example, Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987), which responds to John Kaplan's proposal, and Kamisar, *Writings of Waite and Davies*, *supra* note 65, which responds to Chris Slobogin's proposal.

71. See, e.g., Kamisar, *Grano Tribute*, *supra* note 42 (discussing, in light of the Court's reaffirmation of *Miranda*, the possible reconsideration of rulings allowing prosecution use of the fruits of statements obtained in violation of *Miranda* and impeachment use of such statements).

72. Kamisar, *Inbau Tribute*, *supra* note 43, at 195-96 (quoting Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974)).

no final victory. However great the triumph, it is ephemeral. Without further struggle it withers and dies.”⁷³

* * *

Yale Kamisar has addressed in his scholarship issues that are certain to be the subject of commentary (and probably litigation) for many decades in the future (just as they have been for many decades in the past). As the academic literature on any issue grows, there is a tendency for each generation of commentators to focus primarily on the writings of their contemporaries. Yet some writings will be viewed as so “rich” and “powerful” (to use two of Yale’s favorite adjectives) that they will be cited and discussed even though they date back to an earlier generation. In my opinion, Yale Kamisar has produced a portfolio filled with such writings. Indeed, although he has retired from “full-time teaching,”⁷⁴ that portfolio is certain to grow, for he has lost none of his enthusiasm for the issues or the debating of those issues. Thus, I eagerly look forward to many more years of our discussions/debates.

73. KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS, *supra* note 14, at xx (quoting Francis A. Allen, *On Winning and Losing*, in LAW, INTELLECT, AND EDUCATION 16 (1979)).

74. Yale joined the faculty of the University of San Diego Law School in 2002 (after being a regular winter-term visitor for several years) and he intends to continue to teach there in the Winter term. Over the summer and most of the Fall term, however, I anticipate we will find him, as usual, spending most of his time in the Cook Law Quadrangle.