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YALE KAMISAR: A PRINCIPLED MAN FOR ALL SEASONS

*Douglas A. Kahn**

Yale Kamisar began his distinguished career as a law professor in 1957 at the University of Minnesota Law School. For three years prior to joining the Minnesota faculty, Yale had been an associate with the Washington, D.C. law firm of Covington & Burling specializing in antitrust law. Understandably, Yale and Minnesota assumed that he would devote the major part of his research and teaching to antitrust. At that time, the study of criminal law was near the bottom of the hierarchy of law school topics, and so young faculty often were assigned the task of teaching criminal law as the price to pay for the privilege of joining the faculty. Criminal procedure had not yet become a separate topic in law schools' curriculums.

As anyone who knows Yale can attest, when he undertakes a task, whatever it may be, he devotes all of his energy and intellect to performing it better than anyone else could. While he may not always outstrip everyone, he frequently does, and he is always outstanding. Yale did not merely take on the teaching of criminal law. He was one of several pioneers in the refashioning of that topic by identifying criminal procedure, not just as a separate topic in its own right, but as an intellectually rich subject of greater significance than substantive criminal law. He played a major role in demonstrating that criminal procedure is an important area of scholarship worthy of addition to the curriculum. It is true that Yale was fortunate that, soon after he took up this subject, the Supreme Court began to focus on the area and adopted new and innovative doctrines; but Yale had the wisdom to exploit that development.¹ Moreover, many of the Court's innovations can be directly traced to concepts that Yale propounded and eloquently defended. Yale's fascination with criminal procedure and related topics became so consuming that his interest in antitrust simply fell by the wayside. As a consequence, the world of criminal

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1. The date on which modern criminal procedure might be deemed to have been born is in 1932 when the Supreme Court decided *Powell v. Alabama*, 287 U.S. 45 (1932). See Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 521. But, as noted below in the text, an explosion of interest in the field and an adoption of new concepts began in 1964, when the Supreme Court decided the *Massiah* and *Escobedo* cases. See *infra* note 4 and accompanying text.

justice gained a great warrior, and the world of commercial law lost a scholar who undoubtedly would have contributed much to it.

Yale has been so prolific and influential in the development of the law that it is painful to single out some of his contributions to the exclusion of others. It is an especially difficult task for me since my expertise lies in other areas. Some of Yale's work, however, stands out, even to a novice like me.

Yale's greatest contributions, and his most seminal work, deal with police interrogations and the admissibility of confessions. His first publication in that area² was in 1963 when he reviewed and commented extensively and critically on an interrogation manual³ written by Professor Fred Inbau and John Reid for use in police interrogations. Little did Yale anticipate that this modest undertaking would lead to his becoming a major figure in the expanding development of a relatively new field of law. The year after Yale's review was published, the Supreme Court decided two path-breaking cases dealing with confessions and the right to counsel before trial — *Massiah* and *Escobedo*.⁴ Those cases signaled the increased scrutiny that the Supreme Court would bring to this area, and they attracted Yale's attention.

In 1965, Yale gave a speech at the College of William and Mary in which he contrasted the paucity of legal protection provided to an arrested individual in the police station (the "gatehouse" to the criminal legal system) to the elaborate protection provided a criminal defendant when being tried in the courthouse (the "mansion" of the criminal legal system). Yale then published a much-expanded version of that speech as an essay, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*,⁵ which is among the best-known and most influential of his writings, and was cited by the Supreme Court in its *Miranda*⁶ decision in support of its conclusions in that case.

The famous (or infamous) *Miranda* decision was a bonanza for Yale's academic career. He gave innumerable speeches about *Miranda*, made the discussion of that case a major element of his courses, and wrote extensively in defense of the case and in

2. Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963). Yale had previously published pieces on other aspects of criminal procedure.

3. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962).

4. *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

5. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1, 19 (A.E. Dick Howard ed., 1965).

6. *Miranda v. Arizona*, 384 U.S. 436 (1966).

exploration of its scope and meaning.⁷ Apart from the merits that many find in the *Miranda* policy, it helped feed, clothe, and educate Yale's three sons.

Yale's contributions to the legal academy are not limited to his numerous articles and books. Yale is a magnificent teacher who has inspired several generations of students. He has pioneered and coauthored prominent casebooks in the areas of both constitutional law and criminal procedure. He first coauthored a book on constitutional law while at the Minnesota Law School in 1964, and the editions of that book have been widely used.⁸ He first coauthored a casebook on criminal procedure in 1965, and that book and the subsequent editions have dominated the academic market for criminal procedure texts.⁹ Moreover, those casebooks have had a huge influence on the application of the laws in those subjects. Both books are imposing tomes containing elaborate analysis and commentary. In addition to being excellent teaching tools, they are useful research sources. On the two occasions in which I made the mistake of debating Yale on the exclusionary rule and on *Miranda*, I used his casebook to prepare for the debate, and it prepared me so well that I almost held my own!

But, my knowledge of Yale is derived less from his scholarly achievements than from my association with him as a close friend and colleague for almost forty years. As impressive as his academic credentials are, they pale in comparison to Yale as an individual with a distinctive personality. It is often said by members of the faculty that Yale is bigger than life. What is amazing is that Yale's stature is not the product of any affectation; rather it stems from the core personality and passion of the man. Indeed, there is not one iota of affectation in his make-up. With Yale, what you see is what he is. If I were required to choose only one word that best sums up Yale, that word would be "passion." There are many other powerful aspects of Yale's make-up that come readily to mind, but passion is his dominant feature.

When Yale undertakes a project or a task, he is incapable of doing it superficially. He will focus all of his energy, which is formidable, on the task, and will perform it with care and thoroughness. His writing reflects meticulous research, profound analysis, and creative solutions.

7. E.g., Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?* 67 GEO. L.J. 1 (1978); Yale Kamisar, *Duckworth v. Eagan: A Little-Noticed Miranda Case that May Cause Much Mischief*, 25 CRIM. L. BULL. 550 (1989); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387 (2001).

8. JESSIE H. CHOPER, RICHARD H. FALLON, STEVEN H. SHIFFRIN, & YALE KAMISAR, *CONSTITUTIONAL LAW* (9th ed. 2001).

9. YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* (10th ed. 2002).

I have seen Yale spend hours agonizing over his search for *le mot juste* that will best express his idea.

What is unusual about Yale is that he carries this same intensity and drive to every project, whether it is part of his professional life or not. For example, when a close relative of Yale's became seriously ill, Yale extensively researched the relative's illness and the alternative treatments that were available. When he met with the doctors, he had written out questions for them that he had prepared based on his research, and he taped the doctors' responses and examined them with care, later bringing new questions generated by the doctors' responses. Before the patient chose her treatment, Yale's thorough exploration had provided her with the knowledge of every medical alternative available and of all the potential risks and benefits of each of them.

Yale has a combative nature, and he loves the give and take of colloquy and debate. He has engaged in numerous public debates with other scholars and participants in the criminal law system, and the students that Yale remembers best are those that made cogent arguments contrary to positions Yale took in his lectures. He is never happier than when his views are challenged by someone and he can sally forth to do battle on the plain of ideas. Although no holds are barred in debates with Yale, he deals exclusively with the issues and never resorts to ad hominem appeals. He is a skillful debater who uses humor as a weapon as well as a signal that his disagreement with his opponent is not personal.

At the dawn of Yale's career, he frequently debated Professor Fred Inbau. Professor Inbau was a prominent scholar in the criminal procedure field who held quite conservative views. Much later in his career, Yale often debated Professor Joseph Grano, another prominent conservative scholar. It is a tribute to the intellectual integrity of those debates that Yale became good friends with both men, and that those friendships lasted for the rest of their lives. When Professors Inbau and Grano each retired, Yale wrote law review tributes for each man.¹⁰ Those tributes are as carefully researched and thought out as any of Yale's scholarly works. They display the insight that Yale possessed as to the nature and quality of each man's contributions to the profession, and they show the depth of friendship and respect that Yale held for both "opponents."

Yale has a gruff exterior that may cause someone who first meets him to think that he is unfriendly and perhaps even mean spirited. Nothing could be further from the truth. He is the warmest and most generous person I know. Indeed, the source of Yale's commitment to the study of criminal procedure is not the happenstance that he was

10. Yale Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & CRIMINOLOGY 182 (1977); Yale Kamisar, *Joe Grano: The "Kid From South Philly" Who Educated Us All,* 46 WAYNE L. REV. 1231 (2000).

teaching criminal law when the procedure field erupted. The true source of his devotion to that area is his passion for the underdog. Yale empathizes with the downtrodden and literally cries over their distress. Yale combines this compassion with a deep suspicion that those in authority will abuse their power to take advantage of people who lack the means to protect themselves adequately.

His compassion for the plight of those who are at the mercy of others is also reflected in his work on euthanasia. Yale has been a steadfast opponent of the so-called "right to die" movements, especially when involuntary euthanasia is involved. Those that favor the right to die focus on the plight of an individual who is trapped in a painful situation with no hope of improvement. Yale shares that concern, but he sees what he deems a greater danger and a greater need for protection. He sees the possibility that the individual's relatives may find it burdensome to have the individual linger on and may impose guilt on the individual for selfishly refusing to relieve his relatives of their burden by terminating his existence.

Yale's intensity is also manifested in his social life. When Yale engages in private conversation, he likes to be in close proximity to the other person and even to touch the person's arm as an aid to communication. Of course, some people like more space. It is riotous to watch Yale talk to such a person. Yale keeps coming toward the person who keeps retreating, until finally Yale backs him into a wall.

One of Yale's endearing features is his love of sports and competition. Yale regards himself as something of an expert on football and several other sports. While he is knowledgeable, he is far from being an expert. He is absolutely convinced that a football team's offense cannot be stopped if the quarterback throws short, buttonhook passes to the receivers. An event that occurred some years ago in connection with Yale's football theories illustrates much about him. Some years ago, I had in my office the starting quarterback for the University of Michigan's football team. I told him about Yale's football theory for an irresistible offense, but he thought that I was exaggerating. When we left my office together, we ran into Yale in the hallway, and I introduced them to each other. Yale proceeded to back the quarterback (who by the way was six-feet, six-inches tall) to the wall while regaling him with his theory that the team only needed to employ buttonhook passes to be unstoppable. Afterwards, as the quarterback and I left the building, he said, "He really believes that!"

It is sad to have Yale retiring from the lists at Michigan. The school is much less interesting without him. I will miss his keen analysis of situations, the availability of his extensive knowledge of his subject, and his wonderful sense of humor. I will miss all of our lunches together (I now eat alone). The inclusion of Yale's name on the list of

retirees inspired the following paraphrase of a lyric from Gilbert and Sullivan:

It matters that his name is on the list
For he sorely will be missed
He sorely will be missed.