

Michigan Law Review

Volume 102 | Issue 8

2004

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Francis A. Allen

University of Michigan Law School

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Recommended Citation

Francis A. Allen, *Yale Kamisar: Warrior Scholar*, 102 MICH. L. REV. 1689 (2004).

Available at: <http://repository.law.umich.edu/mlr/vol102/iss8/4>

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YALE KAMISAR: WARRIOR SCHOLAR

*Francis A. Allen**

My association with Yale Kamisar dates back to the 1950s. At that time I became aware of the interesting publications of a young faculty member at the University of Minnesota. The articles were well done, most of them dealing with the Supreme Court's notable expansion of constitutional doctrine relating to criminal procedure, then at full tide, a field in which I also was writing. In addition, Yale had published a remarkable article on the subject of euthanasia, impressive for the thoroughness of its research and the clarity and force of its argument. Fortunately, I decided to write to Yale and express my appreciation for the work he was doing. It is possible that I am the author of Yale's first fan letter. He responded warmly, and there began a conversation that has continued for almost a half-century. The interchange has been one of the profitable and pleasant features of my time in the law schools.

To me the retirement of Yale Kamisar from the Michigan Law School faculty marks the end of an important epoch in American legal education and scholarship, an epoch in which by any definition Yale was a leading figure. His generation was too young to have participated in the Second World War, but many of its members retain childhood memories of it. (Not all were too young to be drafted into the Korean "police action," however, as Yale's own experience demonstrates.) Acute awareness of the Nazi holocaust was a potent influence in the lives of many in that generation; no doubt some could number members of their extended families among the Holocaust victims. It was not difficult for Yale and those of his contemporaries who as law teachers elected to work with the problems of criminal justice to perceive the dangers of abuse and the denial of human rights when governments exercise the police function; and there was abundant evidence that the reality and potentialities of such abuse were not confined to the totalitarian regimes of Europe, but, on the contrary, were clearly present in contemporary American society.

Despite the fact that there were somber problems to be confronted, Yale and his contemporaries spent a large part of their careers in an invigorating atmosphere when confidence of a better

* Edson R. Sunderland Professor of Law, Emeritus, University of Michigan, and Huber C. Hurst Professor of Law, Emeritus, University of Florida. A.B. 1941, Cornell College; LL.B. 1946, Northwestern University. Allen served as Dean of the University of Michigan Law School 1966-1971. — Ed.

future came easily, and opportunities for advancing needed changes seemed available. The universities in the postwar world expanded enrollments and functions, and, as is often the case, institutional growth bred optimism. Most important to law teachers concerned with criminal justice, the Warren Court, building on foundations laid during the previous quarter-century, was finally making clear that the constitutional restraints on police and other law-enforcement procedures, especially in the states, were to be treated as more than polite fictions. The new constitutional law provided law teachers with occasions for exposition and analysis, and even opportunities to assist the courts in fashioning constitutional doctrine in theretofore uncharted areas.

The conditions were favorable to the unfolding of Yale's career: a scholarly field which he could enthusiastically embrace combined with a burning ambition to gain recognition as a great legal authority. I cannot say what combination of genes, family influence, and childhood experiences fueled the ambition; but the result was a commitment to his fields of interest that has not often been matched. His work appeared to absorb his waking moments; fifteen-hour working days were the norm. One of my favorite stories about Yale illustrates how his scholarly efforts pervaded his life. On one occasion Yale informed me that he was reading Dostoyevsky's great novel, *Crime and Punishment*. Later when I asked what he thought of the book he expressed some disappointment, saying: "I didn't find one good quotation in it for my casebook."

At least by the early 1960s Yale, through his efforts and innate ability, had become the leading commentator on constitutional criminal procedure, a position which he deservedly retains to this day. He published a stream of seminal articles that importantly influenced the development of constitutional doctrine. Someone who took the trouble to count found that Yale's work was cited more frequently in the Supreme Court than that of any other writer, and if the many citations in the lower federal and state courts, and in the works of other writers, are also taken into account, some conception of the importance of his influence can be gleaned.

Yale might reasonably be called the "father" of the *Miranda* rule. Before the decision was handed down his voice was the most effective in pointing to the need for judicial regulation of pretrial interrogation of arrested persons, and he has been the leading defender of the rule in the years that followed. He has been equally persistent in his defense of the exclusionary rule in search and seizure cases. These issues seem never to die. As recently as the last year or so he has written in opposition to the efforts of those who seem committed to cancel the gains achieved by the Supreme Court in mid-twentieth

century, and has done it with the same verve and effectiveness that characterized his work forty years ago.¹ With the changing ideological currents expressed in the Court in recent years, Yale no longer wields the same influence as in the past. But as a defender of the earlier advances, and by giving voice to views in danger of being submerged in the dominant political trends of the moment, his present role is hardly less important.

Yale's scholarly output deserves much closer attention than I can give it here. A reader should not expect to find in his writings the formulation or manipulation of jurisprudential abstractions. He has found it unnecessary to articulate in a systematic way the values that underlie his work. He believes it is self-evident that any nation aspiring to be a free society must provide limitations, clearly stated and conscientiously applied, to guide and limit the government's penal powers. It is in the criminal process that the state brings to bear on the individual the most stringent sanctions at its command. Abuses here most clearly imperil human dignity and human freedom. Closely connected with this proposition is Yale's assumption that courts are appropriate vehicles to define and apply such limitations on the powers of the state. This is not because judges are peculiarly qualified for the task. Nor is it because the judicial process is well adapted to monitor the activities of law-enforcement agencies and officers; there are many practices greatly damaging to the integrity of the penal system which, by their nature, are not amenable to the judicial process. Resort to the courts to perform the supervisory function has proceeded much farther in the United States than in other western nations. The reason probably lies in the fact that, unlike other nations, we have failed to develop alternative institutions charged with the task of providing external administrative supervision and control of the police and other law-enforcement agencies. The result is that in no American state is there an official or agency accountable for the decency and efficiency of the criminal justice system as a whole. The elaborate body of constitutional doctrine relating to the criminal process may in large measure represent a response to the deficiencies in supervision and accountability provided by the criminal justice system. Yale has accepted the situation as part of the reality with which criminal justice scholarship must deal.

When Yale Kamisar sits down to write, he is preparing for battle. His articles constitute prime examples of legal advocacy. It is an advocacy, however, that enlightens rather than obfuscates the issues. There is no inclination in Yale's work to reach a conclusion by simply ignoring countervailing arguments, a tendency too often revealed even

1. See, e.g., Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003).

in some opinions of the Supreme Court. On the contrary, he conscientiously seeks out and addresses the points raised by his opponents, and not infrequently articulates them more effectively than those who originally advanced them. Despite the thunder of battle, Yale is able to admire the strong points made by his opponents and to respect able adversaries. He has himself gained the admiration of many of those who most strongly oppose his views. If I were asked to identify the article that most clearly illustrates the style and effectiveness of his written work, I would probably point to his essay, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*.² In it he protests a process in which accused persons in the custody of the police are deprived of meaningful protection of individual rights (the gatehouse), but are surrounded by all the safeguards of trial in the courts (the mansion), often after it is too late. No more effective demonstration of the need for regulation of pretrial criminal procedure has been made. The power of Yale's irony and outrage can be felt even after forty years.

There are many other attributes of Yale's written work that deserve notice, but I shall mention only one of them. It is apparent that he takes pleasure in calling attention to the scholarly achievements of others in his fields of interest, and especially enjoys scanning the work of those who preceded him, an attribute rare in an ahistorical age when many younger colleagues appear to be busy reinventing wheels that were spinning effectively fifty or even sixty years ago. Yale's demonstration of the modern relevance of an article of the late Paul Kauper, first published in this Review in 1932, illustrates this generosity and industry.³

Yale Kamisar has fully earned the right to rest on his laurels, but I hope that he does not take full advantage of the opportunity. He is badly needed at this hour. We are again passing through a dreary succession of events when at the first threats of insecurity we jettison many of our fundamental individual rights and immunities. Perhaps in the future, as in the past, we shall again offer our *mea culpas* and swear it must not happen again. It is a dangerous progression, and the voice of Kamisar needs to be heard.

This is the happy Warrior; this is He
That every Man in arms should wish to be.⁴

2. 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).

3. Paul Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932), reprinted in 73 MICH. L. REV. 39 (1974).

4. 1 WILLIAM WORDSWORTH, *Character of the Happy Warrior*, in *THE POEMS* 662, 664 (J. Hayden ed., 1981).