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YALE KAMISAR: THE ENEMY OF INJUSTICE

*Welsh S. White**

In the summer of 1978, Duke Law School hosted a conference in which a variety of speakers offered perspectives on Constitutional Criminal Procedure. One of the speakers argued that the Warren Court's criminal-procedure revolution created a backlash that ultimately made things worse for criminal defendants. In order to dramatize his point, he suggested, "Yale Kamisar is the enemy." When that speaker had finished, the Conference Moderator began his response by stating, "First of all, Yale Kamisar is not the enemy of anything, except injustice."

To those unfamiliar with Kamisar's work, it might seem implausible to suggest that any law professor should be given the credit or the blame for the Warren Court's landmark criminal-procedure decisions, much less a commentator's evaluation of the consequences of those decisions. Kamisar's scholarship, however, played a significant part in producing some of the Court's most important criminal-procedure decisions. Most famously, his articles on police interrogation during the early sixties provided the basis for the Court's decision in *Miranda v. Arizona*[1] and earned him the title of the "father of *Miranda*."[2] Even earlier, his incisive critique of the Court's decision in *Betts v. Brady*[3] helped produce the Court's unanimous overruling of *Betts* in *Gideon v. Wainwright*.[4] Through his analysis of *Betts* and other cases in which indigent criminal defendants were convicted after trials in which they were not represented by attorneys, Kamisar convincingly demonstrated the fallacy of *Betts*'s central premise: it is simply not possible to determine whether an unrepresented defendant received a fair trial by examining the defendant's trial transcript. His articles relating to the Fourth Amendment exclusionary rule, moreover, have shown that the

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1. 384 U.S. 436 (1966).

2. *See* Terry Carter, *The Man Who Would Undo Miranda*, A.B.A. J., Mar. 2000, at 44, 46.

3. 316 U.S. 455 (1942); *see* 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).

4. 372 U.S. 335 (1963).

practical effect of abolishing the exclusionary rule established in *Mapp v. Ohio*[5] — would be to eliminate the Fourth Amendment.[6]

Why has Kamisar been so influential? His meticulous scholarship, his precise analysis, and his passionate advocacy are all significant. But most important, perhaps, is simply the power of his writing. Prior to the Court's *Miranda* decision, other scholars commented on the disparity between the rights afforded suspects at trial and during pretrial interrogation. But by using his vivid "gatehouses and mansions" metaphor, Kamisar described this disparity in a way that gave it an immediacy it had previously lacked:

> The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.
>
> In this "gatehouse" of American criminal procedure . . . the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics and techniques most appropriate for the occasion": he is "game" to be stalked and cornered. Here ideals are checked at the door; "realities" faced and the prestige of law enforcement vindicated.[7]

Kamisar's "Gatehouses" article clearly resonated with the Warren Court. In *Miranda*, the Court based a central part of its constitutional analysis on an argument developed by Kamisar in that article: when the police question a suspect without advising him of his right to remain silent or providing him with an attorney who can so advise him, the defendant's statements should be viewed as compelled within the meaning of the Fifth Amendment privilege.[8]

Over the past four decades, the Warren Court has been replaced by a much more conservative group of justices. Kamisar's eloquence, however, has not diminished. And, on occasion, his scholarship has continued to influence the Court. Kamisar's article examining 18 U.S.C. § 3501,[9] the statute before the Court in *Dickerson v. United*

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5. 367 U.S. 643 (1961).

6. Yale Kamisar, *"Comparative Responsibility" and the Fourteenth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1 (1987); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

7. Yale Kamisar, *Equal Justice in the Gatehouses and the Mansions of Criminal Procedure* (1965) [hereinafter Kamisar, *Equal Justice*], *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 27, 31-32 (1980) [hereinafter KAMISAR, ESSAYS] (footnotes omitted).

8. *Id.* at 37-39.

9. Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883 (2000).

States,[10] provides the most recent example. One of the possible issues in *Dickerson* was whether 18 U.S.C. § 3501 should be viewed as a legislative attempt to overrule *Miranda* or simply as an attempt to provide alternative safeguards that would replace those provided by *Miranda*. Kamisar's meticulous examination of the statute's provisions and legislative history left no doubt that the statute was intended to overrule *Miranda*. In holding the statute unconstitutional, the Court made it clear that it accepted Kamisar's position.[11]

Kamisar's part in precipitating and in sustaining the criminal-procedure reforms made by the Warren Court is thus undisputed. The question whether those reforms have enhanced the fairness of our system of justice, however, continues to be debated. Critics of the *Miranda* decision suggest that police interrogation practices could have been more effectively regulated through other approaches, such as more closely monitoring police interrogations.[12] Others have suggested that the legacy of the Warren Court's criminal-procedure decisions is a confused and contradictory set of rules for the police that have not produced more fairness for criminal suspects.[13]

Even if these perspectives have some merit, there is no doubt that Kamisar remains "the enemy of injustice." The criminal-procedure revolution, which Kamisar's writings helped to produce, brought us out of the "stone age ... [of] criminal procedure"[14] and into an era in which the police and public are more aware of individuals' constitutional rights and the problems that need to be addressed to create a fairer system of criminal justice. For anyone who believes in the importance of safeguarding the innocent from wrongful conviction and in protecting all citizens from abusive government conduct, there is no doubt that Kamisar's work helped to produce some famous "victories."[15] In assessing whether those victories will ultimately lead to meaningful safeguards for either criminal suspects or ordinary citizens, however, Kamisar reminded us, "there is no final victory.... Without further struggle, it withers and dies."[16] Kamisar is thus aptly characterized as "the enemy of injustice" not only because of his passionate advocacy in favor of a fairer system of justice but also

10. 530 U.S. 428 (2000).

11. *See id.* at 432.

12. *See, e.g.*, Richard Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001); William Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975 (2001).

13. CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 39-41 (1993).

14. Kamisar, *Equal Justice*, *supra* note 7, at 27.

15. KAMISAR, ESSAYS, *supra* note 7, at xx.

16. *Id.*

because he has demonstrated the importance of continuing the struggle to secure such a system.