On flatfoots and gumshoes

Kamisar's study of interrogation wins award

"Professors, it seems, are supposed to tiptoe, not crash. They are supposed to be troubled and tentative, not take very strong and very clear positions on anything," writes Professor Yale Kamisar in an article praising the unusual prescience, outspokenness, and openmindedness of his long-time adversary on questions of police procedure and protection of suspect's rights, Fred E. Inbau. The article is one of seven provocative and influential essays on the law governing confessions collected in the volume, Police Interrogation and Confessions: Essays in Law and Policy. They were written by Professor Kamisar during the fifteen years of unprecedented change from pre-Escobedo, pre-Miranda days to the Supreme Court's decision in the "Christian Burial Speech" case, Brewer v. Williams (1977). Widespread praise of the volume suggests that Professor Kamisar, while an indefatigable scholar who imaginatively and fairly considers all views of a question, is himself no tentative tiptoer.

"Perhaps no other legal scholar's writings have ever played so great a part in formulating the relevant questions, in providing insight into the critical issues, and, ultimately on shaping the constitutional doctrine established by the Supreme Court as have Kamisar's in this area," wrote Welsh S. White in the Pennsylvania Law Review. "The articles survey the pros and cons but then let you know where the author stands, usually in no uncertain terms, and often in language that flows white hot with an indignation made more compelling by Kamisar's obvious awareness of countervailing arguments and his graciousness (usually) to the individuals who advance them," says Stephen J. Schulhofer in the Michigan Law Review. Even a nonprofessional, like the reviewer for the Times Literary Supplement, is awakened to the significance of the subject by the book's impassioned advocacy: "Kamisar's conviction maintains a compulsive, intensive fascination for the reader that makes him [or her] realize thoroughly the importance of legal theory if one is not to place the 'mouse under the protective custody of the cat.'" All of the book's many reviewers mention its thoroughness and power. As the writer in the National Law Journal put it, "Mulling, speculating, pondering, digging about, revising and rethinking, nobody is as comprehensive as Mr. Kamisar. . . . The charm and eagerness that characterize him as a teacher and debater are apparent in his written work."

It is little wonder that Police Interrogation and Confessions received this year's Michigan Press Book Award. The award is conferred for the most distinguished book published by The University of Michigan Press within a two-year period. The seven essays in the volume "provide the most illuminating historical perspective of the Supreme Court's efforts to deal with the confessions problem and the most penetrative analysis of the constitutional and policy issues that have confronted the Court along the way," writes Wayne State's expert on criminal procedure, Joseph D. Grano. Yet the interest of the book is not merely historical. The appearance of the collection is also timely, as reviewers note, coming as it does when many Americans are demanding increased police powers and when the Burger Court has been accused of retreating from the Warren Court's concern for the rights of suspects. With expanded footnotes and a retrospective introduction describing how and why he came to write each of the essays, Professor Kamisar sets all the material in the collection in a contemporary context.

Significantly, Professor Kamisar credits an initial angry reaction with instigating his subsequent prodigious research into the problem of interrogation. In his introduction Professor Kamisar suggests that the "secret root" from which he "drew the juices of indignation" was a six-hour-long tape recording of the questioning in the 1962 Minnesota case, State v. Biron. The tape is unusual, Kamisar says, in including not only Biron's confession, but also the "repetitious and unrelenting" questioning by five interrogators endlessly "urging, beseeching, wheedling, nagging Biron to confess."
Students, to whom Kamisar plays the tape, rarely can bear to listen to more than two hours of it. Yet "the interrogators neither engaged in nor threatened any violence." Rather, what is disturbing about the tape is that it vividly illustrates "the kinds of interrogation practices that at the time satisfied the best standards of professional police work and fell within the bounds of what the courts of that day called 'fair and reasonable' questioning." Kamisar implies that it may have been dismay at actually hearing such methods of wrenching confession from the accused which prompted the Minnesota Supreme Court to strike down Biron's conviction, though the ground which it articulated was only the narrow one that false legal advice by the police had vitiated the confession.

"How can anyone listen to the insistent questioning of Biron and to the many different ways his interrogators urged, cajoled, and nagged him to confess without feeling the relentless pressure, without sensing Biron's confusion and helplessness, without getting the message—confess now or it will be so much the worse for you later—and without wondering what ever happened to the privilege against self-incrimination and the right to the assistance of counsel?" Kamisar asks. The discrepancy this question suggests existed between themeticulous protection of the right to counsel and privilege against self-incrimination required in the courtroom and practices then acceptable in secret police questioning is the subject of a landmark article included here entitled "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure." Kamisar's sense that a court will be most likely to correctly ascertain coercion if it is exposed to an exact record of the interrogation underlies the argument which he makes in his discussion of the famous 1977 "Christian Burial Speech" case, Brewer v. Williams.

In his article on that case, Kamisar illustrates that discrepancies existed between the police captain's two accounts of the speech he made which led to a confession. Noting that none of the courts which considered the case attended to these differences, Kamisar argues for the importance of the nuance which may well be lost in even an honest and well-intentioned officer's account of a conversation. To understand the tone and implications of an interrogation, Kamisar insists, the court needs to have access to tape recordings of private meetings between police and suspects. When police could make such an objective record but fail to, Kamisar argues, courts should reject all governmental claims that a suspect has waived the right to counsel or the right to remain silent.

If Kamisar's first fascination with these issues arose out of his distaste for the Biron tape and sympathy for the accused, he also manifests an unwillingness to let a problem drop and an insatiable appetite for finding satisfactory explanations which might qualify him for the interrogator's role. Indeed, it is Professor Kamisar's own tireless style of questioning which makes his book fascinating. Progressing from the earliest essay, "What Is an 'Involuntary' Confession?" to the final one, "What Is 'Interrogation'? When Does It Matter?" he takes nothing for granted. Through comparisons and a string of hypotheticals, he clarifies the distinctive significance of the particular fact situation of the case under discussion. Analyzing the opinion of the court and those of the dissenters, he patiently highlights points of contention or moments of obscurity. The court, for example, fails to delineate what constitutes "interrogation" in the "Christian Burial Speech" case; Kamisar compensates for the oversight.

No problem seems static in Kamisar's characterization. He does not advance a fixed thesis, but progresses through question and exploration, developing and elaborating a viewpoint which grows as one reads. The landscape of criminal procedure is, as he presents it, a shifting and deceptive one, constantly disturbed by new articles, decisions, and ideas. Professor Kamisar seems to welcome each new complication with an energetic readiness to contemplate all aspects of a problem.

Yet this is not the balance of the cautious, tiptoeing academic. It is the overwhelming crash of the man who has been called "the dominant academic force among the reformers of police interrogation" fortifying the "nearly impenetrable wall" of scholarship he is praised, and sometimes cursed, for having constructed around the Warren Court decisions.