

TRIBUTE TO YALE KAMISAR

Ruth Bader Ginsburg*

When the editors of this issue told me of Professor Yale Kamisar's decision to retire from full-time teaching after a near half century of law faculty service, two thoughts came immediately to mind. First, I thought of the large loss to Michigan students unable to attend his classes and to faculty colleagues at Ann Arbor unable routinely to engage his bright mind. Second, I thought it altogether right for the *Michigan Law Review* to publish an issue honoring one of the Law School's most prized professors. When invited to write a tribute, I could not resist saying yes.

From his early years as a law teacher, Yale produced pathmarking scholarship. Justice Black, in his opinion for the Court in the historic *Gideon v. Wainwright* decision, cited one of Yale's articles when Yale was less than a decade out of law school.¹ By 1966, Yale had earned the unofficial title, "Father of *Miranda*."² His scholarship was cited in that landmark decision four times.³ Yale's 1980 volume, *Police Interrogation and Confessions*,⁴ contains his leading commentary on the procedures of criminal justice. His senior colleague at Michigan, Francis A. Allen, judged the work "one of the great achievements of legal scholarship since the end of the second world war."⁵

Yale has written extensively about the Court on which I now sit. We were co-contributors to *The Burger Court: The Counter-Revolution That Wasn't*.⁶ In that 1983 publication, Yale compared the Warren and Burger Courts' decisions regarding police investigatory practices, while I commented on the Burger Court's sex discrimination

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1. 372 U.S. 335, 338 n.2 (1963) (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)).

2. Terry Carter, *The Man Who Would Undo Miranda*, A.B.A. J., Mar. 2000, at 44, 46 (referring to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

3. *Miranda*, 384 U.S. at 440 n.2, 469 n.38, 472 n.41; *id.* at 511 (Harlan, J., dissenting).

4. YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* (1980).

5. Francis A. Allen, Remarks at the Annual Awards of the Fellows of the American Bar Foundation 2 (Feb. 2-4, 1996) (reprint on file with author).

6. *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983).

decisions.⁷ Yale's writings on physician-assisted suicide and constitutional law, in addition to his prolific and waypaving work on police behavior, searches and seizures, and confessions, have made him one of the most-cited scholars of his time.⁸

In the courts as well as the academy, Yale's work has attracted an impressive audience. More than thirty Supreme Court opinions have cited Yale's scholarship, and citations to his writings by other federal courts, as well as state courts, number far into the hundreds. Benjamin Cardozo once remarked:

Any morning's mail may bring a law review from Harvard or Yale or Columbia or Pennsylvania or Michigan or a score of other places to disturb our self conceit and show with pitiless and relentless certainty how we have wandered from the path. The reviewer seems to say . . . "It is a judgment maim'd and most imperfect."⁹

This observation, while made before Yale's time, might describe some of his incisive analyses. Though more than occasionally devastating, his commentary never extends beyond the realm of the fair.

The practicing bar, too, has been well served by Yale's clear head and secure hand. With Wayne LaFave and Yale's Michigan colleague, Jerold Israel, Yale was a reporter for the 1970-1974 Rules Revision Project for the 1952 Uniform Rules of Criminal Procedure. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Rules drafted by Yale and his colleagues in 1974. Yale also served on the Advisory Committee for the Model Code of Pre-Arrest Procedure, adopted by the American Law Institute in 1975. Yale's firm convictions about proper law enforcement administration and the respect due the rights of individuals stimulated lively debates on the Model Code. At one point in the proceedings, while defending the need to give *Miranda* warnings prior to any police questioning, Yale's resolve in the face of opposition was unwavering as he remarked: "Having been called crazy and absurd before . . . I move on undaunted, and try again."¹⁰ Nearly thirty years later, on Yale's receipt

7. Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in THE BURGER COURT, *supra* note 6, at 132; Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)* and *Police Investigatory Practices*, in THE BURGER COURT, *supra* note 6, at 62. Several distinguished scholars contributed to the volume, in areas ranging from free speech to antitrust law.

8. See, e.g., New Educational Quality Rankings of US Law Schools, 2000-2002, at http://www.utexas.edu/law/faculty/bleiter/rankings02/most_cited.html (last visited Sept. 1, 2004) (listing the 120 academics cited most often in law reviews); Most Cited Law Faculty, at http://www.utexas.edu/law/faculty/bleiter/rankings02/top10_most_cited.html (last visited Sept. 1, 2004) (listing the ten academics in each field cited most often in law reviews).

9. Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 915-16 (1953) (recalling comment by Cardozo and quoting line spoken by character Brabantio, in WILLIAM SHAKESPEARE, *OTHELLO* act 1, sc. 3).

10. AMERICAN LAW INST., 46TH ANNUAL MEETING: PROCEEDINGS 109 (1969).

of the American Bar Foundation's Research Award, one of his colleagues observed: "Yale remains, after forty years, the quintessential young Turk. The wonderful thing is that battles, victories, and honors have not changed him in the slightest."¹¹ Yale's passion for the law and his commitment to shoring up the individual liberties guaranteed by our Constitution are, today, as strong as ever.

Yale has been a faithful correspondent over the years. To keep me *au courant* with what students are currently taught, he never fails to send me the latest editions of his leading casebooks, *Modern Criminal Procedure*¹² and *Constitutional Law*.¹³ I keep these helpful books within easy reach in my office, as do judges, law professors, and practitioners across the country. In the course of our correspondence, I have learned many things about Yale: his sense of humor capable of making even the most sober judge smile, his attention to detail, and, perhaps most impressively, his willingness to rethink even once firmly held positions. Some of Yale's readers may be surprised at this last characterization. In a 1996 tribute to his colleague and collaborator, Jerold Israel, Yale quoted Learned Hand:

[Y]ou may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. . . . You 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.¹⁴

Yale swiftly acknowledged his own tendency to " 'carry a sword' beneath [his] gown," implying his failure to follow Judge Hand's advice.¹⁵ In my conversations and correspondence with Yale, however, I have seen not only the mark of a great warrior, ever ready to "leap into the breach to relieve injustice." I have seen as well a fine thinker at work, one ready to reconsider even long-held beliefs in hopes of finding a better answer.¹⁶

11. Allen, *supra* note 5, at 1.

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

13. JESSE H. CHOPER & YALE KAMISAR ET AL., *CONSTITUTIONAL LAW* (9th ed. 2001).

14. Yale Kamisar, *Bouquets for Jerry Israel*, 94 MICH. L. REV. 2455, 2460 (1996) (quoting LEARNED HAND, *On Receiving an Honorary Degree*, in *THE SPIRIT OF LIBERTY* 102, 105 (Irving Dilliard ed., 1959)).

15. *Id.* at 2461.

16. In another tribute to a colleague, Yale quoted Professor Brainerd Currie who, in turn, had quoted Justice Holmes:

[T]raining for professional responsibility and for awareness of the role of law in society is not a matter that can be parceled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time. . . . It means that we should confront, and bring our students to confront, the most explosive problems with which the law may deal, facing all the facts and plumbing all the issues to their full depth without fear or prejudice. It means that each law teacher should joyfully accept with Holmes the challenge that in his work he may "wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."

Although he is retiring from full-time teaching, I am confident we will hear much more from Yale. I look forward to reading his work and continuing our correspondence for many years to come. To conclude, I think it fitting to recall the final speech of a different “father of Miranda,” Shakespeare’s Prospero, in *The Tempest*. Having announced his retirement, Prospero tells the public he needs its approval before he can leave behind his “potent art.”¹⁷ Although Yale has sought progress, not praise, he has achieved both, and Prospero’s epilogue seems particularly apt:

Gentle breath of yours my sails
Must fill, or else my project fails,
Which was to please

. . . .

As you from crimes would pardon’d be,
Let your indulgence set me free.¹⁸

In these lines, Prospero reveals that his life-long goal, his “project,” has been to make the world a better place. That same aim, those who know Yale would agree, has steered Yale’s course from the beginning.

Yale Kamisar, *Francis A. Allen: “Confront[ing] the Most Explosive Problems” and “Plumb[ing] All Issues to Their Full Depth Without Fear or Prejudice”*, 85 MICH. L. REV. 406, 426 (1986) (quoting Brainerd Currie, *Law and the Future: Legal Education*, 51 NW. U. L. REV. 258, 271 (1956) (quoting OLIVER WENDELL HOLMES, *The Profession of the Law, in SPEECHES BY OLIVER WENDELL HOLMES* 22, 23 (1934))). Yale has accepted this mission wholeheartedly.

17. WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 1, line 50 (William George Clarke & William Aldis Wright eds., William Benton 1952).

18. *Id.* at epil., lines 11-13, 19-20.