

# A Student's Tribute To Professor Yale Kamisar

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I am delighted to provide this personal tribute to Professor Yale Kamisar, to his teaching, to his scholarship, and to his contributions to the American legal system.<sup>1</sup>

Throughout my study and career in the law, I have been fortunate to have had many great teachers. Of these, Yale Kamisar is one of the best. I was Professor Kamisar's student at the University of Michigan Law School, from which I received my law degree in 1973. I sat in Professor Kamisar's criminal procedure class in the early days of my law school education, learned more about his scholarship when I served on the *Michigan Law Review*, and have remained interested in his scholarship over the decades since. I have enhanced my continuing studies of the law, after I was sworn in as a federal appellate judge, with Professor Kamisar's assistance. My strongest impressions of Yale Kamisar are those I have of him teaching, past and present.

Another of my teachers, and one with a special connection both to me and to Professor Kamisar, was the late Honorable Wade H. McCree Jr. Judge McCree was a Circuit Judge on the United States Court of Appeals for the Sixth Circuit. He thereafter served as the Solicitor General of the United States, and subsequently accepted a position proximate to Professor Kamisar as a distinguished professor at the University of Michigan Law School. When I was a law student, Professor Kamisar introduced me to Judge McCree and recommended that Judge McCree hire me as his law clerk. I got the job, and much that was good in my legal career followed from that opportunity. I also know in what high regard Judge McCree held Professor Kamisar. Thus, I invoke Judge McCree's ideas in aid of my tribute to Professor Kamisar.

Judge McCree advanced the theory that academics, lawyers, and the courts were partners in the process of developing the law.<sup>2</sup> Citing the many ways that scholars and judges interacted, Judge McCree wrote of the "symbiotic relationship" between American legal scholars, such as Professor Kamisar, and judges who cooperate on the

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<sup>1</sup> I write in a personal capacity and not on behalf of the Court on which I serve. However, in the interest of full disclosure, I confess that I have a bias in favor of Professor Kamisar. Since my appointment to the federal bench, I have had a series of law clerks from the University of Michigan Law School, each of whom has performed his or her duties with distinction: Carolyn Barth, Matthew Andelman, Sanne Knudsen, Gus Sandstrom, Anne Kanyusik, and Jean Rhee. Joining me next year is Aaron Lewis. All of these Michigan law clerks came to me on Professor Kamisar's personal recommendation.

<sup>2</sup> See Wade H. McCree, Jr., *Partners in a Process: The Academy and the Courts*, 37 WASH. & LEE L. REV. 1041 (1980).

path of legal development.<sup>3</sup> Here is how the process works: Nascent legal principles often germinate in the classrooms of law schools, and in the scholarly writings of law professors.<sup>4</sup> These principles come to the attention of judges through articles in law journals, from the briefings and arguments of the advocates who appear before them (the advocates themselves also being students of these scholars), and from the judges' associations with academia.<sup>5</sup> Judges, in concrete cases, apply the best of these principles, transforming what started as academic thought, or the inspired thought of advocates, into applied law with precedential effect. Academics, in turn, vigilantly scrutinize and criticize these judicial applications, leading to the development of still new theories, and to the refinement of established ones.<sup>6</sup>

One of the premises underlying this view is that judges are permanent students. The education received in America's law schools is only the beginning of a future jurist's legal study. In practice and on the bench, judges continue to learn from legal academics, whose ideas help to shape the evolution of the law. A law professor's contribution is thus determined not only by expertise in the law, but also through the ability to convey ideas persuasively to students, including judges-as-life-long-students.

The very greatest legal scholars often are also great teachers, for in my opinion the most powerful contributions to the legal system are likely to come from those who shape the law not only by their research and writing, but also by reaching the hearts of their students in teaching. By this standard, as by any standard, Yale Kamisar is one of America's great law professors.

I first encountered Yale Kamisar when I studied criminal procedure at the University of Michigan Law School. Many lawyers and judges will recall fondly those law professors who taught them to "think like a lawyer," to see as a whole our system of law. In 1971, Professor Kamisar instructed me in the mysteries of the constitutional aspects of criminal procedure. He was an excellent teacher, and his class was exciting.

Indeed, I would assert that Professor Kamisar is a great teacher even if I had no authority beyond what I saw and heard in his Michigan classroom. Any person could benefit from the stimulating moral and intellectual atmosphere of Professor Kamisar's criminal procedure class. For me, regardless of how much I studied the cases in his casebook, his questioning in class would take my thoughts beyond where they had been before I entered the classroom. Professor Kamisar's experience (when I took his class, he had "only" been a professor for about fifteen years), his advocacy for a system fair to those accused of serious crimes, and his insistence that courts give logical reasons for rulings, all contributed to my introduction to and understanding of the law.

I trust that my high regard for Professor Kamisar's abilities would be endorsed

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<sup>3</sup> *Id.* at 1042, 1053.

<sup>4</sup> *Id.* at 1042-44.

<sup>5</sup> *Id.* at 1044.

<sup>6</sup> *Id.* at 1056.

by any person applying objective criteria. Oliver Wendell Holmes Jr., in an 1886 address to the Harvard Law School Association, spoke on *The Use of Law Schools*.<sup>7</sup> Professor Kamisar measures up well when tested by Holmes's ideas. In describing the methods of instruction and learning that make a law school great, Justice Holmes postulated that "[t]he main part of intellectual education is not the acquisition of facts, but learning how to make facts live."<sup>8</sup> As I witnessed first-hand in his criminal procedure class, Yale Kamisar is a master at bringing cases to life, and he animated not just facts, but also the legal principles for which the cases stand. Here is Holmes again, stressing that great teachers inspire students to want to learn: "Education, other than self-education, lies mainly in the shaping of men's [and women's] interests and aims."<sup>9</sup> Professor Kamisar had a way of inspiring the interests of his students in a fair criminal process that honored the dignity of each individual charged with a crime, and that appreciated the need for fair procedures, no matter how serious the crime. Those students who heard Professor Kamisar hold forth will well understand Holmes's point. Further, Holmes commended a law school faculty's aim to "obtain for teachers men [and women] in each generation who are producing the best work of that generation."<sup>10</sup> By any intellectual and moral measure, Professor Kamisar's work belongs in the vanguard of the best and brightest of his generation.

Professor Kamisar's thoughtful classroom questioning of his students inevitably revealed the limits of our knowledge, encouraging more study. Professor Kamisar's skill at what is sometimes called the "Socratic" method is unparalleled. I don't think any student, indeed any person however broadly educated, could stand before his questions without realizing that there were deeper ways to look at a legal problem. But at the same time, Professor Kamisar's questioning was never undertaken in a way that ridiculed a student's lack of knowledge. The feeling in his class was, "let us consider this problem together." A more skillful use of "what if?" and "so what!" perhaps has never been made. To paraphrase Justice Holmes's 1886 oration: If you convince a person that another way of looking at things is more profound, that person will desire the profounder thought.<sup>11</sup> If my classroom experiences with Professor Kamisar were at all like those of the thousands of future lawyers who enrolled in his law school courses, I can safely say that Professor Kamisar's classroom training of future advocates, judges, and scholars exemplifies the greatness of which Justice Holmes spoke.

Professor Kamisar's methods of legal analysis did not merely help me to understand criminal procedure and attendant constitutional law, though if that were all it would have been enough. Justice Holmes spoke of "the enthusiasm of the lecture room," and of how great teaching "should not stop, but rather should foster,

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<sup>7</sup> Oliver Wendell Holmes, Jr., *The Use of Law Schools*, in 8 MODERN ELOQUENCE 700 (Thomas B. Reed ed., 1900).

<sup>8</sup> *Id.* at 701.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 703; *see also infra* notes 14 and 19.

<sup>11</sup> Holmes, *supra* note 7, at 701.

production,” as a teacher’s “enthusiasm” is imparted to students.<sup>12</sup> Professor Kamisar’s classroom teaching fulfilled these high aims. After learning from Professor Kamisar, his analytical methods helped me better to understand every subject I studied for the rest of my time in law school. These same methods have been of benefit in my role as a judicial law clerk upon graduation, in my subsequent practice in corporate litigation for more than two decades, and in my present work on the federal bench.

Professor Kamisar’s important contributions as a scholar are well-known. I am perhaps not the best person to speak of his scholarship, which will be addressed by law professors who studied in his field.<sup>13</sup> But I wish to add my impression as a student who pondered the cases and questions in the casebook then prepared by Professors Kamisar, LaFave, and Israel in *Modern Criminal Procedure*, the current edition of which commands a position on the bookshelf in my judicial chambers.<sup>14</sup> Many of the cases we studied in it, such as *Mapp v. Ohio*,<sup>15</sup> *Gideon v. Wainwright*,<sup>16</sup> *Miranda v. Arizona*,<sup>17</sup> and *Katz v. United States*,<sup>18</sup> remain beacons of our constitutional law, pointing to the inviolable rights of those enmeshed in the criminal process. Not only in this casebook, but also in his detailed writings on the rights of the accused and the limits of police power under the Fourth and Fifth Amendments,<sup>19</sup> Professor Kamisar has aided our courts by emphasizing the importance of balancing reason and fair play, on the one hand, with efficiency, deterrence, and retribution, on the other, as these competing interests struggle for a role in our criminal process.

A LEXIS search reveals no fewer than thirty-one United States Supreme Court opinions which have relied to some extent on Professor Kamisar’s publications. He has also been cited in more than 100 opinions of our federal appellate courts, and in twice that number of opinions issued by state supreme courts. Citation in any court opinion is a sign of the influence of one’s legal scholarship. Yet, we should be

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<sup>12</sup> *Id.* at 703.

<sup>13</sup> Those who wish to comment in detail on Professor Kamisar’s scholarship will have plenty to say. Professor Kamisar’s *curriculum vitae* reveals no fewer than twenty publications from the year 2000 to the present, a considerable number for any professor in the prime of his or her career, let alone one nearing retirement.

<sup>14</sup> YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* (10th ed. 2002). In law school I studied from the second edition, so it has stood well against the test of time.

<sup>15</sup> 367 U.S. 643 (1961).

<sup>16</sup> 372 U.S. 335 (1963).

<sup>17</sup> 384 U.S. 436 (1966).

<sup>18</sup> 389 U.S. 347 (1967).

<sup>19</sup> Professor Kamisar’s authorship extends beyond his influential work on criminal procedure. To cite an example of Professor Kamisar’s varied scholarly interests, he has written on the topic of assisted suicide and the right to die. *See, e.g.*, Yale Kamisar, *The “Right to Die”: On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481 (1996); Yale Kamisar, *Against Assisted Suicide—Even in a Very Limited Form*, 72 U. DET. MERCY L. REV. 735 (1995). In *Washington v. Glucksberg*, 521 U.S. 702 (1997), affirming the constitutionality of Washington state’s ban on physician-assisted suicide, both Chief Justice Rehnquist’s majority opinion and a concurring opinion penned by Justice Souter cited Professor Kamisar’s work on this topic. *See id.* at 733 n.23, 755, 777 (Souter, J., concurring).

particularly impressed by the several landmark decisions that have rested, in part, on Professor Kamisar's work. Foremost, of course, is *Miranda*. Others include some of the Supreme Court's leading cases on the Fourth Amendment's exclusionary rule—*Arizona v. Evans*,<sup>20</sup> *United States v. Leon*,<sup>21</sup> and *Nix v. Williams*.<sup>22</sup> His work on assisted suicide, of which he has been a vociferous opponent, was quoted in detail in Judge Beezer's dissent from the Ninth Circuit's *en banc* decision in *Compassion in Dying v. Washington*,<sup>23</sup> holding unconstitutional a Washington statute prohibiting physicians from prescribing life-ending medication to terminally ill adults. The Supreme Court subsequently granted certiorari, and relying in part on Professor Kamisar's work, reversed the Ninth Circuit's decision.<sup>24</sup> The effect that Professor Kamisar's work has had on shaping our law typifies the "fruitful" and "complementary" process between courts and great professors that Judge McCree thought so "significant in the development of the law."<sup>25</sup>

Recently, I again experienced first-hand Professor Kamisar's dual role as teacher and scholar. In addition to handling my cases, I worked this past year on an article reexamining the applicability and scope of the Fourth Amendment's probable cause standard in cases involving catastrophic threats.<sup>26</sup> I sent a draft of my analysis to Professor Kamisar requesting his comments. He responded generously with a detailed comment letter in a quality comparable to published work, and enthusiastically set forth his ideas about how the analysis might be improved. His perspectives, borne of a lifetime of scholarship, ranged broadly over the topic. His ideas led me to analyze each potential doctrinal idea in even greater depth. As examples, Professor Kamisar pointed out a dissent of Justice Marshall, written decades ago, that bore on one of my arguments; he also pointed to a recent opinion of Justice O'Connor that shed light on another issue discussed; and where I had addressed and quoted an eminent scholar in

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<sup>20</sup> 514 U.S. 1 (1995).

<sup>21</sup> 468 U.S. 897 (1984).

<sup>22</sup> 467 U.S. 431 (1984).

<sup>23</sup> 79 F.3d 790, 850–52 (9th Cir. 1996) (*en banc*) (Beezer, J., dissenting).

<sup>24</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>25</sup> McCree, *supra* note 2, at 1052, 1055. Nowhere is this complementary process more evident than in Professor Kamisar's devotion to defending the protections assured to the accused by *Miranda*. In part because of Professor Kamisar's persistent and skillful help, *Miranda* has become not only a cultural icon, but also a constitutional fixture. The Supreme Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), reaffirmed *Miranda*'s constitutional footing. This may have surprised some, but it only vindicated Professor Kamisar's good judgment.

In my chambers, I have a framed picture of Professor Kamisar holding an open law book. A careful observer will notice that the book's pages are covered with multiple colors of highlighting. Some passages are highlighted in yellow, some pink, some green, and some blue. One who looks even closer will recognize that this is Professor Kamisar's highlighted copy of the Supreme Court's *Miranda* decision, and the highlighting reveals the depth of a scholar's analysis.

<sup>26</sup> Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777 (2004) (Dr. Stern was a former law clerk and is now an associate at the law firm of Shea & Gardener.)

his field on another point, Professor Kamisar gave me some citations to related work of the same scholar that permitted me to understand that scholar's position even better. Professor Kamisar had not only a scholar's sense of the arguments weighing on an issue; he had a historian's remembrance and recollection of the relevant literature and its treatment of pertinent ideas.

When I think back on Professor Kamisar's teaching, consider his scholarship, and reflect on his thoughtful recent comments on my research and writing, I see that he has been both profound and consistent. Professor Kamisar starts with as comprehensive an analysis as likely can be mustered on any issue, and he then follows with an open mind to consider new ideas and to add to his learning. In all this he puts reason at the fore. No doctrine that cannot be supported by reason will get much praise from him, no matter how high the authority that pronounces it. This is as it should be. As I have said, scholars work in cooperation with judges and with advocates in a process that improves the law. Professor Kamisar speaks directly to the decision-makers and judges of our era; he has trained the advocates who present arguments to them; and his work has rippling effects of incalculable magnitude.

Judge McCree concluded his discussion of the cooperation between the Academy and the Courts in the development of the law by writing that "all of us are the beneficiaries of this process."<sup>27</sup> In the context of Professor Kamisar's career of scholarship, Judge McCree's statement undoubtedly rings true. One cannot imagine that our law, particularly constitutional criminal procedure, would be what it is today absent Professor Kamisar's tireless work and profound intellectual insight.

I am proud to have been Professor Kamisar's student at the University of Michigan Law School. I am proud to be his student today. I join his many admirers in wishing Yale Kamisar well.

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<sup>27</sup> McCree, *supra* note 2, at 1056.