Notre Dame Law Review

Volume 57 | Issue 1 Article 8

12-1-1981

Book Reviews

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BOOK REVIEWS

POLICE INTERROGATION AND CONFESSIONS. By *Yale Kamisar*. Ann Arbor, Michigan: University of Michigan Press. 1980. Pp. xx, 323. $17.50.

Reviewed by Hon. Samuel J. Roberts[1]

> "A teacher affects eternity; he can never tell where his influence stops."
>
> Henry Adams

When the subject of police interrogation and confessions is mentioned, there come to mind many cases—*Miranda v. Arizona*,[2] *Escobedo v. Illinois*,[3] *Massiah v. United States*[4] and *Brewer v. Williams*[5]—to name just a few. There also come to mind many issues—Was there custodial interrogation? Had formal proceedings commenced? Was there a knowing and intelligent waiver?

But there comes to mind only one scholar—Yale Kamisar. For he is the true teacher who, since even before the first rumblings of the "criminal procedure revolution," has fought convincingly to show students, professors, prosecutors, judges, and police not only the problems that exist, but their possible solutions. It is indeed a professional privilege to review some of the scholarly writings of Professor Kamisar, and it is with sincere thanks to the *Lawyer* that I offer these thoughts on *Police Interrogation and Confessions*.

Anyone familiar with his many works can attest that Yale Kamisar is no ordinary writer. He is a jurisprudential philosopher skilled in the art of communication and ideas. He is also a legal scholar who understands that effective critique of any judicial decision requires knowledge of exactly what the case holds. Thus, before using the Supreme Court's "interrogation-confession" cases as evidence of the need for improvement of the law, Professor Kamisar analyzes these cases thoroughly. His in-depth analyses are rich with textual footnotes for the assiduous student.[6]

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1 Justice, Supreme Court of Pennsylvania.

2 384 U.S. 436 (1966).

3 378 U.S. 478 (1964).

4 377 U.S. 201 (1964).

5 430 U.S. 387 (1977).

6 One could wish, however, that Professor Kamisar had not chosen to place only some of

Yale Kamisar, however, goes beyond an historian's overview of 15 years of critical developments in constitutional law and beyond an academician's dissection of Supreme Court decisions, their rationales and incongruities. He is an advocate. Collected in *Police Interrogation and Confessions* are seven superb essays, probing the perplexing and always controversial questions suggested by the book's title.

It is not surprising that those who turn to *Police Interrogation and Confessions* for quick, easy explanations are likely to be disappointed. The subject of interrogation and confessions, among the most highly disputed in the law, lends itself to few, if any, "black letter" solutions. However, the difficulty of the area does not deter Professor Kamisar, who, through detailed analyses, strives in the interest of society to balance the needs of law enforcement with the rights of citizens accused.

Before *Miranda*, Kamisar wrote "What is an 'Involuntary' Confession?" calling for the abrogation of the "voluntariness" test. In this first essay he describes the test as not only "loose and unrevealing" but also "downright misleading" (p. 15). He calls for a "more direct approach" which focuses on the risk of untrue confessions and the offensiveness of police interrogation methods (p. 25).

Professor Kamisar knows that the foundations of the "voluntariness" test, like the rationale of a judicial decision, must be understood before the standard can be successfully attacked. Thus, in "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure," Kamisar addresses the invisibility and secrecy of the interrogation process and the "necessity" for questioning a suspect without advising him of his constitutional rights—factors which permitted the "voluntariness" test to survive.

The "Gatehouses and Mansions" essay, a foundation for the *Miranda* decision, contrasts

> the largely unregulated and unscrutinized practices in the police station—the "gatehouse," where ideals are checked at the door and "realities" are faced—with the proceedings in the courtroom — the "mansion," where the defendant is "even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated." (pp. xi-xii, 31-32).

Professor Kamisar criticizes the "legal mind" which would argue that because police questioning does not involve any judicial process for taking testimony, there is no compulsion to which the privilege

his notes beneath the text while placing others at the end of the book. Many of the endnotes substantially amplify the text and deserve to be more accessible to the reader.

against self-incrimination applies, even though evidence so obtained is subsequently brought into the courtroom (p. 32). In painting his picture of the "gatehouse," he reminds us that "as lawyers and judges" we often forget "what we know as men" (p. 37).[7]

> So long as "what on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor"; so long as his interrogators neither advise him of his rights nor permit him to consult with a lawyer who will; can there be any doubt that many a "subject" will *assume* that the police have a legal right to an answer? That many an incriminating statement will be extracted under "color" of law? So long as the interrogator is instructed to "get the idea across . . . that [he] has 'all the time in the world'"; so long as "the power [legal or otherwise] to extract answers begets a forgetfulness of the just limitations of the power" and "the simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force"; can there be any doubt that many a subject will assume that there is an *extralegal* sanction for contumacy? (p. 37).[8]

Professor Kamisar also criticizes the "legal mind" which would argue that a suspect "waives" his privileges against self-incrimination when he "volunteers" answers to police questions. For Kamisar, that waiver argument is, as it should be, hardly worthy of retort. Kamisar needs only to quote from *Escobedo v. Illinois*: " '[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights' " (p. 38).[9]

The remaining essays in *Police Interrogation and Confessions* were written after the *Miranda* decision. In these essays, Professor Kamisar praises *Miranda*, noting that "[w]hatever its shortcomings, *Miranda* tried to take the 'police interrogation'-'confession' problem by the throat" (p. 223). However, he does not merely extol the virtues of *Miranda*. Nor does he simply argue that *Miranda* and related decisions—such as *Massiah v. United States and Brewer v. Williams*—fail to go far enough. He uses these cases as his arsenal in a continuing assault on the "voluntariness" test.

In this post-*Miranda* era, where the social order is faced with steadily increasing crime, the hasty and all too frequent response is to attack "technicalities" in the law. Kamisar uses the case records to convince us that the solution does not lie in moving backward by

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7 (footnote omitted).

8 (footnotes omitted) (emphasis in original).

9 378 U.S. 478, 490 (1964).

adopting an approach to interrogations and confessions that has been tested and has failed. As he recently observed, "You don't solve the problem by eliminating procedural safeguards."[10] Rather, the solution lies in breathing life into *Miranda* with new techniques, such as those he proposes, that will accommodate both legitimate police investigative needs and equally legitimate needs of the accused citizen and society to be free from police overreaching. Professor Kamisar's relentless assault on the "voluntariness" test, a reminder of the injustices prior to *Miranda*, must be regarded as the most valuable contribution of his essays.

Kamisar is not comforted by the apparent abandonment of the "voluntariness" test in *Miranda*. He is keenly aware that " '[h]owever great the triumph, it is ephemeral. Without further struggle, it withers and dies' " (p. xx).[11] Immediately after *Miranda*, realizing that the majority opinion would be subjected to "microscopic analyses and relentless, probing criticism" (p. 41), Professor Kamisar turns to the dissenting opinions to assure that their more substantial weaknesses do not escape scrutiny. "A Dissent from the *Miranda* Dissents" demonstrates both that application of the privilege against self-incrimination to police interrogation is a natural, historically supported counterpart of the privilege as applied in the courtroom and that the "voluntariness" test is unworkable and ineffective. For Professor Kamisar, *Davis v. North Carolina*,[12] decided one week after *Miranda*, is the "strongest evidence" (p. 73) of the worthlessness of the "voluntariness" test. Notwithstanding the extraordinary facts of record evincing the intention of police to deny the accused his constitutional rights, the state courts and two lower federal courts had held the confession to be voluntary. Although the Supreme Court reversed the finding of "voluntariness," Kamisar uses the reversal to make his point. He asks: "How many garden-variety criminal defendants who cried 'coerced confession' but lost the 'swearing contest' below were likely to survive the winnowing process above?" (p. 75). He answers with the history of cases: in the thirty years preceding *Miranda* the Supreme Court reviewed an average of only one state confession case per year, and in two-thirds of the confession cases which the Court chose to review, as in *Davis*, the death penalty had been imposed (p. 75).

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10 TIME, February 23, 1981, at 81.

11 Kamisar is quoting Allen, *On Winning and Losing*, in LAW, INTELLECT, AND EDUCATION 16 (1979).

12 384 U.S. 737 (1966).

As strong evidence as *Davis v. North Carolina* provides for the ineffectiveness of the "voluntariness" test, Kamisar builds his case further in "*Brewer v. Williams*—A Hard Look at a Discomfiting Record." His comprehensive examination of the record in *Brewer v. Williams* unearths subtle, yet substantial, discrepancies—never discussed by any court—between trial testimony and testimony at the preliminary hearing, and graphically reveals the potential for injustice when a record is not properly scrutinized.

Brewer is also naked proof of the need for an objective, reliable record, one that does not depend upon imperfect, even if honest, recollections of critical events. Without such a record, resolution of the issue of "voluntariness" through a trial "waged by the crude, clumsy method of examination, cross examination, and redirect is almost bound to be unsatisfactory." (p. 131). Indeed, as Professor Kamisar convincingly demonstrates, the "swearing contest" between the accused and his interrogators which accompanies the "voluntariness" test is routinely, almost inevitably lost by the accused.

"*Brewer v. Williams, Massiah*, and *Miranda*: What Is 'Interrogation'? When Does It Matter?" criticizes the *Massiah-Williams* doctrine (right to counsel attaches when adversary proceedings commence) and the New York *Donovan-Arthur-Hobson* rule[13] (right to counsel attaches when counsel first communicates with police that he represents the suspect) as band-aid approaches that, like the "voluntariness" test, do not cure but only hide from public view abuses in the conduct of interrogations. These "haphazard" approaches (p. 222) not only depend upon fortuitous circumstances, subject to possible manipulation by law enforcement officials; they are also substantially unrelated to "the 'overall fairness' of the 'interrogation' and the inherent coercion or potential for coercion in the situation" (p. 211).[14]

Professor Kamisar's solutions—tape-recorded interrogations and confessions, and the right to counsel whether or not adversary proceedings have begun and whether or not the suspect has previously retained a lawyer—seek to assure that the criminal justice system not only satisfies outward symbols of fairness but *is* fundamentally fair. As his final essay concludes, "[s]ymbols *are* important, but more is needed" (p. 224).[15]

13 People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

14 (footnote omitted).

15 Professor Kamisar's primary proposal, tape-recording of police interrogations and con-

No greater tribute to Professor Kamisar's scholarship can be found than the impact of his writings on the Supreme Court itself. That he influenced the Court in *Miranda* in its extension to the "gatehouse" of the protections accorded in the "mansion" must be obvious. So too, since *Miranda*, the influence of Kamisar has been pervasive. Recently, the Supreme Court has turned to "*Brewer v. Williams, Massiah*, and *Miranda*: What Is 'Interrogation'? When Does It Matter?" for assistance in analyzing two of its own "interrogation-confession" cases. In *Rhode Island v. Innis*,[16] Kamisar's analysis of *Brewer* was cited for the proposition that because *Brewer* was decided on sixth amendment right to counsel grounds, the Court was incorrect to focus upon whether the Christian burial speech was interrogation—an inquiry relevant only to a fifth amendment-*Miranda* analysis.[17] Citing Kamisar, the Court also reaffirmed its holdings in *Massiah* that the sixth amendment right to counsel "prohibits law enforcement officers from 'deliberately elicit[ing]' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed."[18]

The dissenting opinion of Justice Stevens went even further in relying upon Professor Kamisar. Justice Stevens urged that the "deliberately elicited" standard of police conduct must apply both where the accused's sixth amendment right to counsel has attached and where, as in *Innis*, the accused has invoked his fifth amendment right to counsel after *Miranda* warnings have been given. "In both cases the police [have] an unqualified obligation to refrain from trying to elicit a response from the suspect in the absence of his

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fessions, is directed at the cause of the "swearing contest" that took *Brewer v. Williams* through five courts in eight years: secrecy of police proceedings. In a "friendly" essay dedicated to an old adversary, *Fred E. Inbau: The Importance of Being Guilty*, Kamisar credits Inbau with having ironically spawned articulate spokesmen for reforms in the area of police interrogations and confessions, including the elimination of secrecy (p. 106-10).

Kamisar's other suggestion, that the police should not be able to obtain waivers of constitutional rights without the advice or presence of counsel, and perhaps without the advice or presence of a judicial officer, is geared to "accommodate both the government's need for evidence and a suspect's need for 'a lawyer's help,' which may be as great, or greater, before the commencement of judicial proceedings as afterwards" (p. 211). In *Kauper's "Judicial Examination of the Accused" Forty Years Later - Some Comments on a Remarkable Article*, Kamisar goes far in suggesting that, if police interrogations were conducted in a counselled proceeding before a judicial officer, silence of an accused could constitutionally be used against him. Although not immune from legitimate criticism, this proposal further manifests his continuing effort to resolve the many competing interests at stake.

16 446 U.S. 291 (1980).

17 *Id.* at 300 n.4.

18 *Id.*

attorney."[19]

In *United States v. Henry*,[20] Kamisar's analysis of *Brewer* was again cited, this time by the dissenting opinion of Justice Blackmun, for the proposition (undisputed by the majority) that the sixth amendment right to counsel is violated when the government deliberately elicits incriminating statements after adversary proceedings have begun.[21]

Unfortunately, while the Supreme Court has looked to Professor Kamisar for technical assistance, the Court has not always fully applied his analysis. Thus, in *Rhode Island v. Innis*, even though the Court relied upon Professor Kamisar's explication of case law, it nevertheless denied relief on a record which, under Kamisar's analysis, would reveal a clear violation of the right to counsel.[22]

Last Term, however, in *Estelle v. Smith*[23] and *Edwards v. Arizona*,[24] the Supreme Court reaffirmed the vitality of the right to counsel under both the fifth and sixth amendments, with all members of the Court agreeing that the accused in each case was entitled to relief. In *Estelle v. Smith*, the Court held that the results of a pre-trial psychiatric examination, at which the accused had been neither informed of his *Miranda* rights nor afforded his sixth amendment right to counsel, could not be introduced at the sentencing stage of trial.[25] In *Edwards v. Arizona*, the Court went even further in applying *Miranda* and implicity affirmed much of Kamisar's analysis. There, the Court addressed the issue of when interrogation may take place once an

19 *Id.* at 310 n.7 (Stevens, J., dissenting). *See also* White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AMER. CRIM. L. REV. 53 (1979), upon which Justice Stevens also relies.

For Professor Kamisar, once the *Miranda* right to counsel has been invoked, the question is not simply whether police have deliberately elicited a statement, but whether the accused's assertion of his right to counsel has been "scrupulously honored." *See* Remarks of Professor Kamisar at the First Annual Supreme Court Review and Constitutional Law Symposium, *reprinted in* THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-80, at 186-88, 204 (1979).

20 447 U.S. 264 (1980).

21 (Blackmun, J., dissenting, joined by White, J.). The majority, although not citing Kamisar directly, reaffirmed this proposition by relying upon Rhode Island v. Innis, 446 U.S. at 300 n.4, which had itself cited Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is 'Interrogation'? When Does It Matter? Henry*, 447 U.S. at 271.

22 *See* note 19 *supra*. In *Innis*, after the suspect had been taken into custody and had invoked his fifth amendment right to counsel, the police refrained from express questioning. However, they conversed in the suspect's presence, stating that if they did not find the weapon a handicapped "little girl" might find the weapon and hurt herself. Thereupon the suspect immediately offered to show the police the location of the weapon.

23 101 S. Ct. 1866 (1981).

24 101 S. Ct. 1880 (1981).

25 101 S. Ct. at 1875-1877.

accused has invoked his *Miranda* right to counsel. The Court held that, once invoked, the *Miranda* right to counsel is violated when the police themselves initiate interrogation of the accused.[26] Further interrogation is permissible only after the accused either has been afforded counsel or has himself initiated the discussion. Thus, although not expressly citing Kamisar, the Court applied a standard similar to that which Kamisar articulates in "*Brewer v. Williams, Massiah*, and *Miranda*: What Is 'Interrogation'? When Does It Matter?": "Once the suspect has exercised his right to counsel, and thus brought the 'second level' *Miranda* safeguards into play, the issue is no longer simply whether 'interrogation' then occurred, but whether 'the exercise of the right' was 'scrupulously honored' " (p. 208).[27]

Although the Supreme Court has often condemned blatant police and prosecutorial interferences with the attorney-client relationship, as in *Massiah, Brewer*, and *Henry*, the Court has not always heeded Kamisar's admonition that the fair and equal administration of justice demands more than a " 'symbolic response' to the violation of the symbol of a fair trial" (p. 217). However, *Estelle* and *Edwards* suggest that the Court has begun to recognize and prevent opportunities for secret compulsion of the accused—opportunities which previously have gone uncorrected, as in *Innis*. As Professor Kamisar illustrates through case histories, our constitutional guarantees of life and liberty are only as secure as the procedural safeguards that surround them. Thus, procedures for finding "truth"—whether in the "gatehouse" or in the "mansion"—must not only appear fair; they must be fair. Our courts, charged with supervising the fair and equal administration of the law, must no longer ignore the truth which objective recording of interrogations and confessions would reveal. Only when an objective, reliable record is assured can "[t]he public conscience . . . be satisfied that fairness dominates the administration of justice."[28]

Police Interrogation and Confessions is indeed the product of a servant of the law. It is the work of a man who clearly believes that "[t]he quality of a nation's civilization can be largely measured by

26 101 S. Ct. at 1884-85.

27 (footnotes omitted). The Court of Appeals for the District of Columbia, citing Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is 'Interrogation'? When Does It Matter?*, recently distinguished between "first level" and "second level" *Miranda* safeguards in United States v. Alexander, 428 A.2d 42 (1981). Adopting Kamisar's approach, the court held the defendant's statement to police inadmissible on the ground that police had not "scrupulously honored" the defendant's assertion of her *Miranda* right to counsel.

28 Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942).

the methods it uses in the enforcement of its criminal laws."[29] That quality will no doubt continue to be improved by the influence of Yale Kamisar.

29 Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).