How a tough son of the Bronx grew up to fight for the rights of the accused.
It was years ago, late one Saturday night in the Law Quad. A well-oiled crew of law students was sloshing home from the Pretzel Bell. By Hutchins Hall, they looked up at the dark facade. One office window showed a light. They knew whose it was.

They started to yell.

“Kamisar! Kamisa-a-a-r!”

They knew he wasn’t up there. Guy just left his light on to make them think he worked harder than they did. Middle of the night on a weekend? No way. Bastard was home in bed.

“Hey, Kamisar, you ______, we know you’re not up there!”

Overhead there was a noise. The silhouette of a balding head appeared, round as a dinner plate. Then that voice, a mixture of the Bronx and the Army, high-pitched and hoarse.

“Will you knock it off! Trying to get some work done here!”

* * *

The middle of another night in a ranch house on the east side of Ann Arbor. A boy, 10 or 11, out of bed.

“Dad…what are you doing? It’s 3 o’clock in the morning.”

“Working on an article.”

“How much are you getting paid for it?”

“I’m not getting paid anything for it.”

“Well, then, why are you doing it?”

He tried to explain it. If he wrote a good article, he said, maybe the Law School would give him a pay raise. And then maybe another law school would offer him a job. And then he could ask the Law School for a bigger raise.

But he knew that wasn’t it. Put in a couple hundred hours on some law review article and wind up with a maybe a thousand more a year? Compared to how much an hour if he were consulting? Not to mention if he were practicing law in Washington or New York?

“I don’t know,” he told his son finally. “You do something, you want to do it right. And once you get into something, it always involves more work. Far more work than you ever thought.”

* * *

What exactly is the public supposed to get when a state university hires a young professor and after a few years gives him or her something close to lifetime job security and pays him a nice living to teach fewer classes than any high school teacher handles? What benefit, exactly, does a “learned scholar” give back to the public for 30 or 40 years on the payroll? And what does that mean, anyway—“learned”? How does that help anybody?

People have been asking the question since universities started, especially public universities like Michigan, with their claim on society’s till. Along with the fond image of the absent-minded professor goes an image of the pointy-headed dreamer who doesn’t have to work very hard. Where is the payoff to the public, the value added?

The answer is that the public is supposed to get a lifetime of work from somebody like Yale Kamisar.

* * *

During World War II in the Bronx the schools would have essay contests—topics like “Fire Prevention Week” or “What It Means to Me to Be an American.” He’d write four or five answers, put his name on the best one and turn it in, then give the others to his twin sister and her friends. He’d win the prize. They’d be runners-up.

His parents were Eastern European immigrants. His father finished the eighth grade and got a job selling supplies to bakeries. His mother finished high school but couldn’t afford college.

One time her only son came home with a report card with three As and one C. She hit him—for the C.

Wait a minute, he said. The kid down the street got three Bs and a C, and he wasn’t getting a beating.

His mother thought about it. She asked if he could honestly say the C was the best he could do. If he could say that, she said, she’d never lay a hand on him again.

No, he said. No, he couldn’t say that. But he said he’d make sure he could say it from then on. And she never hit him again.

She was a difficult woman, he would say later. She liked to claim credit for his achievements. “He practiced law on me,” she would tell friends. And in a way it was true, he said. “She was my first contact with injustice.”
He disappeared into books. There was a book about a guy who talked so well he turned back a mob, and he remembered that.

He was a talker himself. “Jeez, that kid can talk,” people said. “He ought to be a lawyer.” But he wanted to be a sportswriter.

He and his buddies would take a broomstick and a ball into the street and play stickball. A window would break and a neighbor would call the cops, and when the cops came they would chase the boys and shove them down on the pavement and act irritated, like it was beneath their dignity to have to police kids in the street.

* * *

At the High School of Music & Art on West 135th Street, as far as he was concerned, there were only two people in every classroom—the teacher and him. Every question the teacher asked, Yale Kamisar’s hand would go up.

“Doesn’t anybody else’s parents pay taxes?” the teacher would say. “Only Kamisar’s?”

Along with wanting to be a sportswriter, he thought he’d like to be an architect. But Pratt Institute in the city was only accepting World War II vets, so he went to New York University on scholarship, took the subway from home every day. He joined ROTC to make spending money. He wrote a sports column for the student newspaper. But in those days New York dailies were merging and folding, so there was a surplus of experienced sportswriters.

He was too squeamish for medicine, didn’t want to be a dentist or an engineer. So he decided to be a lawyer after all, like everybody in the family said he should.

He made Phi Beta Kappa in his junior year. He won the prize for being the best undergraduate in economics.

Then, in his senior year, NYU nominated him to compete for the Rhodes scholarships.

Final interviews for all the Rhodes nominees from New York City were held at a big Wall Street law firm where several lawyers were Rhodes alumni—men who had gone to Princeton and Harvard and Yale. Ivy League kids from Manhattan families came home from Princeton and Harvard and Yale to be interviewed. So there was Kamisar, the NYU kid with the kids from Princeton and Harvard and Yale. No attorney at that firm had gone to NYU, not in the 1930s and ’40s, when NYU was still thought of as just a subway school. Kamisar didn’t get picked as a Rhodes scholar. And he vowed he would go to an Ivy League law school if it killed him.

* * *

He was admitted to the law school at Yale, the hardest one of all to get into. A well-to-do aunt said she would help with the tuition. He made plans to room in a dormitory with the other guy from NYU who got into Yale.

One day his father took him aside. They didn’t talk much. His mother was the talker. But on this day his father said, look, we’re poor, and if you go to Yale, you’re going to see how rich those kids are and you’re going to be miserable. All the lawyers he knew were smooth, his father said, and he just didn’t think his son could be smooth.

Well, he knew he wasn’t smooth. But he thought maybe he was smart enough and that he could work hard enough to make up for not being smooth.

Then the law school at Columbia, the only Ivy League law school in his hometown of New York, offered him a scholarship.

Yale was 80 miles away in Connecticut. If he went to Columbia, he could live at home and save the room and board at Yale. And he wouldn’t have to use his aunt’s money, because the scholarship from Columbia would cover his tuition.

He wanted to go to Yale. He wanted to leave home, wanted to live in a dormitory like a regular college man.

Then one day the well-to-do aunt called his mother on the phone. Hold on a minute, his mother said, I’m putting chicken in the oven.

You can’t afford chicken, the aunt said. Your son’s about to go to law school.

His mother thought about that a second, then told his aunt she could keep the money for Yale.

So he stayed home and went to Columbia.

* * *

He spent one semester in law school. Then he had to go into the Army—his ROTC obligation. It was the time of the Korean war. He had graduated from Columbia as a second lieutenant. But before he got to Korea, when he was still stationed in the States, there was an incident. Not a big deal, really, but later he realized it was one of those things that nudges your life in a certain direction.
One of his jobs was to supervise the sergeants and corporals who gave bayonet training. One day there was a bayonet class, and a colonel came around and asked who was in charge.

Well, nobody was in charge. Kamisar wasn’t there. He thought his superior officer, a career Army captain, was supposed to be there, and the captain thought Kamisar was supposed to be there. So neither of them was there.

It didn’t matter. Neither he nor the captain did the actual training anyway. But this colonel was a stickler for the rules, and he wanted to know who had screwed up.

Kamisar and his captain talked about it. The captain asked Kamisar to take the blame, as a favor. Kamisar was just an ROTC guy, whereas the captain was career Army, and a black mark on the record of a career Army man could really hurt. So Kamisar said okay, sure, he’d take the blame.

But when the colonel wrote up Kamisar, the charge was going AWOL, “absent without leave,” a far more serious offense than he had actually committed. So Kamisar wrote a pretty strong letter explaining precisely why the AWOL charge was wrong.

A day or two later, at the officers’ mess, a new guy, a major, stopped by Kamisar’s table. He said, let me tell you something as a friend. That letter you wrote made the colonel look bad and he’s a little upset. You should have just confessed to the AWOL charge.

Then the major asked Kamisar how old he was. Kamisar said he was 21. Well, hell, the major said, when he was 21, he’d accidentally wrecked a tank in France and had to pay the Army back—it took years. This was nothing compared to that—a small fine and a slap on the wrist. Why didn’t Kamisar just write a new letter saying he was sorry and the whole thing would blow over?

So he said okay, he’d write the apology.

Then, as expected, he got a memo from the commanding general of the base, saying Kamisar was being fined for going AWOL. It was routine. But something at the bottom of the memo caught Kamisar’s eye.

It was the name of that major, the one who had dropped by his table to give him the friendly advice, except here he was listed as the “investigating officer.” And the memo said the “investigating officer” had advised Lieutenant Kamisar of his rights under the Uniform Code of Military Justice.

Kamisar went and found the major, said he was a little confused here, showed him the memo, said the major had never said anything about an investigation and certainly hadn’t advised Kamisar of his rights under the Uniform Code of Military Justice.

Well, said, the major, he’d heard Lieutenant Kamisar was pretty smart, but evidently he wasn’t. Didn’t he realize a lieutenant’s word was nothing against the word of a major? Kamisar looked at him and said yes, indeed, he was just beginning to realize it right then.

Long afterward he said: “It was a trivial thing. What the hell did I care? I had no interest in the Army. But it’s just the principle of the thing. I mean, it was just a flat-out lie.”

He went to Korea, earned a Purple Heart in combat, then went back to Columbia to finish law school. Ten years would go by before he thought much about the incident with the major. By then he was making a name for himself as an expert on the law of criminal procedure—the rules about what police and prosecutors can and can’t do when they arrest and interview suspects. He was reading through the instruction manuals that tell police how to interrogate suspects, and one of the techniques they recommend is to act sympathetic to the suspect, to act like you’re giving the suspect friendly advice. And then Kamisar remembered the major.

“I said, ‘My God, that must have had an enormous impact on me.’ It’s so obvious.”
Back in law school he looked for a summer research job. The only professor who needed help that summer—it was 1953—was a man named Herbert Wechsler. He was working on a big project in criminal law.

Now, in the major law schools, criminal law was considered second-class. At Harvard the professors would even apologize for making the students learn it.

But Wechsler was no second-class figure. He’d been the chief advisor to the U.S. judges at the Nuremberg trials of Nazi war criminals. He had co-authored a massive casebook on criminal law at the age of 31. He would later argue and win one of the most important free-speech cases in Supreme Court history, *New York Times v. Sullivan*. And he had high standards for the work he wanted done. He once fired a research aide who went on to become director of the American Law Institute. Another one he fired became dean of law at Georgetown and head of the Federal Trade Commission.

Wechsler offered Kamisar the going wage, 75 cents an hour. Kamisar took it.

His research assignment was part of a 10-year project to write an entire penal code for the American Law Institute, which creates model statutes that are used throughout the U.S. and the world. Wechsler told Kamisar to research cases that shed light on the question of when it was permissible for police to use deadly force to prevent the escape of a felon.

He turned in his pay slips at the end of each week, and after a couple weeks Wechsler called him in. Look, he said, you’re asking to be paid for 80 hours a week. I can only pay you for the hours when you’re actually working here at the law school. Kamisar told Wechsler he was putting in 15 hours a day six days a week—at the law school. Yeah, he went out for coffee or a cigarette now and then, but the work still came to at least 80 hours a week. Wechsler looked at him a minute and said okay. Kamisar went back to the stacks.

Finally Kamisar turned in his research. It was 30 pages of text and 60 pages of footnotes.

Four hours later, Wechsler called him back into the office.

“I like it,” he said.

That was it—“I like it.” But the next summer, an old classmate of Wechsler’s offered Kamisar a summer clerkship at Covington and Burling in Washington, D.C., one of the most important law firms in the U.S. Again, he took it.

At the end of his last year in law school, Covington and Burling offered him a position as an associate in the firm, the first step toward a partnership. But, of course, they said, he’d want to take it easy for a few weeks after graduation. Come down later in the summer, they said. We’ll see you then.

He had eight dollars. Total. He said if they didn’t mind, he’d start right away.

* * *

He liked it at Covington and Burling. He worked mostly on corporate antitrust cases. It was complicated, interesting work that taught him a lot. But he worried about job security. Making partner had a lot to do with who your boss was. You’re an associate for eight years, ten years, and what if your boss is out of favor the year you come up for partner? And he was working in obscurity. He might bust his hump on a case and his name wouldn’t even be on the brief. How would anyone know how much he had done, how much he knew?

And there was never enough time to research a problem thoroughly and think it all the way through. Like the time he argued an appeal for a convicted drug user.

Big law firms often donate their lawyers’ services to needy clients *pro bono*—“for the public good,” free of charge. That’s how Kamisar got this case.

Here’s what happened. The junkie got arrested because the cops thought he was selling heroin, though they hadn’t found any drugs on him. After the arrest, in the police station, the junkie pulled a cigarette pack out of his pocket and tossed it aside on the floor. A cop saw him do it, picked up the pack and found heroin packets inside. *Hey, what’s this?* So the junkie said, in effect: *That’s it, you got me*—in other words, he confessed.

Kamisar got all these details and said hey, at the time of the arrest, the cops hadn’t found the evidence yet. That meant the arrest was illegal, because you can’t arrest somebody without sufficient evidence of a crime. And any evidence the cops found *after* an illegal arrest was “tainted”—inadmissible in court.

But what about the guy saying: *You got me*? That’s an incriminating statement.

So Kamisar had to find out what the law said about that: Could
the prosecutor use a self-incriminating statement that was made after an illegal arrest? He scrambled in the law library for a few hours and found out the precedents were against him. It turned out that confessions made after illegal arrests had been admitted before.

But the whole thing seemed so unfair to him. His client could barely read. The written confession the cops had taken from him looked like it had been scrawled by a second-grader. It made Kamisar so mad he got choked up.

So he made his argument anyway. If physical evidence gathered after an illegal arrested was tainted, he asked, why should an incriminating statement made after an illegal arrest be any different?

And sure enough, the prosecutors missed the precedents Kamisar had found, the junkie was let off, and that was that. Ring one bell for the Fourth Amendment’s guarantee against unreasonable searches and seizures. Maybe the junkie had meant to sell the heroin, maybe not. But the Constitution protects everybody against a government that ignores the due process of law. So if you like your own right to due process, you stand up for a drug user’s right to due process, too. At least that’s how civil libertarians see it, and that was how Kamisar saw it.

Still, Kamisar knew that as a matter of law, the inconsistency between the tainted evidence and the tainted confession still stood. It didn’t make sense. But what could he do about it? It would take months of research to argue his case as a general principle, and no working lawyer has time for that. He’d done his little pro bono stint and now he had to get back to work on regular cases.

But it bothered him. He’d sure love to have the time to run a thing like that to the ground.

Then one day he got a letter from a law school friend, Michael Sovern. Straight out of law school, Sovern had taken a job teaching law at the University of Minnesota. And just a couple years later here was Sovern sending Kamisar a copy of his first article in a law review. Sovern was getting to be an expert in something, and credited accordingly. Kamisar liked that idea—to know more about something important than anybody else.

Sovern said Kamisar should think about coming out to Minnesota. There was an opening on the law faculty. He applied for the job, and got it.
Teaching and writing, that was the job now. He went to Minnesota hoping to teach antitrust. But no, that was taken. Criminal law? Okay, he’d worked for Wechsler, he could teach criminal law.

Writing….what should he write about? An editor of the Minnesota Law Review said, hey, you’re teaching criminal law, here’s a book on criminal law to review. You just need to write a few pages; it’s a good way to break into publishing. He started to work on it and pretty soon it wasn’t a book review, it was a 70-page article, his first.

Then the dean asked him to help with a casebook on constitutional law. He wrote the chapters on criminal procedure—all about due process and the rights of the accused. It was police station law, nothing like corporate antitrust issues or the First Amendment. Nobody even taught a whole course in criminal procedure back then, not at the big law schools.

But it was interesting.

He remembered the junkie in Washington and the tainted confession. Now he had the time to look into the thing. That was what he was supposed to be doing—taking a problem apart, reading everything about it, thinking it all the way through and then telling people what it added up to.

After seven months of work he had an article: “Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure.” He argued that it made no sense to exclude tainted physical evidence but to allow a self-incriminating statement that was similarly tainted.

The article was published in 1961. Two years later, the Supreme Court handed down its decision in a case called Wong Sun v. United States. It dealt with a confession made after an illegal arrest. The Court said a tainted confession had to be tossed out. The opinion was written by Justice William Brennan, who noted that “verbal evidence which derives…from… an unauthorized arrest… is no less the ‘fruit’ of official illegality than the more common tangible fruits of [an] unwarranted intrusion.”

That was complicated language for the exact point Kamisar had grasped when he made his case for the drug user in Washington.

Justice Brennan’s passage had a footnote. It read: “See Kamisar, “Illegal Searches or Seizures and Contemporaneous Incriminating Statements…”

That meant that with one article in a law review, Kamisar had helped to change constitutional law.

The same thing happened with another article on the so-called exclusionary rule, the rule that says prosecutors can’t use evidence gathered in an illegal search.

Then another, this one having to do with whether a defendant with no money had a right to a court-appointed lawyer. Kamisar was doing research on this just as the Supreme Court was about to hear a case on the matter—a very big case.

The defendant in this case was one Clarence Earl Gideon, early 40s, a penniless drifter with a long record of petty crime. In 1961, in Panama City, Fla., Florida, a pool hall had been burglarized. A witness said he’d seen Clarence Gideon walk out of the pool hall just after the burglary had supposedly happened. The police arrested Gideon.

In front of a judge, Gideon said he was innocent. He also said he couldn’t afford a lawyer and he wanted the court to appoint one—the Constitution said he was entitled to it. The judge said no, not according to the Supreme Court, which had ruled in 1942 that a state had to appoint an attorney for an indigent defendant only in “special circumstances,” like if the defendant was mentally handicapped.

So, using prison stationery, Gideon hand-wrote a petition to the U.S. Supreme Court. And the justices agreed to consider it.

While Gideon’s case was pending, Kamisar was putting together a bulldozer-like piece of research—77 pages with 368 footnotes, to be published in the University of Chicago Law Review. He had amassed evidence to show a sweeping movement among the states to appoint lawyers for poor defendants. And he demolished the notion that defendants who argued their own cases—many of them not just ill-prepared but illiterate—could get a fair trial.

The article was still in typescript when Kamisar air-mailed it to Gideon’s newly appointed attorney in the Supreme Court, the Washington superstar Abe Fortas, soon to be named to the Supreme Court himself. Kamisar was cited by name in the oral arguments, and when the Court handed down its decision—9-0 in Gideon’s favor—Kamisar’s article was cited on the first page of the opinion. Gideon, in a second trial, was acquitted, and Gideon v. Wainwright spawned the whole modern system of public defenders. (When Henry Fonda later played Gideon in the movie Gideon’s Trumpet, “Professor Kamisar” even got a mention in the dialogue.)

Somebody told Kamisar the chief justice of Minnesota was saying they’d better pay attention to this young guy at the law school. It looked like he had a private line to the U.S. Supreme Court.
Other law schools came sniffing around—University of Chicago, University of Pennsylvania, Stanford. They asked him to come and teach for a semester or two. He said he wasn’t interested.

Then Harvard called. Would he like to teach there next year as a visiting professor?

Kamisar knew it was their way of looking him over for a permanent offer. But again he said no, sorry, he couldn’t do it—too many obligations at Minnesota.

A friend said: Well, you can forget about Harvard now. They don’t call a second time.

He did accept an invitation to teach summer school at the University of Michigan Law School. Then Harvard called a second time, after all. How about the year after next, they asked—would he be free then? He said he would.

But in Ann Arbor, Allan Smith, Dean of the Michigan Law School, acted fast. He offered Kamisar a job—not as a visiting professor, as Harvard had, but as a permanent professor with tenure.

Smith played it tough. If Kamisar didn’t want the job, Smith said he had to offer it to someone else, and he couldn’t wait long. He gave Kamisar two weeks to think about it. Smith knew Harvard was flirting with Kamisar, he said, but he wasn’t in the business of accommodating other law schools.

Dean Smith said later he had known exactly the game he was playing. Kamisar would see it as a case of Michigan in the hand versus Harvard in the bush. Smith bet he would take the bird in the hand, and he won the bet. Kamisar kept his promise to teach as a visitor at Harvard in 1964-65. Then he moved his family to Ann Arbor. Nearly 50 years later, he would still be there.

In criminal procedure, every part of the process touches every other, and in 1963 and 1964, Kamisar was moving from search and seizure and the right to counsel to the law of confessions. He did some research and published a couple articles. Then, during his year as a visiting professor at Harvard, a professor at Virginia called and said they were planning a conference to celebrate the 750th anniversary of the Magna Carta. Would Kamisar like to give a paper on confessions?

He decided to write a summary of his ideas, but with a harder edge than he had used in his scholarly articles.

What bothered him was the big difference between what happened in a courtroom, where there were lots of rules to protect a defendant’s rights, and what happened to arrestees in the average police station, where detectives routinely manipulated confessions out of unwitting, lawyer-less prisoners. The Constitution was supposed to apply in both places. But in terms of justice, he thought to himself, they were as different as a penthouse and an outhouse. Not a bad title, he thought.

He showed a draft to one of the old pros at Harvard and asked him what he thought. Good work, the scholar said, but the analogy about penthouses and outhouses wasn’t quite right. Call it: “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure.”

Kamisar didn’t even know what a gate house was. He looked it up and realized the prof was right. It was a better analogy, and he used it.

The words of the article smoldered with the indignation of a kid who had been pushed around by bullies in uniform. He had always hated the ponderous prose of the law reviews. He wrote now like a tough, sarcastic sportswriter.

The courtroom is a splendid place where defense attorneys below 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… ‘game’ to be stalked and cornered. Here ideals are checked at the door, ‘realities’ faced, and the prestige of law enforcement is vindicated. Once he leaves the ‘gatehouse’ and enters the ‘mansion’—if he ever gets there—the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.

If anyone doubted this account of the difference between a suspect’s treatment in the police station and his treatment in court, Kamisar had proof. Remember, he had dug up those old manuals for police detectives, the ones that spelled out how to soften up, cajole and trick a suspect in custody into incriminating himself—with no one to tell him he had the right to a lawyer or the right to keep his mouth entirely shut. The flouting of the right to due process was right there in those manuals, he argued. And most prosecutors and local judges were too close to the police, he said, too preoccupied with crime and guilt to remember the Bill of Rights and why it existed. Somebody outside that tight circle had to make some new rules, and only the Supreme Court could do it.
CHAPTER 5

“Some Lie I Want to Expose”

In 1966, the Supreme Court handed down its decision in *Miranda v. Arizona*, the case of an accused rapist who had confessed to police without being told of his rights to counsel and against self-incrimination. The Court said that from now on, no suspect could be taken into custody and interrogated until the police had told him he had the right to a lawyer and that he had no legal obligation to tell the police anything at all. In other words, the Court said cops have to tell suspects they’re protected by the Fifth Amendment’s guarantee against self-incrimination and the Sixth Amendment’s guarantee of the right to counsel.

In the majority opinion, Chief Justice Earl Warren cited Kamisar’s “Equal Justice in the Gatehouses and the Mansions” and wrote at length about the interrogation techniques prescribed in the police manuals.

The “Miranda warnings” became law. It was the crowning act in the Warren Court’s revolution in criminal justice. When legal scholars spotted four footnotes to “Gatehouses” in the Court’s majority opinion, said *Time* magazine, “they could well infer the impact of a zesty, gabby, witty Michigan law professor named Yale Kamisar. At 37, Kamisar has already produced a torrent of speech and endless writings that easily make him the most overpowering criminal-law scholar in the U.S.”

In the law schools he was soon called the “Father of Miranda.” Half a century later he is still known by that name, and legal scholars are still debating the arguments he first made in “Gatehouses and Mansions.” Rereading the article long after its publication, former U-M Dean Francis Allen remarked: “The power of Yale’s irony and outrage can be felt even after forty years.”

* * *

*Miranda* became one of the most vilified decisions in Supreme Court history. It would handcuff the police, critics said. Criminals would run wild.

Kamisar set his feet on a long road. He would defend the Court’s ruling on *Miranda* for 40 years.

A couple years earlier he had published a paperback casebook in criminal procedure—a set of materials for law students. Its sales were modest, since the law schools generally didn’t teach stand-alone courses in that field. Once *Miranda* was handed down, the field went nuts. Every law school started offering courses in criminal procedure, and the casebook sold by the thousand, then more than ten thousand per year for many years.

Articles in law review articles were important. They might influence judges or even the Supreme Court. But the casebook, in a way, became even bigger, because with that, Kamisar and his co-authors, Jerold Israel of Michigan and Wayne LaFave of Illinois, were shaping a whole generation’s understanding of the field. In the end they (and new co-authors) would publish 13 editions. Later they figured out that in 45 years, something like 400,000 students used the casebook in its various editions.

He would co-author another casebook, too—*Constitutional Law: Cases, Comments and Questions.* Only 11 editions for that one.

* * *

To get anything done he needed four or five hours at a stretch. Hard to do at the office with the phone ringing, students knocking, colleagues asking you to look over a draft. He’d go home, get dinner and go back to work. He’d look up at the clock and it would be 4 or 5 in the morning and he’d be surprised. That was when he knew he was rolling. And he could still get in 20 hours on the weekend. Sometimes more.

One morning he came into the classroom and said he was sorry, he just didn’t feel prepared to teach. He had been working on an article the night before. He thought he could finish it by 2 a.m., then switch to preparing for class. But he didn’t finish the article until 4. Then he was too tired to prepare for class. He would reschedule the session, he said. Sorry, see you next time.

One of the students in the crowd was Jeffery Lehman. He later became dean of the Michigan Law School, then president of Cornell University. He always remembered Kamisar refusing to teach that day because he wasn’t ready. He could have faked it for an hour, Lehman said. Yale Kamisar? Are you kidding? He could get through an hour of class without being completely prepared. But he wouldn’t do it.

Kamisar said once he never found writing to be fun. But some irritant would be at work inside his mind, and he had to respond. *Had to.* Later he ran across a line by George Orwell—“Writing a book is a horrible, exhausting struggle, like a long bout of some painful illness. One would never undertake such a thing if one were not driven on by some demon whom one can
neither resist nor understand.” Orwell said he would start to write “because there is some lie that I want to expose” or “some fact to which I want to draw attention.” That was how it felt to Kamisar.

* * *

In class he would start like a preacher, quiet. For a few minutes he’d stay behind his lectern. Then, as the meat of the day’s material came to the fore, the pitch of his voice would start to rise and he’d be out in the aisle, advancing toward the front line of students opposing him.

A student named Eve Brensike (who later joined the U-M law faculty herself) remembered a day when Kamisar put a question about *Miranda* to an unlucky soul, one “Smith.” When Smith struggled to get an answer out, Kamisar charged down the aisle, demanding to know what the legal scholar Fred E. Inbau of Northwestern, Kamisar’s great adversary in the national debate over police interrogation, had meant by the term “unhurried interview.”

“By the time he had finished the question,” Brensike remembered, “Kamisar was leaning in so close that Smith must have felt Kamisar’s breath on his face. … Kamisar burst out the answer to his own question.

“I’ll tell you what he means! He wants to give the police free rein to interrogate! An interview suggests a certain amount of freedom. This isn’t an interview! It’s not a chat! These cops are out for blood!”

“Kamisar’s face was fiery red at this point. His hand gesticulated wildly next to his head as he continued to rant, getting louder by the minute: ‘We cannot trust the prosecutors or the police or anyone else! That is why we have the Bill of Rights!’

“He paused only long enough for the blood to start circulating to his face again. Then he leaned forward as though perched and ready for round two.

“‘Okay,’ he said. ‘Back to you.’”
Prosecutors and their friends on law faculties wanted his scalp. In op-eds and law reviews and conference speeches, they skewered him. But they respected him. Once in the ‘70s there was a big conference on criminal law at Duke University, and one of the speakers said the Warren Court’s rules to protect the accused were hurting everybody, even the crooks themselves, because of a backlash against coddling criminals.

He said: “Yale Kamisar is the enemy.”

The moderator of the panel stood up and said: “First of all, Yale Kamisar is not the enemy of anything except injustice.”

His attacks on adversaries’ arguments were “more than occasionally devastating,” Justice Ruth Bader Ginsburg once wrote, but “his commentary never extends beyond the realm of the fair.”

In the core of Kamisar’s mind there was some deep harmony between the Bill of Rights and his own experience of the world. He liked a line in a book called The Price of Liberty by a writer named Alan Barth, who said due process in criminal procedure had “two great values or objectives: the attainment of justice and the containment of power.” The special job he had taken on—or that seemed to have been assigned to him by a long pattern of circumstance—was the containment of power.

One time he was working on a criminal justice project with a legal scholar named James Vorenberg, a Harvard professor who later became dean of Harvard Law. Vorenberg was not a conservative, but when they argued, it was often Vorenberg on the side of prosecutors and police, Kamisar on the side of the accused and the criminals. Over dinner one night Vorenberg got talking. He said his family had owned a big department store in Boston, and his parents worried about kidnapping, so the police would come around to check on suspicious characters in the neighborhood and make sure the family was all right. Kamisar’s memories were different. He thought about stickball and running when you saw a cop. And the difference was so obvious, he realized. Vorenberg saw the police as his friends, the good guys, the protectors. And Kamisar didn’t. The ordinary man in all his weakness and folly was not to be abandoned to the arbitrary exercise of power. The state wasn’t supposed to hold all the cards.

“He believes it is self-evident,” his colleague Francis Allen wrote, “that any nation aspiring to be a free society must provide limitations, clearly stated and conscientiously applied, to guide and limit the government’s penal powers.”

His very first article had dealt with euthanasia—“mercy killing”—and in the ‘90s, with Jack Kevorkian all over the news, Kamisar came back to the issue, and he startled all his old liberal allies.

He came out against assisted suicide—said it was a classic slippery slope.

And he plunged into a vast new scholarly enterprise far afield from his work on criminal procedure. Now he was no longer the avenging liberal, the favorite villain of the right. On the hot issue of assisted suicide, he became a powerful ally of conservatives.


At the same time, Miranda and the exclusionary rule were under siege, and he fought for them, year after year.


In the late 1990s, the Supreme Court considered overturning Miranda. It was preparing to rule on the constitutionality of an old federal statute, enacted in 1968. The statute had been the work of conservative Southern senators striking back at the liberal Warren Court. Part of the statute supposedly “overruled” Miranda. It said confessions could be admitted into evidence even if defendants hadn’t been “Mirandized.” That part of the statute was reversed. But now, in a case called Dickerson v. United States, the conservative Rehnquist Court was reconsidering it.

Kamisar went back to the Congressional Record to unearth examples of the scorn heaped on the Supreme Court by Southern reactionaries like Sen. Sam Ervin and Sen. John McClellan. His article wasn’t cited, but the conservative Rehnquist court, ruling on Dickerson in 2000, upheld Miranda.

It was another victory, if an unsung one, possibly his most important. Quoting his old friend, Dean Francis Allen, he noted that there could be “no final victory” in the effort to safeguard due process and individual liberty. “Without further struggle, it withers and dies.”
He would think about his mother. She outlived her husband by 20 years. Not an easy woman. He knew that. Most people couldn’t say they’d always done their best. Not him. Not since that day with the report card.

“I learned that the hard way,” he said once. “People don’t do the best they can, and I think that’s important. I can honestly say that I look at something I did and I can say, ‘That’s the best I could do.’ Sometimes I say it’s better than the best I can do. I reread something I wrote 20 years ago and say, ‘Gee, how did I do that?’ That’s the amazing thing. You work on something so long that if you’re doing it right, it looks like you just wrote it in one afternoon instead of seven months… You forget how painful it was.”

* * *

His official retirement was in 2004. His colleagues wrote tributes. His foes wrote tributes. Students who had become public defenders, professors, deans, university presidents wrote tributes. Francis Allen, the professor who had written Kamisar a fan letter for his first article on criminal procedure, dean at Michigan in the late ‘60s, pronounced Kamisar the “warrior scholar” of his generation.

At the retirement dinner, his colleague and old friend Ted St. Antoine, dean of the Law School from 1971 to 1978, stood up. There was no point in envying Kamisar for the work he had done and the impact he had made on the country, St. Antoine said. It would be like envying a hurricane for its power.

You might think Kamisar had been wrong his whole career, that he’d protected the criminals at the expense of the law-abiding, or that he’d hurt the cause of assisted suicide. But you couldn’t say he’d done something less than his best. You couldn’t say he had done less than a learned scholar could do in the service of what he believed.

He once quoted another scholar who said the law schools must steer toward an “indefinable fundamental”—the necessity of “confronting the most explosive problems with which law may deal, facing all the facts and plumbing all the issues to their full depth without fear or prejudice.” Each teacher of law, he said, “should joyfully accept with [Oliver Wendell] 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.’”

That was what the public was supposed to get for its money.

* * *

For several years after retiring, he split his time between Michigan and California, where he took a post at the University of San Diego School of Law. In 2011 he retired from San Diego and came back to live in Ann Arbor year-round.

Every day he goes to his office high up in the stacks of the Legal Research Building. He works on new articles and speeches and the annual supplements to Modern Criminal Procedure. The desk where his papers are spread now is not far from his first office, the one where he opened the window in the middle of the night to shoo along a few rowdy law students. Now, generally, he goes home in time for dinner, and he gets to bed by 10 or 11.

– James Tobin

Sources:

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