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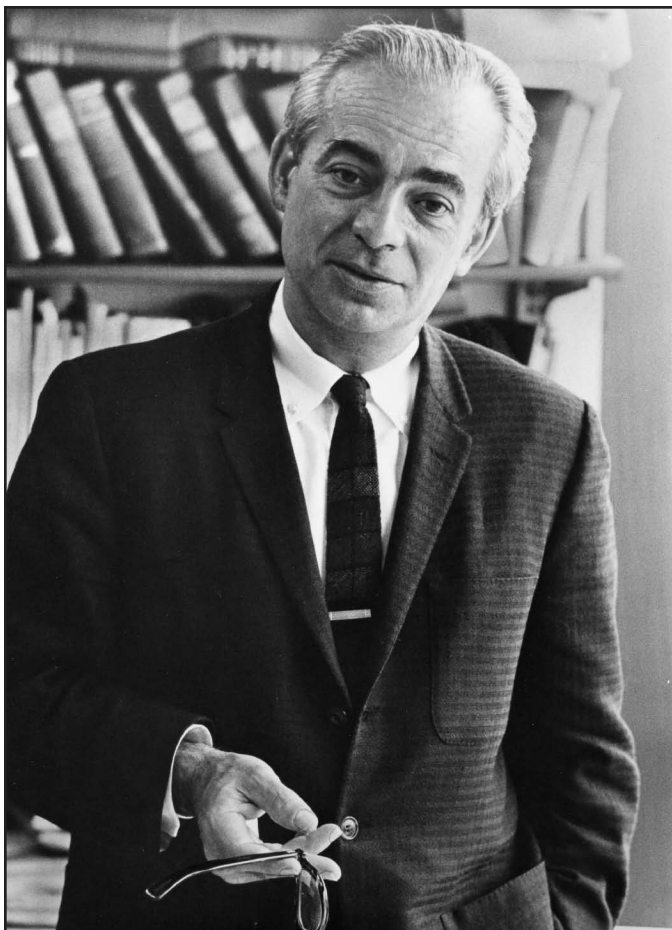
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Harry Kalven, Jr.

Legends of the Legal Academy

Harry Kalven, Jr.

Vincent Blasi

The first week of law school is for most students an intimidating experience. Everyone is so *serious*. My first week was leavened considerably by Harry Kalven. A group of students and Kalven were watching the seventh game of the 1964 World Series in the student lounge of the University of Chicago Law School. The broadcast was interrupted by a news bulletin: Nikita Khrushchev had just been deposed. Viewers were treated to several minutes of political and diplomatic analysis, with correspondents around the globe speculating on what this might mean for East-West relations. One of my classmates, an amateur Kremlinologist no doubt, expressed surprise: “I can’t understand why they would do this now.” Kalven agreed: “Yeah, in the seventh inning.”

Though well liked and greatly respected, Harry Kalven was not the most popular teacher in the law school during my time as a student. Some classmates thought his classes moved too slowly, that he belabored and repeated points. Everyone warmed to his wit, his imagination, and his generous spirit, but not everyone found in Kalven’s classes the crackling intellectual tension, the rigor, the sense of analytic closure that some other teachers provided. By any measure Kalven was a good, effective teacher. But was he a great one?

For me, he was more than a great teacher. He was a unique force in my education. He remains a continuing force. Other former students—practicing lawyers, law teachers, law school graduates who have made careers outside of law—tell me the same thing. His ideas stick in the mind; his personal example continues to lead. His teaching has stood the test. He seems an even better teacher now than he did at the time.

All the more remarkable is Kalven’s staying power when one considers that he was quintessentially a man of his times, an observer, a writer and teacher who was at his best when responding. He wrote mostly about recent cases and issues of current public controversy. His thought seemed always in progress, constantly on the lookout for more facts and better formulations. Kalven was interested in theories and produced a number of theoretical insights, but neither in the classroom nor in his writings did he offer anything like a systematic, well-elaborated personal perspective. He was the most creative legal thinker I have known, but his scholarship was patently, proudly, derivative. He was not,

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and did not try to be, a definitive thinker. Nor was he a forceful personality. He was the antithesis of a self-promoter. And yet he left his mark on his field and on his students in a way that few professors ever do.

The word that best describes Harry Kalven is “inquisitive.” To him learning was a joyous, almost playful activity—not a chore, not a source of power or distinction, more an experience than a quest. His inquisitive mind observed no boundaries; he never became a prisoner of his own expertise. His work as a scholar was unforced.

Kalven’s love of exploration is one reason, I think, why his closest professional companions were other teachers at heart, most notably Walter Blum, Charles Gregory, and Alexander Meiklejohn. What other lifelong liberal could have written the book Kalven co-authored with Blum, *The Uneasy Case for Progressive Taxation*?¹ It says much about their character that two colleagues with such divergent political convictions could have collaborated so successfully on an inquiry that touches a major nerve of the liberal-conservative divide. That Blum and Kalven were able to bridge their differences and jointly advance a bold critique on a sensitive subject probably traces to the fact that, for all their scholarly accomplishments, these virtuosos of the classroom were first and foremost teachers. The book’s insouciant, unscripted analysis suggests that both authors brought to the project a pedagogic agenda: to learn, to test, to provoke, to embarrass dogma.

In Kalven’s work with Gregory, the creative synergy that spawned a remarkably user-friendly yet insidiously demanding torts casebook² was enriched by a shared sense of humor. Gregory’s account of a Kalven prank well captures the fun they had as torts teachers:

Harry visited me in Charlottesville when I was recovering from an illness. Our lawn needed cutting badly, and Harry volunteered. He got the power mower going (*mirabile dictum*) and went at it industriously, for we had a big lawn. After some time I looked out from an upstairs window and saw that right in the middle of the lawn Harry had cut, in huge letters, the word “CARDOZO.” How could I help adoring a guy who would do that to make me feel better?³

Kalven always considered himself a student of Meiklejohn, though he never took a course from the legendary teacher and philosopher of education. The special quality of their relationship comes across in remarks each made about the other. Meiklejohn introduced his most important law review article by explaining:

1. Published initially as a law review article. See Walter Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417 (1952) reprinted as University of Chicago Law School Reprint and Pamphlet Series No. 11.
2. Charles O. Gregory & Harry Kalven, Jr., *Cases and Materials on Torts* (1st ed. Little, Brown 1959).
3. Charles O. Gregory, *Harry Kalven: Scholar and Friend*, 43 U. Chi. L. Rev. 8 (1975).

The writing of this paper is largely due to the friendly insistence of Professor Harry Kalven, Jr. of the Law School of the University of Chicago. He and I have had, in recent years, a continuing exchange of ideas. Professor Kalven tells me that he is not sure that my interpretation of the First Amendment can stand the test of lawyer-like application to the many specific situations which the courts must handle.⁴

In turn, Kalven ended *his* most important law review article, asserting the historic importance of *New York Times v. Sullivan*, by reporting that he had discussed the case with the 92-year-old Meiklejohn shortly after it was decided:

It is perhaps a fitting postscript to say that I had occasion this summer to discuss the *Times* case with Mr. Meiklejohn. Before I had disclosed my own views, I asked him for his judgment of the *Times* case. "It is," he said, "an occasion for dancing in the streets." As always, I am inclined to think he is right.⁵

In his memorial tribute to Meiklejohn, Kalven emphasized his mentor's gift for making learning enjoyable:

I have always suspected that Socrates, however wise and admirable, would have made a trying and difficult companion. "Alec" was a Socrates who wore well, a Socrates it was fun to be with, a Socrates for all seasons.⁶

Not only Kalven's collaborators but also his intellectual adversaries appreciated the love of give and take that he brought to his work. Here is Guido Calabresi (another born teacher) describing what it was like to begin his career by matching wits with Kalven:

In 1960 I walked into an office at The University of Chicago Law School. There I found Walter Blum and Harry Kalven. They had just read a draft of what was to become my first article. Harry greeted me with: "it's all wrong . . . but I wish I had written an article like that when I was your age!" This began the debate. Blum and Kalven delivered the Shulman Lectures at Yale, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*. I struck

4. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 246 n.4.
5. Harry Kalven, Jr., *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 *Sup. Ct. Rev.* 191, 221 n.225 [hereinafter Kalven, Jr., *The New York Times Case*].
6. Adam R. Nelson, *Education and Democracy: The Meaning of Alexander Meiklejohn, 1872-1964* 330 (Univ. of Wis. Press, 2001).

back in *Fault, Accidents, and the Wonderful World of Blum and Kalven*; but they had the last laugh in *The Empty Cabinet of Dr. Calabresi*. I believe that the law of torts benefitted from that hard fought polemic. I know that I, as a young scholar, could not have had a tougher, or more loving, initiation to scholarship.⁷

Kalven wrote and taught on a diverse range of legal subjects. His first major scholarly achievement was in the field of civil procedure, a 1941 article that was ahead of its time in appreciating the potential significance of the class action lawsuit.⁸ In addition to their book on progressive taxation and their running debate with Calabresi, Blum and Kalven produced critiques of many of the modern “no-fault” reform proposals for compensating victims of automobile accidents.⁹ Kalven published articles on a number of other tort topics,¹⁰ even as the casebook he co-edited with Charles Gregory remained the preferred forum for presenting his ideas about torts. With Hans Zeisel and others he conducted an ambitious empirical study of jury behavior.¹¹ A valuable by-product of the jury study was a series of reflections by Kalven on the use of social science methods in the study of legal problems and institutions.¹² Toward the end of his life, he taught a seminar on slavery. He was never superficial and he was frequently penetrating. But he liked to move on, to explore fresh terrain.

One legal subject, however, engaged him more completely and more continuously than any other. Harry Kalven never tired of thinking about the freedom of speech and he never ran out of fresh, important things to say about the subject. Thirty-seven years after his death, in some cases more than fifty years after initial publication, his writings on obscenity,¹³ legislative

7. Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69 (1975).
8. Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941).
9. See Walter Blum & Harry Kalven, Jr., Ceilings, Cost, and Compulsions in Auto Compensation Legislation, 1973 Utah L. Rev. 341 (1973); Walter Blum & Harry Kalven, Jr., A Stopgap Plan for Compensating Auto Accident Victims, 1968 Ins. L. J. 661 (1968); Harry Kalven, Jr., A Schema of Alternatives to the Present Auto Accident Tort System, 1 Conn. L. Rev. 33 (1968).
10. See, e.g., Harry Kalven, Jr., Comparative v. Contributory Negligence: Should the Court or the Legislature Decide?, in Symposium on Maki v. Frelk, 21 Vand. L. Rev. 897 (1968); Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Probs. 326 (1966); Harry Kalven, Jr., Torts: The Quest for Appropriate Standards, 53 Calif. L. Rev. 189 (1965); Harry Kalven, Jr., Mr. Justice Holmes: Some Modern Views—Torts, 31 U. Chi. L. Rev. 263 (1964); Harry Kalven, Jr., Strict Liability, 9 Loy. L. Rev. 31 (1958); Harry Kalven, Jr., The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158 (1958).
11. See Harry Kalven, Jr. & Hans Zeisel, The American Jury (Little, Brown 1966); Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, Delay in the Court (Little, Brown 1959).
12. See Harry Kalven, Jr., Toward a Science of Impartial Judicial Behavior, 42 U. Cin. L. Rev. (1973); Harry Kalven, Jr., Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania, 11 J. Legal Educ. 94 (1958).
13. Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1.

investigations into political beliefs,¹⁴ street demonstrations,¹⁵ and libel¹⁶ remain the classic texts from which almost all subsequent work takes off. Two entries on the short list of important concepts in the modern law of free speech, the “public forum” and the “heckler’s veto,” were first identified (and memorably named) in Kalven writings.¹⁷ His article on *New York Times v. Sullivan* greatly shaped the way that case has been understood ever since. Kalven transformed the *Times* precedent into much more than a holding about libel law simply by spotlighting and celebrating three features of Justice Brennan’s majority opinion: its analogizing of a libel suit by a public official to the infamous criminal prosecutions under the Sedition Act of 1798,¹⁸ its assertion that the First Amendment has a “central meaning,”¹⁹ and its discovery of “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²⁰

It is a fitting tribute to the devotion Kalven could inspire that his major book on the First Amendment, *A Worthy Tradition*, left unfinished at his death in 1974, was painstakingly and perceptively brought to completion by his son Jamie. This editing project, assisted by Kalven’s former colleague Owen Fiss, extended over fourteen years. Jamie, like his father a gifted writer but as a journalist rather than a lawyer or scholar, achieved an expert’s command of the intricate law of the First Amendment, consulted student notes from his father’s classes (a nationwide call for old notebooks went out), then tested and sharpened his editorial judgments in several workshops before major law faculties. Astonishingly, the book suffers hardly at all from the circumstances of its authorship. It is a contemporary book, one that challenges and inspires today’s students of the First Amendment.

What explains Harry Kalven’s striking capacity to live on in the minds of his students and readers? I believe he remains influential because he had an uncanny ability to engender creativity in others—in his students, in his readers, even I would guess in his collaborators. Driven by a genuine curiosity, he tried to enlist those around him in the search. To sit in a Kalven classroom was to be a participant, not an auditor. I was called on to recite only a handful

14. Harry Kalven, Jr. & Roscoe Steffen, The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black, 21 *Law in Transition* 155 (1961); Harry Kalven, Jr., Mr. Alexander Meiklejohn and the *Barenblatt* Opinion, 27 *U. Chi. L. Rev.* 315 (1960).

15. Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 *Sup. Ct. Rev.* 1.

16. Harry Kalven, Jr., The Reasonable Man and the First Amendment: *Hill, Butts, and Walker*, 1967 *Sup. Ct. Rev.* 267; Kalven, Jr., The New York Times Case, *supra* note 5.

17. See Kalven, Jr., *supra* note 15, at 10–21 (public forum); Harry Kalven, Jr., The Negro and the First Amendment 140–41 (1965) (heckler’s veto); Harry Kalven, Jr., *A Worthy Tradition* 89–91 (1988) (heckler’s veto).

18. Kalven, Jr., The New York Times Case, *supra* note 5, at 205–9.

19. *Id.* at 208.

20. *Id.* at 212; see also Harry Kalven, Jr., “Uninhibited, Robust, and Wide-Open”—A Note on Free Speech and the Warren Court, 67 *Mich. L. Rev.* 289 (1968).

of times, but in my mind I formulated hundreds of answers—and hundreds of questions as well—as I observed him conversing with other students. Similarly, reading a Kalven article or book is a participatory experience. One is constantly “revising” the analysis, adding new applications or refinements, imagining objections and responding to them. I suppose most teachers and authors seek this effect; few actually aspire to have the last word. But Kalven was extraordinary in his capacity to converse about law productively with persons far less knowledgeable and insightful than himself, and in the process raise them toward his level.

Exactly how does an inspiring teacher induce his students to probe and create on their own? Is it simply by force of personal example? Or are there techniques? Can someone not blessed with a mind so fertile as Kalven’s nonetheless have the pedagogic impact that he had? As a teacher who would love to do for my students what he did for me, I have pondered these questions for years.

Certainly one secret to Kalven’s success was his utter lack of intellectual pretense or arrogance. He wore his considerable erudition lightly. In matters of the mind he did not seek to separate himself from others. Just the reverse. He was intellectually gregarious and serendipitous. He did not believe that all ideas or traditions or minds were equal—he had high standards, deep commitments, and heroes—but he did believe that persons with no special expertise or ability pertinent to the topic at hand could contribute to his understanding, and not just to his understanding of them. In his writing and teaching he lavished attention on the reasoning of judges whose talents were modest and whose opinions he could easily have savaged. I doubt whether any modern legal scholar has been so generous as he was in discussing judicial opinions. And I do not think his intellectual generosity was a product of personal kindness, deference to authority, or an aversion to confrontation. He was generous with the thought of others because he believed he could learn best by appreciating and building upon the ideas that moved ordinary people.

In fact, Harry Kalven’s distinctive understanding of the First Amendment may be traced to his unusual respect for the thought processes not only of ordinary persons but also of persons at the margins of society. Kalven did not argue that dissenters ought to be tolerated, he argued that they ought to be heard. He fought tirelessly in the law journals against those who would require that acts of expression satisfy minimum standards of rationality and civility in order to qualify for First Amendment protection. He believed that the freedom of speech belongs to the inarticulate and the angry as well as to the loyal and respectful opposition. His writings abound with sympathetic translations distilling messages of social and cultural protest from expressive endeavors that others would dismiss as self-indulgent or coercive rantings. He did not think that “crackpots” and “subversives” and “extremists” deserve First Amendment protection because they are harmless. He thought they deserve protection because they have something to say that ought to be heard

in a democratic society. Kalven's passion for free speech was a product of his curiosity and his humility, not any sense of *noblesse oblige*.

Strong proponents of free speech are often somewhat disengaged from the struggles of their time, or sympathetic to the messages the dominant forces seek to suppress, or so rigid in their embrace of principle that they become more or less heedless of consequences. Kalven was none of the above. He wanted to hear the voices of protesters, even the voices of fanatics, precisely because he was an engaged, moderate, perceptive, and practical participant in the controversies of his day. He thought that vigorous, fundamental challenge contributes to understanding and effective adaptation.

He conducted his classroom in accordance with this belief. I have never seen a teacher work so hard to elicit the "counter-argument" to whatever idea he was proposing. He wanted the counter-arguments stated persuasively and developed with imagination and respect. Seldom have I heard the arguments for censorship presented so well as they were in his class.

His unfeigned interest in uncongenial ideas, his openness to challenge at the most elementary level, proved to be a pedagogic boon. Because he brought to the classroom a desire to learn as well as teach, he could introduce a subject more sincerely, and more energetically, than any teacher I have known. One classmate said of his teaching: "He begins each hour doing algebra and ends each hour doing calculus." The key point here, however, is that he found the algebra fascinating.

Unlike most legal scholars who have reshaped their fields, Kalven employed the individual case as the essential unit of his creative thought. Probably the finest article written about his contributions to First Amendment scholarship, by Kenneth Karst, is aptly entitled "An Appreciative Comment on the Advantages of Thinking Small."²¹ In his famous article on *New York Times v. Sullivan*, Kalven writes as a "torts teacher" grappling with "the dizzying consequence" of a landmark Supreme Court case "transmuting a part of his domain—one that he traditionally does not reach until the last day of the semester—into constitutional law, the Valhalla of the law school curriculum."²² He told our class that the First Amendment will never lack for brilliant philosophers, that what it will always need most is courageous, well-trained lawyers. He greatly admired the legal foot soldiers who devise and defend the procedures, presumptions, and burdens of proof that turn noble ideals into potent operational constraints.

21. Kenneth L. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 *UCLA L. Rev.* 1 (1965).

22. Kalven, Jr., *The New York Times Case*, *supra* note 5, at 192.

I took detailed notes in his torts class and uncharacteristically managed not to lose the notebook. Twenty years later I found myself teaching torts. On rereading the notes a few years after I started teaching the subject, I was struck by how simple and straightforward were Kalven's initial questions for each class period. My teaching of the subject had been more elliptical. I had truncated the introductions and jumped quickly to the hard questions and elaborate theories. One year I attempted to do it Kalven's way. I started each hour with simple, basic questions, sometimes taken straight from his notes. It didn't work. In my hands the technique was artificial. I learned that I can only teach spontaneously by moving as quickly as possible to the levels of analysis that most excite me. To my students' detriment, I did not have the patience, the fascination with basic formulations, or the curiosity about the legal culture that he possessed. The experience made me realize that Kalven's ability to think freshly—and excitedly—about some of the most familiar features of the legal landscape was one of his greatest attributes, both as a teacher and a scholar. His calculus was so sophisticated, so subtle, so original in large part because he loved his algebra so much.

One expression of his fascination with basics was his penchant for schematic exposition. A Kalven blackboard was certain to be covered with diagrams, matrices, even hand-drawn maps and pictures illustrating how an accident occurred. The practice was contagious. It became a game among my classmates to concoct new, ever more elaborate matrices, sometimes to the point of silliness. But he had the last laugh. In our lighthearted efforts to caricature Kalven's teaching style we wound up noticing relationships and making connections on our own. I had assumed that his ability to induce us to think originally through graphic emulation was an unintended by-product of his schematizing impulse. But when he sent me off to begin my own teaching career, his parting advice was: "Use visual aids." From this conversation I learned that he was, after all, a self-aware and calculating pedagogue. He employed visual aids to challenge students, not to comfort them. He simplified in order to investigate complexities and he wanted his students to do the same.

This commerce between the simple and the complex, between the beginning student and the scholar at the forefront of his specialty, was central to Harry Kalven's view of knowledge and the process of discovery. He allocated his time accordingly. One day he appeared in our First Amendment class seeming exasperated and exhausted: "Don't ever," he said "try to teach proximate cause and obscenity in the same week." An accident of scheduling had caused him to be covering the most philosophically challenging and doctrinally confusing topic in the torts course at the same time he was tackling perhaps the most perplexing segment of the First Amendment course. But he had been teaching those subjects and writing renowned articles on them for years. The comment revealed how hard he prepared for class each time he taught a subject, not just by considering strategies of presentation but by rethinking his views on the merits seriously enough to be tired and frustrated and confused. He may have spent his time this way out of a sense of responsibility to his students,

but I think more was involved. I am convinced that to an unusual degree his writing grew out of his teaching, that he knew of no better way to grapple with a subject than to think about it with a group of students—and to do so without holding back.

People often behave in a manner that reflects the expectations others have of them. Kalven treated his students as fellow explorers. His classes were open-ended conversations. That is why some students found the class sessions insufficiently structured, the points that emerged insufficiently conclusive. But open-ended conversations have a way of continuing. And students who are treated like original thinkers tend to keep thinking for themselves. And so, Harry Kalven's teaching endures.