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Harry Kalven, the Proust of the First Amendment

Lee C. Bollinger
Columbia Law School

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A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA. By *Harry Kalven, Jr.* (edited by Jamie Kalven). New York: Harper & Row. 1988. Pp. xxxii, 698. $35.

Reading *A Worthy Tradition* makes one nostalgic. For the generation of scholars who cut their first amendment teeth on Harry Kalven's articles, this book offers the experience of a recaptured past. The question is, however, does it offer anything more?

I

All the marks of Kalven's irresistible style of scholarship are here. The discussion is about cases, and really only Supreme Court cases. The opinions are described in careful, even loving, detail, sometimes accompanied by long quotations, but always evidencing Kalven's remarkable capacity for synthesis of argument. His approach is documentary: the focus is literally on the building of a tradition, of a jurisprudence, through Supreme Court decisions. Kalven clearly has a romance with the Warren Court, but that is because he adores the spirit that animates the conflicts between the Justices of that Court, not because it was the Court of Justice Black, whom Kalven seems to admire above all others. His enthusiasm for detailed case analysis seems to diminish noticeably as the Burger Court emerges.

Kalven's approach is also distinctly non-interdisciplinary. Nowhere is the legal analysis disturbed by references or even citations to the insights of philosophers, social scientists, or political theorists (with the one exception of John Stuart Mill); and the reader most assuredly is never asked to do business with those traders of complex thought such as structuralism, deconstruction, or contemporary continental philosophy.

In general, the book seems to deliberately shy away from large issues of social organization. Kalven is self-effacing and modest before the big questions. At the very beginning of the book, for example, he describes the elements of the "broad consensus on the kinds of messages the government should leave alone" (p. 6), and he observes approvingly that heresy and blasphemy are clearly outside the realm of law to regulate. He then wonders: "Perhaps we would all be hap-

* Dean and Professor of Law, University of Michigan Law School. — Ed.

pier in a society with more religion and less free speech." But he quickly closes the discussion by disclaiming, "That is an issue I am not equipped to argue" (p. 7).

On the other hand, the book is not wholly devoid of grand ideas; but they emerge in the essential intellectual vision through which the free speech tradition is fashioned. The ideas are now familiar and relatively straightforward. Freedom of speech is fundamental to democratic self-government. At the core of free speech, therefore, as *New York Times Co. v. Sullivan*[1] profoundly recognized, is the idea that sedition is a constitutionally untenable category of speech. The scope of free speech protection radiates outward from that understanding: The state is not to be trusted. While some weighty state interests require recognition of limits on free speech, the Court's task is to keep those to a minimum, and to follow a general policy of overprotection of speech. That policy flows from a belief that the harms of protected "bad" speech are far less than the harms of losing "good" speech when official regulation cuts too close to the first amendment bone.

With this simple vision, Kalven approaches case after case, ever-interested in its detail and in its proper resolution. Small is indeed beautiful in Kalven's world, significance resides in the particular. Cases that seem unimportant are invested with high meaning. Thus, *Cohen v. California*[2] is a "nominally trivial and faintly embarrassing controversy," but Justice Harlan's opinion for the Court "exemplifies the best of the judicial tradition as to the First Amendment" (p. 15). Venturing inside the Justices' decisionmaking process yields for Kalven insights about that process not obtained by lesser scholars. Initially, he complains of the Justices' many methods of avoiding important issues: "[C]onstitutional principles would be more firmly perceived by the legal community, and the public generally," Kalven chides, "if the justices would be a little less clever and statesmanlike, and would agree to confront and decide important constitutional points which are fully upon them and on which there is no disagreement among them" (p. 12). Yet Kalven clearly enjoys knowing the law from the inside. Of obscenity's definition that it be "utterly without redeeming social importance," Kalven is confident that it "evidences not a preoccupation with ridding society of the worthless in speech but rather a shrewd tactic for limiting the regulation of the obscene" (p. 19). This serves also as "evidence . . . that the Court is a political institution with its own strategies in a practical world" (p. 19). Or, of Justice Jackson's dissent in *Kunz v. New York*,[3] which Kalven sees as missing the real point of the majority decision, Kalven suggests that Jackson's elegant but ultimately beside the point dis-

1. 376 U.S. 254 (1964).
2. 403 U.S. 15 (1971).
3. 340 U.S. 290 (1951).

course may have resulted from "a tension that developed during the judicial conference on the case. . . ." (p. 87).

In this painstaking elaboration of the cases, Kalven's beautiful and clever phrasing surfaces just often enough to forestall monotony and to excite renewed interest. Here are a few samples:

"It is a paradox of modern life that speech, although highly prized, enjoys its great protection in part because it is so often of no concern to anyone. To an almost alarming degree, tolerance depends not on principle but on indifference" (p. 6).

On obscenity: "This unlikely issue has proved uniquely stubborn and resistant. The Court has been handicapped by a treacherous political undertow: The justifications for obscenity regulation may be faint, but the political passions invested in the issue are fierce" (p. 34). "Indeed, the idea of regulating obscenity by law while permitting case by case challenges in the courts sometimes seems like an invention of the Devil designed to embarrass and unhinge the legal system" (p. 34).

On close judicial scrutiny of loyalty oaths: "To subject a hypocritical ceremony to a hypercritical reading strikes me as not a bad form of justice at all" (p. 353).

II

Yet, despite these enormous strengths of analysis and style, the big question to be asked about *A Worthy Tradition* is what its future is, or should be. Given the enormous effort that Jamie Kalven has expended in rescuing the manuscript from oblivion, which as nearly everyone knows was seriously incomplete at Harry Kalven's death, the question is somewhat awkward. But it must be faced, not the least because nearly everyone will ask it.

That *A Worthy Tradition* will become merely a period piece at best, or a forgotten-because-outdated treatise at worst, are not implausible answers to this difficult question. The first amendment "tradition" is covered only partially. What has been long understood as the "core" of the first amendment — *Schenk*[4] to *Brandenberg*,[5] obscenity, hostile audience, fighting words — is addressed in depth, as are areas traditionally regarded as of lesser interest: loyalty oaths, limitations on the speech of public employees, immigration, and legislative investigations. However, doctrines like prior restraint, time, place and manner regulations, and symbolic speech are neglected, as are many areas of first amendment law like broadcast regulation and commercial speech.

Although the free speech "tradition" which Kalven so elegantly describes continues, and although that tradition still includes many of the cases laid out in this book, a nearly two-decade-old synthesis

4. Schenck v. United States, 249 U.S. 47 (1919).

5. Brandenberg v. Ohio, 395 U.S. 444 (1969).

would seem unlikely to remain interesting for very long. The book is not without new concepts and ideas, but the knowledgeable reader would probably say that many were already incorporated (and in many cases more fully developed) in Kalven's earlier writings. That is particularly true, for example, of the discussion of libel law and *New York Times Co. v. Sullivan.*

To be sure, every now and then some novel tests are proposed. About obscenity, for example, Kalven suggests a distinction from other speech: "In my view," he says, "the Court in *Roth* [6] failed to perceive that obscenity deals not with ideas but with stimuli to the imagination, with imagery and fantasy. It therefore attempted to accommodate the regulation of the obscene with the non-regulation of ideas generally."[7] And with respect to very offensive ideas and the threat of the violent response from a hostile audience, the issue in *Terminiello v. Chicago,*[8] he proposes consideration of a "middle ground," between full protection and official discretion to interrupt the speech:

> There may be implicit in a situation like *Terminiello* a kind of second-class speech which is generally permissible but which is not so valuable that the right to utter it will be protected regardless of the likely impact on a hostile audience. But, if so, we are back full circle to Justice Roberts's insistence in *Cantwell* [9] that, if there are such categories of speech, the legislature must locate and evaluate them. [pp. 85-86]

But, if the truth be told, the book leaves these ideas almost totally undeveloped.

But then, Kalven's interest is not in new major first amendment theories but in offering his judgment about how each case should have been decided, how the tradition should have been developed. With keen appreciation of the difficulties and burdens shouldered by any judge, Kalven nevertheless frequently urges the Court to give speech more protection. For example, Kalven's objection to *Feiner v. New York,*[10] which let a hostile audience override the speaker, begins with a sympathetic appreciation of the Court's dilemma. He wonders whether "we may be asking the police to perform an impossible task — not merely to allow freedom for the thought they hate but to go down fighting on the side of the utterer of that thought." And he wonders whether the Court "can really supervise the norm," given that it is "so far from the street corner" (p. 92). But then Kalven's passion for free speech firms and he is resolute. He says that "underwriting broad police discretion" here "seems wrong." "The Court should not underestimate its symbolic and educative role. It can affect

6. Roth v. United States, 354 U.S. 476 (1957).

7. P. 18. *See also* p. 41.

8. 337 U.S. 1 (1949).

9. Cantwell v. Connecticut, 310 U.S. 296 (1940).

10. 340 U.S. 315 (1951).

the attitude and training of the police, and it can influence the popular attitude, which in turn will affect the police." Concluding that keeping the forum of the streets open is "central to the dynamics of dissent among free men," he proposes his solution: "The police must make a serious effort to keep order before silencing the speaker; and the Supreme Court must remain open to review of that effort" (p. 92).

And then there is Kalven's elegant summary at the end of his discussion of the hostile audience, or as he calls it "reflexive disorder," problem:

> In the end, the Court's hesitation to commit itself further on principle in this area may reflect not only the intransigence of the reflexive disorder issue in a turbulent, real world but also a certain political shrewdness in keeping its options open. As the *dramatis personnae* have changed over the past three decades from Jehovah's Witnesses to Young Progressives to crypto-fascists to Negro civil rights groups to anti-Vietnam protestors, there has been abundant indication that street corner speech remains close to a vital nerve in the society and that it is treacherous to attempt to classify with finality the form the reflexive disorder problem is likely to assume when protest takes to the streets. [p. 118]

Different people will find different things to object to in Kalven's analyses, but the objections probably will take a similar form, which is that Kalven's analysis is too slight for modern scholarly tastes. Some, perhaps most, will object to the slipperiness, or the incompleteness, of Kalven's doctrinal lines. He can seem to evade difficult problems. How should the Court perform its "symbolic and educative role," assuming one exists? What, after all, will constitute a "serious effort" by the police to protect a speaker? And just how should the Court "remain open to review" those decisions of the police?

I am far less troubled by this side of the free speech equation and far more troubled by Kalven's under-appreciation of the "state interest" side for limiting or restricting speech. I detect two problems here. One is the sense he creates, by continually speaking of "*state* interests," that these interests are just those of some alien and distant government entity and not those of the public at large. The other problem is more serious: that is Kalven's frequent effort, no doubt unconscious, to contain — or privatize — the nature of the "state" or "public" interest which supports measures to limit speech behavior.

Thus, with respect to obscenity, Kalven articulates the "state interest" as "the evil of exciting the sexual fantasies of adults," in which "[p]resumably, the underlying concern, although contemporary lawmakers . . . have rarely been candid enough to say so, is with masturbation" (p. 34). With slight bemusement at the earnestness of regulatory efforts, he says "[t]he question is whether this state interest is sufficient, in the case of consenting adults, to justify the solemn intervention of the law." To Kalven the harm of obscenity seems "faint" (p. 34).

Similarly, with respect to libel, Kalven describes the problem as "how best to accommodate the individual interest in reputation and the public interest in unrestrained debate of public issues."[11]

In both of these instances, Kalven seems to understate seriously the public interest in regulation. Of course, it may be unfair to take today's heightened sensitivity to the social role of pornography and to use it to criticize someone writing in the early 1970s. But remember the question I am raising is the present and continued relevance of *A Worthy Tradition.* From that perspective, Kalven's discussion of obscenity has a distinctly anachronistic ring to it. Likewise, the isolation of the injury of libel to mere "private" reputational interest seems strangely understated. For someone of Kalven's remarkable sensitivity to the needs of a democratic society, it is an odd lapse not to raise the question of what kind of democratic society will result from lifting the legal fetters on defamatory statements.

To be sure, Kalven is not wholly unaware of the larger public values put at risk by various kinds of speech. Though at various points he characterizes the "reflexive disorder" cases as merely threatening a public interest in "order," Kalven does give a quite sensitive portrayal of Justice Jackson's powerful dissent in *Terminiello,* in which Jackson discusses the larger political consequences of extremist speakers:

> First, the situation may be one which is being *manipulated* as a conscious strategy of inducing disorder, even against the speaker. This is the dilemma posed by contemporary tactics of confrontation designed to trick "the system" into overreacting, thereby precipitating disorder and disenchantment. Second, the speech must be placed in the context of tensions that exist at the moment the speaker chooses to speak or to continue speaking; the speaker may inherit a situation in which further speaking will be the trigger of disorder. . . . Third, in a tense situation with factions in the audience, language which is neutral in form may take on meaning as incitement. [p. 85]

For Kalven, Jackson deserved credit "for properly sobering the issue" (p. 85), which Jackson did yet again in his dissent in *Kunz v. New York.* But Kalven finds Jackson's fears somewhat irrelevant to the facts of those cases, noting that the Court in any event seemed willing to permit legislatures to draft statutes to guide the police officer on the spot, and he concludes with the observation that, since legislatures have not bothered to enact such statutes, we must face "a point of principle — the worthless offending speech cannot be safely disentangled" (p.88). The issues are not pursued further.

I should note that Kalven sees incitement as presenting potentially serious social problems. At the outset of his discussion of subversive advocacy, Kalven says: "We reach here the ultimate battleground for free speech theory — the area in which the claims of censorship are at

11. P. 60. *See also* p. 71.

once most compelling and most dangerous to key values in an open society" (p. 119). Still, when all is said and done, Kalven's sensitivities lean naturally in the direction of developing the free speech dimension of democratic self-government, not speech's threat to that value. As such the book is somewhat less convincing, and less contemporary, than one might wish. There can be, as it were, a lightness to the analysis.

So what, then, is the value of this book? The simple fact is that I loved reading it. I know I shall return to it again and again, and I think I know why.

It is too easy to lose the forest for the trees with this book. Kalven, as I have said, wanted to document a "tradition," and to do that he reasonably thought it necessary to explore in depth — indeed, as if he were the deciding judge — every single case. The reader, however, can't help wondering, as case after case rises to meet you, whether this book is really the first draft all authors must write before the process of distilling important insights and themes can begin. Whether that is true or not I am uncertain. But I do know that the careful reader can unearth nuggets of insights and themes unavailable elsewhere.

At the heart of this book is one critically important idea, which though frequently referred to, is in the end left somewhat inchoate: the history of the first amendment is a process of the law "working itself pure" (p. 361). Kalven seems to have in mind the idea that the Court's struggle through the labyrinth of cases over several decades was a necessary and inevitable process to develop a full-bodied first amendment. Living now, as we do, in that speech-secure world, Kalven seems to suggest, it is difficult for us to grasp both the heroism of that struggle and the complexity those problems presented to judges of high talent, good faith, and commitment. Just going through the process ourselves, he seems to think, is an education.

It is a fundamental idea of the book that the interaction of factual detail with principle and theory enriches the principle and theory. Without detail, ideas become bloodless and abstract, and end up having nothing to do with anything.[12] This central thesis illustrates why some Supreme Court opinions are important and valuable and some aren't, and also why Kalven's own method is itself important and valuable. Along the way, this profound notion of knowledge and understanding yields comment after comment of sensitive insight: on how it may be important to the resolution of a particular case to minimize the significance of the speaker (as Holmes was frequently inclined to do), but how that tactic fails to help build a tradition of respect for dissent (p. 156); on how the context of the dissent, with its liberation of eloquence from the chains of compromise that always accompany vic-

12. *See* pp. 3, 194.

tory, may have been critical to the emergence of a tradition of free speech (pp. 149, 158); on how remarkable it is that so much of the free speech tradition comes from the pens of elderly people (Holmes, Meiklejohn, and Brandeis were all in their seventies when they wrote their memorable passages on free speech) (p. 162); on how there is a "dialogue between the society and the Court" (p. 181), which the Court can usefully exploit by being generous or ungenerous toward legislative attempts to fashion restrictions on speech.[13]

Kalven himself is at times impatient with the wrangling over tests. He complains that lawyers are often diverted into "Talmudic analysis of competing formulae" and overlook "the value of radical criticism of society" (p. 149). What's really important, he insists, is that we understand the reasons why we want to protect speech; that will give far more protection to speech than any test. But somehow, it seems, and this is the intriguing thesis, the tussle with tests is what provides the revelation about purpose.

Ultimately, it must be said, this book has enduring value because Harry Kalven was a person of remarkable judgment. Ideals are kept in clear vision, and the particulars of the actual world direct the analysis. What might seem relevant in a broad philosophical discussion becomes less so in a world with a real problem to solve. There is never the sense that Kalven's mind is either unable or unwilling to pursue any line of thought, should it be raised and important. While there is receptivity because of problems to be solved, there is quickness in handling ideas for the same reason. His analysis is always just as good, and often better, than the best Justice in the case. And that's in the end how this book should be read. Kalven had earned the right to enter his judgments. In a better world, Harry Kalven would have been a Supreme Court Justice. This book makes him one.

13. *See, e.g.*, p. 347.