Harry Kalven, Jr.
by Hans Zeisel

... he is to be remembered, too, as a legal scholar playing a gallant role as public citizen. Harry Kalven on Ernst Freund (40 U. Chi. L. Rev. 235 [1973])

Harry Kalven will be remembered for three major achievements. He was a distinguished teacher and author in the field of torts; he was among the pioneers who integrated social science into the law; and he was a leading scholar on the law of the First Amendment, the topic that was closest to his heart.

It was only toward the end of his career that he was able to concentrate his energies on the First Amendment. A few years before his death—in the aftermath of a heart attack—he dropped most other activities and devoted himself with great energy and excitement to his magnum opus, an ambitious intellectual history of the First Amendment tradition. The course he taught on the First Amendment during these years was so popular with the students that it had to be moved to the auditorium, an event without parallel in the school's history.

Although his reputation as a First Amendment scholar rests primarily on his writings about the decisions of the Warren Court, Kalven's views on freedom of speech were in many ways shaped earlier—by his experiences in the 1950s, the time when I first came to know him. During those dark years for free speech he wrote a number of essays in response to various loyalty and security issues of the day. In the main, these pieces appeared not in law journals but in general magazines, most often in the Bulletin of the Atomic Scientists.

Taken together, they represent an important chapter in his development as a First Amendment thinker and provide a vivid glimpse of this "legal scholar playing a gallant role as public citizen." I can think of no better way to convey some sense of the flavor of this man—his brilliance, his wit, his sense of justice—than to taste once again these spirited essays.

Taking the Fifth

In 1953 the Bulletin invited Kalven to debate with Professor Bernard Meltzer the merits of avoiding testimony before legislative committees by claiming the Fifth Amendment right against self-incrimination.1

The debate was triggered by a pronouncement of the Association of American Universities that "[R]efusal [to testify], on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak. . . ." Harvard had added its own voice: "The use of the Fifth Amendment is in our view entirely inconsistent with the candor to be expected of one devoted to the pursuit of truth."

Professor Meltzer argues both the immorality and the futility of claiming the Fifth Amendment unless it is truly invoked to protect against self-incrimination. Kalven, although not "in direct disagreement with much Mr. Meltzer has said," does not approve of the universities' position. He argues that, given the gross impropriety of the investigating methods, claiming the Fifth Amendment as a formal defense is not necessarily improper and no stigma should be attached to its invocation. In response to the Harvard statement that "we will not shut our eyes to the inference of guilt which the use of the Fifth Amendment creates as a matter of common sense," Kalven drily remarks: "It would be enlightening to learn from the Harvard Corporation just what in its view is the function of this part of the Fifth Amendment in our legal system." He concludes: "I endorse fully of course the point that a faculty member must be willing to defend his convictions at any time in the appropriate forum; but the statement seems to me to commit a serious and dangerous error. The refusal to cooperate with public authority when the result of an honest belief that the authority is acting illegally is not a lack of candor."

"Where the question is incriminating on its face" he insists, "I do not read the law as

requiring anything further to support the refusal to answer." He adds: "It is possible that the view here suggested on behalf of the privilege comes too late in the day. But if so, this is an occasion for regret. This is not a particularly happy year in which to have become hyper-critical of a part of the Bill of Rights." Years later, in 1957, he acknowledged that he might indeed have come too late: "[T]he claim of the privilege has been widely interpreted as raising a serious suspicion about the witness. . . . The privilege has thus proved to be almost completely self-defeating. . . . The paradox of the privilege has become so complete that the main fact-finding achievement of the committees investigating subversion has been the locating of people who claim the privilege of not answering their questions."

**Oppenheimer Is Denied Security Clearance**

Next came "The Case of J. Robert Oppenheimer"—Kalven's analysis of the Atomic Energy Commission's denial of security clearance to the distinguished scientific director of the Manhattan Project. Again it was the *Bulletin* that invited Kalven's comment. 3

I well remember how he went about this task. For several days from early morning until late at night he hardly left his study, reading, making notes, and finally, as he did so often, typing the 15,000 word piece in one uninterrupted sweep.

Kalven begins with a summary of the case against Oppenheimer: his close association with the Communist movement prior to 1942, when he entered government service; the 1943 "Chevalier incident," when his friend Chevalier told him that one Eltenton had asked him about the possibility of Oppenheimer sharing information with the Russians. Oppenheimer had reported Eltenton immediately to the FBI but had delayed naming Chevalier, whom—as it turned out correctly—he believed innocent. In the hearing before the Commission, moreover, Oppenheimer admitted having lied originally to the FBI about details of his contacts with Chevalier.

"With this much firmly in the record," Kalven asks, "can what the fuss be about? Can it be anything more than a close case which you or I might have decided differently?" He then begins his analysis by making three general points:

*This prima facie case . . . dissolves quickly upon further acquaintance with the facts. First, the early Communist ties are understandable in the context of Oppenheimer's life history. . . . Once he started war work his interests and associations changed radically and permanently. In brief, he appears to have been intellectually attracted to communism for a short intense period and then simply to have outgrown it. Second, he is of course Robert Oppenheimer and not John Doe; and has in the past twelve years achieved a record of absolute top-level performance on behalf of government characterized by great dedication. Third, the early ties were never denied by Oppenheimer and have been fully known for at least ten years to the government, which has so earnestly sought his services.*

Even General Groves, the head of the Manhattan Project, had regarded the Chevalier incident "as a display of the schoolboy attitude of protecting a friend." In Kalven's view, Oppenheimer's lying about Chevalier is "a serious error of judgment in security matters" and the only important item in the record that weighs against him. But since the episode is 14 years old and has been superseded by a decade of faithful, important service, Kalven considers it improper to allow it to seriously impeach Oppenheimer's character. The lie about Chevalier, Kalven concludes, "whatever it shows, does not show that Oppenheimer is a liar."

He then takes on the chief legal difficulty of the case, namely, that the commissioners had merely exercised their broad, undefined discretionary rights. He notes that "[i]t is in the nature of a security risk judgment with which one disagrees that one can never tell whether it is the standard or the application that is at fault." And he continues:

*If the standard is . . . a prudential weighing of evidence to determine future risk to classified information . . . , I find the Commission opinions making a great error in the application of their standard. If the standard has become more stringent so that it was well applied here, one can only tremble at how that standard would read if articulated. . . . Dr. Oppenheimer is less a security risk today by any standard than he was when he was cleared by the Commission*
in 1947. This may not be a legal defect in the case but it is assuredly a moral defect that cannot be ignored. And the point bites deeper, when it is remembered that Dr. Oppenheimer was insistently sought by the government since that time. It was ignoble of the government to reopen the case with no more new data to go on than it had, and it was twice ignoble to reach an adverse decision on such stale matters.

I cannot get over a sense of incredulity as I read the majority opinion. . . . It would be disturbing indeed if judgments like this were exercised in the simple matter of whether a man should be hired or not. It becomes intolerable to have them make a serious part of something so substantial as a security hearing where career and reputation are crucially at stake. The majority must have known that this was not some sort of game of logic they were playing. Nor were they charged with the responsibility of evaluating a candidate for sainthood. They were involved in the serious human business of deciding whether a distinguished scientist was by government action to be publicly stamped as unreliable and set apart from his fellow scientists and other men.

He closes the piece with these words: "It is the security system and not Dr. Oppenheimer that, in the end, has lost its case."

Kalven Is a Witness

A short while later, in 1955, Kalven's piece on Oppenheimer became itself part of an investigative record, when its author was called to testify before the formally titled Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee of the Judiciary of the U.S. Senate. The occasion: at the initial suggestion of a committee of the Kansas Bar Association, and by arrangement with the Tenth Federal Judicial Circuit, the Jury Project had recorded, with consent of counsel and with the consent and control of the federal district judge, jury deliberations in five civil cases. More than a year after these tapes, with an introduction by the chief judge of the circuit, had been played in a masked form to a select group of lawyers and judges at the annual conference of the Tenth Circuit, the Los Angeles Examiner burst into a banner headline announcing that the University of Chicago Law School bugs juries.

The Committee seemed anxious to show that the research effort, which resulted in two major publications, standard works in their respective fields: The American Jury and Delay in the Court, was a Communist-inspired plot to subvert the American jury system. Both Levi, then dean of the Law School, and Kalven, who had become director of the project, defended the research episode, firmly insisting that it in no way impeded the judicial process, that only the untoward publicity accorded to the event could possibly cause damage.

Queried extensively about his Oppenheimer piece, Kalven quietly reaffirmed: "That was my opinion at the time. It is my opinion now."

He was also questioned about another "security matter," a letter in which he had asked President Truman to commute the death sentence of the Rosenbergs. When asked his view of the case, he responded that he found it puzzling on the evidence, not perhaps so puzzling as to warrant a different verdict, but sufficiently puzzling to warrant waiving the death sentence.

The Case of Linus Pauling

Most of the questioning in the jury hearing was done by the Committee's counsel, Mr. Sourwine.

When Kalven next writes about the Internal Security Committee—the occasion is the investigation of Linus Pauling—he puts the Committee counsel into the title of the piece: "Sourwine in an Old Bottle." He also treats him to an epigraph from the annual lampoon skit he had written that year, as so many years before, with his colleague John Hutchens for the amusement of the Chicago faculty. It is one of Kalven's many baseball stories:

COMMITTEE COUNSEL: Evidence before this committee shows that you gentlemen are members of an organization known as the Red Schoendienst Fan Club.

WITNESSES: Yeah Red.

SENATOR: At last we are getting somewhere. (To director of research) Do

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you have a citation there on Red Schoendienst?

DIRECTOR OF RESEARCH: (leafing through a large book) Lefty Gomez, Lefty O’Doul, Red Grange, Red Rolfe, Red Ruffing, yes, here it is, Red Schoendienst. On October 1, 1953, the Daily Worker carried the following item: “Red Schoendienst is currently batting .335!”

The facts of the Pauling controversy are simple: “Mr. Pauling furnished the Committee with much information about his well-known international petition against nuclear testing including a list of signers. . . . He refused, however, to turn over the correspondence he had received from those he solicited, or to say how many signatures each respondent had supplied.” The Committee’s aim was to show that the petition was Communist inspired; the chairman, Senator Dodd, happened to be a leading advocate of nuclear testing. In the end Mr. Pauling proved too much for the committee — there were no contempt proceedings.

As Kalven traces the inquiry he is moved to remark that “one can view the hearings as a dramatic opposition of Mr. Pauling and Mr. Sourwine and, on this view, they take on some of the point of a morality play.” Tracing the progress of the mortality play, he allows us an occasional chuckle.

The next colloquy produces one of Pauling’s finest moments at the hearing:
Sourwine: The list includes the name of Professor Hideki Yukawa of Japan. Do you know him?
Pauling: Oh yes, very well.
Sourwine: Do you know him as a winner of the Lenin prize?
Pauling: He did? I didn’t know that he’d won the Lenin Prize. I knew that he won the Nobel Prize for physics.

But in the end it is Kalven’s outrage over the record that permeates the piece: “the Committee’s conduct verges on the fraudulent, but it is hard to see what the purpose of the fraud was.” He concludes:

I said at the outset that the hearings seemed to me wasteful, hypocritical, and offensive. I see no reason to qualify that verdict now. We have noted that a thin line separates the ludicrous from the sinister as we go through the hearings. Undoubtedly to some the whole enterprise will appear too inept to take seriously, and certainly Mr. Pauling emerges

in very good health and vigor. Maybe it is not serious. But it is, after all, an expression of the official climate of opinion in the official sense of the fair use of government power in the United States in the year 1960. And I find it not quite sufficient comfort that, under the existing circumstances, we are protected from the Committee’s malice only by its incompetence.

Victory in the Courts

There comes then an episode in Kalven’s battle with the committees that allowed him to bring to bear on an actual case both his legal knowledge and his familiarity with the tools of social science research.

In 1965 the House Un-American Activities Committee subpoenaed the distinguished physician Dr. Jeremiah Stamler to appear as witness in its Chicago hearing. On the advice of his counsel, Albert Jenner, Jr., and Thomas P. Sullivan, Dr. Stamler refused to testify on First Amendment grounds and asked the court for a declaratory judgment that would uphold his refusal. Kalven was a consultant on the case, and was asked how one might demonstrate to the court that the Committee’s method of asking questions violated both the authority vested in it by the Congress and the constitutional rights of the witnesses.

Kalven suggested that a content analysis be made of the Committee’s hearings, that is, a detailed analysis of content, purpose, and context of the questions asked and answered or not answered, in a number of hearings that would be randomly selected from all the Committee’s hearings. That analysis became one of the important weapons in a court battle that eventually ended in withdrawal of the contempt citation against Dr. Stamler, and thereby in victory over the Committee.  

This brief essay cannot give more than a glimpse of the measured architecture of the pieces Kalven wrote during these years, of the precision with which the legal argument develops, of the respect and mastery of language they reflect, of the sense of humor that illuminates their serious business, and of the magnificent anger which moved that gentle man when his sense of justice was offended.


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