

# Kalven's Way

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I came to The University of Chicago six years ago. I was hired as a teacher; but that was a mild form of deception. As it now seems clear to me, I came here not to teach, but to learn—more specifically, to begin an apprenticeship with Harry Kalven.

It was a spontaneous apprenticeship. It grew gradually and informally, with little self-consciousness. It began in March, 1968, with a question from Harry, which was followed by a muddled answer on my part and which then became an intense, all-absorbing conversation—in the Law School's freight elevator. That was during my first, bewildering day of interviews for the Law School faculty. Over the years, the pattern repeated itself a million times. Only the details changed. We moved out of the freight elevator and into the perennial flower garden in Jackson Park and to the lakefront at 63rd Street—places that will always have a special meaning to me because they were, in truth, Harry's classrooms.

Harry's method was conversation. Harry would manage to find in the words of the apprentice glimmers of insight—which he would restate in terms so eloquent and profound that they deepened understanding and encouraged further inquiry and comment. The apprentice felt obliged to say more, to think harder, to look at the problem from a new perspective. The conversation became an escalation of insights. That was the core of the apprenticeship. It was one of the most extraordinary experiences of my life. I speak of it today because it meant so much to me, because I suspect the audience is filled with his apprentices and because it so amply revealed the extraordinary qualities of the master.

Harry Kalven was a genius, a completely original intelligence—probably one of the few the law has ever known. I used to thirst for conversation with him. My view of the world would change whenever I listened to Harry reflect about the most recent Supreme Court decision, the latest political event, an important social institution, or the future of legal education. Perhaps one could expect that much of an eminent scholar. What might not have been

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† Professor of Law, Yale University. This tribute is excerpted from a memorial address delivered in Rockefeller Chapel, The University of Chicago, on December 6, 1974.

expected, what was a constant source of wonder, was the fact that there were no limits to Harry's interests. He had insights into even the most trivial events.

I am not here referring to baseball. Baseball was hardly a trivial matter for Harry. Several years ago he disclosed his two "boyhood dreams"—one was to speak here at Rockefeller Chapel, the other was to play center field for the Chicago Cubs. Anyway, I can't give you an example from baseball. That was the only subject we did not talk about—an omission attributable to my own failing.

The kind of event I have in mind is lining up for gas on Lake Park and 52nd Street. I recall a lunch at which Stanley Katz and I were going to discuss with Harry such weighty matters as slavery and the Constitution. This was in early 1974, when the gas shortage was at its peak. Harry had spent a good portion of the morning in the car with Betty, waiting in line at a gas station. When he arrived at lunch—cheerful, totally free of annoyance—he began to reflect upon the emergence of a new social institution—lining up for fuel. His concern was not with the obvious, the energy crisis. Rather what he saw was the spontaneous, collective and wholly cooperative response to queue jumpers. From that, he began to speculate about the strength of democracy today. We never did reach our original agenda.

Harry had the gift not only of insight, but also of expression. It was part of his genius. He turned blackboard diagramming into an art. He spoke with an ease, a grace, an eloquence that had no equal in the legal world. He wrote as he spoke. The words he chose were the right words, the perfect words. More importantly, they were not jargon, but fresh, simple words, words that lawyers had not yet exhausted or even tried. There now exists in the English language a whole list of words and phrases that belong to Harry Kalven. "Resilient," "stubborn," "stunning," "the heckler's veto," "the public forum"—are just a few that come to mind. The words "uninhibited, robust, and wide-open" make one think immediately of Harry. They were originally the words of Justice Brennan in *New York Times v. Sullivan*. It was Harry, however, who saw their importance in marking a new interpretation of the first amendment and who immortalized them. Harry chuckled when he learned that the Harvards—Professors Freund, Sutherland, Howe, and Brown—edited these words out of the opinion when it was reprinted in their casebook.

But Harry's intellectual stature was of minor significance to the apprentice. Genius is not a quality that can be aspired to. The

apprentice could only stand in awe of it. He either had it or he didn't. Harry's personal qualities, however, were another matter. They were qualities that the apprentice could reach for. And they could be the basis not just of friendship but of love.

Harry Kalven cared. He cared about ideas—such as liberty and equality. He valued them not simply because of the intellectual puzzles they produced, but because they were good. The first amendment was not just an object of scholarly effort but also an overarching ideal of personal and governmental behavior. That is why he spoke of it as a tradition, rather than a rule of law. He also cared about institutions, the Supreme Court, the Presidency, the Constitution, this University—and this Law School. Hour after hour we would talk about the future of The University of Chicago Law School, not because he wanted anything from it, not because it had anything it could possibly give him, but because of his personal attachment to it and the things that it stood for. He cared about people. His loyalty to his friends was enduring and uncompromising, not out of habit, but because of the depth and intensity of his feelings. And he loved students—can you imagine?—a law professor who truly loved students. Harry Kalven once defined the law to me as “disciplined passion.” He emphasized the word “passion,” because that was the dimension that was too easily forgotten by the lawyer. I now realize that he was setting an ideal not only for the law, but also for himself.

Harry Kalven was youthful. He died at sixty. The obituaries mentioned his age. They listed his scholarly achievements—the monumental work on law and sociology with Hans Zeisel, the work he had done on torts with Charles Gregory and Walter Blum. They reported that he had almost completed another major work, a book on the first amendment. The image that emerged was one of a scholar in the later phases of his career—standing behind his achievements. That image is profoundly untrue. What was important to Harry was not what he had accomplished, but what he was just beginning.

He was pleased and satisfied with what he had done. He was thrilled by the prospect of his new intellectual ventures, the new collaborations—this time with a group of young upstarts, Stanton Wheeler, Stanley Katz, Gerhard Casper, Richard Epstein, and myself. Just this summer he began to formulate plans with Stanton Wheeler to broaden and deepen his own interest in law and social science. They were to turn to a study of the legal academic profession. Over the last couple of years we set plans for a major new study on the pre-Civil War Constitution and the peculiar way it dealt with

slavery. For him, the work was challenging and fascinating, not just on the merits, but because it involved Stanley Katz and thus opened vistas of a new kind of interdisciplinary work in the law—law and history. Just last spring, he and Gerhard Casper started another collaboration, this time concerning the right to vote and the intersection of law and political science. To this day, I distinctly recall a remarkable session of the Kalven-Casper seminar in which it dawned on Harry—with an exuberance characteristic of the discoveries of youth—that somehow the Constitution had forgotten the right to vote.

This youthful spirit was not confined to scholarly inquiries. Whatever the issue, whatever the cause—the Vietnam war, civil rights, the Chicago conspiracy trial, impeachment—Harry was with the vanguard of the young. He was not a radical. He saw the complexity of issues in a way that the young did not, but if he was forced to choose, he would come down on their side. That was his impulse. The same was true of his involvement in the most treacherous of political affairs, university politics; it is no doubt an open secret that whenever the Young Turks of the Law School met to plan that week's coup, Harry was the first to be invited.

Harry was also optimistic, determined to see the "sunny side" of things—of life, of law and of politics. This became most apparent in our discussion about slavery. The broad jurisprudential question that we put to ourselves was this: how well did law stand up to the challenge posed by the existence of this immoral and thoroughly evil institution? My temptation was to be cynical, negative, depressed. Harry, as you might expect, rejected that impulse. He fought the easy answer every inch of the way. He would search for and seize every glimmer of strength and integrity in the legal system. I do not know whether he was right—we were both very stubborn—but I do know he was the more noble and that his determination to see the bright side was the right sentiment.

I know Harry would want me to see the bright side today. It is hard, but I know he would want it. I know that today Harry would not want me to think of the loss, the extraordinary loss, but what that apprenticeship meant—the excitement, the joy. I know that today Harry would want me to think of our times together. They were beautiful.