

Harry Kalven: Scholar and Friend

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As I write this tribute to Harry Kalven, my mind is a kaleidoscope of intimate memories from the years we spent together on the Torts casebook. Of course I also recall Harry in my 1935-36 Torts class, but only faintly, as having been one of the first students in the Great Books course given by Hutchins and Adler. Years later something came up about our professor/student relationship a generation or so earlier, and Harry said, "Don't worry, Charlie, you gave me an A in Torts." I couldn't remember; but you can imagine my relief.

After the war, in 1945, Harry became a member of the Law School faculty; we were colleagues until I left in 1949 to teach at the University of Virginia Law School. It was then that Harry took over the course in Torts at Chicago. About two years later we began to plan our casebook in Torts. Collaborating on a sizeable law book, we naturally came to know each other extremely well, even though most of the time we were almost a thousand miles apart. We would arrange our schedules so that periodically I would spend two weeks in Chicago and Harry would be with me for two weeks in Charlottesville, staying in each other's homes.

Harry had many ideas for revolutionizing the course in Torts. While the approach we adopted was inspired to some extent by the older book of Shulman and James, through our casebook Harry has had a tremendous influence on legal writing, teaching, and developments in the law. Harry felt strongly that Torts students must become familiar with the law of damages as well as with insurance and its impact on the law of negligence. Indeed, it was the advent of insurance and its analogues—indirect taxation through the price mechanism, products liability, and direct taxation itself—that has been largely responsible for the great changes in the law concerning liability for unintended harm. One of my students at Virginia once accused Harry and me of being Robin Hoods—"taking it from the rich and giving it to the poor." Harry's reply to this was "Robin Hoods, hell!"—a remark borne out by the writing he and Walter Blum did on developments in no-fault automobile accident law.

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Working with Harry gave me insights into how a magnificent and truly original mind operates to create new approaches in a field generally thought to have been sewed up tight, with all the questions answered. During the decade between our first and second editions, 1959 to 1969, ideas about Torts changed so rapidly that our modern approach became almost out of date. In retrospect I think Harry shares with Fleming James most of the credit for the seminal thinking and writing that produced those changes in the general area of liability for unintended harms.

During our collaboration of almost twenty-five years there occurred many incidents that showed what a delightful, charming, imaginative and subtle person Harry was, with an elegant sense of humor and a deft hand at cartoons, a love of people—or of most people—a deep and sensitive understanding of social and moral shortcomings in the world, a broad political and economic outlook, and a passion for fairness and justice. At the same time he had the light touch and a wonderful wit, with a variety of interests from baseball and Shakespeare (chiefly *Hamlet*) to double acrostics. I think my overall appreciation of Harry can best be highlighted by relating a few anecdotes about him.

On one of his visits to Charlottesville the *Virginia Law Weekly* wanted to run a story on our project, with a snapshot. Harry piled up a stack of books in my office about three to four feet high, and leaned on it with his elbow, chin in hand, with a broad grin on his face, while I posed beside him with a solemn look, one hand in my coat front and the other on top of the column of books. The picture, captioned “Prof. Kalven and friend,” was a great success, with just the right touch of ham to prevent it from being stuffy. Harry’s idea, naturally.

Another time 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 dictu*) 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 “CAR-DOZO.” How could I help adoring a guy who would do that to make me feel better?

Over the years Harry had become aware of our keen interest in birds. While I was recovering from my coronary, the Kalvens sent me a perfectly delightful get-well message, which I still have. It was a folded-over sheet of white paper with several square holes cut through the front. Through each of these holes, from the second inside page, peered an impossibly intriguing bird’s head. Printed on

the front cover was "ALL THE BIRDS OF," and continuing on the reverse side of the front cover, "THIS [OR ANY OTHER] WORLD ARE WATCHING THE BIRD WATCHERS." Then on the facing page was a tree with bare limbs on which sat a number of incredible looking birds, whose faces had been peeking through the square windows on the front cover, all done by Harry with colored crayons. Above and below the tree picture in the margins was a continuation from the previous page, "AND SAYING 'GET WELL QUICK, CHARLIE!,'" signed by Betty, Bud, Jamie K, PODIE, X (Peter, his mark), and Bob Steamen, who was then Peter's imaginary playmate. On the back cover, under the heading "SPECIAL GUIDE TO BIRDS (from Roger Whig Peterson)," some of the pictures were identified as Third Strike Bunting, Pileated Warbler, Baby Bunting, Watchbird, Free Passenger Pigeon (Guest Statute Variety), Stephen Crane (Whoops!), and We Don't Know Eider. For me this evokes Harry far more vividly than do his learned works on law.

Another bird incident reveals Harry's uncanny perception and his amazing ability to figure things out on the basis of scant evidence. During his first visit with us in Martha's Vineyard, Harry fell in love with our part of the island on Chilmark Pond. Thereafter he and Betty rented a nearby camp for a part of each summer. One day, while all of us were there, Mrs. Gregory and I had seen an unusually rare bird standing at the far edge of the pond in shallow water, which, after much looking and considering, we concluded must be a marbled godwit. A neighboring ornithologist confirmed our identification as a "first" in those parts—no mean accomplishment, even for longtime amateurs. The next day I went over to the Kalvens' camp and Harry said, "Gee, Charlie, we just saw a marbled godwit on the edge of the pond." "You sure as hell did," I replied, "but how in God's name did you know what it was?" Harry calmly said that he had studied the bird and then studied *the* book (Roger Tory Peterson's)—in which it could have been almost any one of a dozen or more similar looking birds—and concluded that that's what it was. What could I say?

There are a number of other stories about Harry that reveal his many sides. Seeing Henry Fonda on television recently doing Clarence Darrow reminded me of the time in Charlottesville that Harry, Mrs. Gregory and I went to a drive-in theater where Fonda was doing his powerful jury movie, "Twelve Angry Men." This was Harry's first visit to a drive-in. Although Harry liked the movie, his perceptive and versatile mind, together with his sense of fun, immediately grasped and expanded on the terrific teaching potential of our surroundings. Before we had reached home, Harry had built an

entire Torts casebook around the drive-in theater. With a little imagination—and Harry had plenty—we could see the possibilities of trespass to land, assault and battery, false imprisonment, all aspects of negligence, defamation, invasion of privacy, emotional disturbance, and so on, relating item after item that fell within the purview of Torts. Out of this one situation we could have built up a series of related hypothetical cases that would have kept a Torts class busy for months. It was a venture into the functional approach that would have delighted Leon Green.

Harry was a baseball nut; and his team was always the Cubs. His passion for baseball even crept into the casebook. He really went to town with *Talcott v. Exhibition Co.*, a false imprisonment case arising out of the playoff game that had been “proximately” caused by Merkel’s famous boner, the outcome of which cost the Giants the National League pennant in 1908. The fact that they lost to the Cubs was no doubt incidentally gratifying.

Harry carried baseball even into his exams. One of his questions once concerned a baseball announcer who, in blaspheming a mythical shortstop, closed his defamatory remarks with the statement, “As the Greeks said, ‘*Sic transit gloria mundi.*’” Elinor Levinson, John O. Levinson’s daughter, answered the question with a libelous comparison of the mythical shortstop to Don Kessinger and went on to say, “As the Liberians said, ‘*Ubi ius, ibi remedium.*’” Elinor got a high mark on the exam, which her fellow students attributed to the fact that Harry knew she was a Cubs fan. But the exam papers were numbered, and Harry could not have known whose paper he was reading. At a faculty/student party he later told Elinor that after his marks were in he had looked up her number to see who had written that paper. She asked him if that was because of her flip-pant crack about Don Kessinger. Harry said he did not recall that, but that he had been impressed because she was the only one in the class who was aware that *sic transit* wasn’t Greek. For once his enthusiasm for baseball had bowed to his sense of sadness that most of his students did not recognize Latin when they saw it.

I was fortunate, indeed, to have had such close association with Harry Kalven over so many years in compiling the Torts casebook—an association by no means confined to working on the book. We spent many happy hours together in which Tort law was not mentioned. We discussed books, people, ideas, Harry’s views on pornography—for that matter the gamut of first amendment issues—and the Supreme Court, his ventures into criminal law, the jury project, and Watergate with its aftermath. We always managed to take long walks whenever we were together. In retrospect, I mar-

vel that I shared so much of Harry's time when he was involved with so many other things and so many other people—the Jury Project, his extensive work with Walter Blum, his time spent helping others whom he believed to have been unfairly treated, his work on the first amendment, his communications with hundreds of former students, his script-writing for Quadrangle Club shows and all.

Harry was a remarkable man—a sweet, gentle, understanding person, as well as a tough-minded, keen, versatile and imaginative kind of genius—one whom I shall always love and whose association and friendship have meant everything to me. There will never be another Harry Kalven.