A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA. By Harry Kalven, Jr.[1] Edited by Jaime Kalven.[2] New York: Harper & Row. 1988. Pp. 698. Cloth, $35.00.

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In all of its many dimensions, *A Worthy Tradition* will likely, one day, inspire several law review articles and perhaps even a doctoral dissertation. Even the story behind the mere appearance of this book, only the highlights of which can be related here, deserves attention.

At Professor Kalven's untimely death in 1974, the first draft of a massive study of the first amendment lay unfinished upon his desk. With the assistance of Owen Fiss of Yale Law School, his son Jaime Kalven eventually launched a complex effort to move the manuscript toward publication. As an "Editor's Introduction" and an "Editor's Afterword" both explain, the long process involved delicate, obviously emotional, textual surgery.

The decision to not consider any post-1974 decisions by the Supreme Court only began to limit Jaime Kalven's job of translating an uncompleted manuscript into "the clearest possible reflection of my father's thinking on the First Amendment." At many points, this hermeneutical dream required exploration of Professor Kalven's original intent, most conveniently expressed in both the unfinished typescript and hand-written, marginal notes. At other places, such as an entirely new chapter on the 1940s, the editors had to create their own version of what they thought Kalven intended to write about the first amendment. And at all points, the project proceeded with acute sensitivity to how Harry Kalven might have intervened in the complex editorial process. Although *A Worthy Tradition* clearly emerges as the work of several minds, even those of us who knew Professor Kalven only through his published work will recognize the master's touch.

Antonio Gramsci, the celebrated Marxist theorist, distinguished between "wars of position" and "wars of maneuver." The first kind of campaign seeks to build resistance to dominant intellectual positions out of "repressed aspirations and suppressed desires already existing within the society." Wars of maneuver, in contrast,

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try to engage powerful elites in direct contests for power.[4] Although it is doubtful that Harry Kalven ever read Gramsci, *A Worthy Tradition* adopts something akin to the war-of-position strategy toward first amendment battles. In particular, the book reflects the fact that, for more than twenty years, Professor Kalven wrote in response to specific controversies, as they arose, and he aimed at building a view of the first amendment that drew upon a faith that he had discovered a "tradition," albeit one filled with contradictions, of protection for controversial speech.

In contrast, then, to many other first amendment scholars of the post-World War II era, Kalven avoided global theories in favor of more localized critiques of specific cases. Kalven's background in tort law, suggest his editors, encouraged a suspicion of grand theorizing and an abiding faith in the litigation process. In this sense, bitter first amendment controversies represented not a failure of some general free-speech theory but an opportunity for different sides to articulate their views, at least before the Justices of the Supreme Court.

A Worthy Tradition suggests the war-of-position strategy in a second major way: in its determination to "map" the diverse traditions in the first amendment's history so that champions of free speech may better understand the tricky terrain upon which they have to fight. As his editors again explain, Kalven "conceived of the American experience under the First Amendment as something more than a body of legal precedent; he saw it as a tradition of the society." To Kalven, this "tradition" of protecting speech transcended the narrow holdings of Supreme Court cases—and of legal doctrine—until it came to "carry a compulsion and inspiration that goes beyond literal holdings." Moreover, the tradition, at least during certain times and in certain places, had the capacity to "work itself pure," to rise above the earthly discourse of judges and reveal the value of accepting, in most situations, the consequences of unrestrained speech. Once they understood the power of this tradition, guardians of the first amendment would almost necessarily plan carefully-conceived "wars of position," especially if they shared Kalven's belief that general "philosophic tone and eloquence" usually prove less effective than smaller-scale, "pragmatic" forays into specific first amendment battles.

Although sensitive to the value of drawing from the past, Kalven also appreciated the need to understand the particular historical era in which specific cases were situated. He himself entered

4. Quoted in G. LIPSITZ, A LIFE IN THE STRUGGLE 234 (1988). *See also*, A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G.N. Smith eds. 1971).

first amendment combat during the cold-war crusade against communist "subversion." Here, he joined with other "cold-war libertarians"—including Alexander Meiklejohn, Hugo Black, and Thomas Emerson—in believing that both experience and logic had demonstrated the inadequacy of the so-called clear-and-present-danger test. During the 1950s, Holmes's formula simply failed to provide any kind of analytical framework, let alone any effective judicial shield, for difficult controversies. Much of *A Worthy Tradition* painstakingly dissects cases, from the 1950s and early 1960s, that grew out of cold-war crusades to contain allegedly communist-inspired social change. More recent problems, such as pornography, are not covered.

At least to this historian, though, the most fascinating portions of the book trace the rise and, with the 1969 *Brandenburg* decision, the apparent demise of the clear-and-present-danger doctrine. The complex history of this doctrine and the constitutional law of "subversive advocacy," we are told, "lies close to the heart" of the broader first amendment tradition and "provides us with an occasion to survey the most extraordinary anthology of judicial utterances ever."

This careful retelling of the Supreme Court's fifty-year flirtation with clear and present danger, from *Schenck* to *Brandenburg*, assumes a special intensity because of Kalven's passion for recovering the repressed legacy of Learned Hand's approach to allegedly seditious speech in the *Masses* case of 1917 and for exposing the limitations of the Holmes-Brandeis tradition. "Our legal history would almost certainly have been better," he argues, had the Supreme Court immediately recognized the wisdom of adopting Judge Hand's "incitement test" of 1917, rather than clear and present danger.[5] Consequently, "part of the achievement of the inelegant *Brandenburg per curiam* opinion [of 1969] is that it recovers an insight" into the "worthy tradition" that had been "first advanced by Learned Hand's elegant opinion fifty-two years earlier."

Overall, *A Worthy Tradition* offers a fascinating, if somewhat idiosyncratic and limited, approach to first amendment history. In contrast to more traditional accounts, it does not begin by applauding the wisdom of Holmes and Brandeis and jeering the ideas of their legal opponents. In *Gitlow v. New York*, for example, even Justice Sanford's oft-criticized majority opinion receives a sympathetic reading; it was "both lucid enough and rational enough to provide a proper occasion for a full-blown debate among the justices

5. *See* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

over free speech policy." Unfortunately, neither Holmes nor Brandeis could "rise to the occasion," contributing only another (Holmes-authored) "burst" of vague rhetoric. But *A Worthy Tradition* does assign high marks to Brandeis's concurring opinion in *Whitney v. California*, primarily because it veers away from Holmes's and toward Learned Hand's approach.

For a variety of reasons, then, some rather trivial and others more substantial, *A Worthy Tradition* finds Holmes's legacy seriously wanting. Holmes's inapt "fire in a crowded theater" analogy, for example, implicitly equates litigating a complex political speech case with settling a controversy about "solicitation to arson." Much more important, the larger body of Holmes's writings on clear and present danger tends to leave "the impression that the test was designed to protect the occasional, trivial radical speech to which no one should, or would, pay attention." Treating freedom of speech as if it were merely a "luxury liberty" falls far short of Professor Kalven's own demanding standards for first amendment adjudication.

In line with its war-of-position approach, Kalven's book avoids the usual bold theoretical statement in favor of free speech. In contrast to philosophers, lawyers have "taken as self-evident the truth that words can on occasion be the triggers of action; and the core problem" for judges, therefore, "has been to accommodate that insight with the essential value of robust, abrasive, uninhibited dissent." Following Kalven's earlier enthusiastic responses to *New York Times v. Sullivan*, this history re-emphasizes his belief that rejection of seditious libel—the idea that governmental officials can prosecute citizens for merely making critical comments about state policies and public officers—comprises one of the central principles of the first amendment.

But repudiation of seditious libel, this book makes clear, was not the only "central meaning" of the first amendment. Alongside seditious speech, the Supreme Court cases highlighted in this discussion also involved "general unfocused advocacy of violence as a tactic of social change" and incitement to violent action. Although it "would seem at first that the crucial distinction" lies between seditious speech and these other two categories, the real dividing line runs, as Learned Hand long ago suggested, between incitement on one side and "general advocacy of violent change" or seditious libel on the other.

The main fault—or better, limitation—of this fine book is its legalism. Constructed, in effect, as the concurrences and dissents of a "tenth Justice" of the Supreme Court, *A Worthy Tradition* focuses

on what the Justices said, or should have said, to one another. Kalven rarely ventures into the broader litigation process, let alone "social" analysis.[6]

To be fair, Kalven himself recognized that, by plunging into the Court's own first amendment opinions and waging his war of position, he ran the risk of missing other battles. One of his marginal notes concedes that his intensive effort to reconnoiter the field of Court opinions left him with a "*philosophic map*" of free speech that ignored at least "three facts: the sheer weight of broadcasting, the sheer weight of advertising, and the ownership of the means of communication." It is this larger project—to understand, and to confront in appropriate political ways the economic, social, and cultural dimensions of communication in the twentieth century—that Harry Kalven, Jr., has left to others.[7] If *A Worthy Tradition* lacks the comprehensive "map" that he himself had hoped to leave behind, this is still a text that should both provoke and inspire. Students of the first amendment owe a great debt to Professor Kalven—and to the two people, Jaime Kalven and Owen Fiss, who translated his manuscript into his book.

ELITES AND THE IDEA OF EQUALITY. By Sidney Verba,[1] Steven Kelman,[2] Gary R. Orren,[3] Ichiro Miyake, Joji Watanuki, Ikuo Kabashima and G. Donald Ferree, Jr.[4] Cambridge: Harvard University Press. 1987. $30.00.

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Elites and the Idea of Equality reports the results of an inquiry into the views that "elites" in the United States, Sweden, and Japan hold about the various permutations of the idea of equality. The elites examined represent a variety of domains, including leaders in politics, business, labor, bureaucracy, media, and the intellectual world. The leaders of several insurgent groups consisting of feminist, minority, and youth organizations are also surveyed.

6. *See, e.g.*, Rabban, *The Emergence of Modern First Amendment Theory*, 50 U. CHI. L. REV. 1205 (1983); R. POLENBERG, FIGHTING FAITHS (1987).

7. *See, e.g.*, Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

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