

# Symposium

## In Search of a New Paradigm

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Teaching law has its special pleasures. At Yale, they come in abundance, since our classes are small, the atmosphere is highly congenial, and we are given absolute freedom to teach what we want and when we want. Yet the joys of law teaching extend to the entire profession. Unencumbered by the demands of clients, bureaucratic procedures, and sectarian loyalties, law teachers in this country are free to engage the highest issues of state and to speak to them in whatever terms we deem appropriate.

The one problem all of us in the profession labor under, and one that I feel acutely, is that of obsolescence. We stand before our students in 1995, and we build on books, classes, and professional experiences that reach back to the 1960's, sometimes even before. As teachers, we must constantly renew our own education—not just school education, but life education—so that we can speak to the issues that are of concern to our students now and that will be of concern to them in their careers and future lives. We need to prepare our students for a world that is so very different from ours.

My involvement with the First Amendment began about twenty-five years ago. I was then a young professor at the University of Chicago, and got the chance to develop a close relationship with one of the leading figures in the field, Harry Kalven, Jr.<sup>1</sup> We spent much of our time together talking about free speech, and the special attraction that he felt towards the First Amendment inevitably rubbed off on me. In the Fall of 1974, just after I moved to Yale, Harry died and left as part of his legacy a huge manuscript that he had begun

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1. For an account of our relationship, see Owen Fiss, *Kalven's Way*, 43 U. CHI. L. REV. 4 (1975).

only a few years earlier. Jamie Kalven, Harry's son, then began the monumental project of readying this manuscript for publication and, for the next decade or so, I worked closely with Jamie on this endeavor.<sup>2</sup> Finally, in early 1988 the book appeared.

When this project was nearly complete, I turned to the First Amendment itself, and I found myself uneasy with the celebratory mood with which Kalven embraced First Amendment doctrine and that so infused his book—a celebratory mood suggested by the title of his book, *A Worthy Tradition*. I kept wondering why I had such a different reaction to the received tradition than he did. Part of it, of course, was due to his sunny disposition—Harry always saw the best in everything. Yet I also came to the conclusion that part of the difference arose from the fact that he premised much of his analysis on an outmoded paradigm: the street corner speaker.

For me, that paradigm was no longer the proper one to understand the First Amendment. We needed to move from the street corner to CBS. Reexamining free speech controversies from this new vantage point made it possible, I thought, to better appreciate some of the crucial factors shaping public discourse today, including the scarcity of channels of communication and the high cost of speech. Also, with CBS in mind, we could see how the old lines between speaker and censor, or between the state and the private sphere, had to be redrawn. In the end, I realized that a body of doctrine that did no more than protect the street corner speaker from the menacing reach of the police would leave the values served by the First Amendment vulnerable and, sadly, largely unfulfilled.

I presented these thoughts in an article entitled *Free Speech and Social Structure*,<sup>3</sup> first published when the Kalven book was in the hands of the publisher. I also started teaching a course bearing the same name. Often I would begin that course with a recounting of my relationship with Harry Kalven (*A Worthy Tradition* was, of course, required reading) and the story of my discovery about the paradigm shift from the street corner to CBS. When I did so two years ago, in the Spring of 1993, I was greeted with an outpouring of criticism, which was nothing unusual, except that this time it came from close friends and usual allies. "Fiss, you're completely out of it again. What makes you think that CBS is the organizing paradigm to understand the First Amendment?"

What my students were trying to tell me—with the kind of respect that is the norm in the halls of the Yale Law School—was that I was trying to make sense of the First Amendment from a vantage point that was already obsolete. Once again, the ground had shifted from under the First Amendment. My

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2. See *Editor's Note* to HARRY KALVEN, JR., *A WORTHY TRADITION* 589 (1988).

3. Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986).

students already knew, in a way that I did not, that we were on the edge of a new technological revolution. The revolution is now fully underway.

What is happening is nothing less than a redefinition of the way we read and write, the way we talk to and correspond with one another, how we entertain and educate ourselves, how we resolve our conflicts—how we form friendships and communities, and how we perform our roles as citizens. These changes take a multitude of different forms and are giving birth to an entirely new vocabulary—bulletin boards, e-mail, MUDs and MOOs, chat groups, fiber optics, cable television, CD-ROMs, satellite dishes, microwave transmitters, narrowcasting. These new technologies are the special concern of this Symposium—not organized solely as a corrective for my obsolescence, but as a much-needed opportunity for every one of us to update our understanding. Its focus: to help us think through the implications for the First Amendment of the technological revolution through which we are now living.

One participant, Ethan Katsh, highlights the stakes. In Professor Katsh's view, the new information technologies are not simply tools or communications devices but are the components of a new cultural space with radical implications for the future of the First Amendment. Computer networks, interactive machines, new modes of visual communications, and hypertext each expand individual and group opportunities for creating, communicating, and working with information and, in the process, build an environment that contrasts significantly with "print culture." The new environment, Katsh suggests, will affect how we speak about and characterize the First Amendment. How should the law react to this new environment?

One group of authors want to continue in cyberspace the conversation that has been going on for the past fifty years, if not longer. They acknowledge the technological changes underway, but deny the need for new normative structures. The same principles that have been developed in the past, they suggest, should govern the new technologies. On one end of the free speech divide, Dean Thomas Krattenmaker and Professor Scot Powe believe that the Supreme Court made a mistake in ever developing a distinctive set of First Amendment principles for the broadcast media. Krattenmaker and Powe argue that the principles that have long governed newspapers, magazines, and books—what they call the "print model," a model that relies heavily on the market—should serve us equally well with the electronic media, whether in the form of broadcasting, cable, or any of the newer technologies. According to them, the print model will promote access and diversity, while avoiding the dangers of government control they so fear.

Cass Sunstein also does not believe that the emerging technologies should upset the inherited normative framework. He is, however, speaking of a very different First Amendment than Krattenmaker and Powe. His is not oriented toward the market, but instead relies on government regulation to fulfill the democratic aspirations of the First Amendment. This model is rooted in the

Supreme Court's treatment of broadcast media and, even before that, in a form of government intervention associated with the New Deal. The Supreme Court's most recent engagement with cable television builds on this existing framework,<sup>4</sup> and Professor Sunstein considers whether it is well adapted to answer the questions that are likely to arise in the next generation of free speech law.

Another group of authors more readily embrace the futuristic potential of the emerging technologies. They emphasize the revolutionary character of these technologies and anticipate fundamental changes in the normative framework. Jerry Berman and Daniel Weitzner, in their essay, emphasize the importance of deliberately and systematically constructing a structure for cyberspace that will enable us to achieve the ends of the First Amendment. Decisions made today about the "network architecture" of the new interactive media, they argue, will have a fundamental impact on freedom of speech. They advocate two values in this architecture—one emphasizing open-access networks, the other user control over content—that they believe could dramatically improve the democratic potential of the new media. They argue that a decentralized, open-access network with an almost endless number of channels would create an abundance of communications opportunities, increase the diversity of speakers, and eliminate the need for onerous spectrum regulation. Berman and Weitzner argue that mechanisms that allow individuals to screen the information and programming they receive would place content regulation in the hands of users, rather than legislatures and courts.

Another group of futurists also acknowledge the revolutionary character of the changes underway but counsel restraint in how the law responds to them. They insist—plead, even—that we first allow the emerging technologies to evolve more fully, along with the new social structures to which they will give rise. Anne Branscomb looks at some early legal responses to First Amendment issues raised by the new technologies, and concludes that often the law conflicts with attempts by the "cybercommunities" to apply their own rules and sanctions. She suggests that lawyers, legislators, and judges should tread lightly in cyberspace, lest their attempts to draw analogies to past and existing rigid legal rules limit the growth of a true computer-mediated information marketplace.

Lawrence Lessig also makes the case for caution and restraint, and suggests how the law can respond with the most flexibility to this new era. He may be moved by a wariness of the present Supreme Court and Congress, but speaks more generally and insists that we do not yet understand the new forms of association that cyberspace makes possible. Until we do, he argues, the legal system should exercise caution and defer to the more flexible common law process. Only after cyberspace is adequately understood, and the ramifications

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4. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994).

of various lower court pronouncements seen and corrected, should definitive regulation—by the Supreme Court or Congress—be undertaken. To move too quickly might well be to constrict the as-yet unrealized expressive and associational potential of cyberspace.

Finally, we encounter the work of Eugene Volokh. His purpose is not to devise a general legal strategy for reacting to the technological changes, which he, too, readily embraces, but rather to imagine what the new world will look like, and how it will affect values usually associated with the First Amendment. In this respect he is resolutely optimistic, almost utopian. He begins by noting that today speaking costs a lot of money and that, as a result, the so-called marketplace of ideas has generally favored the speech of the wealthy, or speech that can generate revenue through mass appeal. However, the new information technologies will vastly decrease the cost of speaking, and will let many more people make their words, art, and music globally available. The consequence, he argues, will be that the First Amendment of today, which often turns a blind eye to the consequences of the high cost of speech, will not only work well with the new technologies; it will work better than it ever has before. There will be more speech, spoken by more people, and accessible to more people than ever before.

With Professor Volokh, we may find this new state of abundance a cause for rejoicing. The new technologies may enable us to become better informed, more involved, and more able to control our fates. They may strengthen our democratic institutions and enable all of us to become better citizens. The new technologies may advance freedom of speech and foster harmony across communities, be they racial, religious, political, or other. But there is another possibility: The new technologies may turn us not into citizens but consumers, shopping for our favorite speech like we shop for our favorite ice cream. They may give rise to new, narrowly defined, insular communities coexisting, but not communicating, with each other. They may enable each one of us to act as our own censor, and may lead to the further fragmentation of society. Cyberspace may be a world where we listen to what we already agree with and use the channels of communication simply to signify our approval or disapproval—a world where individuals express themselves, but not one in which they debate and deliberate as democratic citizens. Free speech in cyberspace may turn out to be little more than the Rush Limbaugh show on a cosmic scale.

Some thirty years ago, the Supreme Court handed down its decision in *New York Times v. Sullivan*.<sup>5</sup> As never before, the Court spoke boldly and forcefully of the national commitment to a robust public debate on important social issues. This, the Court thought, is the essence of the First Amendment.

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5. 376 U.S. 254 (1964).

Alexander Meiklejohn, who had propounded a similar theory for years,<sup>6</sup> welcomed the Court's decision with glee. Meiklejohn, then in his nineties, remarked to his dear friend Harry Kalven, "It is an occasion for dancing in the streets."<sup>7</sup> Harry, who well understood the import of that assessment (I could almost picture him smiling), then went on to use the *Sullivan* principle to build his celebratory account of the First Amendment tradition. I wonder how these two giants of the law might react to news of the future that now awaits us.

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6. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

7. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125.