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STEVE AS COLLEAGUE AND FRIEND

*Kenneth L. Karst**

I first met Steve Shiffrin in 1977. To help you remember 1977, I will note a few things that happened in that year:

- Bill Murray joined the cast of *Saturday Night Live*.¹
- The Gang of Four was expelled from the Communist Party in China.²
- Reggie Jackson earned the name “Mr. October.”³
- Groucho died.⁴ Bing died.⁵ Even Elvis, for the last time, left the building.⁶

—and—

- 1977 was also the year when President Carter did not make an appointment to the Supreme Court.

Another indicator of the era is that, on the day when I met Steve, he was wearing a turquoise leisure suit. As Dave Barry might say, I am not making this up.

In this symposium we celebrate Steve’s teaching and scholarly career, which has concentrated on the First Amendment. Steve’s interest in freedom of speech grows out of his own experience. For a decade he taught college courses in speech and communication, and he did this right through the years when he was a law student at Loyola. When Steve joined the UCLA Law School faculty, his

* David G. Price and Dallas P. Price Professor of Law Emeritus, UCLA School of Law.

1. See “Saturday Night Live” Steve Martin/Jackson Browne (1977): Cast, <http://www.imdb.com/title/tt0694867> (last visited Oct. 7, 2007).

2. See U.S. DEPT. OF STATE, BACKGROUND NOTE: CHINA, <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited Oct. 7, 2007) (noting that following the death of Chairman Mao in September 1976, the “Gang of Four,” an influential group within China’s government who had helped propel the Cultural Revolution, were arrested).

3. See Baseball-Reference.com, Reggie Jackson, http://www.baseball-reference.com/bullpen/Reggie_Jackson (last visited Oct. 7, 2007).

4. See *Groucho Marx, Comedian, Dead*, N.Y. TIMES, Aug. 20, 1977, at 1.

5. See *Bing Crosby, 73, Dies in Madrid at Golf Course*, N.Y. TIMES, Oct. 15, 1977, at 1.

6. See Molly Ivins, *Elvis Presley Dies*, N.Y. TIMES, Aug. 17, 1977, at 1.

earliest writings turned to the First Amendment, specifically, an article on libel law and one on government speech.

Steve's office was right down the hall from mine, and that was a great boon to me. All of you know Steve's delight in ideas and in their expression. It was (and is) fun to talk with him.

Let's return to 1977, when Steve joined our faculty. In that year, the Supreme Court decided some First Amendment cases of note. For example:

- The *Abood* case, where a public employees union was making political contributions—against the wishes of dissenting members.⁷
- The *Zacchini* case, where a “human cannonball” claimed that a TV station had invaded his right of publicity when they put his whole act (all fifteen seconds of it) on the TV news—and the broadcasters said the First Amendment gave them a right to do so.⁸
- The *Skokie* case, where members of the Nazi Party claimed a right to march in a neighborhood that included a number of Holocaust survivors.⁹
- *Wooley v. Maynard*, where religious dissenters found it offensive to display the New Hampshire state motto on their car's license plate.¹⁰

Except for the Great *Zacchini* case, all these cases centered on the expression of dissent. If that statement carries special resonance here, the reason is that Steve Shiffrin has devoted much of his scholarship to the need for a strong First Amendment that defends dissenters against a political majority that is hostile to their views.

In Steve's view, we need to protect dissenters, not so much because they have useful things to say, but because they stir things up. In response to the argument that stirring things up can lead to instability, Steve says, so much the better. Our society is unjust, and we need someone to rock the boat. In taking this position, Steve aligns himself with many writers, including me, who embrace the label of the “bleeding-heart liberal.” However—have you noticed?—we are all pretty comfortable. We are not volunteering to

7. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

8. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

9. *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977).

10. *Wooley v. Maynard*, 430 U.S. 705 (1977).

give up our incomes and our nice houses in neighborhoods that come with better-than-average schools. We are very much insiders. Our own dissent is usually expressed, not in bomb-throwing, or even in street protest, but in the pages of books and law reviews, where they are mainly read by other insiders—most of whom already agree. We liberal academics may be stirring things up, but the waves made by our writings are not so much a political tsunami as the ripples on the surface of a *caffè latte*.

There are scholars who are also litigators. What they do in court has its own importance—and their insider status, far from holding their activism in check, is an advantage, because it gives them access to power. Understand, I do not say that our scholarship is useless (it would be late in the day for me to come to that conclusion). It is just to say that any influence our writings might have on the “world-out-there” is, at most, indirect. We observe developments in the law, and we characterize them with labels, some of which might even stick. The labels that do stick can be tools for advocates—and even judges—in justifying results of cases. Those results can be invoked in later cases and may well be reshaped by later decisions.

This is not all a tale of sweetness and light. Consider Harry Kalven’s label, “the public forum.”¹¹ Its early deployment was, indeed, liberating, especially in the area of civil rights protest that Kalven himself chronicled. More recently, the label “public forum” has been used to constrict freedoms of speech. But it still has the potential to recapture much of its earlier vitality. If the current U.S. Supreme Court does not seem receptive, remember that Kalven’s message was heard by lawyers all over the country, and it is still having important effects in lower courts, both federal and state, without much intervention by the Supreme Court.

This is the sort of contribution to freedom that Steve Shiffrin has made: exploring the speech, press, and religion clauses in ways that improve understanding by the rest of us, including not only academics but advocates in the trenches and judges who are willing to listen.

In one way, Steve himself has been a practitioner. He has served as President of the Ithaca School Board—maybe not the ideal

11. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 10.

place to practice outsider jurisprudence, but certainly a good vantage point for observing the interplay of law and politics in the wilderness outside the wall of separation that surrounds the garden of academia. I think I can detect some of that school board experience in Steve's article on vouchers and the socialization of children.¹²

* * *

I want to close with some words about Steve as a colleague. As I have said, it was fun to talk with him—about the First Amendment, and about many other matters within the vast range of Steve's interests. But he was an important colleague in many more ways—and I am not referring to such things as service on faculty committees.

I can sum this up in an anecdote. One day, Steve and I were walking back to the law school from our Faculty Center. Steve noted that I had been silent during the general conversation at our coffee group after lunch. He asked, "Is something wrong?" I replied that I had this writing project on intimate association, and it just was not jelling. So, if I seemed down, the explanation was simple: I *was* down. We went on to our offices. A few minutes later, as I stared at my notes, Steve appeared in the doorway, and then sat down. He began to ask questions about my project, in the best lawyer-like fashion. The questions were numerous, but they were all variations on the big question: what do *you* think you are doing with this piece? As I kept responding, and time went on, I had a better feeling about where I was going. He left, and I turned to the typewriter.

For days, I drafted and redrafted, and before long I had a draft I was willing to let others see. I presented it to a group of colleagues at our house one night, and a few days later Bruce Ackerman¹³ phoned and asked if I had some work in process that could be presented to the snake pit in New Haven. Because of Steve Shiffirin's contribution, I was able to say "yes." I tried to express my thanks in a footnote, but this is a better opportunity. To Steve: my colleague, my teacher, my friend, I say, thanks for a lifetime of work in the service of causes large and small.

12. Steven H. Shiffirin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503 (2002).

13. Bruce Ackerman is Sterling Professor of Law and Political Science at Yale Law School.