Freeing Speech

How judge-made law gave meaning to the First Amendment

by RICHARD H. FALLON

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Eugene V. Debs delivers an antiwar speech in Canton, Ohio, in June 1918. He would soon be imprisoned.

Anthony Lewis '48, NF '57, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books, $25)

ANTHONY LEWIS'S *Freedom for the Thought That We Hate: A Biography of the First Amendment* offers a lucid and engaging overview of American free-speech law. The former Nieman Fellow has twice won the Pulitzer Prize, and this volume puts the skills that earned him those accolades much on display. Again and again, he brings to life the *dramatis personae* in leading cases, plucks out moving or telling quotations, and explains who won and who lost in order to provide a clear introduction to First Amendment doctrine.

Lewis '48, NF '57, styles the book "a biography." In fact, it is more nearly a history in which unfolding events are presented as teaching by example—sometimes positive and sometimes negative example. He begins by sketching the hated traditions of British censorship against which the American ideals of free speech developed. By the late eighteenth century, various state constitutions included guarantees of freedom of the press. When the Constitution of the United States that emerged from the Philadelphia Convention contained no bill of rights, there was widespread sentiment that the omission needed to be rectified. The first Congress thus drafted and the states ratified a Bill of Rights, the First Amendment of which guarantees that "Congress shall make no law...abridging the freedom of speech, or of the press."

Interestingly, however, there is considerable uncertainty about what the Framers and ratifiers of the First Amendment understood it to protect. Accordingly, in *Freedom for the Thought That We Hate*, Lewis scrupulously avoids claiming that the "original understanding" of the First

vard, $35). The author teaches Social Analysis 72, "Economics: A Critical Approach," an alternative to the mainstream Ec (now Social Analysis) 10. Here he explores, as the subtitle says, "how thinking like an economist undermines community."

Riding the Waves: A Life in Sound, Science, and Industry, by Leo Beranek, S.D. '40, AMP '65 (MIT, $24.95). The acoustical scientist and entrepreneur was involved in telephony, the Tanglewood Music Shed, and the precursor to the Internet.

The Fall and Rise of the Islamic State, by Noah Feldman, professor of law (Princeton, $22.95). After long reflection on constitutional change in the Islamic world, Feldman observes that "the Islamists continue to promise justice and the rule of law"—and that trying to deny them power will likely backfire.

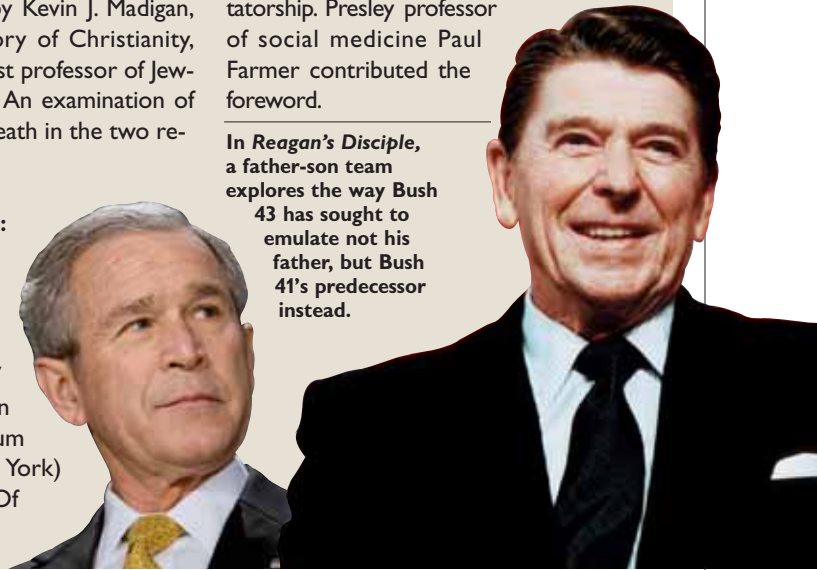
Reagan's Disciple, by Lou Cannon and Carl M. Cannon, a 2007 spring fellow at the Institute of Politics (Public Affairs, $27.95). A pair of political journalists, biographers of Ronald Reagan and Karl Rove, respectively, put the "troubled quest" of George W. Bush, M.B.A. '75, "for a presidential legacy" in perspective. Reagan, they find, "was practical, in ways that George Bush was not."

Resurrection: The Power of God for Christians and Jews, by Kevin J. Madigan, professor of the history of Christianity, and Jon D. Levenson, List professor of Jewish studies (Yale, $30). An examination of the belief in life after death in the two religious traditions.

The Greatest Game: The Yankees, the Red Sox, and the Playoff of '78, by Richard Bradley, A.M. '90 (Free Press, $25). Some 257 pages, plus notes, on the moment of maximum baseball ecstasy (New York) and agony (Boston). Of course, that was then.

Santiago's Children: What I Learned about Life at an Orphanage in Chile, by Steve Reifenberg (University of Texas, $55 hardcover, $24.95 paperback). The director of the Chile office of Harvard's David Rockefeller Center for Latin American Studies recalls his life-changing work in an underclass orphanage during the political and economic traumas of the Pinochet dictatorship. Presley professor of social medicine Paul Farmer contributed the foreword.

In *Reagan's Disciple,* a father-son team explores the way Bush 43 has sought to emulate not his father, but Bush 41's predecessor instead.



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5

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Amendment's reach resolves contested cases that have come before the Supreme Court. First Amendment law, Lewis emphasizes, is almost exclusively judge-made law, nearly all fashioned in the past 90 years.

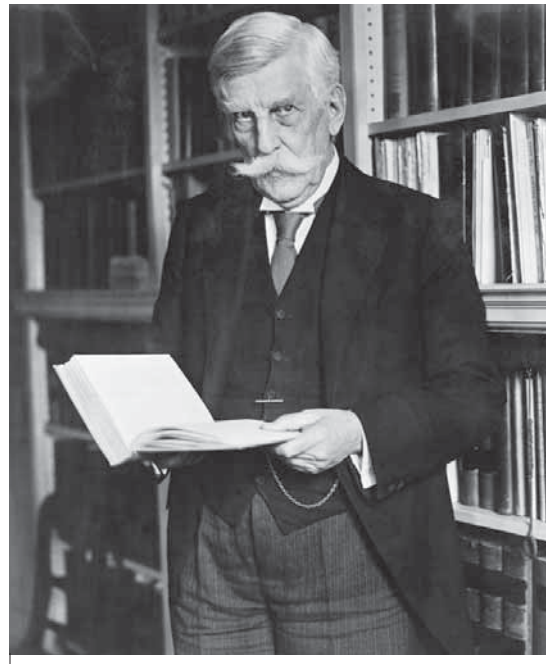
Because early Congresses seldom passed laws attempting to punish speech, the Supreme Court never decided a case invoking the Free Speech clause before World War I. But once the country had entered the conflict, Congress enacted an Espionage Act that banned speech tending to cause resistance to the draft or to military authority. Startlingly, from a modern perspective, the Supreme Court upheld the convictions of dissident speakers in all the Espionage Act cases that came before it. In the first of those cases, in the majority opinion by Justice Oliver Wendell Holmes Jr., A.B. 1861, LL.B. '66, LL.D. '95, the Court began by establishing that the First Amendment could not possibly protect *all* speech. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater and causing a panic," Holmes wrote. With absolute protection for all speech thus untenable, the Court held in 1919 that speech would receive no protection under the First Amendment if it posed a "clear and present danger" of instigating serious harms.

Although the "clear and present danger" test sounds as if it might have conferred substantial protections on critics of the United States's involvement in World War I, early cases required almost no evidence concerning what danger the defendants' utterances posed. In one notorious case, the well-known radical political leader and former presidential candidate Eugene V. Debs was sent to jail based on a political speech that he gave to a Socialist convention on a Sunday afternoon. Given that Debs's audience might have been persuaded by his denunciations of war, the Court reasoned that his speech's "natural and intended effect would be to obstruct recruiting."

Had this approach prevailed, the kinds of criticisms that ultimately helped turn the public against the Vietnam War might never have occurred, nor might much contemporary discussion of the Iraq War. But the Court's easy tolerance for the repression of speech proved short-lived.

The foundations for modern doctrine—under which Americans are, in Lewis's words, "freer...to say what we think than any other people, and freer today than in the past"—began to take shape only when Justice Holmes, who wrote the opinion upholding Debs's conviction, appears to have had an almost immediate change of heart. Although he claimed that his position was consistent throughout, after the Court's 1919 summer recess he abandoned his prior emphasis on "the natural and intended effect" of radical protests in provoking resistance to government policies and emphasized instead, in a dissenting opinion in the fall, that "Congress certainly cannot forbid all effort to change the mind of the country." He continued,

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition....But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate



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Free-speech law in the United States owes much to a change of heart by Justice Oliver Wendell Holmes Jr.

> good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market....That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

During the next decade, he and his colleague Louis Brandeis, LL.B. 1877—writing mostly in dissenting or concurring opinions—provided vital intellectual and rhetorical foundations for contemporary First Amendment doctrine, which provides more "freedom for the thought that we hate" than the law of any other nation in the world. For example, almost every other western democracy has signed international treaties that call for signatories to prohibit and punish speech that incites racial hatred. In the United States, by stark contrast, most if not all speech preaching racial hatred is protected by the First Amendment. "Freedom for the thought that we hate" is freedom for Nazis brandishing swastikas to march in Jewish neighborhoods—indeed, in the famous *Skokie* case, to march through a village populated largely by Holocaust survivors—and for members of the Ku Klux Klan to use vicious epithets in advocating the suppression of African Americans.

The Supreme Court has also held that cigarette companies have a right under the First Amendment to place advertising billboards in close proximity to schools and playgrounds—even though tobacco is an addictive product on which most smokers become hooked while still of school age. A large pornography industry also thrives under the First Amendment. Although the Supreme Court has held that "obscenity" enjoys no constitutional protection, it has defined obscenity so narrowly that "adult" films, magazines, and pictures are a staple of contemporary American culture.

Is this state of affairs an occasion for American pride in protecting free speech, or is it "freedom for the thought that we hate" run riot? And what framework should we use in answering this and similar questions?

These questions have enduring currency because, although freedom of speech in the United States is very broad, even today no one thinks that absolutely *all* speech should be protected. Going beyond false cries of fire in crowded theaters, most people do not think the First Amendment does or should protect blatantly false advertising (even if it protects billboards advertising cigarettes), or verbal threats, or speech offering bribes. The Supreme Court has also allowed the Federal Communications Commission to ban "indecent" speech on the radio and in broadcast (rather than cable) television—as illustrated by the steep fine that followed Janet Jackson's "wardrobe malfunction" during her halftime performance at the 2004 Super Bowl. Whatever one may think about these examples, the Supreme Court clearly needs to draw lines. But where?

To provide a general theory indicating where lines between protected and unprotected speech should be drawn is a central ambition of academic theorists who write about the First Amendment. Some of their writing is brilliantly provocative. Some is turgid nearly beyond belief. Lewis quotes a few of the best theorists, but only very briefly, near the end of his book. Otherwise, he avoids theory—or the effort to provide general principles explaining which kinds of speech should be protected and which should not—almost entirely.

Instead, what his book does well, even superbly, is to explain how the law has developed historically in a number of doctrinal areas, including those governing the rights of radical protesters, of disseminators of sexually explicit speech, and of media outlets that want to disclose facts that intrude on people's privacy. Like most biographers or historians, Lewis drops in his own opinions, but he does not identify the theory, if any, that underlies them.

As a former reporter and columnist for the *New York Times*, Lewis has especially interesting opinions about Supreme Court decisions involving the press. He lavishes perhaps his highest praise on *New York Times v. Sullivan* (the subject of his 1991 book, *Make No Law*), which holds that the press cannot be sued for criticizing public officials, even when reporters and editors make factual mistakes that damage officials' reputations, unless the reporters and editors acted with "reckless disregard" for the truth. And although it is hardly news when a journalist praises a decision expanding journalists' rights, Lewis is impressively evenhanded in assessing the protections that the First Amendment should give to the press. For example, he debunks claims that the First

Amendment should be read to create a "reporters' privilege" that would invariably shield journalists from having to reveal the identity of their sources to juries and grand juries.

For the most part, Lewis's style of offering opinionated commentary without laying out any systematic framework for thinking about First Amendment issues serves his readers well. Occasionally, however, the comments in one part of the book seem hard to square with the critical observations in another. For example, he criticizes Supreme Court decisions upholding the punishment of radical dissenters from past eras who preached the desirability of law-breaking and even violence as a tool of political change: Bolsheviks during World War I, criminal syndicalists in the 1920s, and Communists in the McCarthy era. Moving to the present, however, Lewis criticizes a 1969 Supreme Court decision that he thinks could protect a devotee of radical Islam who advocated terrorist violence unless the speech was likely to trigger "imminent lawless action." He writes, "I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging."

But how, I wonder, is the case of terrorists' speech today any different in principle from cases involving past advocacy of lawless violence in the 1920s or the 1950s? It is true, of course, that both the public and the judiciaries of those eras overestimated the threat that violence would actually occur. And the danger that speech will actually spur violent action may be greater now than it was before. But we cannot know today how great the threat actually is—nor could those of earlier eras know with certainty how the future would unfold. Thus the questions: Is there really a difference of principle among the cases? And if so, what is the governing principle?

Perhaps self-evidently, these are the questions of a law professor who craves a general theory that would explain why some kinds of speech should be on the protected and others on the unprotected side of the First Amendment line. Given this craving, I cannot help observing that *Freedom for the Thought That We Hate* makes scant effort to answer such questions, or a number of similar questions that arise when Lewis says that the press should have some protections but not others.

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American Nazi Frank Collin reports the cancellation of a planned march in Skokie, Illinois, in June 1978 because his group has won the right to demonstrate in Chicago's Marquette Park.

But I can guess quite confidently how Lewis might respond to this gently barbed observation. He would, I imagine, recall some well-known words of Justice Holmes, whose pithy observations he repeatedly quotes with clear approbation. Holmes famously wrote that "[g]eneral principles do not decide concrete cases" and that "[t]he life of the law has not been logic; it has been experience."

History and experience lie at the center of Lewis's narrative, and he makes them come vividly alive in *Freedom for the Thought That We Hate*. After picking up the book on a winter afternoon, I read on into the evening, not wanting to put it down.

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Editor's note: Anthony Lewis is an incorporator and former director of Harvard Magazine Inc.

Solar Sculptor

Michael Kapetan's sundials don't do "clock time."

by CARA FEINBERG

On the front lawn of the U.S. vice-presidential residence in Washington, D.C., less than 150 yards from the nation's most precise clock, sits another type of timepiece. Its measurements are approximate, its hour hands are absent, its polished granite time markers are useless when the sky is overcast. It can't tick off nanoseconds like the atomic Master Clock at the neighboring U.S. Naval Observatory; the sundial's hour hand appears only as a shadow cast toward the crescent of red granite markers 10 feet from its central stone.

But for designer Michael R. Kapetan '69, a sculptor and teacher at the University of Michigan School of Art and Design, keeping exact time has little to do with his art. "We are all too caught up in clock time," he says from his converted one-car-garage studio in Ann Arbor, Michigan. "I coined the term 'solar sculpture' to get away from the traditional garden artifacts that mark the hours, and get to a broader idea of art that addresses the sun, the seasons, and time."