

Book Review



Reviewed by Richard A. Forsten, Esquire

A Love/Hate Relationship: Freedom for the Thought That We Hate, A Biography of the First Amendment

by Anthony Lewis (Basic Books, 2007)

“Ours is the most outspoken society on earth.” So begins Anthony Lewis in his new book, *Freedom For The Thought That We Hate*. It was not always so. Subtitled, “A Biography of the First Amendment,” Lewis’s book begins in England, in 1538, with King Henry VIII, before quickly moving across the Atlantic to the 1735 trial of John Peter Zenger, a printer who happened to print a newspaper for a client (Zenger had nothing to do with the content) that criticized the Royal Governor of New York. Although truth was not a defense to a charge of seditious libel, Zenger’s attorney argued that the criticisms were true and the jury should acquit. It did.

Lewis’s book is very much a biography. It covers all of the major high spots that one would expect, starting with the passage of the First Amendment through to the present day and the issues confronting the United States in the twenty first century. He tells the familiar stories, but also mixes in some unfamiliar observations and anecdotes as well.

As might be expected, Lewis discusses well known cases such as *Texas v. Johnson*, the flag-burning case, and the 1964 case of *New York Times v. Sullivan*, in which the Supreme Court, in a 9-0 decision, first articulated the modern requirements for libel. Yet, Lewis also discusses less well known cases such as the Supreme Court’s 1931 decision in *Near v. Minnesota*, which involved a Minnesota statute that authorized courts to shut down “malicious, scandalous and defamatory newspapers.” In the first ac-

tion brought under the statute, Jay Near had his weekly paper, the *Saturday Press*, shut down. Near was an anti-just about everything (anti-Semite, anti-Catholic, anti-labor, etc.) and his paper regularly charged that Jewish gangsters were corrupting government officials. However, his paper was apparently fairly accurate in terms of reporting corruption. From the bench, Justice Brandeis told the lawyer for the state that he had read the nine published issues of the paper and that the paper was trying to expose corruption. If the paper got the facts wrong, it could be sued for libel. By a 5-4 vote, the Court struck down the statute as violating the First Amendment.

Lewis adds to the description of the case with a story about Irving Shapiro, the former CEO of the du Pont Company. Shapiro knew Jay Near when he was a boy. Shapiro’s father had owned a dry-cleaning store in Minneapolis. Gangsters had demanded protection money and when Shapiro said no, they sprayed clothes hanging in the store with acid. The established local papers took no interest in the story, but Near wrote about the attack and the gangsters were prosecuted!

Lewis also tells the story of the Supreme Court’s 1967 decision in *Time, Inc. v. Hill*. The Hill family, father, mother, and five children, lived in a Philadelphia suburb in 1952 when three escaped convicts took over the house. They kept the Hills hostage, but treated them with respect. After the convicts left, they were caught.

Two years later, a play was staged on Broadway called *The Desperate Hours*,

in which a family is held hostage in its home by escaped convicts. It was set in Indianapolis and, unlike those who held the Hills, the convicts in the play engaged in a reign of terror against the family. *Life* magazine did a feature on the play, and, in doing so, photographed the actors in the Hills’ old home. The story stated that the play, with all of its terror and brutality, was a reenactment of what happened to the Hills. The Hill family was devastated, and Mrs. Hill suffered a breakdown. They sued under New York’s invasion of privacy law and were awarded \$30,000. The publisher took the case all the way to the Supreme Court, where it was represented by Richard Nixon. By all accounts, he argued the case well.

The Court, in its conference following the argument, voted 6-3 to uphold the judgment and the case was assigned to Justice Fortas. His draft opinion began with a stinging attack on the magazine, but his draft was never published. In the following weeks, some of the Justices began to have second thoughts. The case was reargued the following term, and the Court ultimately decided against the Hills by a vote of 5-4. Justice Brennan wrote for the Court that “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.” Fortas dissented (writing a milder version of his original draft) as did Justice Harlan. Because the Hills were private individuals and not public figures, who was going to publish their side of the story?

Their ability to compete in the marketplace of ideas would not work. Harlan would have applied a negligence standard in the case of private individuals such as the Hills, rather than the more difficult test of knowledge or reckless disregard established by the *Sullivan* case. Lewis disagrees with Brennan and finds Harlan's position persuasive. As a sad denouement to the case, he notes that Mrs. Hill took her own life in 1971.

By and large, though, Lewis' book is a celebration of the First Amendment, celebrating its growth and the freedom it provides. Ours is indeed an outspoken society. Surprisingly, though, Lewis ends in a curious place. After extolling the virtues of the First Amendment throughout his book, he concludes near the end as follows:

“In an age when words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones. The law of the American

Constitution allows suppression only when violence or violation of law are intended by speakers and are likely to take place imminently. But perhaps judges, and the rest of us, will be more on guard now for the rare act of expression—not the burning of a flag or the racist slang of an undergraduate—that is genuinely dangerous. 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. That is imminence enough.”

September 11 has had profound effects on America. Will it also change our conception of the First Amendment? Should it? Lewis never asks these questions, and ultimately, the story of the First Amendment will be one that continues on into the twenty first century and beyond. ☞