JOHN SHATTUCK: Good evening and welcome. I’m John Shattuck, the CEO of the Kennedy Library Foundation, and on behalf of myself and our Library Director, Tom Putnam, who is here with us today, we’re just thrilled that you’re here at tonight’s very special Kennedy Library Forum. Tonight we are celebrating one of the bedrock principles of our democracy, freedom of speech, and one of the greatest defenders of that freedom, Boston’s own national treasure and national civil liberties champion, Anthony Lewis. Tony has written an extraordinary new book, which I will now shamelessly peddle to you. He’s advised me to do this at the end of the forum as well as the beginning and I completely agree with him, but on the principles of early and often I’m now showing it to begin with. It’s a book entitled Freedom for the Thought That We Hate, and it is on sale at our bookstore and I know he will be very pleased to sign copies after tonight’s forum. Tony’s book is a special portrait of an American freedom, and he’s here on our stage to have a conversation about it with another great civil liberties champion, my friend, Harvard Law School Professor Martha Minow.

And before saying a few words of introduction about tonight’s discussion, I want to welcome our own very special Massachusetts Chief Justice Margaret Marshall and to say how honored we are to have her here with us tonight, both as a guest of the Kennedy Library and of her husband, Tony Lewis. Margaret, maybe you could just stand and we can recognize you. [applause]

I also want to express my appreciation to the institutions that make these Kennedy Library Forums possible. We’re especially grateful to our lead sponsor, Bank of America, and to our other generous Forum sponsors: Boston Capital, the Lowell Institute, the Corcoran Jennison Companies and the Boston Foundation, as well as our media sponsors, The Boston Globe, NECN and WBUR, which broadcasts all of our forums on Sunday evenings at eight.

So tonight we’re going to explore what Tony Lewis calls in his book the 14 most important words in American democracy. They’re found in the First Amendment to the
Constitution, and for those of you who need a refresher course, here’s what they say:

“Congress shall make no law abridging the freedom of speech or of the press.”

Amazingly, although we take this great principle for granted, there was no reference to it in the original Constitution adopted in 1787. In fact, the First Amendment was an afterthought -- added four years later along with other basic rights -- because Massachusetts, Virginia and New York and several other states had refused to ratify the 1787 Constitution unless there were guarantees against the danger of a repressive or overbearing central government.

Tony shows us how over the years we Americans have had plenty of reason to watch out for this danger, probably no more so perhaps than today. As early as 1798 in the Alien and Sedition Act, President John Adams got the Congress to criminalize “false or malicious statements” made against the government at a time of fear that a French Revolution’s “reign of terror” might spread across the ocean to our shores. And in his book Tony reminds us that the political use of fear to justify repression is a recurrent theme in American history, and he shows how the debate over the Sedition Act really mirrors a lot of what has been happening much more recently. He warns that, and I quote, “Americans should sense danger when the government tries to stop a newspaper from disclosing the origins of an unsuccessful war, as the Nixon administration did when The New York Times began publishing the Pentagon Papers in 1971, or accuses a newspaper of endangering national security by disclosing secret and illegal wiretapping without warrants, as the administration of George W. Bush did during the Iraq War in 2006.”

American presidents have, of course, often wished that the press would write the story their way and they’ve rarely been satisfied with the way the story came out. Tony Lewis tells us that Richard Nixon, who was especially wary of the press and I suppose for good reason, was the lawyer on the losing side of a case in the Supreme Court against Time Magazine two years before he was elected president. Tony quotes Nixon as saying with
more than a touch of foresight that, and I quote, “I always knew I wouldn’t be permitted to win a big appeal against the press.”

President Kennedy was wary but a bit more magnanimous in speaking about his relationship with the press. In an interview with Sandy Vanocur on NBC News on December 17, 1962, JFK spoke about the role of a free press in holding the government accountable. Here’s just a bit of what he said. “It’s never pleasant to be reading things that are not agreeable news, but I would say it is a check really on what is going on in the Administration. So I would think that Mr. Khrushchev, operating in a totalitarian system -- which has many ‘advantages’ as far as being able to move in secret, there is a terrific disadvantage for him in not having the abrasive quality of the press applied to you daily. Even though we never like it, and even though we wish they didn’t write it, and even though we disapprove, there isn’t any doubt that we could not do the job at all in a free society without a very, very active press.”

I first met Tony in 1974 at the height of Watergate when I was a young staff lawyer for the ACLU and he was already a Pulitzer Prize-winning columnist for The New York Times. I had written an article about executive privilege for a book about government secrecy, and Tony wrote the introduction to the book. And I’ll never forget having met him for the first time how transfixed I was by the power and simplicity of his words, cutting to the core of why freedom of speech and openness are essential in a democracy. Here’s what he wrote in 1974. “In the end these issues are a matter of faith, a faith in the democratic process. At its birth the United States staked its all on the belief that openness leads to truth and secrecy to superstition. As Justice Brandeis said in arguing for free speech to let in the light: ‘Men feared witches and burned women.’” I thought that was quite an extraordinary way to end that particular passage.

Not surprisingly, Tony has twice won the Pulitzer Prize for his remarkable writing and reporting. His New York Times column “Abroad at Home” was for many years the true North Star of thoughtful liberal commentary in the American press. Earlier Tony
reported for the *Times* on the momentous legal, political and social developments that shaped the civil rights revolution and the decisions of the Supreme Court that reflected major changes in American society. In addition to his new book, Tony is the author of three hugely acclaimed bestsellers: *Gideon’s Trumpet*, about a landmark Supreme Court case giving impoverished criminal defendants the right to an attorney; *Portrait of a Decade*, about changes in American race relations; and, *Make No Law*, about a 1964 Supreme Court decision that reinforced freedom of the press in America. Tony has taught at the Harvard Law School and for more than 20 years he was the James Madison Visiting Professor at Columbia University.

We’re very fortunate to have as our moderator tonight and our discussant with Tony another great champion of civil liberties, Martha Minow. Martha is the Jeremiah Smith Professor of Law at Harvard and an expert on issues of free speech, equality, human rights and religious freedom. She has written five widely acclaimed books and many articles, has served on the Independent International Commission on Kosovo, the Project on Justice in Times of Transition, and the Institute for Global Ethics, and has been an advisor to the United Nations High Commissioner for Refugees.

Most importantly, in 2005 Martha received the top award at Harvard Law School for her teaching, the prestigious Sacks-Freund Teaching Award presented annually to the Law School’s outstanding professor. In her speech accepting the award, Martha modestly told her students, “It’s a privilege to teach here and I can’t believe they pay me for it.”

Please join me in welcoming to the stage of the Kennedy Library Tony Lewis and Martha Minow. [applause]

**MARTHA MINOW:** Good evening. And it’s a special privilege for me to be here and to thank John Shattuck for helping to make the JFK Library an exemplary forum for free speech. And so with no further ado, let me just say how thrilled I am to be here with
Tony, who I consider a teacher and a friend. A sustained observer of free speech, he’s also an exemplar of the criticism that it enables.

There’s someone who once described Tony this way: “Lewis has the best mind for seeking out and fairly defining the public interest of anyone I know.” Now the person who said this, I never heard of him before. His name is Ralph Deeds. He’s a blogger. More on blogs later.

Never hesitant to direct critique actually to the press too, Tony after 9/11 has said quite consistently that the press has provided only a flickering light on the torture scandal, without the relentless critique that the press distinguished itself with in Watergate. And that’s one of the questions I’m going to come to later.

But I want to turn right at the beginning, Tony, to something that John also touched on. Your book offers a window onto the early test of the First Amendment posed by the Sedition Act that criminalized writing and publication of “false, malicious, scandalous” writing against the government. And apparently we’ve had recurrences of this same kind of impulse to punish speech that criticizes the government. And I’d like to ask you what actually produced that very first Sedition Act and what allowed it to be pushed back and what lessons can we draw from that?

**TONY LEWIS:** Let me begin before I answer your question by making one comment on John’s introduction. It was a wonderful quote from President Kennedy, John, but there’s another one that more accurately, I think, represents his usual slightly sardonic air, which was of The Herald Tribune, “I’m reading it more and enjoying it less.” [laughter]

Well, the Sedition Act is really a wonderful case in point. It’s true, as both of you said, that it criminalized criticism of the government, but it mainly focused on criticism of the president, independently named in the statute. And it supposedly allowed a defense of truth if you were prosecuted, but the prosecutions that occurred were usually for
completely political statements that weren’t either true or false, that we would just take as part of political slang. Actually a member of Congress -- a pro-Jefferson member of Congress -- was sent to prison, convicted and sent to prison, for saying that John Adams was a pompous ass. Well, I mean, how could you prove that to be true or false? It’s in the eye of the observer. And that leads to the real reason for the Sedition Act. The Federalist majority in Congress, and John Adams, a Federalist who signed it into law, described it, as Martha said, as a defense against a Jacobin terror leaking across the ocean from France. But in fact, it was not very likely to happen. I mean, it took a month at least to sail from France to the United States. The notion of Jacobin terrorists overcoming the United States was pretty far-fetched.

And the real reason for the act was to imprison Jeffersonian editors in the run-up to the election of 1800 in which Jefferson, who was Vice President, would run against Adams, the President. And in due course, the leading pro-Jefferson editors were all prosecuted and sent to prison or fined heavily. And interestingly, the act made it a crime to criticize the President maliciously, but it did not protect the Vice President from malicious criticism. It was a wholly political statute, and in fact that was emphasized by the fact that it expired in its own terms of the next inauguration day. Well, how did it happen? I think I just said how it happened.

It was a political statute, and it’s important to know this actually as a sort of prelude to what we’re going to talk about. Madison, the author of the First Amendment, and Jefferson, attacked the statute, campaigned against it, wrote important documents against it, but they didn’t go to court. They didn’t do what we would think naturally of doing today, rushing to court and saying, it’s unconstitutional. Madison said it’s unconstitutional, but he didn’t think of that as something he would go to court about. He regarded it as a political question and he argued it as a matter of politics. And when Jefferson was elected, some argued that was a public verdict on the constitutionality of the statute, and in fact those who argued 100 years later, 120 years later, about freedom of speech argued that it was a public judgment on that kind of statute. And it was argued
by the lawyer for The New York Times in the 1964 case that John mentioned is a subject of a book of mine, New York Times against Sullivan. The man who argued it, Professor Herbert Wexler of the Columbia Law School, said the election of 1800 was a judgment that punishing speech because it’s critical was found by the United States public in the campaign of 1800 to be unconstitutional.

MARTHA MINOW: I’m so glad you mentioned the question about the role of courts, because elsewhere in the book you talk about Lernard Hahn’s point, that the courts alone can’t protect freedom, that there has to be a spirit of liberty in the land. But you have a view that the courts do have a role. So could you comment on that?

TONY LEWIS: Well, Judge Hahn is wonderfully eloquent. I don’t have his statement at the tip of my tongue. You’ll have to read the book, but he went farther than you said, Martha. He said, “It’s unavailing to go to the courts.” He didn’t say it’s not the only thing, he said it’s not a good idea to go at all. And I don’t agree with that. Of course, it’s true that in a country that doesn’t believe in free speech the courts can’t do very much. They can try.

But I look at it if for no other reason the courts are important because of dissent in times of fear and times of war and times of stress when the Supreme Court has often not been a bulwark of freedom. It has yielded to public fear and government pressure and said, “Okay, you can punish communists, you can do all these things.” But there usually have been dissents, and the dissents have had a lasting effect. There were dissents beginning in 1919 by Holmes and Brandeis, and then in the McCarthy period by Black and Douglas, and they had a consequence. People listened to them.

MARTHA MINOW: It is striking, isn’t it, that it’s the dissenting voices in the Supreme Court echoing dissent in the country that have ended up triumphing and being the bulwark of freedom. When Justice Holmes dissented in the Abrams case at the time of World War I, you quote him with his marvelous statement that “the best 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. We
should be eternally vigilant against attempts to check the expression of opinions we
loathe and believe to be fraught with death, unless they so imminently threaten immediate
interference with the lawful and pressing purposes of the law that an immediate check is
required to save the country.” Now you comment that only Holmes could have said this
comment particularly about the Constitution being an experiment and the United States
being an experiment. What did you mean by that?

TONY LEWIS: I was talking about his command of language, his rhetoric. I can’t
imagine any other judge who would speak of the American system as an experiment as
all life is an experiment. What a statement for a judge to make. Or the next phrase in
that opinion which Martha just read, “We must be vigilant against attempts to check the
expression of opinions that we loathe and believe to be fraught with death.” [laughter]
You know, most judges are not quite so eloquent, let’s put it that way.

MARTHA MINOW: Well, we know for sure that wasn’t written by a law clerk.
[laughter]

TONY LEWIS: No. Well that leads me to a story. Can I tell a story?

MARTHA MINOW: Please tell a story. That’s why we’re here.

TONY LEWIS: Just to indicate something about the background when Holmes wrote
that and dissented, joined by Brandeis, and made that statement. We mustn’t take it for
granted that it was easy to do. It was not. This was the first opinion, though a dissent,
ever written in the Supreme Court that treated freedom of speech as a fundamental
American value.
The country was absolutely swept by patriotic fervor during World War I. German words were banned from ordinary usage. Sauerkraut was called Liberty Cabbage.

[laughter]

**MARTHA MINOW:** Like Liberty Fries, huh?

**TONY LEWIS:** Liberty Fries. Nothing new under the sun. Freedom Fries. You have to alliterate -- freedom fries. And the Sedition Act, which was proposed by President Wilson in 1918 and enacted by Congress, Second Sedition Act in American history, made all sorts of completely ordinary critical speech criminal offenses. And people were sent to jail for criticizing Wilson. In the Abrams case itself, some radicals had thrown leaflets from the top of a building in New York criticizing Wilson for sending American troops to Russia after the Bolshevik Revolution. It was political criticism of a presidential policy. I can’t imagine anything more squarely at the heart of free speech, can you? They were convicted of violating the Espionage Act and sentenced to 20 years in prison. Twenty years in prison for these pamphlets! Absurdly ineffectual. Holmes in the course of his powerful dissent dismissed them as puny anxonymities. They were anonymous pamphlets. Puny anxonymities.

Well how did I … oh, I know the story I wanted to tell. Sorry. It took me a little while to get there. I wanted to show you how it wasn’t easy for Holmes to write that opinion and publish it. And I’ve given you the background, but now the actual occurrence. After he circulated it among his colleagues but before it was published, one day three of his colleagues went to call on him at his apartment, and they were accompanied by Mrs. Holmes, Holmes’s wife. And they pleaded with him not to publish the opinion because he said we needed national unity and he as an old soldier would understand that. Can you imagine it? Mrs. Holmes pleading with her husband not to publish this opinion? And he said, thank you very much, I’m really glad you called on me but I’m going to publish it. That’s what it was like.
MARTHA MINOW: Quite a story. You mentioned another dissent by Holmes in United States versus Schwimmer, the case in which an individual refused to swear when she was applying for citizenship that she’d take up arms to defend the United States. And you commented about why you came to even read that dissent. Why did you read that dissent? I never heard of the case.

TONY LEWIS: Well, it’s not taught nowadays and it’s not much known, but it was brought to my forceful attention in the following episode. When I was covering the Supreme Court for The New York Times -- this was a little while ago, around 1960. [laughter] One day I was invited to come in to see Justice Frankfurter for a chat. Now, it was only a chat, no secrets passed. I never learned anything about pending matters. He was very irritated that day because some newspaper had called him insufficiently liberal, especially compared to his colleagues Hugo Black and William O. Douglas. Well, there was nothing more likely to drive Felix Frankfurter up the wall than to be compared unfavorably to his colleagues. And he said, liberal -- because he had a different view of what liberalism was, because he grew up in a different time. And then suddenly he looked at me, stood up from behind his desk and said, “Liberal, I’ll show you liberal.” And he walked across the room, grabbed a wall opposite his desk – there were shelves of the United States reports, the compendiums of Supreme Court opinions -- and he pulled one volume out, opened it, all very brisk gestures, handed me the book and said, read. It was open to a dissent by Justice Holmes in the case that Martha just mentioned, United States against Schwimmer.

I read. And as she said, Ms. Schwimmer, who was an immigrant from Hungary and loved the United States and wanted to become a citizen, was refused the right to do so because she was a Quaker. But not a Quaker, she wasn’t a Quaker. She was a pacifist. Like Quakers, she was a pacifist and wouldn’t take the oath that said she would defend the Constitution by taking up arms. Well, Holmes couldn’t resist saying in the beginning of his opinion that he rather doubted that she would be asked to take up arms because she was a woman of a certain age. [laughter]
But he said he didn’t agree with her. In any event, he didn’t agree with her about war. He knew war was terrible, and he did know. This was 1929, this dissent -- 1929. Holmes was 88 years old. He had fought in the Civil War, mind you, 1929, the Civil War, and had been wounded three times gravely. His father, Dr. Holmes, came down from Massachusetts to treat his wounds in Virginia. And when he died a few years after this opinion, his friends found hanging in his closet his Union Army uniform. He knew what war was about. But, he said, I know war is terrible but I think it has its noble side so I don’t agree with her. But if there is any provision of the Constitution that more imperatively commands attachment than any other, it is freedom of thought. Not free thought for those who agree with us, but freedom for the thought that we hate. Hence the title of my book.

I didn’t quite stop there. He had a few more sentences in which he said the Quakers have done their part in making this country what it is, and I had not thought before now that we regretted our inability to expel them because they believed more than some of us in the Sermon on the Mount. Well, again, I don’t believe there’s any other judge anywhere who would have written that sentence. A Sermon on the Mount, wow.

MARTHA MINOW: Louis Menand in his book The Metaphysical Club writes about Justice Holmes’s experience in the Civil War as teaching him above all to be resistant to true beliefs, absolute beliefs, because he had come to believe that war was the result of people believing something so strenuously that they couldn’t resolve anything other than by war. And yet he ended up having a true belief in speech in a way. Is that a paradox?

TONY LEWIS: Yes, it’s a paradox about Holmes. Holmes made his name and really attracted Felix Frankfurter’s attention at a time Frankfurter was a professor at the Harvard Law School by refusing to go along with the majority of the Court when it took these absolute views about economic legislation. The Court held unconstitutional child labor laws, maximum hour laws -- all kinds of things that it’s hard to imagine them being held
unconstitutional today, even to imagine the theory under which they would be unconstitutional, but the Supreme Court simply didn’t allow economic experiment on the part of legislatures, Congress or state legislatures. Holmes thought that was drastically wrong and there had to be room for experiment.

And indeed, even in the speech area he came fairly late to the views you’ve described if not absolute, very close to absolute. And in two cases, three cases before 1919, during World War I, he affirmed convictions that we would regard today as quite wrong. And then suddenly in 1919 he wrote this dramatic dissent, freedom for the thoughts that we loathe.

MARTHA MINOW: In some sense, he’s the realization of his own philosophy. That is, because there’s dissent, people can change their mind. Because there’s dissent, there’s free exchange of ideas and the best ones can win in a marketplace. And apparently he was convinced.

I want to turn your attention to New York Times versus Sullivan, which you referred to earlier and which is the subject both of the earlier book, but I think not until this book did I really get the significance of this decision in which the court really reversed the common law, really transformed what had been the inheritance from England. And I wonder if you could talk to us about that and also help explain could it have happened but for the fact it occurred in the context of the civil rights movement?

TONY LEWIS: That’s a whole book that I have to answer. [laughter] I’ll try to make the answer as short as I can. My answers have been too long, and I apologize for that.

MARTHA MINOW: They’re great.

TONY LEWIS: You know, you say you’ve only just realized it on your second-go. I taught the case for about 15 years before I began to think I understood it. It’s actually a
very elusive case. I once had occasion many years later to read the story I wrote about the
decision for *The New York Times*. Didn’t understand it at all. [laughter] I didn’t. I
really didn’t.

Well, here’s what you have to know. First of all, from 1791, when the First Amendment
was added to the Constitution, until 1964 it was universally assumed and carried out that
the First Amendment did not affect libel law. Libel was an exception to the First
Amendment and no libel action, no judgment for damages in libel had ever been held
unconstitutional, no matter how large, how absurd, how faulty the reasoning. Just had
nothing to do with the First Amendment it was thought.

Then along came this case, and the case was this: supporters of Dr. Martin Luther King,
Jr. took out an ad in *The New York Times* in which they criticized southern white officials
for their abusive treatment of civil rights demonstrators and those demanding their rights
in the south, Dr. King and his supports. It did not name any of these southern white
officials but described them as southern violators of the Constitution. Generic term. One
of them said the ad referred to him and he sued for libel, though he wasn’t mentioned by
name. And he was a man called L.B. Sullivan, who was a commissioner of the City of
Montgomery, Alabama. And he showed that there were some mistakes in the ad, one or
two of them relevant, significant, but others rather trivial. For example, the ad said that
Dr. King had been arrested on trumped-up charges seven times. He had only been
arrested four times. Well, you know. And under the common law and Alabama law … I
have to remind you what the common law is. The common law, begun in England and
carried over to this country, is simply the accretion of decisions by judges. Judges
beginning hundreds of years ago in England decided cases the way they thought best and
then other judges built on those decisions the precedent, system of precedents, and the
result was the common law. Nothing written down in a statute, just the sum and
substance of these judicial decisions.
And libel law under the common law was very strongly weighted toward the plaintiffs. The defendant, let’s say a newspaper that published something and was sued for libel, had to prove the truth. The plaintiff didn’t have to prove it false; the defendant had to prove it true, the statement true. That’s sometimes hard to do: you can’t get witnesses, they refuse to testify or whatever. It makes it much harder.

Secondly, damage was presumed. If you published something that you couldn’t prove true, it was then false. Falsity was presumed unless you could overcome that. Damage was presumed. And third galloping presumption so-called was fault. In ordinary civil damage cases, tort cases as they’re called, you have to show some kind of fault. For example, if you sue for medical malpractice you have to show negligence on the part of the doctor, or if it’s an automobile accident case you have to show negligence. In libel cases you didn’t have to show anything, fault was presumed. So it was very weighted in favor of plaintiffs.

Well, the Alabama courts followed the English common law, and that’s the way they decided the case. The case was tried before an all-white jury by a judge who was so enamored of the Confederacy that on the anniversary of its founding he seated the jurors in his courtroom in Confederate military uniforms. [laughter] It wasn’t an easy case for The New York Times to win and it didn’t win. And the judge really decided everything except two questions: whether the ad could be taken as referring to Commissioner Sullivan, and the jury found that it did, even though he wasn’t named, and if so, what the damages were. And the jury awarded him all the damages he requested, half a million dollars. It’s the largest libel judgment in Alabama history at that point. So it was a serious matter, not only for The New York Times, which before this case reached the Supreme Court had lost a second case arising out of the ad to the mayor of Montgomery, and the governor had a lawsuit too rising out of the ad, and it looked as if we were going to be out two and a half million dollars, which was enough, the Times’s Executive Vice President later said, to put the paper out of business.
But even beside The New York Times, it was likely to intimidate the national press from covering the civil rights movement. And that was its purpose. Sullivan and his colleagues wanted to keep -- and boasted of it -- wanted to keep the “cotton-pickin’ national press” out of the south. And that would have been probably fatal to Dr. King’s effort because his whole theory -- his theory of nonviolent action for change -- was that if the rest of the country -- which was rather ignorant, most people in the north were rather ignorant of the actual cruelty and brutality of racial segregation and decimation -- could see it in operation, read about it in the papers and see Viola Liuzzo killed in Selma and read the beating up of people because they tried to vote, if they knew about that, they wouldn’t like it and they would demand change. And you know, the New York Times case was decided in favor of free speech and it worked and Congress passed two statutes that transformed the situation in the south.

So I’ll say just a word about the case. The Supreme Court had to do something which it doesn’t really like to do very much, which is to reverse more than 100 years of decisions going one way. Libel wasn’t part of the First Amendment. That had been the rule from, as I said, 1791 to 1964. And the lawyer for The Times, Professor Wexler, persuaded them to do that by using the example of the Sedition Act of 1798. He said this ad was like a political speech. It wasn’t something in an ordinary libel case. It was a political speech. And it was just as much entitled to protection and the central meaning of the First Amendment --- his phrase -- picked up by Justice Brennan in the opinion of the Court, was that the right to criticize our rulers is the central meaning of the First Amendment. That was the basis of the opinion. And then afterwards the Court went on to apply it to lots of other situations and libel is now fully covered by the First Amendment.

MARTHA MINOW: It’s an extraordinary story, and one of the things that comes through so powerfully is the impact of the times, impact of the context. And it really has made me think we do a disservice in law schools because we rip these cases from their
historical context and just teach them as abstract doctrines. And you make it come alive in its times.

But in the midst of this -- here’s one thing remarkable about this book, and I guess I’m shamelessly plugging it as well, you paint of course in that context the press as a great hero. But in other contexts you don’t defend the press 100%. And so I wonder if you could in contrast discuss the very complicated question of the shield law for reporters.

TONY LEWIS: That is a bit complicated.

MARTHA MINOW: Valerie Plame, all that stuff. Maybe the way to get into it is to talk about the peculiar fact that the Supreme Court decided a case, Branzburg versus Hayes, five to four rejecting in essence what the press wanted and the press has ignored it.

TONY LEWIS: Oh, that’s a peculiar fact. I thought you were going to say that the decision was peculiar. I didn’t think the decision was peculiar for this reason: over modern history when the First Amendment has been interpreted it has with a single narrow exception been read to protect the right of the press or the public to discuss or publish things that it knows. It has never been viewed as a Freedom of Information Act. You can’t waive the First Amendment and get into a cabinet meeting and find out what the cabinet is discussing with the president, or a secret meeting of the Supreme Court justices, a conference at which they discuss their decisions.

And the argument in favor of a constitutional right of the press to withhold the names of confidential informants began with a claim that the First Amendment covered the right to acquire information. And it said we have to keep sources secret in order to get the information. So it was a rather long shot and it failed. But I think there are instrumental or policy reasons why it would be unwise to have an absolute shield for confidential informants, and the case that I’d like to cite is the case of Wen Ho Lee.
Wen Ho Lee was a physicist at the Los Alamos National Laboratory. Some newspapers and broadcast stations began carrying stories from a government source, unnamed, or sources, that Wen Ho Lee was actually a spy for China and he was giving nuclear documents to China. Well, of course, that had the most devastating effects on Wen Ho Lee. He was arrested, charged with 60 counts of espionage and other things, held in solitary confinement, moved from his cell to anywhere else in chains, treated in a truly awful way. And then after nine months or so the government dropped 59 of the 60 charges. He pleaded guilty to one charge of the misuse of information that had been retroactively classified and was let go without any further sentence. And the court, the judge, the trial judge who approved the settlement said the country owed an apology to Wen Ho Lee. That’s unusual. Well, he sued the government for invasion of his privacy in the leaks which had such devastating consequences. And, naturally, in order to maintain his lawsuit he had to find out who the leaker or leakers were. So he subpoenaed the members of the press who had written the stories and naturally they wouldn’t tell the name. Of course not. Because that’s the ethics of the press and it’s a correct ethic. If you give a promise, you’ve got to keep it. Promise of confidentiality.

Now, here’s the question. You can decide it yourselves. Would it be right to have a system in which if we granted immunity to the press from answering that question, somebody whose life was destroyed essentially would have no recourse, would have no compensation, however modest, for what had been done to him? Would we want to have that kind of society? Well I don’t. I vote against that. So that’s where my line is drawn at the claim of privilege. And in fact the press institution settled that case by paying Wen Ho Lee $800,000 dollars and the government paid him $600,000 to cover his legal fees. He wasn’t made whole. His life remains not what it was. But he got something.

MARTHA MINOW: You endorse Judge Tatel’s solution to this problem, which is to have a qualified privilege. And yet as I understand it, Judge Tatel, who advocates at least
that degree of a privilege, went ahead and applied it to the situation presented in the Valerie Plame case and would not have granted it in that context.

**TONY LEWIS:** That is correct. Judge Tatel was dealing with leak cases, cases in which the government is trying to find out -- the government, not Wen Ho Lee, civil plaintiff, but the government is trying to find out the source of the leak. And in this case, a government special prosecutor subpoenaed Judith Miller of *The New York Times* and demanded to know from whom she had gotten some information about the fact that Valerie Plame was a CIA employee. That fact was made known by Robert Novak in a column. And though it wasn’t advertised at the time, Novak in fact answered the question secretly, privately. When the special prosecutor asked him, he answered it so he wasn’t held in contempt.

Judith Miller was held in contempt although she had never written a story. She had just gathered information. And she was held in contempt and spent 80-some days in prison before she decided that after all she better check back with the person who gave her the story and see if he really was unwilling to have his name used and he said, no it’s fine, use my name. [laughter] It was really kind of crazy, but she then gave the name and she was released.

Well, as Judge Tatel analyzed it, in this case, this wasn’t a case of a whistleblower, the usual leak case when a whistleblower tells a reporter that the government is secretly and illegally tapping your wires or secretly torturing prisoners. That’s a whistleblower. This was a government -- the opposite. The government was trying to punish somebody who had been a whistleblower. And so Judge Tatel wanted to have a balance. His theory was that you should balance the harm done to the public interest by the leak; the government would say it’s destroyed our network of spies, it’s destroyed our relationship with allies, that’s the harm done, against the good done to the public interest by letting the public know what’s going on. To balance those two things. And in the Plame case, the Judith
Miller case, he said the balance is in favor of the government because it’s trying to do the right thing, not the wrong thing. So she loses.

MARTHA MINOW: So you don’t think that there should be an absolute protection of the press or of speech. In fact, you also are sympathetic to invasion of privacy suits. You’re also concerned about fair trial. You’re also concerned about campaign finance fairness. The great defender of the First Amendment turns out to be a balance man. How could this be? [laughter]

TONY LEWIS: Well, as Joey Brown said it at the end of the movie Some Like It Hot, “Nobody’s perfect.” [laughter]

MARTHA MINOW: Or maybe the answer is that it’s hard and there have to be balances.

TONY LEWIS: I think there are values on both sides. I can’t say that the press is always right because I don’t want to deny Wen Ho Lee some compensation. If you want me to give a privacy case, I’ll give a privacy case.

MARTHA MINOW: I was just going to ask you, how about it, yes.

TONY LEWIS: Well, the privacy case: there are many that are quite compelling to me, but let’s take the one you mentioned in which Richard Nixon was counsel for the plaintiff. A family named Hill that lived outside Philadelphia, their home was invaded by three escaped convicts. The convicts held them in the house for several days against their will. The convicts did nothing to them. They were very polite and friendly and so on, but they didn’t let them out of the house. Then the convicts finally left and two were killed by the police and one captured.
It was an enormous story in Philadelphia, huge publicity. And Mrs. Hill, who was very nervous and worried about the publicity, suffered terribly from this. She suffered more from the publicity than from the actual occupation of the house. And the Hills moved from their home outside Philadelphia to a remote corner of Connecticut and sought obscurity where they would not be recognized anymore.

Some years later somebody wrote a play called *The Desperate Hours*, which was about escaped convicts occupying a home. It was not about the Hill family. The convicts were brutal, they threatened to rape the daughter, they beat up the father. It was, you know, a highly dramatized version of the essential situation, but it wasn’t about the Hill family. However, *Life Magazine*, in its wisdom, did a feature at the time the play opened on Broadway, which they staged in the former home of the Hills outside Philadelphia and treated it as the story of the Hill family, imparting things to the play that were really not part of the Hill family. And Mr. Hill sued for invasion of privacy. The family and then Mr. Hill sued. They won a very modest judgment in the New York courts, $25,000 dollars. And Time, Incorporated, the publisher of *Life*, took the case to the Supreme Court, where Mr. Hill was represented by Richard Nixon. The case was argued twice, and we know now because a professor wrote a very learned book about it, a very good book about it, about various cases decided in that period. The Court first voted in favor of the Hill family and the case was assigned to then Justice Abe Fortas to write the majority opinion. He wrote an opinion that was very sarcastic and unpleasant about the press. Said things like, editors and reporters, despite their high office, have to have some respect for common decency. Etc., etc. Well this seemed to put some of his colleagues on edge and they had the case reargued in the fall and it came out the other way, five to four in favor of *Life Magazine*.

And again, some years later, after this book disclosing this background, this backstage history of the case, was published, Nixon’s law partner, Leonard Garman published a long and very interesting article in the *New Yorker* about what Nixon did during the case and the whole conduct of the case. It was very, very interesting. And then toward the
end he said doctors had said that Mrs. Hill was very fragile and that anything could tip her over the edge. Two years after the decision in the case she took her own life. So I’m not a fan of the Hill decision. I think there has to be room for privacy as well as freedom of the press.

**MARTHA MINOW:** It’s a very, very compelling story. I did make a reference earlier to bloggers, and I want to ask you about what do you think is/should be the scope of the First Amendment when there are restrictions imposed not by the government but by private actors? Increasingly we have new technologies where it’s the architecture of the internet that’s going to affect access to speech. Or we can start even with the issue of private universities. Many people claim that when the Iranian president Mahmoud Ahmadinejad was invited to speak at Columbia University that he had a right to do so. A private university was put in a difficult position if it tries to restrict someone who has then been invited. But it is a private university; it’s not governed by the First Amendment. So I wonder what are the lessons you can draw for this new terrain, where we have increasingly private actors who are actually involved in framing for a … whether they’re public or where people really do exchange ideas.

**TONY LEWIS:** You actually have two different questions in there, and I’ll answer them both as I understand it. First of all, private universities or clubs or organizations within private universities have the right to invite people or not as they wish. You don’t have to invite Ahmadinejad but if you do not as a matter of constitutional law, because the First Amendment says Congress shall make no law, it doesn’t say Columbia University shall make no law. But once you invite somebody it’s really bad to disinvite them. It’s not wise from the point of view of your commitment to free speech or your consistency or whatever, and I think you have to go through with the invitation. Columbia did but the president, for reasons I didn’t understand then and still don’t, introduced the Iranian President at the occasion and began with a 15-minute lecture about how terrible the President was, which seemed to be a bit awkward. [laughter]
MARTHA MINOW: So that’s one.

TONY LEWIS: That’s one question.

MARTHA MINOW: And bloggers are different?

TONY LEWIS: Bloggers are a different question. But no, there’s still another aspect of it which I want to say first. That is, the private entity which controls the public access to information, not a blogger shall we say. The one I’m thinking of as an example right now is a cable television channel called Discovery. You undoubtedly know of the Discovery Channel. The Discovery Channel bought the rights to show a documentary called *Taxi to the Dark Side*. It’s a documentary film about the torture and detention of American prisoners. It’s a very powerful film. As it happens, it won the Academy Award for documentaries last night. But I’d feel the same way even if it hadn’t won the Academy Award. And Discovery Channel, after having bought this film a few weeks ago, said we’re not going to show it. We’re just going to keep it and not show it because it’s too controversial. Well, that is to me an outrageous example of the suppression of information and truth, or at least an argued truth, part of the marketplace of ideas that Holmes was talking about, by a private entity. I think that’s a very bad idea. Because they had acquired the rights and effectively suppressed it by not showing it. Well they’ve had enough complaints about that, public disquiet, that it looks as though they may agree to sell it to some other cable channel, which would be a happy ending in a way.

But now as to bloggers. They are the other question. I think bloggers are wonderful. They really are a modern technological version of what James Madison had in mind for the First Amendment. Madison lived at a time, the end of the 18th century and after, when newspapers were not big powerful metropolitan dailies with millions and billions in capital investment. Anybody could have a newspaper. You took your fool’s cap, you wrote out what you wanted to say, and you brought it to a printer and he printed it. That was your newspaper. And Madison’s idea was that there would be unpleasant critical
false things said which he might not like but that the answer, as Brandeis said as, I don’t know, I think you quoted, the answer to that was not suppression but counter-speech, more speech, better speech. That was Madison’s idea and that is in a modern version bloggers. Everybody is entitled to an opinion and it costs very little to put yourself on the web and you can shoot your mouth off.

The difficulty is that it’s only opinion, and that is a major difficulty. Or not -- I’m about to explain why it’s not 100% only opinion, but 99% of what’s on blogs is opinion -- people shooting off their mouths about subjects. Which is nice. But a blogger can’t discover … It took months of work by two reporters, fulltime work for The New York Times to discover the warrantless wiretapping by George W. Bush. It took months of work for The Washington Post, through their brilliant reporter Dana Priest, to discover the truth about torture by American officials. Really valuable.

Now, ordinarily a blogger doesn’t have the resources to do that. Now there happens to be a story in The New York Times today about a blogger who does have some resources. Joshua Micah Marshall -- I’ve forgotten the name of the blog -- but he does actually do work getting facts and it’s admirable. And he’s attracted enough attention so he now has seven full-time reporters working for him. But that’s unusual and it’s wonderful. I hope it continues, because the more sources of information there are the better.

**MARTHA MINOW:** Well, we do have a kind of crisis of a business model that will sustain the print media or the broadcast media so they’ll continue to be able to have that kind of investigative reporting that the bloggers can then opine about, because we haven’t figured out a way to do that. That’s maybe a subject for another panel, John Shattuck.

I think I’m allowed one more question before we’ll open it up to you all, so I hope that you all are thinking about what you’d like to ask. You say in this book, and I quote, “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.” I’m going to say it again. “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.” Again, this looks like a very reasonable sentence. But I don’t know, how do we tell whether some people in the audience are ready to act and is it in advance or is it only afterwards?

TONY LEWIS: This audience? [laughter]

MARTHA MINOW: And I’m looking out at this audience right now. And what led you to that view and how do we actually apply it?

TONY LEWIS: Well, I can tell you literally what led me to the view, because in the draft of this book I fenced around that question. I found it very hard to deal with and I sort of didn’t answer it. And I sent the manuscript to my co-teacher at Columbia -- where I still am teaching, not the past tense -- wonderful professor at Columbia and the University of Virginia Law Schools, Vincent Blasi, who did an extraordinary thing which was actually read it in detail and make comments. [laughter] No, really. Wonderful investment of time on his part. And he came to that part of the book and he said, you know, I know you find it hard, but you’ve got to make up your mind. [laughter] So I wrote that sentence. And naturally you would pick it out! [laughter]

Well, what I say in the book leading up to that sentence is I give the example, truthful, factual example, of an imam in London who in his mosque preached the necessity of imminent violence against western institutions. And one parishioner in his mosque was a man named Richard Reed, who got aboard an airplane with a bomb in his shoe and fortunately it didn’t go off. So that seemed to me to be proof of readiness to act imminently to carry out a violent act.

The doctrine of the Supreme Court, the test laid down by the Supreme Court, is that you can’t publish speech urging lawlessness or violence unless you urge imminent violence and it’s likely to take place. Well, I thought the Reed example showed you it was likely
to take place in that particular mosque with that particular imam. If he gave the same kind of speech again, I thought you should be able to stop him. And the British have stopped him, in fact. That’s the background for it and I’m stuck with it.

**MARTHA MINOW:** So retrospectively, it sounds like something we could apply. Prospectively we may not always know.

**TONY LEWIS:** It’s very hard to know.

**MARTHA MINOW:** It’s very hard. That’s a good place to start. The audience is now invited to contribute your questions and comments, or else I can keep going. One that I will ask while people think about what they’re going to do …

**TONY LEWIS:** You have to talk, folks.

**MARTHA MINOW:** Anybody? Hands?

**TONY LEWIS:** But go ahead.

**MARTHA MINOW:** Okay, I’ll ask one while people are thinking. And you can line up behind the mics right back here. We’ve talked about Holmes, you’ve mentioned Brandeis. Are there any great justices for freedom of thought we hate currently on the Court?

**TONY LEWIS:** There are members of the Supreme Court who stand up very strongly for freedom for the thought that we hate. The example I would give of a hateful act, symbolic speech, not even words, was the burning of the flag. The Supreme Court held five to four that burning a flag for a political statement was speech and could be protected. Well, I will tell you that one member of the five to four majority will surprise you, if you don’t know it already, and that was Justice Scalia. Justice Scalia, the
conservative in many ways, is a strong advocate of freedom of speech and he voted that way.

I happened to be -- very unusual, because I don’t come to the Court anymore and I don’t go there very much -- but I happened to be in the Court that day it was decided. It has nothing to do with your question, but I’ll never forget, because Chief Justice Rehnquist who wrote the dissent, appended to his dissent the full text of whose poem was it, Whittier? Somebody? “Barbara Frietchie.” Who wrote “Barbara Frietchie”? Anyway, it was either Longfellow or Whittier. And then he read it aloud in the courtroom. “Shoot if you must this old grey head, But spare your country’s flag,” she said. Memorable day. [laughter]

**MARTHA MINOW:** We have a question. Will you identify yourself?

**AUDIENCE:** I’ll start the ball rolling. I’m Roy Fried from Canton, retired lawyer. I should say I almost feel like fools rush in where angels fear to tread. So be gentle. [laughter] I wonder if your last example is related to Oliver Wendell Holmes’s statement that it would not be free speech to cry fire falsely in an auditorium. Is that at all related?

**TONY LEWIS:** That was an earlier test that he laid down as Chief Justice of the Supreme Judicial Court of Massachusetts -- and I had said before, a little while ago, that he wasn’t a great free speech advocate until 1919. He came to it late in his career. I’m glad that you quoted it exactly, because most people quoting that famous passage leave out the word falsely. And it’s quite crucial, because the consequences of a false cry of fire in a crowded theater might be very serious. It’s very close to the imminent damage thing. So I don’t think it’s in conflict. I really don’t.

**ROY FRIED:** I didn’t think so either. I thought it was support.
TONY LEWIS: Oh, thank you. [laughter] I will say that I thought you were going to go off into symbolic speech.

MARTHA MINOW: Good, because I want to ask you about that.

TONY LEWIS: But you know, the first case that was ever won -- this is an extraordinary fact that we haven’t mentioned. The First Amendment was added to the Constitution in 1791. The first time a claimant for free speech ever won a case in the Supreme Court was 1931, 140 years later. And that was a woman named Yetta Stromberg who violated a California law against carrying red flags in the street as a symbol of radicalism. [laughter] She walked down the street with a red flag and was sent to prison. Supreme Court reversed her conviction. Symbolic speech.

MARTHA MINOW: I think we have now a line. Could you identify yourself?

AUDIENCE: Hi, I’m Kathy George. I teach high school. And my question for you is how much support would you give to limiting the Constitutional rights of high school students both in the classroom or in the school building and outside of the classroom? Thank you.

TONY LEWIS: That’s a hard question which the Supreme Court has fumbled. I would give rather broad rights. The tension is obvious. There’s a tension between free speech and discipline in a school. You obviously wouldn’t want to have a situation where students could disrupt classrooms and suddenly jump up and start yelling and say, “Down with the teacher.” That would not be protected any more than you could do that in a courtroom. A court that protects free speech outside the courtroom will summarily hold you in contempt if you start screaming at the judge. You can’t do that because there are some demands for discipline and order which take precedence. And they have to be weighed case by case. The last attempt by the Supreme Court to weigh those two
interests was decided five to four in a way I didn’t like. Maybe that’s what you had in mind. It was decided last term.

MARTHA MINOW: Morse versus Frederick. Bong hits for Jesus.

TONY LEWIS: Bong hits for Jesus, which took -- to my ignorance about the young world and marijuana turns out to be interpreted as having something to do with the right to smoke marijuana. I didn’t know that. [laughter] But the school disciplined the student who said that or held up a …

MARTHA MINOW: Banner.

TONY LEWIS: A banner, Bong hits for Jesus. And the discipline was sustained by a vote of five to four. That will tell you how disputed the issue is.

MARTHA MINOW: Well, just even more remarkably, he held up the banner not on school property. He held up the banner across the street. He lived in Alaska and he thought, how can I get on national news? And he came up with a way, and from everything that he said in subsequent interviews, he came up with a nonsensical phrase, Bong hits for Jesus, but it had enough words in it that would be provocative that he got the school to discipline him and he got his national news.

TONY LEWIS: Well, I’m glad you said that because I didn’t know any of that. That’s very informative.

MARTHA MINOW: Next person.

AUDIENCE: My name is Miriam. Thanks so much for coming to speak to us today. I had something to say, and I just guess I wanted to hear your comments on it. It’s not exactly in the form of a question. But it touches on two things that you mentioned. One
is the parallel between the newspapers of Madison’s era and the blogs of today, and the other is the Valerie Plame case. And that case was actually covered by the blogs, by a few blogs at least, far better than *The New York Times* coverage, or actually the coverage of any of the major newspapers. And one of the things in fact that came out for me that I hadn’t read elsewhere, hadn’t read in the press, the traditional press before was some details about the coverage events leading up to the war by *The New York Times* and the flawed coverage, to put it mildly, of *The New York Times* in particular and of other papers.

So I would just sort of submit to you that perhaps one way that the blogs are -- you spoke about one example of a blogger who has a staff now -- but one way that blogs in general are able to kind of do investigative reporting even without much of a budget is through other technologies or through web technologies that make, for example, *The New York Times* articles, archives, available to everybody who has a web connection. And this also relates to some particulars of the Valerie Plame case where one could argue, or I believe, that the government and the press were somewhat or a little bit too close, a little bit too much on the same side of … The press was in a sense advertising for the government in some way. And …

**TONY LEWIS:** I think I’m ready to make my comment. I don’t want to cut you off, but I agree with you. I think I should …

**MIRIAM:** One thing you said about the Plame case, which I couldn’t follow, it kind of flew by quickly, so I was asking also because I wanted to hear more about what you thought about that.

**TONY LEWIS:** Well, I think that at its best the blog can do exactly what you said. Now, Mr. Marshal, the man I spoke of before who is the newsworthy blogger, was the person who broke the story of Alberto Gonzales -- we have to assume it was him -- removing United States attorneys across the country for political reasons. And after he
broke the story the traditional press, as you rightly called it, began writing it as well. So it can be a very valuable function. And I don’t know how he did it, but it was possible. It wasn’t any great secret about it. Nobody advertised the reasons for it, nobody said we’re firing X for political reasons, but it just added up. If seven people were fired around the country suddenly, you could add up two and two, or in this case two and five. [laughter]

So what do I say? I agree with you. And as to your other, you said two other things in passing: one, the press and the government can be too close in Washington. Boy, is that true. And that is certainly true. And it’s also true that The New York Times and The Washington Post were far from diligent in exploring the reasons for the Iraq war before it began. And in fact after it began, sometime after it began, they both apologized publicly in articles in the newspaper, editorial matter from the newspaper, for their indolence before the war. So you’re right about that as well.

MARTHA MINOW: Let’s go to this mic. Identify yourself.

AUDIENCE: Hi, my name is Greg Pickett from Hyde Park. I have two questions. And I came late so excuse me if you’ve already covered this. They both have to do with employment and the rights of employers with employees. In one instance, how do you feel about an employer’s right to look at an employee’s off-work -- let’s say MySpace page or blog site, find opinions or maybe see pictures of that employee and base whether or not to hire or fire an employee based on that. That’s one.

And second was actually a case I was reading a couple months ago. I guess it’s a real case of an employee who was found to have religious inclinations that I guess they felt would impair him from doing his job. He was a marine biologist down in Woods Hole I think and it was discovered that his religious beliefs may contradict his ability to do his job. And I was wondering how you felt an employer’s right to hire and fire based on those things.
TONY LEWIS: You don’t ask easy questions, do you? [laughter] Do we assume that a Woods Hole Oceanographic Institute is a government organization?

MARTHA MINOW: I think it is.

TONY LEWIS: If it is, to some extent …

MARTHA MINOW: I think it’s private.

TONY LEWIS: It is private but perhaps it’s using federal funds. It undoubtedly is.

MARTHA MINOW: I think it is using public funds, yes.

TONY LEWIS: They’re probably using public funds and maybe therefore it takes on the burden of the First Amendment. I sort of doubt that the Woods Hole Oceanographic Institute can make choices of employment on the basis of religion, but Congress has been very specific in statutes, not the Constitution mind you, on regulating the use of religion as a basis for employment. For example, it has exempted religious institutions that get federal funds for social …

MARTHA MINOW: Services.

TONY LEWIS: … enterprises, social services, from the requirement to hire people regardless of their religion. They are allowed to discriminate in favor of their own religion. So I don’t know exactly what statute might cover the Woods Hole situation. There’s also a possibility that the Woods Hole Institute could demonstrate an absolutely ineradicable conflict between the duties he has at the Institute and his belief. As I recall the case, it had to do with creationism. He was suppose to be following the origins of some species or something that assumed Darwinian thinking, and he was a creationist and
he said, these two things are in conflict, you can’t do them. So it’s a complicated thing. I wouldn’t really be in a position to pass judgment.

And the other one was …?

**MARTHA MINOW:** About the employer looking at MySpace for …

**TONY LEWIS:** Oh. Well, I’m going to give you what sounds like a frivolous answer, because I don’t really know the larger answer. But I would say everybody should be aware that everything you do on a computer is public. If you tune into MySpace … [laughter]. If you tune into MySpace, somebody can find that out. Your employer can, anybody can. It’s there and it can’t be removed. You’re in it forever. Someone I know puts it this way: If you don’t want something you’re doing on the web or an email you’re sending to be on the front page of The New York Times, don’t send it.

**GREG PICKETT:** That’s a matter-of-fact answer. I’m asking more of like, personally, how you feel about whether it should or shouldn’t be.

**TONY LEWIS:** I know you were. I was ducking the question. [laughter] I don’t know the answer.

**MARTHA MINOW:** And I’ll just say, to add to your practical point, as lawyers are finding out what’s called meta data, the data around the data on the computer, are also discoverable. So even if you amend what you put on the web or in an email, people can track back what was the earlier version and what was the earlier version of that, and this is proving to be quite volatile in lawsuits and so forth. Next question.

**AUDIENCE:** Thank you. My name is Kabrina Chang from Boston. I’m a lawyer and a professor at Boston University. My question, sort of picking up on what the man just
asked about the internet and where you come down or your opinion, given that you have a bit of an exception when it comes to free speech, on cyber bullying …

**TONY LEWIS:** Cyber what?

**KABRINA CHANG:** Cyber bullying.

**MARTHA MINOW:** Bullying on the internet.

**KABRINA CHANG:** Exactly. And not just blogs, but chatrooms. It’s been brought to my attention -- I teach undergraduates and MBAs -- and the undergraduates have brought to my attention a website called juicycampus.com. And I went on to juicycampus and there are some hateful, hateful things on there. And there are statutes that will protect from liability the ISPs and the hosts, but I was curious about your opinion about a court’s involvement, if there ever were, I’m not aware of any right now, but if there ever were any involvement how you feel about that given your exceptions you feel to absolute protection of First Amendment speech.

**TONY LEWIS:** I made particular exceptions when I think there are valuable interests on the other side, like privacy or fair trial, as Martha mentioned. In general, and that’s the title of the book, hateful speech is protected, more so in this country than any other. And you have to remember that one’s devotion or universality, devotion to universal free speech, is very largely a cultural phenomenon.

Germany has a post-war constitution with a wonderful constitutional court to enforce it and very liberal-minded, but it doesn’t allow Nazi speech. Nor should it be expected to after the experience of the Nazis. South Africa has a wonderful new constitution with a brilliant constitutional court enforcing it, and it has a great free speech clause, but not for racist speech.
So we have a different view. And I don’t think myself that there would be any difference if you made a Nazi kind of speech or if you did it on the web, hateful as it might be. One of the great cases testing this was a proposed march through Skokie, Illinois by the American Nazi Party. And a lot of people were shocked by the fact that the American Civil Liberties Union defended the right of the Nazis to march. But in the end it turned out that that was the right thing to do, defend their right to do it, because it showed them out for what they were and it made us stronger in our belief in free speech. Barring some demonstration of imminent violence, I wouldn’t stop it.

**KABRINA CHANG:** Am I allowed to ask a rebut and add on to that?

**MARTHA MINOW:** Briefly.

**KABRINA CHANG:** Okay. A 13-year-old girl in Missouri I believe, and I just asked for how you would characterize this, she killed herself as a result of cyber bullying. Now you had mentioned Richard Reed and I agree that in retrospect obviously it’s easier to see, but prospectively it’s very difficult.

**TONY LEWIS:** Very difficult.

**KABRINA CHANG:** Would you apply your exception that you formulated as a result of the imam and Richard Reed to that instance where the little girl killed herself as a result of the -- I don’t know what the speech was. I don’t know what they said.

**MARTHA MINOW:** We’d have to know a lot more. We’d have to know a lot more. Was it targeting her particularly? Was it invading her privacy particularly?

**KABRINA CHANG:** It was. It was by the girl next door and the girl’s mother.

**MARTHA MINOW:** Oh, yes, I do know the answer now.
TONY LEWIS: If in fact it was targeting her destructively, then it goes beyond speech and it may be a crime for other reasons, and I would not stand in the way of that crime. But I don’t know enough about it to pass a judgment.

MARTHA MINOW: We do criminalize threats, for example.

TONY LEWIS: Oh yes, threats and blackmail are certainly not protected by the First Amendment. Not at all.

AUDIENCE: Good evening, thank you. My name is Richard Kirby. I’m a lawyer in Providence, Rhode Island. I’m actually here to ask you a question to mortify and embarrass my seventh-grade son who is here with me tonight on a school project. [laughter]

TONY LEWIS: Is that constitutional?

RICHARD KIRBY: Yes. For me as his dad it is constitutional. My son and his friend are actually working on a project with their school on the First Amendment and censorship. Naturally they had to pick obscenity and words that are inappropriate that are in certain music and things. Tonight’s discussion was very informative regarding First Amendment and political speech. And when my son came to me he asked about the First Amendment and we talked about how it’s important to have free speech with regard to democracy, etc. And in turn he said, “Well, how can the government then stop rappers and other types of music and censorship for that type of offensive words?”

And I was just asking if you could give a few comments regarding how the First Amendment has also evolved to censor offensive words in the realm of obscenity. And I know that you know what obscene is – as Justice Potter said, “You’ll know it when you see it,” but if you could just make a comment or two.
TONY LEWIS: Well, I think I’ll limit myself to discussing a particular case, because I can then use obscenity with the confidence given by the fact that it appears in the United States reports.

RICHARD KIRBY: Thank you.

TONY LEWIS: Maybe this case will answer your question, but perhaps not; I don’t know. Because some rapper lyrics go beyond mere dirty words to violence and murder and so on. That may raise a somewhat different issue. But this case was called Cohen against California. Mr. Cohen was represented by a copyright lawyer, wonderful copyright lawyer, named Melville Nimmer. When the case was called for argument, Nimmer stood up and Chief Justice Burger said to him, “Mr. Nimmer, it will not be necessary for you to dwell on the facts of this case.” And Professor Nimmer said, “Oh, I understand, Mr. Chief Justice. I’ll content myself with saying that my client, Mr. Cohen, was arrested and convicted for breach of the peace for walking through the California courthouse in Santa Barbara wearing a sweatshirt on which -- this was during the Vietnam War -- on which was written “Fuck the Draft.” Well, of course that’s what Burger didn’t want him to say. [laughter] That was the point. But if he hadn’t said it, he would have in a sense been giving his case away. And he was brave and he said it. And he won the case five to four. And Justice Harlan wrote in his opinion, “One man’s vulgarity is another’s lyric.” [laughter] And I think that fits the blogger -- not the blogger, the rapper case. One man’s vulgarity is another’s lyric.

MARTHA MINOW: Great. We’ll take two more. This one. Do we have time? Yes?

AUDIENCE: My name is Daniel Banuwitz. As you probably hear, I’m South African, and thank you for those very kind things you said about my country’s constitution. The question I have, actually two, I’ll run them by you. The first relates to the issue of drawing limitations, where do you draw those boundaries on free speech. There are the
famous cases of individuals trying to, for example, preach religion in airports, and you’re allowed, for example, to have circumscribed areas where if you’re a Hare Krishna you can speak to … Apparently that defeats the purpose of trying to speak to anyone if they have to come to you to actually hear their message, but those are limitations that have been drawn. So I’m interested in what are those criteria in terms of limitations on speech and public spaces.

TONY LEWIS: I’ll be brief because we have very little time left. Did you want another one, very briefly?

DANIEL BANUWITZ: The other one, very quickly, in terms of public funding, the NIH is the largest public funder. Funding is received by Harvard and other institutions. At what point does it cross the boundary in terms of receiving government funding when you become a state actor and as such those limitations apply to you? Thank you.

TONY LEWIS: Well, the second one is a subject that has produced many reams of opinions, judicial opinions. But I think, and Martha can speak to this much better than I can, I think that if you are, say, awarding scholarships that are federally funded, you’re covered by the Constitution. Am I too simple?

MARTHA MINOW: I wish it were the case, but that’s not where the current court is.

TONY LEWIS: Well, there you have an authoritative answer. [laughter] And the other question was?

MARTHA MINOW: In airports where there’s corded off …

TONY LEWIS: Oh yes. Well, that’s just another example of what we’ve talked about before, the balancing of interests. People have to get around in airports, and they’re very crowded as it is and you have to suffer all kinds of indignities, not just the security lines
but the crowding and the … Well, I mean, I’m thinking of Heathrow, the London airport, where there’s practically no place to sit; they’re trying to sell you something in every square inch of the airport and it’s really nasty. And if you, on top of that, had people running up to you and demanding that you believe in Hare Krishna or … I’ve forgotten, it was less Hare Krishna than the followers of that rogue politician. What was his name?

AUDIENCE: (inaudible)

TONY LEWIS: Oh yes, yes. It wouldn’t work. So I think it’s a simple question of balancing interests.

MARTHA MINOW: Last question. Say who you are.

AUDIENCE: I have a hard time understanding how if the Constitution says we have the right of free speech, where in the Constitution does it say, and that free speech can be contained in certain cases and under what circumstances, which I don’t believe it does? How have we got to the point where we have free speech but …

MARTHA MINOW: Can you say who you are. This is compelled speech.

AUDIENCE: I’m talking about restricted speech.

TONY LEWIS: Would you just say your name?

AUDIENCE: Bob O’Connell, I’m sorry.

TONY LEWIS: That’s okay. Well, you sound like Justice Black, who always said, the First Amendment says Congress shall make no law abridging the freedom of speech or of the press, and no law means no law. But Justice Black when he wanted to accommodate some other interest found very sort of off-putting ways of doing that. For example, in the
case I mentioned just now, Cohen against California, he was among the dissenters. He would not have allowed Mr. Cohen to make his speech via the sweatshirt in the Santa Barbara courthouse. He said, “It’s not really speech, it’s a juvenile trick.” Well, that’s a sort of sleight of hand. It was speech of a kind. And Justice Black also said that demonstrations near a courthouse were not protected, on the street outside a courthouse. They were not protected because it was an inappropriate place. In other words, and from the beginning certain interests, like the ones I mentioned -- stopping blackmail, stopping threats -- have always been held to be outside the protection of free speech.

The fact is that for 140 years, from 1791 to 1931, no free speech claim ever won in the Supreme Court. It’s only in the 60, 70, 80 years since then, 70-odd years since then, that the Supreme Court has protected some speech -- not all speech, most -- to a degree greater than in any other country, but it has consistently rejected Justice Black’s view that the speech claimers always win and said that there are other interests that have to be taken account of.

MARTHA MINOW: So now you see why I began by saying that Tony Lewis is not only a sustained observer of free speech but he is an exemplar of the criticism that it enables.

JOHN SHATTUCK: Well, I would suspect that there is not a person here who has not been educated in one or many ways during the course of this evening and -- [applause] -- just to give you one example of the wise counsel that we have received here tonight, my good friend Chief Justice Marshall leaned over and whispered to me during the exchange, Tony, that you were having about bloggers and the fact that the internet is really completely open, that one of your many areas of wisdom is that you do all of your communication in terms of actually sitting down and writing your manuscripts on a typewriter. So he knows how to protect his own privacy. [laughter]
And I will in the interest of the principle of early and often once again raise this wonderful book and tell you that it is on sale in our bookstore and Anthony Lewis will be pleased to sign it after the forum. And please join me again in thanking Anthony Lewis and Martha Minow for a wonderful event. [applause]

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