Book Review

The Conscience of a Constitutionalist: A Recipe for Living?

LIVING THE BILL OF RIGHTS: HOW TO BE AN AUTHENTIC AMERICAN, by Nat Hentoff. Harper Collins, 1998. Pp. 254.

Reviewed by Jim Hornfischer*

A constitutional scholar, no originalist to be sure, recently observed, "the meaning of the Constitution in general, and the Bill of Rights in particular, is in the hands of each generation."[1] In *Living the Bill of Rights*, journalist Nat Hentoff, one of this generation's most widely read columnists, authors, and free speech advocates, has produced an ambitious but ultimately unsatisfying exploration of the role of the Bill of Rights in American life today.

The question that Hentoff's title suggests is well worth pondering. At a time when the rights of individuals and the duties of citizens are regularly colliding in contexts as varied as gun control, abortion rights, campaign finance, and the death penalty, the issue of what the Constitution permits and requires is an essential intellectual challenge. Today, however, the issue of Constitutional interpretation is as much a political hot potato as an imponderable of jurisprudence. Nowhere is this more apparent than in Hentoff's book, which, though heartfelt and earnest, falls well to the left of today's irreducible ideological divide and leaves a nuanced evaluation of individuals' rights and duties for another author and another day.

Perhaps a modern commentator on constitutional law should be forgiven a bit of ideology. As the legal touchstone of American society, the Constitution is the ultimate intellectual trump card. For liberals, who favor the idea of a "living Constitution," it enables (indeed, requires)

---

* J.D. Candidate, The University of Texas School of Law 2001, and the author of RIGHT THINKING: CONSERVATIVE COMMON SENSE THROUGH THE AGES (1996).

1. Edward A. Hartnett, *The Akhil Reed Amar Bill of Rights*, 16 CONST. COMMENTARY 373, 401 (1999).

their far-reaching efforts to improve society. The Constitution, as a "living" document, does not possess fixed meaning. This liberal view is forward-looking. Supreme Court Justice Anthony Kennedy said, "The Constitution needs renewal and understanding each generation, or else it's not going to last."[2]

Conservatives, by contrast, tend to feel the world is generally fine the way it is and accordingly view the Constitution as a check to government action. They are leery of the notion that the Constitution's meaning is flexible and shifting. To them, the idea of a "living Constitution" is a front for reckless judicial activism, whereby judges—seizing on Justice Marshall's dictum that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[3]—substitute their political views for those of elected legislators. "[A] 'living Constitution' is, in a sense, no Constitution at all,"[4] wrote the outspokenly conservative University of Texas law professor Lino A. Graglia. If the Constitution is subject to reinterpretation and revision that originates from outside the four corners of the original document, then, conservatives ask, what was the point of setting out these foundational ideas on paper in the first place? Do we have, after all, an unwritten Constitution?

> The . . . question . . . 'Do we have an unwritten Constitution?' is not a difficult one. . . . The answer is 'no,' we have a written one. It is true, of course, that the written Constitution no longer has anything to do with constitutional law. . . . [But] constitutional law is a fraud, . . . the product of nothing more than the Justices' willingness, not to say eagerness, to substitute those notions for the notions of what they consider to be their less enlightened and less well-disposed fellow citizens.[5]

The dangers of the judicial "super-legislature" are not totally lost on liberals. Professor Alan M. Dershowitz has written:

> [T]aken to an extreme, the power of judicial review can be transformed into an undemocratic veto by an appointed and unaccountable aristocracy in robes. A

2. *Quoted in* NAT HENTOFF, LIVING THE BILL OF RIGHTS 197 (1998).

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177.

4. Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STANFORD L. REV. 1019, 1030 (1992).

5. Lino A. Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARVARD J.L. & PUB. POL'Y 83, 88-89.

> judiciary whose interpretations of such broad concepts as 'due process' and 'equal protection of the laws' are unrooted in some broad historical purpose can quickly become a super-legislature in robes, simply voting to overrule inferior legislatures and executives.[6]

As Yale Law School professor (and self-proclaimed populist) Akil Reed Amar recently observed, history vividly illustrates the risks of entrusting our democracy and liberty to federal courts. He notes:

> Federal judges . . . enthusiastically enforced the infamous Sedition Act of 1798, cheerfully sending men to prison for their antigovernmental speech and neutering juries along the way. It is hard to imagine a bigger betrayal of the original Bill of Rights, whether we look at the First, or the Sixth, or the Tenth Amendment. A century later, the Supreme Court strangled the privileges-or-immunities clause in its crib in the *Slaughter-House Cases*; blessed Jim Crow in Plessy; and blithely allowed judges to imprison a newspaper publisher (in a juryless proceeding lacking specific statutory authorization). . . .[7]

To this catalog of judicial atrocity Amar might well have added the Supreme Court's audacious transformation of a simple prohibition on racial segregation in the schools[8] into an affirmative duty to integrate.[9] And then there is Justice William Brennan's opinion in *Goldberg v. Kelly*, infamous among conservatives, in which he rewrote by fiat New York State's system of welfare administration despite explicit legislative enactments on the subject.[10] Brennan's activism in *Goldberg* provoked a piquant dissent from Justice Black:

> Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of

6. Alan M. Dershowitz, *John Hart Ely: Constitutional Scholar (A Skeptic's Perspective on Original Intent as Reinforced by the Writings of John Hart Ely)*, 40 STAN. L. REV. 360, 365 (1998).

7. AKIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 305-06 (1998).

8. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

9. *See* Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) ("It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation [and] *the court should retain jurisdiction* until it is clear that state-imposed segregation has been completely removed.") (emphasis added).

10. Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring New York State, on due process grounds, to hold full evidentiary hearings before discontinuing payments to unqualified welfare recipients).

> 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. . . . The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention. In my judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. . . .[11]
>
> Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. . . . And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document. A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content.[12]

On the first page of *Living the Bill of Rights*, Nat Hentoff is sitting in the Supreme Court chambers of William Brennan, listening to the late Justice lament the fate of a nation whose citizens he believes are woefully ignorant of their foundational civil rights. "The Bill of Rights never gets off the page and into the lives of most Americans," Brennan complained. "It's not enough to tell them what their rights and liberties are. They need to know—and this will get them interested—how these American liberties were won, and what it takes to keep them alive."[13]

From this exchange with Brennan grew Hentoff's idea to assemble this ambitious volume. It's ambitious because Hentoff hopes to illustrate, through modern profiles and anecdotes, the central role the Bill of Rights should occupy in American life today—and the trials that certain heroic individuals endured on behalf of the rights that Hentoff believes are embodied in that document. "Unless more Americans *know* the Constitution and live the Bill of Rights," he writes, "the future of the

11. *Id.* at 273-75.
12. *Id.* at 276-77.
13. HENTOFF, *supra* note 2, at xv.

nation as a strongly functioning constitutional democracy will be at risk."[14]

This assembly of admiring profiles of civil rights champions and stories about issues of constitutional import is intended to illustrate—tacitly so, because Hentoff does not acknowledge alternative views of the Constitution—what a "living Constitution" is all about. The Bill of Rights finds its meaning not from its language, or from the intentions and purposes of those who wrote it, but in the lives of individuals whose consciences compel them to fight for a result. At the end of the day, however, the actual text of the Bill of Rights has uncertain relevance to many of the stories Hentoff tells. Though he helpfully includes the complete text of the first ten amendments to the Constitution at the beginning of the book,[15] the critical reader is justified in concluding that the principles of civil liberty that Hentoff actually espouses have less to do with the Bill of Rights than with a sense of morality derived from natural law. Indeed, by the end of the book it is clear that Hentoff reveres less the Bill of Rights per se than the refined conscience and dignity of people whose causes, beliefs and tribulations embody a moral order that reaches beyond those mundane sheets of paper ratified in 1791. In that sense, *Living the Bill of Rights* offers no constitutional exercise at all.

Discerning exactly what constitutional principles Hentoff believes are indispensable is, alas, the beginning of the diligent reader's problems. If, as Hentoff suggests, we should order our lives (and become "authentic Americans") by "living" the Bill of Rights, it is peculiar that he should ultimately place more faith in individual conscience than in ideas that are even tangentially related to what the Constitution actually says. Hentoff does not pause to consider whether the impulses of conscience and dignity are more likely to blow with the cultural winds than the sheets of paper that make up our Constitution. Nor does he question, or even make reference to, the idea that the living Constitution elevates the judgments of Supreme Court over the will of a people as expressed through their elected representatives.

It might have been more accurate to title this book, *Living Your Particular Idea of the Bill of Rights*. For the Constitution's power and promise, according to Hentoff, is on display in the pantheon of individuals profiled in the book. Five are featured in their own chapter; three of those are Supreme Court Justices: Brennan, William O. Douglas, and Anthony Kennedy. (Justice Brennan gets three chapters all to himself.) The non-Justices are Anthony Griffin, an African-American

14. *Id.* at 197.
15. *Id.* at xi-xiii.

lawyer who zealously defended a grand dragon of the Ku Klux Klan in Texas, and Kenneth Clark, a passionate integrationist who taught at the City College of New York whose research earned a footnote in *Brown v. Board of Education*.[16]

Three other chapters are issues-oriented, with one devoted to the death penalty (which Hentoff vehemently opposes on moral, not constitutional, grounds), freedom of (and from) religion, and racial discrimination. Finally, two chapters are general tributes to "individuals of conscience against the State"[17] and "further bold adventures of men and women of conscience."[18]

The latter two chapters are most strongly indicative of Hentoff's largely unarticulated constitutional credo: that only people who defy the state at some level can be said to be properly living the Bill of Rights. Navigating the world by their conscience, and armed with a thick quiver of rights (courtesy of an expansively interpreted fourteenth Amendment) with which to assert their consciences in the courts, these paladins of freedom fight the good fight and save liberty for those who Hentoff believes are too ignorant to understand, much less litigate, their constitutional rights.

He quotes Brennan approvingly on the subject of judicial activism: "We have to keep taking up the cudgels and the first thing you know, by God, we'll abolish the death penalty and we'll make the fourteenth Amendment come alive for everyone, so that there will be justice for all." If those words sound more like the gushings of an initiate of your local university's chapter of Young Democrats rather than the pronouncement of a Supreme Court jurist, Hentoff is unbowed. Indeed, his own reverence for Brennan and the formidable policy-making power he wielded has an almost child-like quality: "Brennan saw much injustice in the land, but he always believed that the Constitution would be able to redress it when enough Americans understood the power and promise of that document."[19] The fact is, as this book illustrates, the Constitution scarcely figures into it at all. All of the redressing Hentoff describes is animated not by the Constitution, but by the consciences of those who Dershowitz warned could become a "super-legislature in robes."

If it is the Supreme Court's solemn duty to survey the landscape, seek out "much injustice in the land," and "tak[e] up the cudgels" to bring about change through judicial activism ("by God"), then liberals

16. *Brown*, *supra* note 8, at 495.
17. HENTOFF, *supra* note 2, at 131.
18. *Id.* at 183.
19. *Id.* at 72.

such as Brennan and Hentoff have much to fear from a Court with different political leanings that, at some future time, surveys the landscape and finds very different applications for its cudgel. It wasn't so long ago that the Court had done precisely that. In the 1940s, the high court, dominated by conservatives like Justice McReynolds, was doing its best to take the cudgel to Franklin Roosevelt's New Deal. Horrified, liberals declared judicial activism dead. "Substantive due process was thereupon denounced as an abomination, never again to be permitted to rear its head, and vows of abstinence were taken that the Court would never again act as a super-legislature to disallow the policy choices of the people's elected representatives."[20] According to people whose cudgels swung in same direction as Justice Brennan's, high-court activism was out.

Hentoff's faith in the idea of a living Constitution seems to depend on the social leanings of the Supreme Court Justices who must invariably enable the "living." It is right, by Hentoff's view, for ad hoc moral determinations to override law. Yet he does not question whether personal moral vision is a reliable recipe for "how to be an authentic American." At the root of many—but not all—sections of this book is a curious intolerance to views that do not grow out of his idea of a properly calibrated moral sense.

Lost on Hentoff, or at least unrecognized in his book, is the balance between notions of individualism or egalitarianism that flow from the Bill of Rights: the First and Fourteenth Amendments in particular. Hentoff does not acknowledge how powerfully the interests of individuals and groups contend with one another. It is often assumed that both individuals' rights and surpassing social equality coexist perfectly, if for no other reason than the inherent goodness of the people advocating these opposing positions. Yet as two of the stories Hentoff relates in *Living the Bill of Rights* make clear, these ideals frequently collide, leaving intellectual wreckage where good intentions once stood.

Consider Anthony Griffin, legal counsel to the grand dragon of the Texas chapter of the Ku Klux Klan. When Texas state authorities sought the Klan's membership lists in their fight against discrimination in public housing, Griffin, who happens to be an African-American, risked his career to defend the grand dragon. In his eagerness to praise Griffin, however, Hentoff does not consider how we should weigh the individual right to associate (KKK) against the civil rights movement's just battle against discrimination in housing—discrimination that was

20. Lino A. Graglia, *Getting Procedural Due Process Right*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y at 819 (1985).

practiced by those same members of the KKK that Griffin on principle defended.

It is enough for Hentoff that those who occupy his pantheon bring a high level of commitment and emotional intensity to their causes. Time after time, Hentoff's subjects are quoted in a way that underscores the purely emotional nature of their battles. William Brennan would have done away with the death penalty "by God." Dr. Kenneth Clark, the City College social scientist whose research into the detriment of racism on African American public school students was cited in *Brown*, set forth his own emotional credentials with no small amount of pride: "For . . . reasons . . . which are much too visceral for me to express with any pretense of coherence—I am personally unalterably opposed to any educational or other public or quasi-public institution classifying . . . its students or personnel on the basis of . . . race or color."[21]

An emblem of the fervor of his conscience, Dr. Clark's emotionalism entitles his views to the highest constitutional deference, in Hentoff's view. That is all well and good until one looks closely at what the landmark, prized opinion of *Brown* wrought in subsequent Court decisions: the very opposite of color-blindness; an intrusive, expansionist application of racial consciousness in the form of a mandate to force integration in the public schools, coupled with close judicial monitoring of schools' progress to that end.

Though *Brown* is hailed as a breakthrough in the battle against race discrimination, the Supreme Court used the decision as a springboard to an unprecedented level of race-awareness and race-based policy-making in the public school systems. In *Green*,[22] the Court finally summoned the courage to convert by fiat a prohibition (against race discrimination) into a duty (for schools to take active measures to integrate their populations). By commanding the integration of schools, the Court required the very thing that *Brown* and the Civil Rights Act of 1964 had outlawed: the most scrupulous attention to race by public school officials. Thus, although Hentoff does not recognize it, the later decisions based on *Brown* are probably hostile—and irredeemably so—to Dr. Clark's vision of a race-blind world. Indeed, Clark professes hostility to any type of racial exclusionism, including separate black social clubs. Intellectual inconsistencies such as this appear to be beyond journalist Hentoff's ken or interest.

The well-documented failure of busing to close the educational performance gap between the races since *Brown*, and the failure of the Court's excursion into social engineering generally, illustrates how

21. HENTOFF, *supra* note 2, at 111.

22. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

disaster can result when the Court tries to force change upon a world that is not ready to enact it.[23] Though arguably the Fourteenth Amendment supports the *Brown* decision, the Constitutional support for the subsequent interventionist case law is difficult to find. Following *Brown*, the Court became less a judicial tribunal than a tool of social science. In *Bradley v. Richmond*, a federal district judge "compel[led] one of the States of the Union to restructure its internal government for the purpose of achieving racial balance."[24] In *Keyes v. Denver*, the Court applied a remedy theory of desegregation to a northern school system that had *never been segregated*.[25] In both cases, the Court was forced to recognize the inadequacy of a mere constitutional (or *Brown*-based) prohibition on discrimination. Intractably (and intolerably), though the law could be made "equal," racism would still prevail. Though any "authentic American" should be rightly angered by that fact, Hentoff does not evaluate the connection between the requirements of the Bill of Rights, *Brown*'s correct prohibition on state action compelling or authorizing segregation, and subsequent social experimentation by the United States Supreme Court, motivated by its apparent desire to serve as the conscience of a nation.

This is not to deny Dr. Kenneth Clark his hero status. In his fight to get teachers in inner-city schools to care about their charges, and to teach with a sense of hope and mission, he is surely heroic. His observations about how teachers' low expectations of African-American students stunts their learning and leads poor academic performance have the unmistakable ring of truth. His "embarrassingly simple" solution to the problem of Black underperformance in the classroom appeals strongly to the social conscience: "Teach them with the same expectations, the same acceptance of their humanity and their educability and, therefore, with the same effectiveness as one would teach the more privileged child."[26]

But Dr. Clark's views, like his virtue, have little to do with the Constitution. He laments the ineffectuality of a school system whose teachers exhibit "sloppy, sentimental good intentions" and "reduce learning standards for low-status youngsters."[27] He worries that "the guise of compassion and understanding . . . reinforce[s] educational disadvantage by treating the [African-American] child as inherently

23. *See generally* LINO A. GRAGLIA, DISASTER BY DECREE (1975).

24. Bradley v. Sch. Bd. of the City of Richmond, 462 F.2d. 1058 (4th Cir. 1972) (holding that "imposition as a matter of substantive constitutional right of any particular degree of racial balance is beyond the power of a district court"), aff'd 412 U.S. 92 (1973).

25. Keyes v. Denver, 413 U.S. 189 (1973).

26. HENTOFF, *supra* note 2, at 100.

27. *Id.* at 84.

inferior, as having real limitations of intelligence."[28] As a consequence, "the self-fulfilling prophecy of massive educational underachievement for these children is thereby perpetuated."[29]

Indeed, there is a social tragedy here. But what does the Bill of Rights have to do with it? In the wake of *Brown*, the problem of discrimination is eliminated. The Court has spoken, and racial discrimination in the schools is illegal. Since when did the First Amendment outlaw patronizing attitudes or "good intentions" that have bad effects? This is a slick tarmac for a constitutionalist. For if "dignity" is the Constitution's grail, and if conscience is its guardian, then any social problem, real or perceived, can be defined as constitutional in nature. Unless we accept Nat Hentoff's view of the Bill of Rights as the all-encompassing guardian of personal dignity, and not merely a check to unlawful state action ("Congress shall make no law. . ."), Dr. Clark is simply a doer of good works, not a standard bearer of constitutional jurisprudence.

Under the First Amendment, of course, a person's beliefs, even racist beliefs, are beyond the reach of the law. Sure enough, Nat Hentoff's admiring profile of Anthony Griffin shows that he understands that. Griffin is an African-American lawyer from Texas who gained notoriety for defending Michael Lowe, the grand dragon of the Texas Knights of the Ku Klux Klan. Years before, in the 1958 *NAACP v. Alabama* decision,[30] Griffin had been counsel to the National Association for the Advancement of Colored People (NAACP). When the Alabama attorney general ordered the NAACP, which he considered a subversive organization, to turn over its membership lists, the organization sued. The Supreme Court ruled for the NAACP, citing the risks of retaliation faced by members who received public exposure.[31]

---

28. *Id.*

29. *Id.*

30. NAACP v. Alabama, 357 U.S. 449 (1958), *rem'g*, Ex Parte NAACP, 268 Ala. 361 (1959), *rev'd*, 360 U.S. 240 (1959).

31.

> Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

NAACP v. Alabama, 357 U.S. 449, 462-63.

Given his background, Griffin's decision to represent the Klan in a case with a similar fact pattern, a local NAACP leader said, "You can't represent the NAACP and the Klan at the same time."[32] Griffin stood his ground. "If you take the First Amendment from the Klan," he declared, "we, as Black folks, will be the next to suffer."[33]

Griffin is surely a courageous man, and his principled adherence to the First Amendment is admirable. But if we accept Hentoff's argument that it is conscience, not necessarily principle, that defines how one should "live" the Bill of Rights, then Griffin's hero standing may be less certain. Wouldn't conscience tend to *dissuade* an African-American lawyer from representing the Klan? Wouldn't Hentoff have been as lavish in his praise for Griffin had he taken the opposite stance—refusing to defend a suppressor of the African-American people? Wouldn't "Black folks" have suffered even more if Griffin were successful and the Klan were thereby allowed to maintain the organizational cohesiveness that allowed it to do such things as influence housing policies?

In recognizing Griffin's commitment to First Amendment principle over racial conscience, Hentoff unwittingly knocks out the entire intellectual undergirding of his book. It is, in the end, impossible to reconcile his admiration for Griffin with his praise for Dr. Kenneth Clark. Would not Dr. Clark's professed reasons for advocating integration, reasons "which are much too visceral for [him] to express with any pretense of coherence" have prevented him from doing the same thing, from defending the Klansman? Unlike Clark's, Griffin's virtue most certainly did not arise out of a fuzzy notion such as "basic human decency." Quite to the contrary. "Decency" might well have required an African-American attorney with a conscience to shun a white-robed brownshirt whose organization enforced with taut nooses the segregation that *Brown* dismantled. Had Anthony Griffin filed his papers on the other side of the docket, alleging that his client had violated the NAACP's civil rights, it's likely that Hentoff's applause for him would have been just as fulsome. But because Anthony Griffin's decency and conscience yielded to principle, he lives the Bill of Rights much more truly than Dr. Clark.

Although standing on constitutional principle against the cries of conscience would seem to be among the ways one might "live" the Bill of Rights, it is not something, alas, that Hentoff can endorse. Hentoff's idea of "living the Bill of Rights" seems to consist of following the dictates of individual conscience wherever it may take us—except where

32. HENTOFF, *supra* note 2, at 23.
33. *Id.* at 19.

it is preferable to stand on principle and look to the words on those sheets of paper ratified in 1791. One moment Hentoff is maintaining an uncompromising, Old Testament-style view of the First Amendment that batters down the distinctions separating First Amendment rationales reaching diverse areas as campaign finance, commercial speech, and regulation of the public airwaves. At another, he is championing a vision of a living Constitution whose meaning yields to necessity or expedience and which, in the words of Justice Anthony Kennedy, "needs renewal and understanding each generation, or else it's not going to last."[34]

For Hentoff, the freedoms flowing from the Bill of Rights reach their highest form when an individual espouses unpopular views against a majority. He lionizes a high school valedictorian that becomes a pariah for refusing to submit her speech for administrative approval prior to graduation day.[35] He cheers a New York City housing department worker who refused to attend a mandatory sexual harassment prevention course on the grounds that his Pentecostal beliefs "instruct [him] as to [his] moral behavior code."[36]

Here and there, Hentoff recognizes that there are limits to speech, that common law exceptions such as libel and obscenity have a place in First Amendment jurisprudence. So did Justice Brennan. In *New York Times v. Sullivan*, Brennan steered clear of the view expressed in a concurrence by Justices Goldberg and Douglas, advocating an "absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuse."[37] But elsewhere in the book, Hentoff draws a hard line, espousing unqualified First Amendment protection in areas fraught with conflicting policy and interests: campaign finance.

Hentoff's now-you-see-it, now-you-don't commitment to free speech appears in another story he tells. In the wake of the Martin Luther King assassination, Vera Katz, a Jewish drama professor at Howard University, suffered ostracism and hostility from Black faculty and students. When the militant leader of the Nation of Islam, Khallid Abdul Muhammad, visited campus, advocating anti-Semitism and race-based hatred, Vera Katz spoke out against the racial agitation Khallid inspired. Hentoff, who deplores the militants' racism and bigotry, praises Katz for facing down "vicious bigotry."[38]

---

34. *Id.* at 197.
35. *Id.* at 132-33.
36. *Id.* at 184.
37. New York Times v. Sullivan, 376 U.S. 254, 298 (1964) (concurring).
38. HENTOFF, *supra* note 2, at 192.

But in admiring her for her bravery, Hentoff doesn't pause to consider whether the Nation of Islam radicals might have the same First Amendment rights that KKK Grand Dragon Michael Lowe had, and which Black attorney Anthony Griffin risked so much to defend. In lauding Katz for educating her students on the perils of stereotype, Hentoff refrains from a more challenging—and meaningful—inquiry: distinguishing the constitutional from the merely political. For Hentoff, it is enough to make note of the bruised sensibilities of a Jew in the face of bigotry and conclude that by responding with dignity she must be truly living the Bill of Rights. Although Khallid is a convenient strawman given his "Goebbels-like" views, it is ultimately difficult to say who—Khallid or Katz—more faithfully "lives" the Bill of Rights. The Bill of Rights says nothing about the constitutional status of good teaching and efforts to defeat stereotypes. It says nothing about the preferability of Jewish views to Nation of Islam views. Indeed, it protects anyone's right to speak their racialist idiocy freely. In that sense Katz and Khallid both live the Bill of Rights equally well, if from opposite sides of the political and social spectrum. Both risk their professional standing and career by virtue of their speech. As Hentoff sporadically acknowledges, morons and bigots enjoy First Amendment rights that are as resilient and powerful as those of more enlightened speakers. Yet time and again in *Living the Bill of Rights*, Hentoff's seemingly irresistible need to identify with conscience instead of principle confuses his message about what the Bill of Rights really stands for, and muddles the huge distinction between personal morality and constitutional law.

Of course, Hentoff's professed love of the Bill of Rights is sometimes hard to square not only with the views he has espoused in this book, but in his work for the *Washington Post* as well. The case isn't mentioned in the book, but Hentoff strongly supported the controversial, speech-hostile "Nuremberg Files" decision handed down in 1999 by an Oregon federal court.[39] There, a jury awarded the plaintiffs a $107 million civil judgment against individuals and groups who created two provocative anti-abortion posters and provided information for an anti-abortion web site known as The Nuremberg Files. The posters and web site featured the standard anti-abortionist hyperbole, accusing abortion doctors of Satanism and espousing the need to try abortion providers in Nuremberg-like trials.[40] More significantly, the operators of the web site

39. Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999).

40. *See* Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1186-88 (D. Or. 1998) (denying defendant's motion for summary judgment).

drew a line through the names of abortion providers who had been murdered because of the nature of their professional work. The Oregon jury concluded that this constituted a threat to the named persons in violation of the federal Freedom of Access to Clinic Entrances Act. In a *Washington Post* column, Hentoff supported the speech-suppressive jury verdict, saying that the defendants should be liable for their speech: "when a doctor targeted on a Web site has to wear a bulletproof vest, a true threat has been made."[41]

But as one commentator has written:

> As a general rule [the Oregon court] misstates the relevant First Amendment jurisprudence.[42] The Nuremberg Files defendants cannot be held liable for their speech alone unless the doctors who are mentioned in the web site and posters are responding to the immediate danger of action by the defendants themselves; the defendants cannot be held liable for the actions of others who have merely been inspired or encouraged by the defendants' speech.[43]

Hentoff seems to support the rights of the Ku Klux Klansmen to espouse their particular brand of hatred, but deny pro-lifers the right to express theirs. His surprising intolerance for certain brands of speech is again on display in Chapter nine of *Living the Bill of Rights*. There he tells the story of a fourth-grade teacher in Grand Saline, Texas, who was accused of satanism for assigning books that religious fundamentalists believed contained demonic imagery.[44] The teacher, herself a Christian, believed it was important "to nurture the imagination of her students and to create a classroom that is as wide as the world, enabling kids to learn about cultures and ideas they never dreamed of."[45] Alas, her liberal approach to teaching incensed the local Bible-thumping fringe. They rallied against her, accusing her of devil worship and atheism. But rather than obey Justice Brandeis's famous command that bad speech

41. Nat Hentoff, *When 'Pro-Lifers' Threaten Lives*, WASH. POST, Feb. 27, 1999, at A 21, *available in* 1999 WL 2202264.

42. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment precluded liability for violence and threats on the part of boycotters because the boycott was otherwise nonviolent, politically motivated, and designed to force governmental and economic change and to effectuate constitutional rights. Liability would arise only if the losses from violence or threats of violence were proximately caused by unlawful conduct).

43. Stephen G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 591 (2000).

44. HENTOFF, *supra* note 2, at 134.

45. *Id.*

should be countered with "more speech, not enforced silence,"[46] she filed a defamation suit against her "more wildly imaginative critics."[47]

A defamation plaintiff is surely a curious standard bearer for the First Amendment. And this particular individual is equally implausible as a champion of Hentoff's other great holy grail, the moral conscience. When the teacher learned that the school board was going to fire her, rather than stick to her guns and fight for her conscience, she quit, moving out of town with her seven-year-old daughter, never to be heard from again. Although the moral conscience surely sympathizes with a woman who struggles against such unreasoning oppression, it is difficult to see how she fits Hentoff's profile of a Bill of Rights hero who organizes her existence by either the First Amendment or conscience. By turning to common-law remedies and skipping town rather than standing and fighting, this teacher falls short of both of Hentoff's standards.

For a Bill of Rights advocate, Hentoff is surprisingly disdainful of anyone with constitutional views that differ from his own. University of Chicago law professor Cass R. Sunstein, for example, worries that recent advances in technology, and consolidation of the market for news and information generally, have led to an expansion of First Amendment rights that mainly benefits the wealthy corporations that are the primary purveyors of speech in the information age. "[W]e must now doubt," Sunstein writes, "whether, as interpreted, the constitutional guarantee of free speech is adequately serving democratic goals."[48] Sunstein believes that this *Lochner*-esque expansion of individual (that is, corporate) rights will weaken the discourse that fuels democracy.

In calling for a "New Deal for speech" that would use government action to enhance the distribution of speech in the public interest,[49] Sunstein is far from a traditional progressive advocate of free speech rights. One surely could say, however, that in taking into account realities of modern life that the Founders could not have foreseen, Sunstein is operating by the same notion of a "living Constitution" that Hentoff advocates when it is convenient for him. Nonetheless, Hentoff dismisses Sunstein's ideas. Once again donning the cap of the First Amendment purist, Hentoff sarcastically refers to Sunstein as a "constitutional law scholar, adding a "(!)" after that moniker, as if a *genuine* expert on the Constitution could not possibly hold such views."[50]

46. Whitney v. California, 274 U.S. 357, 377 (1927) (concurring).
47. HENTOFF, *supra* note 2, at 135.
48. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH at xi, 19 (1993).
49. *Id.* at xix, 17, and 29.
50. HENTOFF, *supra* note 2, at 196.

Of course, if conscience provides the currency of constitutionality, perhaps a liberal journalist of fine sensibilities understands the law as well as a law professor. For whatever Sunstein's egalitarian notion might be worth, Justice Brennan would have been skeptical of it. Hentoff quotes an exchange with the late Justice where Brennan expresses his dismay at the quality of press coverage of the Supreme Court. "[Brennan] stressed his disappointment . . . at the inaccuracy of the reporting and the placing of decisions out of context. 'I'm afraid,' he said [to Hentoff], 'that most of your colleagues in the press simply don't do a good job.'"[51] If by relating this exchange Hentoff seeks to imply that Brennan exempted him from that criticism, this book does little to suggest why that should be so.

51. *Id.* at 68.