

*Garrett Epps**

MR. EPPS: Thanks, Paul. Paul's invitation to come to this conference and honor Professor Dershowitz, whom I will call Professor Dershowitz since we've barely met and I never was a student, arrived, luckily, on a Thursday. And I say luckily because on Sundays, Tuesdays and Thursdays, I say to myself, that Alan Dershowitz, what a brave civil libertarian, terrific scholar, great force in American life. On Mondays, Wednesdays and Fridays, that Alan Dershowitz, what a troublemaker, he's completely wrong about everything. On Saturday, I rest.

But really, regardless of what day it arrived, I would have had to say yes because Professor Dershowitz has unwittingly been an inspiration to me throughout his career. I first heard his name when I was editor of the student newspaper at Harvard, and the administration, which was weary of anti-war demonstrations, formed a group called the Committee on Rights and Responsibilities. And I, as a civil libertarian, I think when you have the government forming a group to tell you what your responsibilities are, there is a problem. And there certainly was with this group. They were basically hoping to purge a lot of the real troublemakers. And a lot of my friends fell into that category, by bizarre chance, and they went to the Harvard Law School—to all the great civil libertarians who taught there—and said, we need some help, we've got this—these trials coming up. And a number of these folks came back very disappointed because the eminent civil libertarians had appointments elsewhere or conflicts of interest or something. But they said, but there's this guy, Dershowitz. And so this guy, Dershowitz, came and helped these people with exactly the same sort of zeal he has deployed later in his career, even though he was representing them against his own administration. And I thought, that's kind of cool. And then I got a call from a friend, Felicity Berringer, who was the editor of the Stanford Daily, and she said, "Have you heard of this guy, Dershowitz? He's defending

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Bruce Franklin,” who, of course, was the *bet noir* of the Stanford administration, the student—not—a faculty radical. And I thought, wow, you know, coast-to-coast troublemaker, this is very impressive.

And later in life, when I was thinking of going to law school after my years as a journalist, I read, *The Best Defense*, a terrific book if you’re considering whether the role of representing people whom some people find morally dubious is worth adopting in life. And it really confirmed me in the idea that, decrepit as I was at the age of thirty-eight, I might be able to contribute something by going to law school and studying law. Much later, when I was a clerk on the 4th Circuit, Professor Dershowitz came through doing what he modeled in the book: defending a very unpopular defendant, still attempting to demonstrate the innocence of Jeffrey MacDonald, the so-called Green Beret Killer whose conviction, under very complex and clouded circumstances, continues to puzzle people as to the—whether justice really was served in that or not. So I thought, in honor of Professor Dershowitz I would write a brilliant essay carrying on, elucidating, bringing forth the unexplored implications of his essay, *Shouting Fire*, which was written in 1989 in the *Atlantic* about the famous metaphor Justice Holmes uses, stating that the most stringent protection of free speech would not protect one who falsely shouts fire in a crowded theater thereby causing a panic. And I was going to, you know, build on this foundation something brilliant. I quickly discovered that’s not possible because pretty much Professor Dershowitz said everything that rationally can be said in that short essay about what’s wrong with this metaphor. And so, I decided still I would do a meditation, probably in a minor key rather than in the key of brilliance, and I found the title to this talk because I spoke just before I came here—I had to speak at the birthday celebration for Thaddeus Stevens in Lancaster, Pennsylvania, and I told my host I was on my way to talk about fire in a crowded theater. And he said, “You know, I was—when I was sixteen, I was an usher and there was a fire in the theater, and there were a lot of people there and they told me to go get the people out.” And he said, “I thought that was kind of odd because I was the sixteen year-old. Why didn’t somebody who knew something about it do it?” I said, “Well, what did they say to tell them?” He said, “Well, they said, ‘Tell them there’s a problem with the projector and they have to leave.’ And the people said, ‘Why do we have to leave because there’s a problem with the projector?’” He just kept saying, “There’s a problem with the projector.” and, “Get

the people out.” So the title of my talk is *A Problem with the Projector*. And it opens with a film. For those of you who have seen the film, *The Magnificent Yankee*, which was made in the early 1940s, it is a bio-pic about Justice Oliver Wendell Holmes, based on a Broadway play. And, supposedly, narrated by Owen Wister, the famous author of *The Virginian* and other western novels. And in this movie, two unbearably acute Supreme Court justices, Justices Holmes and Brandeis, kind of totter around Washington talking over all the issues that come before the Court and trying to figure out the right answers. And they go to the zoo, and they go to the Capitol, and they go to the Washington Monument and various places. And every now and then—they’re at the zoo, and Brandeis says, “Well, you know, if somebody yelled fire here, there would be a stampede and people would be hurt.” And Holmes says, “Yes, you can’t yell fire in a crowded zoo.” And—taking notes this is kind of puzzling—and then later in the movie they’re—they go by the circus. And Brandeis or Holmes says, “You know, if somebody were to yell fire in that circus tent there could be a stampede and people would be hurt.” And Holmes says, “Yes, you can’t yell fire in a crowded circus.” And I—this took me a long time to—what? They never say the right quote. What’s going on? And then I realized, probably when the film was originally shot they used the correct quote and then somebody from the studio, Darryl Zanuck or somebody, said, “Nobody is saying burning theater in one of my pictures.” All right. So they had to go back and put in the zoo and—but the—this film ends. This film, shot early in the war, ends. Its final scene is the ninety-two-year-old Holmes on the verge of death, awaiting the visit paid to him on Inauguration Day 1933 by Franklin Roosevelt, which is a historical event. After being sworn in, the President went to visit Justice Holmes. You never see the President. What you see is Holmes drawing himself up to attention, like the soldier he had been in the Civil War, saluting like this, waiting for his Commander in Chief. And the point of the film is that you can’t yell fire in a crowded whatever. In war time, no one can criticize the war. No one can criticize the Commander in Chief. It is the ultimate extension of the misuse of the metaphor documented in Professor Dershowitz’s essay.

As he says in that essay, “fire in a crowded theater” is probably the wide—widest spread and most generally misused metaphor in American legal history. The reasons for that are complicated. My colleague at Oregon, Robert Cy, has done some very interesting

historical research about what fires in mass venues meant at the time that Holmes used the term. They were much more frightening phenomena because there was a sort of yearly spectacle of improperly protected buildings burning with large loss of life. And so, “fire in a crowded theater” was very vivid. But it’s also just because of the way it sounds. And I came across an essay by Terry Eagleton, the British literary critic, in a book called *How to Read a Poem*. And in that book, Professor Eagleton says that poetic analysis, though useful, is probably best not deployed all the time in daily life. And he says:

When someone shouts ‘Fire!’ in a crowded theatre, only those of us who get paid for doing so might stop to linger over the way that the stabbing emphasis of the ‘F’ consonant, followed by the long drawn-out wail of the vowels, mimicks the motion of the fire itself, from its explosive beginning to the whoosh of its spreading. Most people are just busy leaping from the circle into the stalls.¹

So part of the reason “fire in a crowded theater” is so durable is simply because it’s just a really nice phrase. It’s easy to say—much easier than “fire in a crowded zoo,” for example.

I first encountered, first-hand, the way in which “fire in a crowded theater” can be deployed, I think, erroneously when I wrote a piece back in the nineties decrying an ongoing, and, I think, scandalous violation of the First Amendment, that continues to this day in this country, in the case of a woman named Katherine N. Power. I don’t know, those of you of my generation may remember Catherine N. Power. She was number one on the FBI most-wanted list for longer than any person in history. Forget Dillinger or anybody else. She had been the wheel person in a supposedly politically inspired bank robbery in Boston in 1970, in which a police officer was killed. She disappeared into a fugitive network and was missing for twenty-three years, and surfaced only shortly after I moved to Oregon. She surfaced and surrendered, turning out to be the owner of the Italian bakery down the block from my house. This was sort of surprising. It got my attention to her case. And I wondered, as I think maybe other people in this room might, how did she do that? Right? This was a college junior, not particularly part of any organized criminal

¹ Terry Eagleton, *How to Read a Poem*, TIMES ONLINE, Jan. 20, 2007, <http://www.timesonline.co.uk/article/0,,923-2554138.html> (last visited Feb. 5, 2008).

gang. How did she elude the FBI for nearly a quarter of a century? However, when she surrendered herself to Boston—to the Massachusetts Superior Court—the judge gave her a ten-year sentence with life suspended, but added a condition of probation that if she ever told her story she would be sent back to prison for life. So, to this day, she is, in essence, under a South Africa-style banning order and I've never been really able to talk to her because of the danger to her. I do know that on one occasion, when one of the Berrigan brothers spoke in Oregon, she asked a question from the audience and the next day received a call from her probation officer saying, I can't protect you if you go public like that. So I wrote an article saying, this is really not the way we do things in this country. When people break the law, they do so for reasons. We need to know the reasons. For policy reasons, if not constitutional reasons, it's important to know how and why people like Kathy Power—a honor student, a person who had been raised in a very, very ethically minded home—how did she go so far off the rails as to end up complicit in the murder of this police officer? And the only way to find out is to let the people involved tell us.

And I got a—the paper got a letter from a lawyer saying, shame on Garrett Epps. He clearly doesn't understand anything about Justice Oliver Wendell Holmes because, after all, he said you can't shout fire in a crowded theater. End. That was the end. That was the argument. So I began to try to think about where we are with this because, staggering as it seems, this brilliant essay by Professor Dershowitz in 1989 has done nothing to slow the fire in a crowded theater juggernaut. It chugs on, irrelevant, and yet squashing everything in its path.

I did a search for uses of “fire in a crowded theater” within the last few months, and I found a number of really interesting ones. The first one, perhaps not surprisingly, comes from Bill O'Reilly, commenting on a case in which the family of a murdered child is suing the North American Man-Boy Love Association on the grounds that the person that killed their son had some literature from this organization, and therefore that they are responsible. O'Reilly is on with someone from the ACLU, and he says, “You can't yell fire in a crowded theater. People might get hurt. You know that. You can't say go out and have sex with boys underage. People might get hurt. It's the same thing.” So one's left to try to unpack that.

I found in a student newspaper—now, in my day, which Professor

Dershowitz remembers, student newspapers were hotbeds of trouble and disloyalty and evil. This is a student newspaper decrying the cowardice of the Bush administration in not prosecuting the reporters for the New York Times who disclosed the National Security Agency's warrantless surveillance program under the Espionage Act. And the—this is the Syracuse newspaper. And it says, "One may neither scream 'fire' in a crowded theater, nor unlawfully threaten the life of another. Nor may one disclose classified information regarding a communications intelligence program."² The interesting thing about both of these, of course, is there's always a missing step. Why is, you know, why is A like B? That is not necessary.

The third came up in a discussion of the Aqua Teen Hunger Force, a fiasco in Boston, if you're familiar with this. Someone denouncing the Turner Entertainment System for putting up little animated devices that look like cartoon characters from Aqua Teen Hunger Force, which someone mistook for some sort of very recondite warning from Al-Qaeda. And it said, "Why stop with little electronic devices? Why not yell, 'Fire!' in a crowded theater and then make a clever advertising pitch outside [as people rush out]?"³

These are, you know, mostly fairly mildly amusing. We tip over into farce in the Vallejo Times in California where it is held to be yelling fire in a crowded theater to criticize the fire department.

It is a long held axiom of public safety that one does not yell "Fire" in a crowded theater—particularly when there is no sign of a fire. It seems that at least one senior manager of Vallejo public safety does not adhere to this principle. Nor, it seems, does the editorial board of our only local newspaper.

On Monday, March 12, you neither questioned nor objected to Fire Chief Parker's . . . unprofessional statements that "People are going to be injured, people are going to die" . . . if he is required to trim his fat cat payroll.⁴

So because the fire chief says cuts in the fire department may

² Kris Miller, *Award-Winning Reporter's Wiretapping Story Illegal*, THE DAILY ORANGE, Feb. 8, 2007, <http://www.dailyorange.com/media/storage/paper522/news/2007/02/08/opinion/AwardWinning.Reporters.wiretapping.Story.Illegal-2705386.shtml> (last visited Feb. 6, 2008).

³ Editorial, *High Alert in Boston*, DALLAS MORNING NEWS, Feb. 7, 2007, at 12A.

⁴ Alan Whittaker, Letter to the Editor, VALLEJO TIMES HERALD (Cal.), Mar. 16, 2007.

lead to deaths, he is yelling fire in a crowded theater.

And then, finally, I found one—and this is the particular trope that comes out most often—that I think has serious implications for the world we live in right now, the moment we live in right now. These low-level sort of comic opera uses of it are always going to be with us, but here is one that I'm sure we've all heard in one form or another. It was a scholar of Islam, who shall remain nameless because it's not my point to kind of generate outrage at anybody, but who is discussing the cartoons of Mohammed that were run in some European newspapers and discussion of Islam that takes place in American media. And he says individual freedom can be checked by the idea that one cannot yell fire in a crowded theater. Freedom is limited by the situation you are in. Since the cry endangers the life and property of others, you don't have that right. You're going to get arrested for it if you don't get trampled yourself. If you were in the forest, you could yell till your jaw drops. There's some interesting implications of this I'd like to tease out. The first one, obviously, is the suggestion that freedom of speech is really fine as long as it's in places and times where either no one will hear it or it won't make any difference. And we're dealing with this in a very serious way in this country now by the new tactic that's been developed by local and federal governments of spatially segregating protest, so that, when the president comes to your town, you certainly may protest against him as long as you're willing to go to the cage in the fairgrounds about a mile-and-a-half from where he's going to speak and remain locked up, like a prisoner, until he has left. That way, you have free speech. No one hears you. The president doesn't see you. It doesn't make any difference. So that is an idea that is gaining ground.

But there's also the idea that fire in a crowded theater means discussing difficult or explosive social problems. That is to say, the argument is quite sincerely made by people across the political spectrum that we must mute our discussion of religious differences between Christianity, Judaism and Islam, and other religions because it is a time of great sensitivity, particularly for Muslim Americans, or Muslim—or English Muslims or French Muslims, as this is going on in Europe too. And I have no desire to stand up here and sort of appear to be singling out Muslims and saying, you know, suck it up. You guys need to have a better sense of humor. That's not what this is about.

What it's about is the question of whether we ever get any of the

benefits of free speech if we adopt an exception to it that says, “When things are really tense you can’t have it.” And when I say “when things are really tense,” I mean, literally, when certain kinds of free speech are leading to potentially blood on the sidewalk, as has happened in some of the places where those cartoons were printed. Is it really a legitimate exception to free speech? Is that “fire in a crowded theater” to say social tensions are so great, society is so divided, violence may occur if certain expression is allowed, therefore this is a permissible exception to the principle of free speech?

And I draw my very preliminary conclusions on this. By the way, I don’t know if you guys know what the four big lies are, but they are, of course: I’ll marry you (right?); the check’s in the mail; I’m from the government and I’m here to help you; and I’m a law professor and I’ll be brief. But I actually am going to try to leave plenty of time for questions because I really do have a paper without conclusions, only with questions. My thoughts about this situation, as someone who doesn’t like to see blood on the sidewalk anymore than anyone else, come, in part, out of my study of the antebellum South for my recent book to which Paul alluded, *Democracy Reborn: the Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America*⁵ because one of the features of southern life, to which anti-slavery northerners can ex—objected most strongly during the years before and during the Civil War, was that freedom of speech was not permitted in the South. The mails were censored by federal officials in the South. Any mention of abolition or manumission of slaves, any statement or question of the slave system was removed, and any person making statements like that in the South was usually censored by being warned or exiled or killed. And the argument was—they didn’t have Holmes’ trope at that time; Holmes had not said fire in a crowded theater—but it was—the argument was, look at our situation. In much of this region, whites are a minority. If the slaves get the idea of revolt, we’re all dead. And certainly demographically, there seemed to be some plausibility to that.

In 1832, the Nat Turner Revolt had led to some loss of life in Virginia. And that—at that point the system of censorship was put

⁵ GARRET EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

in place. Of course, it had the added advantage of freezing the slave system politically in place, since no one could question it. But those who did this insisted that that was not the reason. The reason was to keep us safe, to prevent blood on the sidewalk, to prevent us from yelling fire in a crowded theater. And so one of the most important aims of the authors of the Fourteenth Amendment, in my opinion, was to make sure there was full freedom of speech throughout the country, including the freedom to question very basic institutions, whether they were slavery or capitalism, or anything else. And that, of course, is one definition of the open society that was set out in the twentieth century by the philosopher, Karl Popper. In an open society, no institution, no practice, no assumption is beyond critique and people may not be silenced for doing so.

So where does that take us in terms of this question of religiously provocative speech? Well, a couple of things. One is I do think we're beginning to see this trope about social tension picked up by dominant religious groups to be—to—as reasons why they should be beyond critique as well. If we can't say bad things about Islam, you can't say bad things about Christianity, it's oppressive to us, and so forth. I expect to see that argument expand over the next few years in order, again, to freeze the dialogue in place.

But one other thing I think from my study of American religious history—because, as Paul said, before the Fourteenth Amendment book, I wrote a book about free exercise—is that there is something about American history that changes religious faiths as they come here—makes them into players in the American religious system—which is different from that almost anywhere else in the world. And many years ago, I heard a lecture by a historian of Mormonism, Jane Shipp, a brilliant lecture on the history of the Church of Latter-Day Saints, and I went to talk to her afterwards. And I said, “You know, I've always thought that the Mormon Church, as originally formulated, was so brilliant in expression of the nineteenth century American liberal mentality that it was only the accident of Mormon polygamy that prevented it from really taking over the whole country and becoming the official church, because it was so perfectly in tune with the times otherwise.” And she said to me a very wise thing, which I've borne in mind as I've studied. She said, “No, that wouldn't have happened because what would have happened was they would have learned to play the game the way everyone else plays the game. They would have learned to get along with the other faiths because that's the way the American system

works.” People who, a generation ago, were denouncing each other as, you know, pappas swine or whatever else—prelects from those churches—play golf together and cooperate because that’s the way the American system works. And that changes religion.

American religion has a fundamentally different and, often, more open quality to it than it does elsewhere in the world. That doesn’t come painlessly. And if you look at the history of American religion, there’s blood on the sidewalk over and over and over. Whether it is the Exterminate Order that drove the Mormons out of Illinois or the anti-Catholic riots in Boston, there’s blood on the street. People criticize. People attack religions. The struggle goes on until some kind of cease-fire is reached because the combatants are changed; and, in some way, they accept the American liberal religious order. And so I think if we attempt to freeze discussion of any religious group, if we attempt to shield any religious group from hateful speech, we’re, in essence, preventing progress toward the end that we want, which is a genuine pluralistic country in which all of those people—all of these groups—will feel safe.

I think that “fire in a crowded theater” stands as a very substantial obstacle to our understanding free speech in these kinds of contexts in a robust way. If you push people about it, it means usually one of three things. The first one is—and Professor Dershowitz’s essay begins with a quote from the Reverend Jerry Falwell who had sued Larry Flint of Hustler Magazine because Flint had run a really scabrous ad parity denouncing Falwell’s mother, and Falwell had sued him for intentional infliction of emotional distress. And Falwell says, “Well, you can’t shout fire in a crowded theater and you can’t print something really bad about my mother,” basically. Those are not the exact words. And what that means, in essence, is, look, if there’s one exception to free speech then there ought to be one for me, too. Right? There’s no logical connection between the two. It’s simply, look, you’re talking to me about some seamless Gorman to free speech, but look at this hole. All I want is a little hole like that one. That’s the first way that it’s used.

The second way that it’s used is to say, free speech is fine. Free speech is fine. Free speech is terrific, but this speech does harm so we can shut it down. In other words, as long as you’re in the forest shouting, as long as no one hears it, as long as it doesn’t mean anything, free speech is fine. As soon as it does harm, we can shut it down. And I think if you study jury verdicts in defamation cases,

2008]

Garrett Epps

999

you realize that a large percentage of the American population holds that view.

And then, finally, the most sophisticated view is: Yes, we have freedom of speech. There are some things that are going to cause blood on the sidewalk, and we can shut those down. And that one is a hard answer because, you know, nobody's for blood on the sidewalk. But it seems to me that perhaps the harm that speech does, including sometimes blood on the sidewalk, in the end, are the most economical way to get where we're going. And I am curious whether Professor Dershowitz agrees, and I do not doubt that he will let me know.

Thank you very much.

If there are questions, I'll—yeah.

MR. DERSHOWITZ: I surely agree. I think blood on the sidewalk is one of the costs of free speech. And should there be free speech anywhere in the world, you would find blood on the sidewalk. And Holmes and Brandeis always took the easy way out. Brandeis' famous example, you can't prevent speech because somebody's going to trespass on the grass. The harder question is: What kind of cost are you prepared to pay for free speech? Having said that, I do think that you can't say that there are no restrictions on verbal statements. I mean, remember: my point is that the "fire in a crowded room" case is an easy case because it's not speech law. It has no functional difference between shouting fire and setting off an alarm bell. It's not intended to convey an idea. It's simply a message to the public without the intermediation of the human mind. The analogy would have been: Could you hand out a leaflet in front of a theater saying don't go into the theater, read this leaflet, think about it seriously, it failed the fire inspection? But having said that, though I would never allow the violence . . . or the hecklers . . . or the idea that you can't have speech just because of violence, there plainly have to be some exceptions, which is why this is part of my whole philosophy and why I annoy you on Mondays and Wednesdays. When Harvard—

MR. EPPS: Fridays, too. Fridays, too.

MR. DERSHOWITZ: Fridays, too. Right. When Harvard proposed restrictions on free speech I immediately came out and said, "Fine, I favor a speech code. Let's draft one." Now, why would I favor a speech code? I favor a speech code because I prefer a speech code to a speech common law. We already have speech common law at universities. I could not, as a professor, point to a

female student in class and use the “B word,” or an African American student and use the “N word,” or a Jewish student and use—I could do that, but yet I’d be fired. Why? Because there is a rule prohibiting me from doing that. But I don’t want the Dean to have the authority to decide when the rule gets violated, so I want speech codes for the same reason I want torture warrants, for the same reason I want sentencing guidelines, for the same reason I want a range of constraints on discretion.

Having said I want a speech code, what would I put in it? I think there are things I would probably put in it. I don’t think that that would, you know—I would not prevent a student from calling another student by a racial name, I think that would be an educational experience on balance. But I think when you’re in a hierarchical situation and take advantage of that hierarchical situation—clearly we would all agree that naming spies, to use the most recent instance, if they really are spies, or disclosing true blue So I think that people who advocate free speech don’t spend enough time defining what they’ll exclude from protections. What I’m afraid to say is you get two extremes. The speech phonies who say, “No means no, but I don’t believe speech on a stick is speech.” You know, who would never allow pickets—speech is the exception—or others who have their own implicit exceptions, but that’s not speech at all. And the others who say, “Well, fire in a crowded theater is an exception once it—you know, speech for me but not for thee.” I do think it’s a good idea, so Harvard did appoint a committee on it. Of course, I volunteered to be on it. And we worked for three years to create a speech code. And every time we came up with something that wanted to ban, someone or some group said, “No, you can’t ban that. Ban this.” Take, for example, the use of the “N word.” We wanted to do that. That was part of the proposal. African American students came in and said, “You can’t do that. We call each other by that name. Therefore you should have a special rule saying the ‘N word’ can’t be used except by Blacks to Blacks with kind of an understanding.” I said, “Well, you can’t have that in a rule.” We exercised—it was a three-year exercise in which we ended up with no consensus on anything at all. But we sent a message to the Dean saying, “Don’t construe this as giving you back your common law authority.” The thing that’s good about a code is it occupies the whole space. It leaves no common law. And so we tried to send the message that the failure to do a code leaves nothing; no power in you and no power in us. And we

2008]

Garrett Epps

1001

haven't had a case on it since that happened. I don't know whether that's going to be good or not.

MR. EPPS: But let me ask you a question, if you don't mind, because the big difference in the area I just ended by talking about—you know, when you're talking about a religion, Islam is this way, or, you know, a group is that way—the difference between the United States and most of the rest of the world is that, in most of the rest of the world, and certainly in UN human rights norms, sort of discriminatory speech that denounces or stigmatizes a group and propaganda for war or discrimination are outlawed.

MR. DERSHOWITZ: Right.

MR. EPPS: Which would mean that a lot of what you hear on a.m. radio in this country would be against the law. I mean, you hear people just saying, you know—I mean, the stuff that goes on during the day on a.m. radio about Muslims is just astounding. And one could hardly be surprised when Muslim Americans protest. Which is right?

MR. DERSHOWITZ: Well, you have a person that you can ask other than me. I'm sitting next to a man who I agree with on 98 percent of things in the world. I'm called the American Irwin Cotler, he's called the Canadian Alan Dershowitz This is one area we have disagreed on since we first met in 1968, and we have been fighting about it like children for the last—

MR. EPPS: Can we watch?

MR. DERSHOWITZ: . . . we're now celebrating our fortieth anniversary of fighting. He invited me to come to Canada and give a talk, and I made your case and my case for untrammelled free speech, even in the context of . . . in the news, denial of history, racial effects, all these things. And a very distinguished justice of the courts there, named—

MR. COTLER: Maxwell Cohen.

MR. DERSHOWITZ: Maxwell Cohen . . . raised his hand and said, "Alan Dershowitz should not be allowed to be a lawyer. You should not be allowed to teach young people. You are a disgrace to the law." And all I was doing was taking the position that you're taking. It is a cultural thing. It is so differently embedded, even in Canada, though Canada gets the same criticism. But you're right. It's very much cultural.

MR. EPPS: Lucky Canada.

MR. DERSHOWITZ: I'd love to hear what Mr. Cotler has to say.

MR. COTLER: I would say that it affects my respect for free

speech. And I invited Alan to comment. I may make some comments on it later.

MR. FINKELMAN: Well, now we see that it was indeed appropriate to compare you to Socrates earlier, since you're clearly teaching philosophy. It struck me, in listening to his talk, that, of course, you have the quotation wrong.

MR. EPPS: Which one? I had a number of quotations. Which one?

MR. FINKELMAN: Justice Holmes. Justice Holmes said that you would not be allowed to falsely shout fire in a theater. He did not use the words "crowded in a theater, thereby causing a panic." And it strikes me that when we think about—and I spent an entire day teaching that sentence in law. But we think about that sentence that it is far more complex than shouting fire in a crowded theater—although obviously he implies crowded when he says theater. But everybody puts it—and I've seen the U.S. Supreme Court misquote—it says something about Supreme Court clerks when they can't even cite Justice Holmes properly. But it does strike me that the quotation, if taken seriously, is far—it may—you know, Holmes thought—he thought this was very protected speech, and he comes back in the Abrams case and says, "Well, this is what I really meant to say, and it really is protected."

But I want to challenge Alan in one way. You know, when you say something like reporting troop movements, my argument would be that as long as you were not taken into confidence by the government—that is, you weren't instructed—that if you are a reporter who is sitting in the bar and hears the Colonel say, "Tomorrow we're going to invade Normandy." then not only should you write that, but you have a moral obligation to report that because if you have found out about it. Surely, Fidel Castro has also found out that the Bay of Pigs is going to happen tomorrow. And, of course, that's the great example of where the American crest failed miserably to do exactly what it should do, which is to report the troop movements in advance and say, "Guess what. The CIA and a bunch of crazy Cubanos are going to invade Castro's Cuba tomorrow, and they'll probably get wiped at the beach by the tanks that are probably already moving in."

So that would be my response to—

MR. DERSHOWITZ: And I think it's very situational. I think, as Scotty Reston did famously say, that he withheld reporting the troop movements leading up to Bay of Pigs, and he would never do

2008]

Garrett Epps

1003

it again. He wished he hadn't. He knew it was the biggest mistake of his career, and he had learned it in a confidential way, but that's the way that journalists do learn things. I think if you had this discussion, however, in 1944, in 1945, when we were fighting the good war—the authorized war; the war that was declared by Congress; the last time we had such an experience of lawful war—I think the attitude to you—what people would say is you have a right; that you may be right. Reasonable people can disagree. If reasonable people agree to pass narrow legislation to prevent the disclosure of troop movements during a war, even if you learn it by the usual reporting methods, that would be sustainable under the First Amendment of the Constitution. That is, you might be right, but even if you're right, if the—if you go back in history, it becomes, of course, a much more believable story. But plainly, not Madison or Hamilton or anybody at that time would imagine that the First Amendment covered that kind of thing. And they had a very constraining view of what freedom of speech was in those days. And I don't know if you—you know, I'm sure you know this, but just a year or two years before Oliver Wendell Holmes wrote his famous *Shouting Fire*, he wrote a decision in a Washington State case, which is absolutely shocking. Washington—the City of Washington—had an area where people would go skinny dipping, and a small newspaper in Washington wrote an opinion piece saying the police should not arrest these people for skinny dipping; skinny dipping is part of the cultural tradition in this part of Washington State. But nudity in the parks was against the law. This case came up to the United States Supreme Court, and Oliver Wendell Holmes wrote an opinion saying there was nothing unconstitutional under the First Amendment. So Holmes gets on the Court, and nothing unconstitutional under the First Amendment about prohibiting speech that advocates crime, even crime like nude swimming, he said. An editorial on that—prohibiting an editorial like that from being written is no different than requiring vaccination from communicable disease. We had no sensitivity toward the First Amendment at all until—

MR. FINKELMAN: Well, I—

MR. DERSHOWITZ: —Brandeis gets on board, essentially; until Holmes begins to—telling him and persuading him that he's wrong, and then it gets turned around, and it gets turned around. You're right, it was a two-step process.

MR. FINKELMAN: I think—you know, I don't want to go into

Holmes too much. I mean, we're here to talk about Dershowitz, not Holmes. And I know not all Harvard Law professors believe that, but it does strike me that Holmes's reputation as a civil libertarian in a great variety of ways, and what, you know, his ability to use language was brilliant. And that—and to paint metaphors and short little pithy sentences, and that, I think, enhances his reputation, probably does him justice.