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STANLEY FISH, *THE FIRST*, AND THE LIFE OF THE LAW

Samuel A. Terilli, Jr.*

Any thoughtful reading of *The First* by Stanley Fish will lead many to come away feeling discouraged about the state of the First Amendment and free speech in the United States, for the simple and compelling reason that Fish is right on target with his observations and analysis. Particularly distressing will be his conclusion that the First Amendment provides only limited help when tackling either of two dreaded speech viruses spreading across the country: hate speech and fake news.

While concern is understandable, no one should assume all hope for our democracy and society is lost, or that Fish is suggesting it is lost. Instead, Fish throws a cold bucket of realist water on those who think some embedded and neutral constitutional principle, as opposed to democratic and political action, including speech, will save us from the likes of neo-Nazis and Internet trolls, be they domestic or foreign.

Fish starts with a convincing refutation of any search for a unifying principle deciding free speech disputes under the First Amendment. He dismisses, for example, common terms such as the oft-heard and often adoring references to the so-called free marketplace of ideas as mere slogans devoid of substantive or coherent meaning.

Fish next shatters any effort to identify hate speech as a coherent category of speech, the first step in any effort to define it as unprotected by the First Amendment and, thus, subject to punishment and exclusion. He does not suggest that some speech is not, in fact, hurtful and even hateful, but he demonstrates with wit and clarity that no widely accepted formula exists to decide that which is hateful and that which others might say is only offensive or possibly even truthful. As Justice John Marshall Harlan wrote in *Cohen v. California*, “one man’s vulgarity is another’s lyric.”¹ As pointed out by Fish, one man’s (or woman’s)² hate is another’s revelation.

Fish is no more comforting on the topic of fake news. With the erosion of trust in traditional institutions, including the mainstream or legacy press, Fish finds the seeds of the problem. One cannot distinguish the fake from the

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¹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

² STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 51 (2019).

real, in terms of news, when one side of the divide has signed on for a new wave of populist-inspired narratives and the other for a “messianic faith in data.”³ Merely adding more data to the mix without context or trust leaves too many people subject to the lure of the good story told with alleged facts of questionable lineage or provenance.

Discouraging, indeed! Along the way, Fish also takes his readers on equally distressing analyses of the First Amendment’s anomalous religious clauses. He dissects the ill-defined campus speech controversies masquerading as free speech issues when they really represent administrative abdications or subterfuges. He even jumps into the myriad issues raised by the Trump presidency and the cries about a post-truth era when the evidence of any era truly committed to truth is wanting, to say the least.

Not all hope is lost, however. Even in the jurisprudential world outlined by Stanley Fish, one can find, upon a closer examination, cause for optimism, albeit cautious optimism, or at least a more realistic strategy for those who care. As with the recent exhortations against the so-called new post-truth world populated by the likes of Donald Trump and the trolls, the truth is, as argued by Fish, that the term “post-truth” identifies not a new development but the age-old human condition.

Engage in the political processes, from elections to legislation, to defeat those who disseminate “verbal poison (at least as you see it), and don’t flinch when the First Amendment is brandished as a weapon against you.”⁴ In short, among the messages delivered in this short and quite readable analysis of the First Amendment is the fact that we cannot rely merely on a text written more than 200 years ago, but must rely on ourselves, and we must continually engage in the debates, even when our political landscape seems so desperate. If one were to read Fish as a lawyer, one would find an underlying truth about the law and the courts. There may be rules for everything from evidence to procedure, but nothing guarantees justice. One must seek to plead one’s case and not flinch when those same laws appear twisted beyond recognition. Such is the human condition.

If one hears a faint echo of some of the thinking of that great and enigmatic jurist, Oliver Wendell Holmes, this is no wonder. As once said by Holmes, “[t]he life of the law has not been logic: it has been experience.”⁵ So, too, with the life of the First Amendment—another law. Fish has shown we are obliged not merely to rely on logic but to argue for what we think should be the felt necessities of our time.

³ *Id.* at 194.

⁴ *Id.* at 191.

⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover 1991) (1881).