THE FREE SPEECH METAMORPHOSIS OF MR. JUSTICE HOLMES

*David S. Bogen**

I. INTRODUCTION

> The trouble with all explanations of historic causes is the absence of quantification: you never can say how much of the given cause was necessary to provide *how much* effect, or how much of the cause there was. I regard this as the source of the most subtle fallacies. But such exercitations always are amusing and tickling if new.[1]

In the spring of 1919, Justice Oliver Wendell Holmes, Jr., writing for a unanimous United States Supreme Court, upheld the convictions of Charles Schenck and Elizabeth Baer under the Espionage Act of 1917 for their role in distributing antidraft circulars to draftees.[2] Holmes found that the circulars posed a clear and present danger to the recruiting service in World War I.[3] The following week, Holmes again spoke for a unanimous Court in affirming the Espionage Act convictions of Jacob Frohwerk[4] and Eugene V. Debs, both of whom had condemned the draft publicly—Frohwerk by publish-

---

* Professor of Law, University of Maryland. B.A. 1962, L.L.B. 1965, Harvard University. LL.M. 1967, New York University. This essay grew out of a seminar conducted by Professor Robert Cover at Yale University under the auspices of the National Endowment for the Humanities. The sponsorship of NEH and the assistance of Professor Cover is gratefully acknowledged. My colleagues William Reynolds, Kenneth Abraham, Andrew King and Peter Quint of the University of Maryland School of Law also provided helpful criticism. Finally, Mrs. Erica Chadbourn, curator of the manuscript collection at Harvard Law School, was invaluable in making the correspondence of Justice Holmes with Professor Chafce available to me along with Holmes' correspondence with Felix Frankfurter and the notes of Justice Brandeis' conversations with Frankfurter. My thanks to Mrs. Chadbourn, to Professor Freund for the Brandeis papers, and to Professor Morris L. Cohen, now the Yale Librarian for permission to quote from these materials.

1. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick and Lady Pollock (September 24, 1904), *reprinted in* 1 HOLMES-POLLOCK LETTERS 118 (M. Howe ed. 1941).

2. Schenck v. United States, 249 U.S. 47 (1919).

3. For a discussion of Holmes' clear and present danger test, see *infra* notes 300-76 and accompanying text.

4. Frohwerk v. United States, 249 U.S. 204 (1919).

ing certain antiwar articles, Debs by making a number of public speeches condemning the war and the conscription effort.[5] This time, Holmes made no mention of any "clear and present danger." Frohwerk and Debs, though opposed to both the draft and the war, never specifically told their audiences to violate any law. As the author of these three opinions, Holmes seemed a symbol of the forces of suppression of speech.[6]

In the fall of 1919, Holmes broke with his brethren. In *Abrams v. United States*,[7] joined only by Justice Brandeis, he dissented from the Espionage Act convictions of several Russian aliens who had published leaflets opposing American intervention in the Soviet Union and calling for a general strike by workers in munitions factories.[8] Holmes pleaded eloquently in his *Abrams* dissent for freedom of speech and argued that the actions of these defendants posed no clear and present danger of bringing about unlawful acts.[9] As a result of this dissent, Holmes was hailed as a champion of freedom of speech, a distinction he maintained during the following decade of service on the Court.[10]

The view of recent commentators who have attempted to explain this apparent turnabout in Holmes' view of free speech is that Holmes had a vision in the summer of 1919 on the road from his persecution of the antiwar defendants in *Schenck*,[11] *Frohwerk*,[12] and *Debs*[13] to his dissent in *Abrams*.[14] For example, Professor Fred D. Ragan has argued that the criticism during the summer of the *Debs* decision by Zechariah Chafee, Jr. caused Holmes to alter his views on the first amendment.[15] Harry Kalven and Douglas Ginsburg have pointed to Ernst Freund's criticism of *Debs* as instrumental in effectuating the change,[16] while Gerald Gunther has set forth the claims

5. Debs v. United States, 249 U.S. 211 (1919).

6. *See infra* text accompanying notes 350-65.

7. 250 U.S. 616 (1919).

8. *Id.* at 624 (Holmes, J., dissenting).

9. *Id.* at 627 (Holmes, J., dissenting).

10. Holmes continued his championship of free speech in dissent in Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) and United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting).

11. 249 U.S. 47.

12. 249 U.S. 204.

13. 249 U.S. 211.

14. 250 U.S. 616, 624 (Holmes, J., dissenting).

15. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and The Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971).

16. Ginsburg, *Afterward to Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 243 (1973); Kalven, *Professor Ernst Freund and Debs v. United States*, 40 U.

for the influence on Holmes of Judge Learned Hand.[17] The difficulty with these theories is that Holmes later claimed he was already converted when the visions of Chafee, Freund and Hand appeared. The clear and present danger test relied on by Holmes in his *Abrams* dissent was first enunciated by him in *Schenck*, and Holmes never repented his decisions in *Schenck*, *Frohwerk* or *Debs*.[18] Yet some truth remains to the speculations about Holmes' development of free speech theory over the summer of 1919. The classic dissent in *Abrams* has a sharply different tone from his earlier majority opinions. The convert became a missionary.

It is a thesis of this article that the different tone of the *Abrams* dissent is not evidence of a marked change in Holmes' view of free speech, but is rather the product of Holmes' frustration at what he considered the misreading by critics and the public of his position in *Schenck*. The same constitutional standard that Holmes urged in *Abrams* to protect the defendant's speech was consistently applied in upholding the convictions in *Schenck*, *Frohwerk* and *Debs*. Tracing the development of Holmes' view of free speech throughout his legal career will demonstrate both that the major step was taken in *Schenck* and that the seeds of what became the "clear and present danger" doctrine were planted early in Holmes' life, though Holmes' skepticism and his reluctance to depart from prevailing legal doctrine combined to prevent those seeds from bearing fruit until his seventies.

Holmes mentioned several of the sources from which the "clear and present danger" test first articulated in *Schenck* was derived in an exchange of letters with Zechariah Chafee, Jr. of Harvard Law School. Several years after *Schenck*, Chafee wrote Holmes:

> This brings to mind a question that I have long intended to ask you —whether this definition of freedom of speech in the Schenck case was at all suggested to you by any writers on the subject or was the result entirely of your reflections. Since you hit the nail, in my opinion, so squarely on the head, I am wondering whether you had been aiming at it for a long while and whether you had learned of others who had at least succeeded in mashing their fingers some-

---

CHI. L. REV. 235 (1973).

17. Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

18. "I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs*, 249 U.S. 47, 204, 211, were rightly decided." Abrams v. United States, 250 U.S. at 627 (1919) (Holmes, J., dissenting).

where in the neighborhood of the same nail.[19]

Holmes replied from his summer home in Beverly Farms, Massachusetts:

> My Dear Professor Chafee
>
> Your letter arrives here just after myself—and I must make a hurried answer. The expression that you refer to was not helped by any book that I know—I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the carlier Paterson [sic] case, if that was the name of it, I had taken Blackstone and Parker of Mass as well founded, wrongly. I surely was ignorant. But I did think hard on the matter of attempts in my Common Law and a Mass case, later in the Swift case (U.S.) And I thought it out unhelped. I noted that Bishop made a slight modification of his text after I had printed but without reference to me—I speak from ancient memory—And much later I found an English Nisi Prius case in which one of the good judges had expressed this notion in a few words.[20]

"I surely was ignorant." This article will begin by examining the sources of Holmes' "ignorance"—his legal education and his early years on the bench. At the same time, it will consider and examine various influences throughout Holmes' life which eventually aided him in shedding his ignorance. It will then move on to an analysis of the period of time during which *Schenck*, *Frohwerk*, *Debs* and *Abrams* were decided as well as an examination of the cases themselves, with a view toward learning how, when, and why Holmes finally revised his understanding of the first amendment.

---

19. Letter from Zechariah Chafee, Jr. to Oliver Wendell Holmes, Jr. (June 9, 1922) Box 14, Folder 12, Zechariah Chafee, Jr., Papers on file at Manuscript Division, Harvard Law School Library.

20. Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922) Box 14, Folder 12, Zechariah Chafee, Jr. Papers (on file at Manuscript Division, Harvard Law School Library). Holmes' handwriting is often rather difficult to decipher. The refercnce to the *Patterson* case in the quote was referred to as the "Patriotie" case and identified as *Schenck* v. *United States* in Ragan, *supra* note 15, at 26. The error is explicable because Holmes' vague memory of the case caused him to misspell the name. Closer inspection of the letter reveals the error. The referenee to Patterson v. Colorado, 205 U.S. 454 (1907), is logical because in that case Holmes cited Parker's opinion in Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1826), which relied on Blackstone, and because he was responding to an inquiry about the new test in *Schenck*. Ragan's error, however, has had far-rcaching consequences, for it has focused scholarly attention on the changing attitude in Holmes' free speech opinions between Schenek v. United States, 249 U.S. 47 (1919) and Abrams v. United States, 250 U.S. 616 (1919). Sce *supra* notes 15-17.

II. THE ACQUISITION OF IGNORANCE: BLACKSTONE'S DEFINITION

> "[I]n the earlier Paterson [sic] case, if that was the name of it, I had taken Blackstone and Parker of Mass as well-founded, wrongly. I surely was ignorant."[21]

At least three different views of freedom of speech existed in the United States in the middle of the nineteenth century. One view, exemplified by Blackstone's *Commentaries on the Laws of England* and adopted by many state courts, held that the phrase "freedom of the press" referred to the absence of prior restraint, but placed no limit on the subsequent punishment of expression.[22] Freedom of speech, according to Blackstone, was merely the ability of individuals to speak freely and required no separate legal protection; however, while everyone had the ability to speak or write what they desired, the state had the power to punish them for what they said.[23]

A second view, stated by the English Whig pamphleteers Trenchard and Gordon in *Cato's Letters* and found in specific provisions in many state statutes and state constitutions, added to Blackstone's definition the proposition that truthful criticism of government was a civic duty and should not be punished if engaged in with good motives and for lawful ends.[24]

Finally, a third view, grounded in considerations of federalism and states' rights and reflected in the Kentucky and Virginia Resolutions, maintained that the first amendment was the mirror image of a constricted interpretation of federal power under the Constitution.[25] Under this view, grants of power to the federal government should be narrowly construed, and the first amendment merely reflected the Framers' understanding that Congress had been granted no power over speech or publication and that these matters were left to state control.

The first time that Holmes interpreted the first amendment guarantee of freedom of speech and press as a United States Su-

---

21. Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922) Box 14, Folder 12, Zechariah Chafee, Jr. Papers (on file at Manuscript Division, Harvard Law School Library).

22. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (7th ed. 1775); L. LEVY, LEGACY OF SUPPRESSION 201-14 (1960).

23. *See* W. BLACKSTONE, *supra* note 22, at 150-52.

24. *See* L. LEVY, *supra* note 22, at 116-20 (Cato letters), 192-200 (general discussion of truth as a defense).

25. *See* the Kentucky Resolutions of 1798 and 1799 in IV THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540-41 (2nd ed. 1941); The Virginia Resolution of 1798, *id.*, at 528.

preme Court Justice he adopted Blackstone's definition.[26] That Holmes later, when he was nearly eighty, adopted a completely different, much broader view of the amendment is remarkable; it becomes even more so when one realizes that in other respects, Holmes' values and constitutional principles underwent little change after he reached seventy.[27] Only with respect to free speech did a complete metamorphosis occur.[28] It seems implausible that this unusual turnaround could be brought about by one or two events or influences so late in his life. Thus, examination of the young Holmes must simultaneously focus on two discrete inquiries: one into how Holmes developed his adherence to Blackstone, the other into the forces present early in his life that set the stage for his eventual repudiation of Blackstone.

Oliver Wendell Holmes, Jr. was raised in Cambridge, Massa-

---

26. Patterson v. Colorado, 205 U.S. 454, 462 (1907): "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." (citations omitted).

27. "[A]t my age a man has his final formula made up, and my cosmos goes into a pretty small package. It is not likely to change its contents very much, or to let in either Hegel or the Catholic Church." Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (December 30, 1903) *reprinted in* THE HOLMES-EINSTEIN LETTERS 8-9 (J.B. Peabody ed. 1964).

"Holmes at least has found his dominant conceptions before he was forty and never thereafter saw any reason to change them." F. BIDDLE, MR. JUSTICE HOLMES 85 (1943).

As further evidence of Holmes' adherence to long-held views, specifically involving a constitutional interpretation, one only need recognize that Holmes' willingness to permit legislative action, as seen in Tyson Bros. v. Banton, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting) (state has power to limit mark up of theater ticket prices by ticket agencies) and Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting) (state can regulate hours of work for bakers) was prefigured by his opinion on the Massachusetts Supreme Judicial Court in Commonwealth v. Perry, 155 Mass. 117, 123 (1891) (Holmes, J., dissenting) (state can forbid employer from withholding wages because of imperfections in employees' work).

The values and constitutional principles to which Holmes consistently adhered have been subject to quite different critical review at different times. *See* White, *The Rise and Fall of Mr. Justice Holmes*, 39 U. CHI. L. REV. 51 (1972). His insensitivity to modern civil liberties concerns was pressed by Yosal Rogat in a series of articles, *see, e.g., Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 254 (1962-63) and *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964). Even his first amendment decisions are open to criticism on modern standards. *See* Gunther, *supra* note 17. Nevertheless, the historic importance of Holmes' dissent in the *Abrams* case for the development of constitutional protection for speech has not been questioned.

28. Despite the attractions of psycho-history to explain the value choices and principles of an individual (*see, e.g.*, H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981)), it would appear less relevant than traditional studies of legal materials to explain the change of position on a particular issue by one who had already developed a mature philosophy. Thus, although brief excursions into the speculative realm of individual psychology are attempted, *see, e.g., infra* notes 445-61 and accompanying text, the focus of this essay is on the broader range of ideas and legal arguments which affected Holmes' position.

chusetts and entered Harvard there in 1857.[29] Holmes' exposure to Civil War-era Massachusetts may well have driven him away, at the outset, from the view of free speech reflected in the Kentucky and Virginia Resolutions.[30] Massachusetts in the mid-1800's was a center of antislavery sentiment; the invocation by the slave states of the South of the "states' rights" doctrine to fend off attempts by the federal legislature to limit slavery—born of the same fear of the national legislature that was the underpinning of the view that Congress could not regulate speech—received a cold reception in the abolitionist northern climate of the Bay State.[31] The federal

---

29. 1 M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 1-40 (1957).

30. The Kentucky Resolutions of 1798 and 1799, the original draft of which was prepared by Thomas Jefferson, and the Virginia Resolution of 1798, drawn by James Madison, were drafted, and adopted by the Kentucky and Virginia legislatures, in response to a number of repressive and, they argued, unconstitutional laws passed in 1798 by a largely Federalist Congress, *see infra* note 101. *See also* Virginia Resolution of 1798, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot 2d ed. 1836); Kentucky Resolutions of 1798 and 1799, *id.* at 540. The Resolution argued for a narrow reading of the powers delegated to the federal government by the states under the Constitution; for example, the first Kentucky Resolution described the federal government as "a general government for special purposes, delegated . . . certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government." *Id.* The Resolutions represented the view of Jefferson's Republiean party, which assumed power beginning in 1800 with Jefferson's election to the presidency; the party in power during the early years of the United States, however, was the Federalist party, which drew its primary support from northern states like Massachusetts. As a result, those northern states flatly rejected the view represented by the Resolutions. *See* J. MILLER, THE FEDERALIST ERA 241 (1960). *See also* J. MILLER, CRISIS IN FREEDOM 171-72 (1951). After Jefferson became President, some New England men argued for a break with the union, but without opposing the idea of a strong national government. *See* 1 M. HOWE, *supra* note 29, at 180.

31. The Virginia and Kentucky Resolutions were used in southern arguments in the 1830's as a basis for defending slavery from potential interference by the federal government. W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, 130-31. Although the Republican party in the 1850's seemed to adhere to the doctrine that slavery was a local matter, the proslavery southern states were afraid of federal power under the Republicans and urged secession. D. POTTER, LINCOLN AND HIS PARTY IN THE SESSION CRISIS 1-40 (1942). Northern disunionists like Garrison and Phillips sought to disentangle the nonslave states from the infection of slavery, but they based their argument on the evils of the Constitution rather than on any theory that the federal government was violating it. W. WIECEK, *supra,* at 228-48.

The strongest abolitionist position favoring states' rights was the view that the fugitive slave law was unconstitutional. *See* Sumner, "Duties of Massachusetts at This Crisis." A Speech Delivered at the Repulican Convention at Worcester (Sept. 7, 1854), *reprinted in* W. PEASE & J. PEASE, THE ANTI-SLAVERY ARGUMENT 440-45 (1965); W. WIECEK, *supra* at 99-100. Yet the Republican slogan "Freedom national and slavery sectional" was not hostile to federal power. It reflected the pragmatic desire to oppose slavery in whatever way possible — confining federal power where it was used against fugitive slaves but using federal power to eliminate slavery where possible beyond the borders of the southern slave states.

government posed no threat to antislavery advocates in Holmes' youth.[32] Indeed, it was the southern states that pressed state rights that posed the greatest danger to abolitionist speech. Thus, southern arguments for stringent limits on federal power over speech sounded hollow to northern ears.

The antislavery movement was, however, inextricably linked with demands for freedom of speech. Abolitionists were threatened by private mobs, such as the one that killed the printer Lovejoy in Alton, Illinois,[33] and by state laws in the southern states that forbade the spread of abolitionist sentiments.[34] The abolitionists responded to the state laws by arguing that truthful criticism of government should be allowed. They set forth various reasons why such speech should be protected and linked repression of speech with slavery.[35]

William Lloyd Garrison and Wendell Phillips, prominent abolitionists, denounced the union as created under a proslavery compact and called for secession by the northern states to avoid contamination with the slaveholding south. W. WIECEK, *supra*, at 228-48 (1977). The plea for separation suggests the same resentment of federal power found in the Virginia and Kentucky Resolutions, but Garrison and Phillips explicitly stated that the federal government had power under the constitution. *Id.* It was not an interpretation of the Constitution, but the Constitution itself they wished to repudiate.

"Despite their diversity, the antislavery enthusiasts agreed on one thing: slavery was wrong and ought to be ended. That, however, was about the only thing on which they could agree. About the *what* there was no dissension; over the *how* there was no unity." W. PEASE & J. PEASE, *supra*, at 440-45.

While Garrison and Phillips thought the Constitution evil because it supported slavery, a less prominent group of abolitionists advocated the exercise of federal power, believing that the Constitution was opposed to slavery. *See* J. TEN BROECK, EQUAL UNDER LAW 66-93 (1965). These radicals were entirely opposed to the narrow views of federal power voiced in the Virginia and Kentucky Resolutions.

Still other antislavery advocates pursued more pragmatic policies. They accepted slavery in the south as beyond the reach of federal power, but desired every exercise of federal power—over the District of Columbia, over the Territories, over the admission of new states, over interstate trade to repudiate slavery. *See* Charles Sumner, "Duties of Massachusetts at This Crisis." A Speech Delivered at the Republican Convention at Worcester, (Sept. 7, 1854), *reprinted in* W. PEASE & J. PEASE, *supra,* at 440-45 (1965).

32. There was some debate in the 1830's over banning abolitionist literature from the federal mails. The debate was resolved in theory in 1836 by a law which adopted a principle of non-interference. *See* R. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY (1830-1860) 69-81 (1963). A related issue involved the refusal of the House of Representatives to consider antislavery petitions. The fight made John Quincy Adams a heroic figure, but its constitutional focus was the right to petition for redress of grievances rather than freedom of speech. *Id.* at 41-66. By 1850, however, controversy over the federal government's relationship to free speech no longer had a featured place.

33. *See id.* at 145-52.

34. *Id.* at 154-58, 175-76. "With the exception of Kentucky, every Southern state eventually passed laws controlling and limiting speech, press and discussion." *Id.* at 175.

35. *See* "Speech of Mr. Gerrit Smith" in New York Antislavery Convention, Proceedings of the III Convention, Held at Utica (October 21, 1835); New York Anti-slavery State

They were, however, deprived of the one argument that would immediately occur to the reader of today—that such state laws violate the constitution—by an inescapable fact: Prior to the adoption of the fourteenth amendment, the federal Constitution placed no limit on state regulation of speech.[36] Thus, the abolitionists were forced to resort to reason or to natural law rather than to the protection of the first amendment.

Appeals to the protection of free speech guarantees in state constitutions were also futile. Southern states with state constitutional protections for free speech simply used Blackstone's definition to uphold the subsequent punishment of antislavery speech.[37] Once again, the abolitionists were forced to invoke an ideal of individual and governmental tolerance of dissenting ideas rather than appeal to legal limits on governmental power to regulate speech.

Abolitionist speakers, as mentioned above, were threatened with suppression by private intolerance that was as repressive as southern state laws.[38] Mob rule could effectively gag the most dedicated orator, and the authorities would often stand idly by while abolitionist speakers were threatened with violence. Protection against this threat required a public perception that lawlessness and intolerance were wrong.[39] It was thus not a question of constitutional limits on government, but rather an issue of the public moral climate for speech.

Holmes was not unaware of this struggle for the right to free speech. While he was in college, he joined with classmates to protect Wendell Phillips when the great abolitionist orator spoke at the annual antislavery convention in Boston.[40] The power and fervor of Phillips' advocacy and the condemnation of interferences with free speech may have impressed the young man. Phillips stressed, however, the opposition of the Constitution, which judges were obligated to enforce, to the moral universe which should exist.[41] Thus, Holmes was confronted with the dichotomy that he would be faced with

---

Society Held at Peterboro (October 22, 1835) *reprinted in* W. PEASE & J. PEASE, *supra* note 31, at 257-60. *See also* R. NYE, *supra* note 32, at 171-73.

36. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding the Bill of Rights inapplicable to the states).

37. R. NYE, *supra* note 32, at 157-58.

38. *Id.* at 145-52.

39. *Id.* at 158-62, 176-77.

40. 1 M. HOWE, *supra* note 29, at 65-68.

41. W. Phillips, "Can Abolitionists Vote or Take Office Under the United States Constitution" (1845), *reprinted in* W. PEASE & J. PEASE, *supra* note 31, at 459-73.

again and again—free speech praised as an abstract value, but broad government power to suppress speech accepted as prevailing constitutional law.

With the onset of war, concern for individual rights of expression moved further into the background, at least in the areas where the war raged. Lincoln suspended the writ of habeas corpus and many suspected confederate sympathizers were rounded up.[42] Holmes, serving on the front lines in the Union army, probably discussed the New York City draft riots with his companions and was thus aware of the need for strong measures. The echoes of this awareness may be seen in *The Common Law* almost two decades later: "No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death."[43] Again, the power of a government to regulate the behavior of its private citizens, and the special necessity for such power in wartime, was brought home to Holmes; he remained aware of this special necessity even half a century later.[44]

At the same time, however, the commitment of the confederate soldiers to their cause and the courage of some of his Union comrades who faced death daily[45] while criticizing the justice of the

---

42. *See* 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, 841-66, 901-30 (1974).

43. O. W. HOLMES, JR., THE COMMON LAW 43 (1881). *See* 1 M. HOWE, *supra* note 29, at 144-45.

44. "When the nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Schenck v. United States, 249 U.S. at 52. "When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force." Letter from Holmes to Herbert Croly, May 12, 1919 (not sent to Croly, but enclosed with a letter from Holmes to Laski, May 13, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 202, 203-04 (M. Howe ed. 1953).

45. That death was the constant companion of Holmes and his comrades cannot be doubted. Holmes himself was seriously wounded several times. See 1 M. HOWE *supra* note 25, at 102-08 (Holmes' account of his wound and expectation of death at Ball's Bluff), 124-30 (Antietam), and 154-55 (Chancellorsville).

Holmes' brushes with death remained in his memory throughout his life. For example: "October 21, '61—(67 years ago) was Balls Bluff." Letter from O. W. Holmes, Jr. to Harold J. Laski, October 24, 1928, *reprinted in* 2 HOLMES-LASKI LETTERS 1105 (M. Howe ed. 1953); "On the 17th I drank a glass of wine (contrary to my custom when I am alone at home) to the living and the dead, it being the anniversary of Antietam, where 1862-1908—46 years ago (!) I was shot through the neck." Letter from O. W. Holmes to Cannon Patrick Augustine Sheehan (September 21, 1908), *reprinted in* HOLMES-SHEEHAN CORRESPONDENCE 25 (D. Burton ed. 1976).

Union's position led Holmes to doubt that his notions of right had any better claim of universal validity than the right conceived by his neighbor.[46] "I used to say when I was young that truth is the majority vote of that nation that can lick all others."[47] This initial skepticism emerges, full blown, half a century later in the famous *Abrams* "marketplace of ideas" dissent;[48] in the early 1860's, however, any skepticism Holmes may have felt about the "truth" of the Union's cause, or the need to suppress criticism as a means of assuring loyalty, was balanced by the perception of the needs of government during wartime and the emotional commitment of participating in the suppression of the seceding southern states.

III. HOLMES' LEGAL EDUCATION

In July of 1864, Holmes returned home from the Civil War, and soon entered law school.[49] In some respects, his encounters with free speech there resembled his exposure to the Massachusetts of his youth and to the antislavery advocates. The limits on federal power over speech derived from states' rights arguments were ignored, the expression of honest criticism in the abstract was praised, but the narrow definition of Blackstone was acknowledged as existing law. In fact, Holmes' exposure to free speech concepts in law school was probably narrower, and more traditional, than had been his experience in college and in the war, where he was at least exposed to some broad advocacy of free speech.

Like many law students before him, Holmes commenced the study of law with Sir William Blackstone's *Commentaries on the Laws of England*.[50] Blackstone began his section on libel by discuss-

---

46. *See* Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 536-37 (1951).

47. O.W. Holmes, Jr., *Natural Law*, 132 HARV. L. REV. 40, 40 (1918).

48. Abrams v. United States, 250 U.S. 616, 624 (Holmes, J., dissenting). Holmes' marketplace of ideas theory stressed that the "basic test of truth" focuses on whether the idea would be "accepted in the competition of the market." *Id.* at 630 (Holmes, J., dissenting).

49. 1 M. HOWE, *supra* note 29, at 176.

50. Holmes kept a list of books that he had read. The first book on Holmes' reading list during his first year of law school was Blackstone's *Commentaries*. Little, *The Early Reading of Justice Oliver Wendell Holmes*, VIII *Harv. Lib. Bull.* 163, 168 (1954). Holmes presumably read George Sharswood's edition of 1859, for on page 2 of the advertisements in the front of the second edition of Sharswood is a statement from Theophilus Parsons, a professor of Holmes at Harvard Law School, endorsing the 1859 edition. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (2d ed. Sharswood ed. 1866). Parson's choice of Sharswood's edition is significant, because the most famous prior edition was ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES: AND THE COMMONWEALTH OF VIRGINIA

ing seditious libel, or libel against the government. He pointed out that such attacks on government are injurious to the maintenance of order and may therefore be punished whether they are true or false.[51] Such doctrine might be thought by some to subvert the liberty of the press, but Blackstone felt that "[t]he liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matters when published."[52] Blackstone added that if any man "publishes what is improper mischievous or illegal, he must take the consequences of his own temerity."[53]

Blackstone was simply restating the common law of England. There was no prior restraint of speech in England at that time; the system of prior censorship there lapsed in 1694 and was never renewed.[54] Libel, slander and seditious libel could, however, all lead to censure under the common law, and the King in Parliament could punish any offense without being subject to any judicial check.[55] Admittedly, the constitutional structure of the United States is different from that of England, and Holmes might have ignored Blackstone's definition as irrelevant to conditions here. Blackstone, however, was also expressly made part of Holmes' education in American law.

For the young law student the basic text on American law was Kent's *Commentaries on American Law.*[56] Although the organiza-

---

(1803). Tucker repudiated Blackstone's definition of freedom of speech in an extended essay—Appendix to Volume First, Part Second of Blackstone's Commentaries, Note G, "Of the Right of Conscience, and of the Freedom of Speech and of the Press." Thus, Holmes missed early exposure to the Jeffersonian attack on Blackstone. He might have had an indirect exposure to the Jeffersonian viewpoint through Story's sharp attack on Tucker's essay in J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 672-75 (3d ed. 1858). Holmes' reading list for his law school career did not include Story's *Commentaries*, but the list may not have been complete.

51. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150 (7th ed. 1775).

52. *Id.* at 151-52.

53. *Id.* at 152.

54. R. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 650 (1916). *See* F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, 260-65 (1952).

55. "The King in Parliament" refers to the King and Parliament together. By the time Blackstone wrote, Parliament had become the predominant force in English law, although George III could still manipulate it through his appointment of ministers. *See generally* W. BAGEHOT, THE ENGLISH CONSTITUTION (2d ed. 1872). Nevertheless, parliamentary supremacy—the notion that there was no document or constitution which was supreme as to Parliament and could be applied by courts meant that no court would invalidate a statute on grounds that it interfered with free speech.

56. Kent's *Commentaries* was the fourth book on Holmes' reading list. Little, *supra* note 50, at 168.

tion of Kent's text in some ways paralleled that of Blackstone, the section on libel and slander began in a very different tone:

> The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States.[57]

In his capacity as a state court judge, Chancellor Kent had adopted, in *People v. Croswell*,[58] Alexander Hamilton's argument[59] that truth should be admitted in evidence under New York law as a defense to a charge of libel.[60] However, while this opinion was reflected in the tone of Kent's *Commentaries*, it was expressed as exhortation rather than as a statement of prevailing law. The *Commentaries* also attempted to set forth the existing principles of law, and the majority of state courts had not followed the views Kent had expressed as judge. Even his own court had been evenly divided in *Croswell*, and the conviction there was upheld.[61] In his *Commentaries*, Kent admitted: "[T]he weight of judicial authority undoubtedly is that the English common law doctrine of libel [in which truth was not a defense] is the common law doctrine in this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions."[62]

One of the cases to which Kent devoted considerable attention in *Commentaries* was *Commonwealth v. Blanding*.[63] Holmes and his fellow students in Cambridge must have paid particular attention to

---

57. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 17 (12th ed. 1873). Holmes presumably read the 10th edition of Kent, edited by Richard McCurdy and Wm. Henry Forman and published in 1860, in which the section on liberty of the press is contained in the first volume, pp. 631-42, but with internal references to denote that the section was originally in volume II. *See id.*, (10th ed.) at 610. When Holmes took over the editorship for the twelfth edition, he returned to Kent's original division.

58. 3 Johns. Cas. 336 (N.Y. 1804).

59. *Id.* at 352 (Hamilton, argument for appellee).

60. *Id.* at 393-94 (opinion of Kent, J.) Kent was a Federalist oppesed to Jefferson, and a supporter of the Alien and Sedition Acts, as his *Commentaries* demonstrate. *See* KENT, *supra* note 55, at 24. Croswell was prosecuted for libelling Jefferson. In his opinion in *Croswell*, Kent wrote, "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals." *See Croswell*, 3 Johns. Cas. at 392-93 (N.Y. 1804). In his *Commentaries*, he was not quite as explicit; *see* J. KENT, *supra* note 57, at 20.

61. *Croswell*, 3 Johns. Cas. at 361-62.

62. J. KENT, *supra* note 57, at 21.

63. 20 Mass. (3 Pick.) 304 (1825). *See* J. KENT, *supra* note 57, at 21-22.

Blanding because it was a Massachusetts case. At issue in *Blanding* was the Massachusetts constitutional provision stating that "[t]he Liberty of the press . . . ought not . . . to be restrained."[64] The defendant, who had stated in a newspaper that an individual kept a public house in an improper manner, offered to prove the truth of the allegation as a defense, but the Supreme Judicial Court of Massachusetts found that truth was irrelevant in a libel action. Accusations of misconduct must be made through legal proceedings in order to be privileged, the Court said, and not through public accusation. Alluding to the claim that such a ruling violated the guaranteed freedom of the press contained in the Massachusetts Constitution, Chief Justice Isaac Parker said:

> Besides, it is well understood, and received as a commentary on this provision for liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The Liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse.[65]

With respect to the holding in *Blanding* that truth was not relevant as a defense to libel, Kent noted with some satisfaction that the Massachusetts legislature almost immediately thereafter enacted a statute that provided that truth published with good motives and for justifiable ends would be a defense.[66] He did not, however, criticize the interpretation Parker gave of the Massaehusetts constitutional guarantee of freedom of the press.[67] Kent's concern was to suggest

---

64. MASS. GEN. LAWS ANN. Const. Art. XVI (1780, amend. 1948) (West 1968).

65. *Blanding*, 20 Mass. (3 Pick.) at 313. In 1789, Chief Justice Cushing and John Adams in letters to each other agreed that Article 16 of the Massachusetts constitution repudiated the view of Blackstone and permitted truth as a defense. *See* Letters from William Cushing to John Adams (Feb. 18, 1789) and from John Adams to William Cushing (March 7, 1789), *reprinted in*, L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 147-53 (1966) (footnotes omitted). The correspondence was not available to Parker, of course, and he behaved like most judges of the period in adopting Blackstone's definition of liberty of the press rather than departing from the norms that prevailed prior to the revolution. "The doctrine laid down by Mr. Justice Blackstone respecting the liberty of the press had not been repudiated (as far as is known) by any solemn decision of any of the State courts, in regard to their own municipal jurisprudence." J. STORY, *supra* note 50, at 617.

66. J. KENT, *supra* note 57, at 21.

67. *Id.* Kent even tried to justify the *Blanding* decision: "[*Blanding*] went only to control the malicious abuse or licentiousness of the press, and that is the most effectual way to preserve its freedom in the genuine sense of the constitutional declarations on the subject." *Id.*

that legislatures and courts should act by decision, statute or constitutional amendment to assure that truth could be given in evidence in trials for libel. Holmes and his fellow students, reading Kent, were again confronted with a broader view of freedom of speech as an abstract "good," but with Blackstone's as "the law":

> These provisions in favor of giving the truth in evidence are to be found only in those constitutions which have been promulgated long since our Revolution; and the current of opinion seems to have been setting strongly, not only in favor of erecting barriers against any previous restraints upon publications (and *which was all that the earlier sages of the Revolution had in view*), but in favor of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of the truth.[68]

Kent's own view of how broadly the constitutional principles of freedom of speech should be read sounded far more liberal than that of Blackstone. " '[E]very citizen,' " he wrote, " 'may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and . . . no law can rightfully be passed to restrain or abridge the freedom of speech or of the press.' "[69] If the legislature determines that particular speech is an abuse of the right to free speech, however, Kent's concession that the speaker is "responsible for the abuse of that right"[70] was in accord with Blackstone's views.[71] Thus, although Kent personally believed that truth offered with good motives should not be punishable, his *Commenta-*

---

68. *Id.* at 23 (emphasis added). State statutes and new constitutional provisions expressly provided for truth as a defense; as the quoted passage indicates, Kent approved. Further, Kent himself went beyond Blackstone in *Croswell*, *see supra* note 58. It is not clear, however, whether his *Commentaries* took a firm position.

69. J. KENT, *supra* note 57, at 17.

70. *Id.* Blackstone assumed that writings would be punished only if they had a pernicious tendency. This is the same thought as responsibility for "abuse" of the right of speech. Nevertheless, Blackstone believed that "*any* dangerous or offensive writings," even true statements, which tended to bring the government into contempt had a pernicious tendency and thus supported the common law of seditious libel. *See* W. BLACKSTONE, *supra* note 22, at 152 (emphasis added). Given *Croswell*, Kent surely would not have agreed that such criticism is an abuse. The *Commentaries*, however, never quite come out flatly with a statement that a legislative enactment which condemned seditious libel even if true would be unconstitutional. In any event, when Holmes was studying law, truth published with good motives and for justifiable end was a defense either by statute or specific constitutional provision in most states. *See generally* J. KENT, *supra* note 57, at 24. *See also supra* text accompanying note 64. Kent suggested no further refinement for determining when an "abuse" of speech occurred, and as a result could be cited to support virtually any restrictive law that state legislatures would be likely to enact.

71. *See* W. BLACKSTONE, *supra* note 22, at 152.

ries did not explicitly repudiate the validity of Blackstone's formulation as the prevailing definition of frcedom of the press. Kent's argumcnts were based on social policy, on what the law ought to be, rather than on what was required by state constitutional guarantees of freedom of speech and prcss.

Kent's *Commentaries* served American law students as a statement of existing law. There had been, to that date, no definitive Supreme Court interpretation of the federal first amendment free speech and press provisions. On the other hand, Chief Justice Parker had interpreted just such a provision in the Massachusetts Constitution using Blackstone's terms. With no later decisions in Massachusetts on that point, *Commonwealth v. Blanding*[72] thus stood as "the meaning" of freedom of speech to young lawyers like Holmes planning to practice in Massachusetts.

Holmes found Blackstone's view of free speech further supportcd in Timothy Walker's *Introduction to American Law.*[73] Whercas ambiguity existed in Kent's treatment of Blackstone and free speech, Walker seemed to swallow the whole of Blackstone's view. "The doctrine then is," Walker wrote, "that the liberty of speech and of the press consists in freedom from previous censorship or restraint, and not in exemption from subsequent liability for the injury which may thereby be done."[74] With a bow to a rhctorical tradition of freedom, Walker added, "[t]he truth ought to be published, when it concerns the public to know it."[75] This phrase, however, did not suggest much of a limitation on the legislature's determination of when "it concerns the public to know it."

In December of 1865, Holmes stopped attcnding law school and began clerking for a private attorney. During his entire law school career, then, his only recorded exposure to views on the meaning of constitutional free speech guarantees had come from writers who had accepted Blackstone's definition of free speech as "no prior restraints" or had at least failed to clearly explain in what way they differed.

---

72. 20 Mass. (3 Pick.) 304 (1825).

73. T. WALKER, INTRODUCTION TO AMERICAN LAW (1837). Holmes also read Walker, *see* Little, *supra* note 50, at 169.

74. T. WALKER, *supra* note 73, at 189. The quoted language made direct reference to such provisions in state constitutions, but he also said, "This qualification is tacitly annexed to cvery species of civil liberty."

75. *Id.*

IV. HOLMES AS LEGAL SCHOLAR: ENGLAND

After receiving his degree from Harvard in the spring of 1866, Holmes took a vacation trip to England. Philosophy was one of his greatest interests during college and the trip to England gave him an opportunity to meet some of the English philosophers. One such meeting was with a man whose views would later become important to Holmes' view of free speech—John Stuart Mill.

His father wrote a letter to John Morley to obtain a letter of introduction for his son to Mill. "He is a presentable youth," the senior Holmes wrote of his son, "with fair antecedents, and is more familiar with Mill's writings than most fellows of his years."[76] The best known of Mill's works, and one with which Holmes was surely familiar, was *On Liberty*.[77]

In *On Liberty*, Mill set forth the utilitarian[78] proposition that government had no legitimate power to suppress or punish expression, even if the vast majority of the populace supported such

---

76. F. BIDDLE, *supra* note 27, at 29.

77. Mill, *On Liberty* (1859), *reprinted in* J. S. MILL, UTILITARIANISM 126 (M. Warnock ed. 1970).

78. Utilitarianism, the school of philosophical thought which can be essentially summarized by the well-known phrase "the greatest happiness of the greatest number," is generally acknowledged to have been begun by Jeremy Bentham with the publication of his *Introduction to the Principles of Morals and Legislation* in 1789 (although the phrase itself first appeared, in a slightly different form, in a pamphlet by Joseph Priestley, *see* J. S. MILL, *supra* note 77, at 7 (editor's introduction)). Bentham was a friend of James Mill, the father of John Stuart Mill; young John Stuart was steeped in utilitarian ideals by both his father and Bentham throughout his early life, *see id.* at 8-10, and he later became perhaps the best philosopher of Bentham's school, *see id.* at 9. That Mill, a utilitarian, made a powerful defense of freedom of speech should not be taken to indicate that utilitarian thought and free speech are necessarily compatible ideals. At least one other utilitarian contemporary of Mill—James Fitzjames Stephen—attacked Mill's *On Liberty*. *See infra* note 86 and accompanying text. In addition, it is not difficult to bend utilitarianism to support *suppression* of speech; one can argue, for example, that criticism of a country's war effort, even if truthful, might cause a serious weakening of the war effort (by encouraging the enemy, or causing draft resistance), which might in turn threaten the safety of the citizens and perhaps even the existence of the country. Thus, the argument concludes, suppression of the dangerous speech will shield the country, and its citizens, from the threatened harms and thereby bring about the greatest good for the greatest number.

That utilitarian philosophy can be used as described above, combined with the attack on Mill by Stephen and Holmes' general reluctance to confuse philosophy and legal doctrine, should serve to remind the reader that Holmes' adherence to Blackstone after having been exposed to Mill is not difficult to understand. What the reader must also remember, however, is that these same factors indicate that Holmes' later adherence to Blackstone did not mean a repudiation of Mill, but rather a reluctance to unilaterally import Mill's philosophy into the text of the Constitution. This also makes his receptiveness to Mill years later, after he perceived a popular rejection of Blackstone, less difficult to understand, *see infra* note 517 and accompanying text.

suppression:

> The power [to suppress speech] is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordanco with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[79]

Mill, it is true, was an English philosopher, and Holmes surely understood that his essay was not intended as a definition of American constitutional law or even a description of English common law—that he was merely advocating free speech as a matter of moral philosophy which could be deduced from the utilitarian principle of the greatest good for the greatest number. Even so, Mill's view that government had no power to suppress the voice of a single dissenter would have appeared as a vastly different view of speech than that espoused by Blackstone.

Mill then went on to demonstrate how such suppression might eventually injure the entire society by pointing out that time may eventually prove the dissenter's to have been the voice of truth: "[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible."[80]

As proof that suppressors may indeed be fallible, Mill pointed to notable examples throughout history of ideas that, along with those who espoused them, were ridiculed and attacked in their day but which were eventually triumphant, like those of Socrates and Jesus Christ.[81]

Mill then went on to elaborate on how freedom of expression and debate will benefit society:

> [M]an is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it.[82]

---

79. J.S. MILL, *supra* note 77, at 142.
80. *Id.* at 143.
81. *Id.* at 150-54.
82. *Id.* at 146.

Thus, Holmes was exposed to a position on free speech—that it is necessary to help society discover and root out "wrong opinions and practices"—which he would echo in *Abrams*, years later, in his famed "marketplace of ideas" analogy.[83]

The young Holmes of 1866, however, was fresh from being steeped in Blackstone through college and law school[84] and was surely in no position to discard what he had been shown over and over again to be "the law." Even his exposure to other philosophers who, like Mill, claimed to be utilitarians, presented him with ambiguous views of speech. Returning from a lecture that he had attended with Mill, Holmes fell into a long conversation with one such utilitarian, James Fitzjames Stephen,[85] who subsequently published an attack on *On Liberty*.[86]

Stephen's attack, read by Holmes,[87] against the free speech view espoused by Mill in *On Liberty* proceeded on two levels. On the idealistic level, Stephen disputed Mill's contention that freedom of speech necessarily leads to the greatest good for the greatest number, pointing out various situations where suppression of even the truth might be desirable.[88] On a more concrete level, Stephen pointed to the countervailing interests of the state that override ideals like total freedom of speech.[89] Thus, Holmes was again confronted with the familiar dichotomy—the rhetoric of free speech as an ideal, but an acknowledgment of the reality and even the desirability of government power to suppress it.

V. HOLMES AS LEGAL SCHOLAR: AMERICA

After his return from England, Holmes started work at the law firm of Chandler, Shattuck & Thayer.[90] For the next several years, Holmes developed his skills as a common law attorney, with free speech issues fading into the background.

In 1869 Holmes began editing the twelfth edition of Kent's

---

83. "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of thought to get itself accepted in the competition of the market . . . ." *Abrams*, 250 U.S. at 630.

84. *See supra* notes 21-74 and accompanying text.

85. *See* 1 M. HOWE, *supra* note 29, at 227, 236-40.

86. J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873).

87. Howe assumed that Holmes had read Stephen's book. *See* 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES 48 n.44 (1963).

88. J. STEPHEN, *supra* note 86, at 74-122.

89. *Id.* at 71-72.

90. 1 M. HOWE, *supra* note 29, at 245.

Commentaries with its admission that Blackstone was still "the law" on speech.[91] The following year he opened his own law office, became co-editor of *The American Law Review* and commenced a series of lectures on constitutional law to juniors at the Harvard Law School; the latter activity once again focused his attention on speech.[92]

The textbook Holmes used in his lectures was Joseph Alden's *The Science of Government in Connection with American Institutions*.[93] It was not a very sophisticated book. Alden's treatment of freedom of speech consisted of laying quotes from Blackstone and from Kent, paraphrasing Blackstone, side by side:

> An eminent jurist has remarked that freedom of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To censure the licentiousness is to maintain the liberty of the press." Chancellor Kent remarks: "It has become a constitutional principle in this country that every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*; and that no law can rightfully be passed to restrain or abridge the freedom of the press."[94]

Thus Holmes was again exposed to Blackstone and Kent in a class at the Harvard Law School, this time as professor. If it did nothing else, his exposure to Alden would have served to remind Holmes that Blackstone was still "the law."

His exposure during this period to an influential view of free speech which differed from Blackstone appears not to have had much effect on Holmes at the time. In 1871, he reviewed the second edition of Thomas Cooley's *Constitutional Limitations*[95] for *The*

---

91. *Id.* at 273. *See* J. KENT, *supra* note 57, at 22.

92. 1 M. HOWE, *supra* note 29, at 273.

93. *See* 2 M. HOWE, *supra* note 87, at 27-29.

94. J. ALDEN, THE SCIENCE OF GOVERNMENT IN CONNECTION WITH AMERICAN INSTITUTIONS 200-01 (1868). As this passage suggests, it was easy to meld Chancellor Kent with Blackstone, at least in an American setting where no one expected that mannerly, truthful criticism of government offered at an appropriate time and place would be subject to any punishment. If any of these conditions was arguably absent, Kent's formula would be no greater barrier to suppression of such speech than Blackstone's. Neither had attempted to define appropriate manner, time or place.

95. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON

American Law Review.[96] Cooley began his discussion of freedom of speech by noting that the commentators agreed that the term liberty of the press was confined to the absence of previous restraints.[97] He even cited Parker in *Blanding* for that proposition.[98] But Cooley argued that the first amendment should be read more broadly. He first pointed out that previous restraint was not relevant to oral speech which clearly cannot be "reviewed" by a censor before "publication" as can print. Second, he contended that the constitutional phrases would be a mockery "if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."[99] Cooley suggested that freedom of speech should be determined by the principles that existed at common law.

> [W]e understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established, and in reference to which they have been adopted.[100]

Cooley did not specify which "common-law rules" should be used as a standard for testing speech, but he did point out one which he thought should not be used: the common law doctrine of seditious libel. Cooley recited tersely the history of the Sedition Act,[101]

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 463 (2d ed. 1871).

96. 6 AM. L. REV. 140 (1871).

97. "It must be evident from these brief references that liberty of the press, as now understood and enjoyed, is of very recent origin, and commentators seem to be agreed in the opinion that the term itself means only that liberty of publieation without the previous permission of the government, which was obtained by the abolition of the censorship." T. COOLEY, *supra* note 95, at 463-64.

98. *Id.* at 464.

99. *Id.* at 465.

100. *Id.* at 466.

101. *Id.* at 471-72. The Act for the Punishment of Certain Crimes, popularly known as the Sedition Act, Ch. 74, 1 Stat. 596 (1798), was one of several repressive measures enacted that year by a Federalist Congress gripped by fear of war with France and mistrust of foreigners here in the United States. *See* J. MILLER, *supra* note 30, at 228-29. *See also* Naturalization Act, Ch. 54, 1 Stat. 566 (1798)(raised the residency requirements for aliens to attain citizenship from five to fourteen years and required reports and certificates proving compliance); Alien Enemies Act, Ch. 66, 1 Stat. 577 (1798)(gave power to President during wartime to imprison or deport citizens of the enemy nation suspected of aiding the enemy without having to accord normal procedural due process rights); Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798)(gave power to President during peacetime to imprison or deport aliens suspected of

stressing its subsequent rejection.[102] He then argued that libels on the system of government are inconsistent with the principle that the people frame their own system of government.[103] In short, Cooley's view of free speech, if Holmes had taken note of it, would have appeared a clear repudiation of Blackstone.

Holmes' review of Cooley's work, however, did not even mention this treatment of freedom of speech. Instead, Holmes commented on the discussion of the police power in the book—"powers of which, 'the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit the exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.' "[104] In addition, Cooley's book did not cause Holmes to alter or add to the notes on liberty of the press in his edition of Kent's *Commentaries*.[105] Holmes' reaction to Cooley's discussion of free speech is thus a subject for speculation.

Holmes may not have been impressed by Cooley's view of speech because that view had little practical importance at the time. Since the Alien and Sedition Acts had expired over half a century earlier, the federal government had made no attempt to proscribe seditious libel, or any speech for that matter.[106] On the state level, the principles of the common law only allowed for the punishment of speech "of a pernicious tendency."[107] In short, the "bogeyman" of

---

being dangerous to the peace and safety of the United States).

The Sedition Act prescribed heavy fines and imprisonment for writing, publishing, or speaking anything of "a false, scandalous and malicious nature" against the government or any of its officers, 1 Stat. 596. While never declared unconstitutional, the Sedition Act, as well as the other repressive Federalist laws, were harshly criticized and, once Jefferson became President in 1800 concurrent with the downfall of the Federalist Party, were repealed. *See* T. COOLEY, *supra* note 96, at 471. In fact, part of the criticism inspired by the passage of these Acts was in the form of the Kentucky and Virginia Resolutions, *see supra* note 31 and accompanying text.

102. T. COOLEY, *supra* note 95, at 471-72.

103. *Id.* at 471-74.

104. 6 AM. L. REV. at 141-42 (1871). This attitude towards the police power suggests disbelief that government would deliberately prevent itself from dealing with undesirable conduct (or speech). This would apply to state constitutional provisions, but it might not apply with equal force to the first amendment where states retain the power to deal with undesirable speech.

105. *Compare* volume 1 of the 10th edition (1860) edited by McCurdy and Forman, at 631-41 *with* volume 2 of the 12th edition edited by Holmes at 16-26. On the other hand, when Cooley edited the 4th edition of Story, he added a long running footnote denying Story's affirmation of Blackstone. J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 613-14 n.2 (4th ed. T. M. Cooley ed. 1873).

106. *See* T. COOLEY, *supra* note 95, at 471.

107. *See* J. Story, *supra* note 50, at 670.

punishment for "harmless publications" feared by Cooley would have seemed, to Holmes, simply a bad dream. Cooley set forth no instances of unconstitutional state laws and cited no authority for his argument.

In addition to his exposure to scholarly views of free speech, Holmes was, during this period, involved in the study of various schools of philosophical thought. For example, at the instigation of his friend William James, Holmes joined with James, Chauncey Wright, Charles Peirce, Nicholas St. John Green, and Joseph Warner, to form the Metaphysical Club—a loose association of individuals who met for regular discussions of philosophical matters.[108] Holmes was the first to drop out of the group's discussions as his focus on the law consumed his energy and drew him away from general philosophical discussions.[109] Nevertheless, his participation in the Club exposed him to a philosophy—pragmatism—which, some commentators have argued, was later adopted by Holmes as the basis for his legal philosophy.[110]

An adequate exegesis of the philosophy of pragmatism is, quite clearly, beyond the scope of this article; it will suffice, for now, to define pragmatism as the belief that through scientific experimentation and observation of external phenomena man could define and understand the conceptual world around him. One member of the Metaphysical Club—Charles S. Peirce—defined pragmatism as follows: " 'Consider what effects that might conceivably have practical bearing you conceive the object of your conception to have. Then your conception of those effects is the WHOLE of your conception of the object.' "[111] Perhaps the easiest way to understand pragmatism is to view it as the philosophical offshoot of the rise of the scientific method during the late 1800's, with the concomitant belief that the only truth was that which could be proven experimentally, through observation and cataloguing of external phenomena.[112]

---

108. Fisch, *Was there a Metaphysical Club in Cambridge,* in STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE, 2d series (Moore and Robin, eds. 1964).

109. *Id.* at 11, 12.

110. *See* B. KUKLICK, THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS 1860-1930 47-50 (1977); Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism,* 39 J. OF PHIL. 85, 88 (1942); Note, *Holmes, Peirce and Legal Pragmatism,* 84 YALE L.J. 1123 (1975). Whether the views of his friends in the Club influenced his views is not certain. Mark DeWolfe Howe suggested their source lay in Holmes' personal critical examination of Austin. *See* 2 M. HOWE, *supra* note 37, at 75-76.

111. Peirce, *What Pragmatism Is,* (1905), *reprinted in* C. S. PEIRCE, SELECTED WRITINGS 181, 192 (P. Wiener ed. 1958).

112. *See* C. S. PEIRCE, *supra* note 111, at x (editor's introduction).

The pragmatist view of free speech, if one could call it that, was set out in an essay written by Peirce entitled "The Fixation of Belief,"[113] to which Holmes was apparently exposed while in the Club.[114] Peirce examined and rejected several ways in which an idea or belief could become accepted as true, including what he called the method of authority—namely, through "an institution . . . which shall have for its object to keep correct doctrines before the attention of the people . . . having at the same time power to prevent contrary doctrines from being taught, advocated, or expressed."[115] Peirce preferred "the method of science."[116] Applied to ideas, this method would begin with doubt about the validity of a certain idea; this would be followed by a period of testing and experimentation, what Pierce termed "the struggle to attain belief," and would only end when doubt was laid to rest, at least until some new information was presented that would cause new doubt.[117]

One can easily see the parallel between Peirce's period of experimentation and Mill's belief that free speech was necessary to allow correction of wrong opinions and ideas,[118] a parallel Holmes surely recognized. Another philosophical view that was closely related to Peirce's pragmatism, and which can easily be adapted to support free speech, is that of Social Darwinism,[119] the belief that the superior cultural, social or idealogical system is that which, like the biological species in Darwin's work,[120] survives the struggle for life.[121] This adaptation of Darwin's theory, like Peirce's pragmatism, had its roots in the scientific revolution of the late nineteenth century; both were attempts to transfer the perceived superiorities of the scientific method to the search for philosophical truth.[122] Social Darwinism, like pragmatism, can be used to buttress the argument for free speech—ideas, like biological entities, should be free to struggle, unfettered by suppression, in the community, with those ideas that gain popular acceptance deemed to be the "survivors" and thus superior.

---

113. Peirce, *The Fixation of Belief* (1877), *reprinted in* C. S. PEIRCE, *supra* note 111, at 92.

114. *See* Note, *supra* note 110, at 1125.

115. C. S. PIERCE, *supra* note 111, at 103.

116. *Id.* at 107.

117. *Id.* at 99-101.

118. *See supra* note 82 and accompanying text.

119. *See generally* H. SPENCER, SOCIAL STATICS (abridged and revised ed. 1892).

120. C. DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (1859).

121. H. SPENCER, *supra* note 119, at 365.

122. *See* C. S. PEIRCE, *supra* note 111, at x (editor's introduction).

That Holmes was strongly influenced by Darwinist thought during the period is beyond doubt;[123] an article he wrote for the *American Law Review* in 1873 is filled with references to Darwinist social struggle: "The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence."[124]

Holmes' exposure during this period of his life, to a number of philosophical viewpoints that seem to militate in favor of free speech does not, however, mean that Holmes viewed them as such. For one thing, philosophical ideals can be easily bent in practice to support either position in an argument. Darwinism, for example, can be used as support for the notion that government should have the power to suppress dissenting ideas; if one views the actions of a representative government as the expression of the will of the people, government suppression of a minority viewpoint may be seen as the victory in a Darwinian struggle of the viewpoint of the majority.

Perhaps more important is the realization that Holmes may have wholeheartedly accepted the notion that free speech in the abstract was desirable while at the same time supporting the government's power to supress it, right or wrong. After all, despite his apparent fascination with Darwinist theory,[125] it was Holmes who, as a Supreme Court Justice, would later assert that "[t]he Fourteenth

---

123. *See* Gordon, *Holmes' Common Law as Legal and Social Science,* 10 HOFSTRA L. REV. 719, 739-40 (1982).

124. 7 AM. L. REV. 582, 583 (1873). In the article, Holmes expressed doubt that the legislative model conformed as well to Darwinist theory as Spencer had suggested. *Id.* But his doubts were chiefly aimed at short-run conformity; as he put it, "legislation . . . like every other device of man or beast, must tend in the long run to aid the survival of the fittest." *Id.*

Years later, Holmes expressed the hope that the struggle would, in the long run, succeed in raising man to new heights:

> If I feel what are perhaps an old man's apprehensions, that competition from new races will cut deeper than workingmen's disputes and will test whether we can band together and fight; if I fear that we are running through the world's resources at a pace that we cannot keep; I do not lose my hopes. I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead—perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I eatch a dreaming glimpse of peaee.

Holmes, "Speech at a dinner of the Harvard Law School Association of New York on February 15, 1913" *in* O.W. HOLMES, SPEECHES (1913).

125. *See supra* notes 123, 124.

Amendment does not enact Mr. Herbert Spencer's Social Statics."[126] Holmes had already seen how idealistic theories of free speech could be consistently linked with the admission that constitutional free speech guarantees were only intended by their framers to guard against prior restraint.[127] In short, it would be erroneous to attribute Holmes' eventual embrace of broad free speech protection to his legal philosophies; it would be equally erroneous to dismiss the notion that those philosophies had an effect because of Holmes' adherence to Blackstone[128] while a judge on the highest court in Massachusetts, to which he was appointed in 1882.

In his new judicial role, Holmes had only occasionally to deal with problems of free speech, and even then it was under the Massachusetts constitutional provision which Chief Judge Parker had narrowly construed in *Commonwealth v. Blanding*.[129]

VI. HOLMES AND SPEECH CASES ON THE MASSACHUSETTS SUPREME JUDICIAL COURT

A few years after he came to the bench, Holmes decided a case in which he made direct reference to the *Blanding* decision. In *Cowley v. Pulsifer*,[130] the plaintiff sued a newspaper for libel. The paper had merely reported on the filing of a petition for removal of a lawyer from the bar, but the contents of that petition were libelous in the absence of a privilege. The parties did not appear to argue that the case was controlled by any provision of the state constitution.[131] Instead, the defendant argued that reports of the commencement of legal proceedings were privileged publications under the common law.[132] In response to this argument, Holmes cited *Commonwealth v. Blanding* for the proposition that accusations of misconduct are not privileged communications unless made in a legal proceeding. The filing of the petition for removal was privileged, Holmes reasoned, but the published report of its contents served as a public accusation

126. Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting).

127. *See supra* notes 56-71 and accompanying text.

128. *Cf. supra* note 78.

129. 20 Mass. (3 Pick.) 304 (1825).

130. 137 Mass. 392 (1884). "Early in my judicial experience I wrote a decision on the extent of the privilege in publishing legal proceedings, *Cowley* v. *Pulsifer*, 137 Mass. 392 (in 1884). I remember that *The Nation* pitched into it and don't remember much else." Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (December 15, 1912), *reprinted in* 1 HOLMES-POLLOCK LETTERS 204 (M. Howe ed. 1941).

131. 137 Mass. at 392-93.

132. *Id.* at 393.

and was thus not similarly privileged.[133] In other words, a newspaper might be privileged to report on the proceedings at a trial in which defendent had an opportunity to make his defense, but a report of the petition alone was not fair treatment. Holmes, like Parker before him, saw the law as attempting to civilize disputes by confining them within the established bounds of a legal proceeding.

Holmes referred to *Blanding* with approval again just two years later, citing it in *Bigelow v. Sprague*[134] for the proposition that each separate copy of a publication can be used to sustain an indictment. Although *Bigelow* was a libel suit, no argument concerning freedom of speech was made. Thus, on the Massachusetts bench, Holmes, as he did in law school and in his work on Kent's *Commentaries*, turned to Parker's opinion in *Blanding*, and never in a context in which the old Chief Justice's interpretation of the meaning of freedom of the press was challenged.

It is not surprising that, for Holmes, the speech related issues that arose on thc Massachusetts bench were set in a framework established by Parker's opinion in *Blanding*. The first amendment did not apply to the states, and no one on the Supreme Court was ready yet to apply it through the mediating device of the fourteenth amendment.[135] For this reason, the great antifederalist demands for first amendment protection of speech and the history of the treatment of the Alien and Sedition Acts by Jefferson were irrelevant to Holmes while he sat on the Massachusetts bench. It was the meaning of the state, not the federal, constitution which was at issue for Holmes and that meaning had been settled for more than half a century.

From this framework, a striking departure from the judicial consensus over the meaning of the phrases in the Massachusetts constitution would have been a great leap for Holmes to make. It would have required him to pit the state Supreme Judicial Court against precedent taught to Holmes as dogma in law school and reinforced as "the law" throughout his early legal career. Despite his previous exposure to various views on freedom of speech as an ideal during his early years, Holmes was never seriously prodded into abandoning "the law" to make that leap.

Later speech cases did not directly confront Holmes with the

133. *Id.*

134. 140 Mass. 425 (1886).

135. *See* Gitlow v. New York, 268 U.S. 652 (1925). Holmes finessed the issue when it first arose during his tenure on the Supreme Court. *See infra* text accompanying notes 150-55.

prospect of reconsidering *Blanding*. For example, in *McAuliffe v. New Bedford*,[136] a policeman was discharged for participating in a political campaign contrary to city rules. Holmes, without direct reference to any frec speech considerations, held the discharge justified for violation of a reasonable condition of employment. His colorful phrase, howevcr, was invokcd later by others for more serious invasions of speech: "Thc petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[137] Believing, as the Supreme Court still does today,[138] that it was wholly appropriate to keep public servants from engaging actively in partisan politics, Holmes seized upon a deceptive principle and a brilliant phrase to justify the result in *McAuliffe*. He did so in a way that enabled him to avoid any direct consideration of the validity of the constitutional interprctation in *Blanding*.

In another specch related case, *Commonwealth v. Davis*,[139] Holmes affirmed a conviction for speaking without a permit in a public park.[140] The argument that the permit requirement under the ordinance is unconstitutional, said Holmes, "involves the same kind of fallacy that was dealt with in *McAuliffe v. New Bedford* . . . . It assumes that the ordinance is directed against free speech generally . . . whereas in fact it is directed toward the modes in which Boston Common may be used."[141] Once again Holmes decided a speech related case without having to consider thc wisdom of *Blanding*.

Holmes' tenure on the Massachusetts bench lasted over twenty years. Thus, by the time he was appointed to the Supreme Court of the United States in 1902,[142] he had spent over twenty years on the highest court of a state where the leading case on freedom of speech[143] adopted a view—Blackstone's—that he had been taught as

---

136. 155 Mass. 216 (1892).

137. *Id.* at 220.

138. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding a state statute restricting the political activities of civil servants).

139. 162 Mass. 510 (1895).

140. *Id.* at 513.

141. *Id.* at 511. The Court had previously upheld the ordinance against a challenge of unequal administration. Commonwealth v. Abrahams, 156 Mass. 57 (1892).

142. *See* F. Biddle, *supra* note 27, at 101. Holmes seemed, at the time, ready and willing to put the past behind him: "The work of the past seems a finished book—locked up far away, and a new and solemn volume opens." Holmes to Pollock (December 28, 1902), *reprinted in* 1 HOLMES-POLLOCK LETTERS 109 (M. Howe ed. 1941). But the past stayed with him in understanding freedom of speech until 1919.

143. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825). *See supra* notes 64-67 and accompanying text.

dogma in law school,[144] and had seen treated as such thereafter.[145] And in all those years on the bench Holmes had heard no effective challenge to the familiar doctrine as law;[146] any inconsistent idealistic or philosophical viewpoints he had been previously exposed to[147] had, no doubt, faded into the background, pushed aside by a judge's duty to, as Chief Justice Marshall once put it, "say what the law is."[148]

Holmes' first experience with a speech case as a Supreme Court Justice failed, for reasons examined in the following section to provide him with any real opportunity or impetus to deviate from the pattern established in Massachusetts. An examination of this case will provide an interesting contrast to the later analysis of the Espionage Act cases,[149] where a Holmes prepared by critical abandonment of Blackstone was effectively convinced to reconsider his view of free speech.

VII. HOLMES ON THE SUPREME COURT: *Patterson*

The first speech case presented to Holmes as a Supreme Court Justice was decided in 1907, just five years after he joined the Court. *Patterson v. Colorado*[150] was a contempt case brought against ex-Senator Patterson for an editorial and article written by him that severely criticized a Colorado Supreme Court decision invalidating elections held in Denver. "What next?" the editorial demanded. "If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."[151] Other articles by Patterson suggested that the Colorado Supreme Court decision was just the first step towards a final decision that would free the utility companies from restrictions on their franchises.[152] The contempt charge brought by the state attorney general alleged that the articles described above affected pending matters before the judiciary since the decided cases were still subject to a petition for rehearing and the articles made refer-

144. *See supra* notes 50-74 and accompanying text.
145. *See supra* notes 93-98 and accompanying text.
146. *See supra* notes 130-41 and accompanying text.
147. *See supra* notes 58-60, 69-71, 78-82, 96-103, 113-24 and accompanying text.
148. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
149. *See infra* notes 252-300, and accompanying text.
150. 205 U.S. 454 (1907).
151. People v. New-Times Publishing Company, 35 Colo. 253 (1906).
152. *Id.* at 257-75.

ence to a course of decision in cases that had not been heard.[153] Patterson's defense was that the intimations of the articles were all based on fact.[154] His answer proceeded to detail a scandalous scheme by the utility corporations to buy control of Colorado, including the "purchase" of the appointment of two of the judges of the state supreme court before whom the contempt charge was to be heard.[155] Not surprisingly, the Colorado court refused to permit Patterson to prove the allegations contained in his answer. It found that truth was irrelevant as a defense where a defendant is charged with out of court comments tending to influence the outcome of pending matters.[156]

In state court, Patterson had argued, *inter alia*, that his comments were protected by Article II, section 10 of the Colorado Constitution which provided:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.[157]

Patterson also included a claim that the contempt charge violated his rights under the fourteenth amendment to the United States Constitution.[158]

On appeal to the United States Supreme Court, the bulk of Patterson's argument was devoted to the proposition that the due process clause of the federal Constitution was violated by incorrect state interpretations of state common law and the state constitution. Patterson's free speech argument under the fourteenth amendment also appeared to be based on the thcory that the due process clause was violated by the state court misinterpretation of the state constitution. This discussion emphasized that truth was a defense under the Colorado Constitution and repeated almost exactly the language of the state constitutional provision in defining the free speech right

153. *Id.* at 275-77.

154. *Id.* at 283.

155. *Id.* at 284-351.

156. *Id.* at 393.

157. COLORADO CONST. art. II § 10. *See* People v. New-Times Publishing Company, 35 Colo. at 279.

158. 35 Colo. at 279.

protected.[159]

In attempting to also find a federal right to be free of state impairment of free speech independent of any state constitutional guarantees, Patterson did not rely on any enumerated constitutional protection, retreating instead to the vagueness of the ninth amendment:

> [T]his right of any person to rely upon the truth of what he has alleged, is one which was established with our government, and as a part of our free institutions. . . . This right, as we believe, is independent of the expressed constitutional recognition given, and while in some form or other it has been embedded in the constitution of every state of the Union, and in the Constitution of the United States, it would doubtless be held to be included in those general rights not specifically named in the constitution, which are reserved by and to the people.[160]

As a result of Patterson's primary reliance on the language of the Colorado Constitution that provided truth was a defense to libel, he felt no need to go beyond it to argue either the history or meaning of the first amendment to the United States Constitution. At this point, based solely on the petitioner's brief, the Court could have dismissed the case for want of federal jurisdiction without mentioning freedom of speech. It could have pointed out that the federal courts have no power to review state court interpretations of state law and that petitioner had failed to claim that any specific provision of the federal Constitution was violated in any other manner.

Justice Harlan's dissent, however, avoided the easy cscape route. Outraged by what appeared to be a high-handed cover-up of evildoing, Harlan insisted that the Colorado court had violated Patterson's free speech rights as embodied in the privileges and immunities and due process clauses of the fourteenth amendment.[161] This

---

159. While any person may say what he pleases of or concerning any other person or institution, yet the law makes him responsible for exercising this right, but it must be kept clearly in mind that one is punished solely for an abuse of the liberty of speech, or the abuse of the liberty of the press.

Brief for Plantiff-in-Error at 88, Patterson v. Colorado, 205 U.S. 454 (1907). *See supra* note 157 and accompanying text.

160. *Id.* at 87-88. *See* U.S. CONST. amend. IX. Reliance on the ninth amendment was, and still is, a very weak basis for constitutional limitations. Even Justice Goldberg's concurrence, in Griswold v. Connecticut, 381 U.S. 479 (1965) conceded that the ninth amendment created no rights. At most it recognizes the existence of rights which may be enforceable against the states through the fourteenth amendment. In addition, the suggestion that somehow freedom of speech was a right beyond any specific constitutional mention would have had no appeal to Holmes. *See* Holmes, *Natural Law,* 32 HARV. L. REV. 40 (1918).

161. *See* Patterson v. Colorado, 205 U.S. 454, 464-65 (1907) (Harlan, J., dissenting).

was a novel argument, and Harlan cited neither history nor precedent to support it. Harlan's theory was not clearly set forth by the petitioner, so it is not surprising to find that there was also neither history nor supporting precedent in the petitioner's brief. Harlan laid down no test for free speech, noting only that it was violated. "In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution."[162]

Holmes, assigned to write the opinion of the Court, had the task of responding to Harlan's contentions, which surely offended Holmes as examples of Harlan's usual high-handedness.[163] Holmes would surely have preferred to dismiss Harlan's fourteenth amendment argument by simply asserting that the due process clause did not impose substantive limits on the states, a position he had espoused since his early days on the Court.[164] Had he taken this tack, however, Holmes would have been unable to receive the support of the Court; much to his chagrin, they had shown no reluctance to read their conceptions of justice and "natural rights" into the due process clause.[165] Yet Holmes hesitated to make a statement that might be

---

162. *Id.* at 465 (Harlan, J., dissenting).

163. "[T]hat sage, although a man of real power, did not shine either in analysis or generalization and I never troubled myself much when he shied. I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other." Letter from Holmes to Pollock (April 5, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 7-8 (M. Howe ed. 1941). *See* F. BIDDLE, *supra* note 27, at 111.

164. "I like to multiply my skepticisms as against the judicial tendency to read into a Constitution class prejudices naively imagined to be eternal laws." Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein, (June 12, 1906) *reprinted in* THE HOLMES-EINSTEIN LETTERS 23 (J. Peabody ed. 1964), Holmes' dissents in a number of cases involving due process limits on state power to reveal his belief that his brethren had imposed their version of "eternal laws." The most notable of these is Lochner v. New York, 198 U.S. 45, 74 (1905). (Holmes, J., dissenting). Later dissents in this vein were Coppage v. Kansas, 236 U.S. 1 (1915), and Adams v. Tanner, 244 U.S. 590 (1917).

165. Holmes' objection to using the fourteenth amendment as his brethren had went deeper than a simple belief that the drafters of the amendment had not intended it to be used that way. It had its roots in Holmes' skepticism about the existence of any "natural" or "fundamental" rights which transcend government or the will of the people. In a famous law review article Holmes explained this skepticism:

> But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a precxisting right. A dog will fight for his bone.
>
> The most fundamental of the supposed preexisting rights—the right to life— is

viewed as a retreat from his traditional narrow reading of the fourteenth amendment. He decided, therefore, to finesse the problem, and satisfy his more activist brethren, by arguing that the most extreme position on incorporating the first amendment would still give no protection to Patterson:

> We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach.[166]

In interpreting the first amendment, Holmes was deciding a point that the parties had not briefed. Harlan's conclusory statements offered neither history nor precedent in support. Thus, Holmes, with no cogent argument to the contrary available, engrafted on the first amendment the interpretation with which he was familiar under Massachusetts law. "In the first place," he wrote, "the main purpose of such constitutional provisions is to 'prevent all

---

sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell.

Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918). Many of the expressions in this passage were contained in two letters to Felix Frankfurter in November of 1915:

> I say Law in Books is merely Sibylline leaves of prophecy as to when the public force will be brought to bear on you through the Courts. (See Amer. Banana Co. v. United Fruit Co. 213 U.S. 347, 356). And a statement about rights is merely a part of those prophecies—The talk about rights is what I believe the philosophers call a hypostasis of the prophecy. If you don't want to mix up law with morals &c., (as you may, qua philosopher, but may not qua lawyer,) you should approach it with a cynical mind—be a bad man—and say I don't care a damn about your approval or disapproval. All I want to know is what will happen (through the Courts) if I do so and so.

Letter from Oliver Wendell Holmes to Felix Frankfurter (November 4, 1915), Box 29, Folder 3, Holmes Papers (Manuscript Division, Harvard Law School Library).

> What I wrote yesterday ought to have been condensed by me into a single orphic saying—A $\frac{duty}{right}$ is the hypostasis of a propheey. Which I hereby copyright with you.
>
> . . .
>
> P.S. So, Force is the hypostasis of the prophecy that "Bodies" will behave to each other in a certain way—or more accurately that phenomena will have a eertain sequence. It adds nothing—and intelligent men of science know that it adds nothing.

Id.

Letter from Oliver Wendell Holmes to Felix Frankfurter (November 5, 1915), *id.*

166. *Patterson*, 205 U.S. at 462.

such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[167] To the familiar cite to *Blanding,* he added *Respublica v. Oswald,*[168] a contempt case in which the Pennsylvania Supreme Court, in response to a free speech claim by the defendant, adopted the "no prior restraints" view of Blackstone. In the absence of any attempt by the parties to seriously question either case, or the rule they adopted, it is not surprising that Holmes fell back on the familiar doctrine.[169]

Holmes was not again confronted with a free speech claim until eight years after *Patterson,* and even then only in a case where virtually no authority was mustered by the claimant against Blackstone's theory. In *Fox v. Washington,*[170] the appellant had been convicted of violating a state statute proscribing the printing of material encouraging or advocating disrespect for law. He had written an editorial entitled "The Nude and the Prudes" that criticized the arrest of some nude bathers for indecent exposure.[171] The fine imposed by the

---

167. *Id.*

168. 1 U.S. (1 Dall.) 319 (1788).

169. *Id. See* Patterson v. Colorado, Brief of Defendant-In-Error at 15-16 (quoting *Respublica*).

That *Respublica* would have appeared to Holmes a strong statement in support of Blackstone cannot be doubted:

> The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame.

Respublica v. Oswald, 1 U.S. (1 Dall.) at 325.

The strong reaction against the *Respublica* opinion—the contempt conviction upheld was based solely on one newspaper article protesting the publisher's recent conviction for libel, and the justices of the Pennsylvania Supreme Court were nearly impeached as a result of the case—should, one can argue, have weakened its precedential value in Holmes' eyes.

On the assumption that Holmes read the case in Dallas, he would have seen the long note by the reporter on the subsequent attempt to impeach the justices who decided *Oswald.* One view of this event is that it evidences a general dissatisfaction with the restrictive view of the state court on guarantees of liberty of the press.

However, the other perspective notes that the impeachment failed, and would conclude that the legislature agreed with the judge's view of the Constitution. Given Holmes' position in trying to avoid Harlan's incorporation without losing the rest of the court, he surely was not looking to draw out adverse inferences from a footnote to the only case which either party cited that could be found in the Supreme Court reports. (Dallas mixed both Pennsylvania Supreme Court and United States Supreme Court decisions in these early volumes. It was a sensible procedure, since the U.S. Court did very little appellate business in its first years).

170. 236 U.S. 273 (1915).

171. *Id.* at 276.

state trial court was small,[172] and the record and briefs in the case were almost as scanty as the bather's attire. The appellant included an argument that the first amendment guarantees of freedom of speech and freedom of the press were part of the liberty protected by the fourteenth amendment;[173] his main argument, however, was based on the vagueness of the statute,[174] and there was no treatment in his brief of the history or purposes of the first amendment. Holmes indicated some sympathy with Fox, but upheld the statute as a valid regulation of speech deemed contrary to public morals: "[B]y indirection but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury so found."[175]

In short, Holmes' concern with the first amendment through *Fox* was peripheral. He had been taught Blackstone's definition in law school, he had practiced in a state that had adopted it as the meaning of its constitution, and his encounters with free speech problems in both the Massachusetts court system and United States Supreme Court had not exposed him to an effective historical critique of that position. Given his belief that the law should be in harmony with the desires of the dominant community in order to survive, it is thus not surprising that, through 1915 and *Fox*, he had accepted a definition of free speech that was, as far as Holmes could tell, the prevailing dogma. Philosophy and ideal to the contrary had yet to be shown to Holmes as a viable legal position. Soon, however, all that would change.

VIII. THEORY AND LAW BEGIN TO MERGE

Little as I believe in it [freedom of speech] as a theory I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion, in favor of it.[176]

As Justice Holmes entered his seventies after a decade on the Supreme Court, he added a new circle of friends. His skepticism regarding current truths and tolerance of new experiments as well as his wit, brilliant conversation and philosophical bent, made him at-

172. *See* State v. Fox, 127 P. 1111, 1112 (Wash. 1912).
173. Brief of Plaintiff-in-Error at 17, Fox v. Washington, 236 U.S. 273 (1915).
174. *Id.* at 7-17.
175. *See* 236 U.S. at 277.
176. Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (October 26, 1919) *reprinted in* 1 HOLMES-LASKI LETTERS 217 (M. Howe ed. 1953).

tractive to bright young liberals.[177] In turn, Holmes was drawn by their youth, their enthusiasm and their intelligence. In 1910 he had sent for Herbert Croly's *The Promise of American Life*,[178] and by 1914 he had become fast friends with Croly and Walter Lippman.[179] The same year, Croly and Lippman were among the founders of *The New Republic*, to which Holmes promptly subscribed.[180] Several years later, he wrote Lewis Einstein:

> Do you see the New Republic? It is rather solemn for my taste; but the young men who write in it are, some of them, friends of mine, which doesn't prevent an occasional, flattering reference to this old man, and I get great pleasure from our occasional talks. They put me on to books that they think will be good for me, and please me by their latent or expressed enthusiasm, and their talent. But I fear they would be empty names to you. Frankfurter (Professor at Harvard Law School), Walter Lippman, Croly, Laski, etc.[181]

The *New Republic* group, Holmes wrote Pollock, "make much of your venerable uncle and not only so, but by bringing an atmosphere of intellectual freedom in which one can breathe, make life to him a good deal more pleasant."[182]

This delight in his new friendships does not, of course, indicate that Holmes accepted all the views of his new friends without question. The work of Laski, for example, moved towards socialism, and others in the group pressed towards nationalization of large business enterprises;[183] this hardly accorded with Holmes' ideals.[184] They did,

---

177. "[I]t is that willingness to experiment which is the basis of his hold over the radical mind." Laski, *Mr. Justice Holmes*, HARPER MAGAZINE (March 1930), *reprinted in* MR. JUSTICE HOLMES 153 (F. Frankfurter ed. 1931); *see also* Lippman, *To Justice Holmes on his Seventy-Fifth Birthday*, 6 NEW REPUBLIC 156 (1916), *reprinted in* MR. JUSTICE HOLMES, 165-67 (F. Frankfurter ed. 1931). "In him wisdom has lost its austerity and becomes a tumbling succession of imagery and laughter and outrage." *Id.* at 166.

178. *See* Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (July 23, 1910), *reprinted in* THE HOLMES-EINSTEIN LETTERS 54 (J.P. Peabody ed. 1964).

179. Letter from Holmes to Einstein (December 10, 1914), *reprinted in id.* at 102.

180. "He [Lippman] and Croly, one of the strongest of the young men, . . . are going to start a weekly, *The New Republic*, to which I have subscribed with hope." Letter from Holmes to Pollock (November 7, 1914), *reprinted in* 1 HOLMES-POLLOCK LETTERS 225 (M. Howe ed. 1941).

181. Letter from Holmes to Einstein (August 12, 1916), *reprinted in* THE HOLMES-EINSTEIN LETTERS 136 (J.P. Peabody ed. 1964).

182. Letter from Holmes to Pollock (February 18, 1917), *reprinted in* 1 HOLMES-POLLOCK LETTERS 244 (M. Howe ed. 1941).

183. *See generally* C. FORCEY, THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMAN AND THE PROGRESSIVE ERA 1900-1925 (1961).

184. "I do have a vague apprehension that what you and I think the finest ideals and

however, place their faith in participatory democracy while remaining fully aware of its problems.[185] Holmes' friends from the *New Republic* called attention to perceived abuses of free speech that accompanied the United States' entrance into World War I[186]—an editorial strongly opposed the 1918 Amendment to the Espionage Act[187]—but strongly supported the entrance itself.

Although Holmes paid more attention to the book reviews than to the editorials, his delight in the young men must have led to numerous conversations with them on civil liberties. One such conversation with a member of the *New Republic* group, Judge Learned Hand,[188] is reflected in a series of letters. This exchange holds particular interest for several reasons: (i) It is one of the few records of Justice Holmes discussing free speech prior to the Espionage Act cases; (ii) it was written in the summer before those cases came to the Court; (iii) it echoed discussions of the English utilitarians with whom Holmes was familiar from almost half a century earlier; and (iv) Learned Hand's opinion in *Masses v. Patten* was the key authority for the arguments of the defendants in two of the Espionage Act cases in the spring of 1919.[189]

In July of 1917, Learned Hand had enjoined the postmaster of New York from excluding the August issue of *The Masses* magazine from the mails.[190] Although articles in the magazine condemned the war and praised individuals who took vigorous measures in opposition to it,[191] Hand found that it did not violate the Espionage Act of

---

interests may be, I won't say swept away, but dimmed and diminished by the coarsely materialistic ones that are behind so much of what presents itself with spiritual claims: socialism, pacificism, etc." Letter from Holmes to Einstein (February 10, 1918), *reprinted in* THE HOLMES-EINSTEIN LETTERS 161 (J. P. Peabody ed. 1964).

185. *See generally* H. CROLY, PROGRESSIVE DEMOCRACY (1914); W. LIPPMAN, DRIFT AND MASTERY (1914).

186. *See, e.g.*, Dewey, *In Explanation of Our Lapse*, 13 NEW REPUBLIC 17, November 3, 1917; Hard, *Traitor*, 13 NEW REPUBLIC 95-98, November 24, 1917; 14 NEW REPUBLIC 91 (editorial, February 23, 1918).

187. 15 NEW REPUBLIC 65-66 (editorial, May 18, 1918): "[T]he bill itself brings one institution into disrepute that has always been most highly valued, and which has always been considered characteristically American—the institution of freedom of speech."

188. *See* C. FORCEY, *supra* note 183, at 181 (discussing Hand's ties to the *New Republic.*)

189. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917), *cited in* Brief for Plaintiff-in-Error at 7, 12-13, Schenck v. United States, 249 U.S. 47 (1919); Brief for Plaintiff-in-Error at 71, Debs v. United States, 249 U.S. 211 (1919).

190. Masses Publishing Company v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d. Cir. 1917).

191. *Id.* at 543-45.

1917.[192] That act forbade causing insubordination in the military forces or obstructing the recruiting service.[193] Hand held that the Act was not violated by speech unless the speaker urged others that it was their duty or in their interest to violate the Act.[194]

To Hand's regret, the Second Circuit reversed his decision.[195] The reversal emphasized the scope of the postmaster's discretion, but it also substituted a new standard—whether the natural and reasonable effect of speech was to encourage resistance to a law by words used in an endeavor to persuade to resistance.[196] As Hand foresaw, the court of appeals standard made it possible for lower courts to more easily suppress speech, since an intent to persuade could be presumed from the tendency of the words to encourage resistance.[197]

A further step to facilitate suppression of speech was taken in May of 1918 when Congress amended the Espionage Act[198] to include, *inter alia*, prohibitions against using disloyal, scurrilous and abusive language about the form of government of the United States and against using language intended to bring the form of government of the United States into contempt.[199] Thus, in the summer of

---

192. *Id.* at 542-45.

193. Espionage Act, ch. 30, 40 Stat. 217 § 3:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

194. *Masses*, 244 F. at 540, *rev'd*, 246 F. 24 (2d Cir. 1917).

195. 246 F.2d 24 (2d Cir. 1917).

196. "If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested." *Id.* at 38.

197. *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 50-60 (1941).

198. Ch. 75, 40 Stat. 553 (1918).

199. The amendment, *id.*, added the following to section 3 of the 1917 Act, *supra* note 193:

> [a]nd whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into con-

1918, Judge Hand was witness to the spread of the sort of suppression he had feared, and he may have brooded about his country's disregard for freedom of speech as he took the train home for a vacation.

His companion for a portion of that train trip was Supreme Court Justice Oliver Wendell Holmes. Holmes was vaguely aware of the prosecution of socialists and radicals under the Espionage Act,[200] but no case involving issues of free speech under that Act had yet reached the Court. We do not know the exact nature of the conversation between Hand and Holmes on the train journey, but a letter from Hand sent soon after appears to re-create a portion of it. "I gave up rather more easily than I now feel disposed about Tolerance on Wednesday," wrote Hand.[201] The discussion aboard the train may have begun as speculation about the bases for tolerance—the willingness to accomodate opposing viewpoints[202]—sparked at least

---

tempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or beth: *Provided,* That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official.

200. Holmes was an avid reader of the *New Republic* which made various mentions of the suppression incident to the war, see *supra* note 182. An editorial even referred to the *Masses*—"A magazine entitled the Masses edited by Mr. Max Eastman was one of the first and least necessary casualties of the present war." 14 NEW REPUBLIC 93, (February 23, 1918).

201. Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918), *reprinted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,* 27 STAN. L. REV. 719, 755 (1975).

202. Some support for this theory of the initiation of the conversation may be derived from Laski's letter to Holmes which was written after Holmes had shown Laski the letter from Hand and presumably recounted the conversation with Hand on the train. Laski treats the letter from Hand as part of a discussion of the grounding of toleranee in history.

on Hand's part by reflection on the intolerance pervading the United States at war. Hand may have argued that tolerance finds its source in the majority's doubt of its own premises. Holmes may have made the same point, for it comports exactly with his comments on the logic of persecution.[203]

The next step was common ground among the two men—that man cannot perceive absolute truth. For Holmes, "I mean by truth simply what I can't help accepting . . . . Therefore I know nothing about absolute truth."[204] Hand then used their common skepticism to argue the necessity for tolerance:

> Here I take my stand. Opinions are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own.[205]

Here then, was virtually the same argument in favor of free speech Holmes had read in Mill's book years earlier, but this time from a judge in the midst of dealing with the greatest speech controversy of

---

> His thesis seemed to me acceptable in its result, but not in its method, and allowing certain difficulties to sneak round the corner instead of being boldly met. I take it that the history of ideas relative to toleration pass through three clear states; (I) when the idea *eo nomine* is criminal and therefore meets persecution *e.g.* the early Christians; (II) when the idea itself is not judged criminal but inexpedient, and persecuted on that ground *e.g.* the Catholics under Elizabeth; (III) when the idea is regarded as having sufficient strength or weakness to be permitted survival. Hand seemed to me in the third stage about most ideas, and so am I. But is any government likely to adopt it? . . . I ought to add that I am sure the real ground for toleration is the change of perspective. . . . There is an alternative hypothesis that toleration was a dodge invented by the physically weak to secure survival.

Letter from Laski to Holmes (July 5, 1918), *reprinted in* 1 HOLMES-LASKI LETTERS 159-60. In January of 1919, Laski was still discussing toleration. " 'Please look at Volume VI of his Collected Works,' Laski wrote Holmes of Bagehot, the essay on the 'Metaphysical Basis of Toleration. I don't know why he uses the word metaphysical; but his is certainly the most sensible discussion of that business I know.' " Letter from Laski to Holmes (January 29, 1919), *reprinted in id.* at 182.

203. "My thesis would bo (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise." Letter from Holmes to Laski (July 7, 1918), *reprinted in* 1 HOLMES-LASKI LETTERS 160-61. This was a familiar thought for Holmes: "The other day when I was speaking of the logic of persecution he [C.J. White] agreed but said we, none of us live logically." O.W. Holmes to Canon Patrick Augustine Sheehan (February, 1904), *reprinted in* HOLMES-SHEEHAN CORRESPONDENCE 14 (D. Burton ed. 1976).

204. Letter from O.W. Holmes to L. Einstein (June 1, 1905), *reprinted in* THE HOLMES-EINSTEIN LETTERS 16 (J.P. Peabody ed. 1964).

205. Letter from Hand to Holmes (June 22, 1918), *reprinted in* Gunther, *supra* note 201, at 755.

his time. Mill had asserted that man is fallible, that to suppress opposing views is to deny this fact, and that "wrong opinions and practices" could be discovered and mistakes rectified only through unlimited free discussion;[206] Hand was now similarly saying that opinions were provisional hypotheses which had to be tested, presumably by allowing them to compete in an unfettered atmosphere of free discussion.[207] It is reasonable to assume that, even a half century later, Holmes would have recalled his early exposure to Mill[208] and would thus have been responsive to Hand's argument on an intellectual level.

On a more practical level, however, Hand was dealing with a Holmes who shied away from applying idealistic notions of right and wrong to the realities of human existence. As has already been discussed, Holmes eschewed the approach of judges, like his Supreme Court colleagues, who discovered "absolute truths," such as freedom of contract, in natural law or the Bill of Rights and then wielded those truths to sweep aside legislation duly enacted by representatives of the majority.[209] He may, therefore, have viewed Hand's invocation of Mill as interesting, and have agreed with it on an intellectual level, while feeling at the same time that Hand was wrong in trying to enact that theory into law in *Masses*. That Holmes' disdain for natural law was still with him in 1918 cannot be doubted; that summer, the *Harvard Law Review* published an article by Holmes in which he essentially argued that all natural rights were nonsense.[210]

An additional reason why Holmes would not have been entirely responsive to Hand's free speech argument has to do with its relationship to Mill. While its similarity to Mill may, as has been suggested,[211] have struck a responsive chord in Holmes, it just as surely reminded Holmes of Stephen's attack on Mill, which he had read at about the same time as his exposure to Mill.[212] Stephen's response to Mill's argument—that society should be aware of its fallibility and thus tolerate dissenting views[213]—was to point out that recognition of the possible correctness of an opposing view does not require an

206. *See supra* notes 77-82 and accompanying text.
207. *See supra* note 205 and accompanying text.
208. *See supra* note 76 and accompanying text.
209. *See supra* notes 164-65 and accompanying text.
210. Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).
211. *See supra* text accompanying note 208.
212. *See supra* notes 85-87 and accompanying text.
213. *See supra* notes 77-82 and accompanying text.

individual or a state to tolerate its existence.[214] In the same article that attacked the natural rights concept, Holmes that summer wrote a sentence that could have come straight from Stephen:

> Deep seated preferences can not be argued about—and therefore, when differences are sufficiently far reaching we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as it appears, his grounds are just as good as ours.[215]

Apparently Holmes said something similar on the train, for Hand wrote him, "You say that I strike at the sacred right to kill the other fellow when he disagrees. The horrible possibility silenced me when you said it."[216] On further reflection, Hand believed he could reconcile the human urge to crush opposition with a theory of tolerance:

> Now, I say, "Not at all, kill him for the love of Christ and in the name of God, but always realize that he may be the saint and you the devil. Go your way with a strong right arm and a swift shining sword, in full consciousness that what you kill for, and what you may die for, some smart chap like Laski may write a book and prove is all nonsense." I agree that in practical application there may arise some difficulty, but I am a philosopher and if Man is so poor a creature as not to endure the truth, it is no concern of mine.[217]

Thus far, as Hand knew, Holmes would be in complete agreement. Hand then added his argument for tolerance, again echoing Mill, but this time with a subtle exception that tempered Mill's absolutism:

> Only, and here we may differ, I do say that you may not cut off heads, (except for limited periods and then only when you want to very much indeed), because the victims insist upon saying things which look against Provisional Hypothesis Number Twenty-Six,

---

214. *See* J. STEPHEN, *supra* note 86, at 74.

215. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 44.

216. Letter from Hand to Holmes (June 22, 1918), *reprinted in* Gunther, *supra* note 201, at 756.

217. *Id.* The practical difficulty of fighting someone while acknowledging that your cause may be nonsense to which Hand refers is reminiscent of a later eomment by Holmes:

> It is true that many people can't do their best, or think they can't, unless they are cocksure.
>
> As long ago as when I was in the Army I realized the power that prejudice gives a man; but I don't think it necessary to believe that the enemy is a knave in order to do one's best to kill him.

Holmes to Einstein (May 6, 1925), *reprinted in* THE HOLMES-EINSTEIN LETTERS at 239.

> the verification of which to date may be found in its proper place in the card catalogue. Generally, I insist, you must allow the possibility that if the heads are spared, other cards may be added under that sub-title which will have, porhaps, an important modification.[218]

Holmes enjoyed the letter. "Rarely does a letter hit me so exactly where I live as yours, and unless you are spoiling for a fight I agree with it throughout."[219] Holmes also surely noticed that Hand departed from Mill's absolutism in the parenthetical remark "(except for limited periods and then only when you want to very much indeed)."[220]

In that vein, Holmes' reply to Hand stated:

> My only qualification, if any, would be that free speech stands no differently than freedom from vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act.[221]

---

218. Letter from Hand to Holmes, (June 22, 1918), reprinted in Gunther, *supra* note 201, at 756. *Compare* Hand's argument *with* Mill's second ground:

> Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

J.S. MILL, *supra* note 77, at 180.

219. Letter from Holmes to Hand (June 24, 1918), *reprinted in* Gunther, *supra* note 201, at 756.

220. Letter from Hand to Holmes (June 22, 1918), *reprinted in id.* at 756. *See* Mill's argument with no language of exception, *infra* at note 221.

221. Letter from Holmes to Hand (June 24, 1918), *reprinted in* Gunther, *supra* note 201, at 756-57. Holmes' reference to vacoination law is an example of the rejection of Mill's absolutist theory of liberty.

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

198 U.S. at 75. Thus, to the extent Mill's discussion of freedom of speech, *see supra* notes 75-82 and accompanying text, was intended as an outgrowth of his general principle of liberty, Holmes would have found it unacceptable. Long after Holmes had written his free speech dissents, he still found the distinction between speech and other forms of personal freedom difficult. "I think the argument for free speech, devoutly as I believe in it, is not entirely easy. In other cases *e.g.* vacoination, when we know that we have the power, want the end, and are convinced of the efficacy of the means we don't hesitate very much over even conscientious scruples. Or at least I shouldn't." Lotter from Holmes to Laski (May 18, 1930), *reprinted in* 2 HOLMES-LASKI LETTERS 1250 (M. Howe ed. 1953).

It is important to understand that neither Hand nor Holmes was attempting an exegesis of the first amendment. Like Mill and Stephen before them, they were arguing abstract principles of government. Hand's argument was prescriptive—how government ought to behave. Holmes' reply was descriptive—how government and individuals do behave. Holmes' remark to Hand—"I agree with it throughout,"[222] indicates a recognition of this difference. Yet Holmes' skepticism ran deeper than that of Hand and Mill: If man can never know absolute truth, it may be impossible to determine whether suppression of particular speech is good or bad. "Compulsion is bad," wrote Fitzjames Stephen, "(1) When the object aimed at is bad. (2) When the object aimed at is good, but the compulsion employed is not calculated to obtain it. (3) When the object aimed at is good and the compulsion employed is calculated to obtain it, but at too great an expense."[223] Thus, a true skeptic cannot condemn all suppression of speech as an absolute principle, for in a particular case it may be more productive of good than harm.[224] Whether a particular instance of suppression is good or bad may itself be incapable of certainty. "Of course," wrote Holmes, "when I say I don't believe in [freedom of speech] as a theory I don't mean that I do believe in the opposite as a theory."[225]

Freedom of speech to Holmes, however defined, was simply one of many competing principles. It was a principle to which he was attracted, yet in Holmes' view the sole task for a judge was to determine which principles have been adopted by the society. Years after his famous dissents exalting the values of free speech, Holmes wrote Laski, "I think the argument for free speech, devoutly as I believe in it, is not entirely easy."[226]

The difference in approach between Hand and Holmes may indicate a difference in commitment to the values represented by freedom of speech, but it does not show that Holmes was insensitive to its worth. His very evident delight in Hand's letter suggests the op-

---

222. Letter from Holmes to Hand (June 24, 1918), *reprinted in* Gunther, *supra* note 201, at 756.

223. J. STEPHEN, *supra* note 86, at 85.

224. "[P]ersecution has much to be said for it." Letter from Holmes to Einstein (July 11, 1918), *reprinted in* THE HOLMES-EINSTEIN LETTERS 169 (J.P. Peabody ed. 1964).

225. Letter from Holmes to Laski (October 26, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 217 (M. Howe ed. 1953).

226. Letter from Holmes to Laski (May 18, 1930), *reprinted in* 2 HOLMES-LASKI LETTERS 1250 (M. Howe ed. 1953).

posite.[227] Nevertheless, there remains a question as to whether the exchange between Hand and Holmes in the summer of 1918 increased Holmes' appreciation for the value of free speech or contributed to his insistence that he did not believe it as a theory.[228] To the extent that Holmes found Hand to be convinced that freedom of speech was a principle of justice approximating a conception of natural law, it may have influenced Holmes' disregard of Hand's *Masses* test[229] when he came to write the opinion in *Schenck*.[230]

IX. THE REPUDIATION OF BLACKSTONE: THE SCHOLARS

"After the later cases (and probably you—I do not remember exactly) had taught me . . ."[231]

Holmes to Chafee, June 12, 1922

The exchange with Hand served to remind Holmes of Mill and arguments favoring a social policy of broad tolerance. Despite Holmes' view at the time that governmental power prevails over natural law,[232] he was more in sympathy with tolerance. "I agree that the logical result of a fundamental difference is for one side to kill the other," Holmes wrote later in 1918, "and that persecution has much to be said for it; but in private life we think it more comfortable for disagreement to end in discussion or silence."[233] Yet a fundamental tenet of Holmes' creed was that the judge should not impose his personal values on society,[234] and prior to 1918 he had seen

---

227. Holmes not only expressed his pleasure in the letter to Hand, *see supra* note 219 and accompanying text; he also wrote Laski, "I had a good talk with Judge Hand (Learned) coming on which led to a characteristic and mighty good letter carrying on the talk." Letter from Holmes to Laski (June 25, 1918), *reprinted in* 1 HOLMES-LASKI LETTERS 159-60 (M. Howe ed. 1953).

228. If one is in the position of arguing a point, it is sometimes difficult to see the justice of an opponent's position. The reference to disbelief in freedom of speech as a theory is taken from a letter to Laski written a few days after the *Abrams* case was argued. *See* Letter from Holmes to Laski (October 26, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 217 (M. Howe ed. 1953).

229. *See supra* note 194 and accompanying text.

230. Schenck v. United States, 249 U.S. 47 (1919). *See infra* notes 315-20 and accompanying text.

231. Letter from Holmes to Chafee (June 12, 1922), Chafee Papers, *supra* note 19.

232. *See supra* notes 164, 165 and accompanying text.

233. Letter from Holmes to Einstein (July 11, 1918), *reprinted in* THE HOLMES-EINSTEIN LETTERS 169 (J.P. Peabody ed. 1964).

234. One of the queer aspects of duty is when one is called on to sustain or enforce laws that one believes to be economieally wrong and do more harm than good—but as I think we know very little as to what the laws pronounced good; as there is no even, inarticulate agreement as to the ideal to be striven for, and no adequate scien-

little evidence that the constitutional provisions on free speech and free press were intended to go beyond Blackstone's position. It is thus unlikely that Hand alone could have led Holmes to abandon Blackstone. Other influences must be discovered, influences that could have combined to convince Holmes that the free speech theories he heard in his youth could be legitimately thought of as the view embodied in the first amendment.

One such influence may have been an article by Dean Roscoe Pound in the 1916 issue of the *Harvard Law Review* dedicated to Justice Holmes.[235] Pound described three doctrines on the scope of liberty of publication under constitutional provisions relating to it: Blackstone's no previous restraint; the position, which Pound ascribed to Joseph Story, of the right to publish truth, with good motives and for proper ends; and Cooley's view that speech is protected from subsequent punishment as long as it is not harmful when judged by standards of general application.[236] Pound said the cases were in accord with Cooley.[237] He dismissed Parker's adoption of Blackstone in *Blanding* as dicta,[238] and insisted:

> [I]f history is to be the sole criterion of interpretation, Story's view is more nearly in accord with the ends indicated by the historical development of the subject. Moreover, it is generally conceded that this restricts the scope of the guarantee too narrowly. Hence, it would seem that we cannot safely rely on history to give us the proper construction.[239]

Pound's article dealt with defamation, a matter of state law not immediately germane to Holmes' duties on the Supreme Court. And in 1916, there were still no federal laws that posed significant frec

---

> tific evidence that this rather than that will tend to bring it about, if we did agree as to what we want, I settle down on simple tests. I look at it like going to the theatre—if you can pay for your ticket and are sure you want to go, I have nothing to say.

Letter from Holmes to Sheehan (November 23, 1912), *reprinted in* THE HOLMES-SHEEHAN CORRESPONDENCE 52-53.

235. Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916). Holmes surely read this article, both because it was in a law review issue dedicated to him and because it was written by Pound. "Apropos of Pound," Holmes had onee written, "perhaps I said before that I keep all his essays. I have one volume bound and the stuff for another." Letter from Holmes to Pollock (December 29, 1915), *reprinted in* 1 HOLMES-POLLOCK LETTERS 229 (M. Howe ed. 1941).

236. Pound, *supra* note 235, at 650-51.

237. *Id.* at 651.

238. *Id.* at 651-52 n.29.

239. *Id.* at 654.

speech issues. Thus, Pound's article did not immediately elicit any response from Holmes, yet it may have served to warn Holmes that there was substantial support for finding that free speech provisions in the American state and federal constitutions were repudiations, not adoptions of Blackstone.

An attack on Blackstone which, unlike Pound's, followed federal legislation suppressing speech—the Espionage Act of 1917[240] and its amendment in 1918[241]—appeared late in 1918. Zechariah Chafce published an attack in *The New Republic* on the definition of freedom of speech that Holmes had set forth in *Patterson*.[242] "This definition of liberty of the press originated with Blackstone, and ought to be knocked on the head once and for all."[243] The arguments Chafee set forth did not differ markedly from those Holmes had read in Cooley almost fifty years earlier,[244] but the context was sharply different. In 1871 there had been no federal statute that might raise problems under the first amendment, and deferential speculation could be filed away as idle talk. In 1918, the ability of the individual to criticize the central government had become a burning question. Cooley's argument that prior restraint made no sense with respect to protection of freedom of speech was irrelevant to the application of the Massachusetts Constitution that protected only the "liberty of the press."[245] It was, however, directly relevant to the first amendment of the United States Constitution, and in November of 1918, the first challenges under that guarantee were reaching the Court (although the briefs had not yet been filed).[246]

Chafee built on Cooley, dropping the latter's deferential tone and adding references to pre-revolutionary popular landmarks in the history of free speech.[247] "Those rules had been detested in this country ever since they were repudiated by jury and populace in the famous trial of Peter Zenger, the New York printer, the account of which went through fourteen editions before 1791."[248] The free

240. *See supra* note 192 and accompanying text.

241. *See supra* note 198 and accompanying text.

242. Chafee, *Freedom of Speech*, 17 NEW REPUBLIC 66 (Nov. 16, 1918).

243. *Id.* at 67.

244. Cooley, *supra* note 95, reviewed by Holmes in 6 AM. L. REV. 140, *see supra* note 104 and accompanying text.

245. MASS GEN. LAWS ANN. Const. Art. XVI (1780).

246. The Record in *Schenck* was filed on May 3, 1918, and that of *Debs* on October 12, 1918. The petitioners' briefs in those cases, however, were not filed until December of 1918. The brief of petitioner in *Frohwerk* was not filed until January of 1919.

247. Chafee, *supra* note 242, at 67.

248. *Id.*

speech clauses in federal and state constitutions "were written by men to whom Wilkes and Junius were household words, who intended to make prosecution for seditious utterances impossible in this country."[249] Chafee cited Jefferson on the Alien and Sedition Acts and Hamilton's defense of *Croswell*.[250] "Thus we have testimony from the leaders of both parties."[251]

For the first time, Holmes was confronted with several sound legal arguments against the notion that "freedom of speech" simply meant "no prior restraints." Acceptance of those arguments would finally allow him to reconcile the idealistic, philosophical arguments in favor of broader protection of speech he had been hearing and reading since his youth with his reluctance to depart from prevailing legal doctrine. Here, then, was evidence that Blackstone was not "the law." What Holmes required, however, was an opportunity to consider and decide a speech case in which that argument was fairly presented to the Court. Within a month of Chafee's article, that opportunity presented itself, as the first briefs were filed in the Espionage Act cases.

X. THE REPUDIATION OF BLACKSTONE: HOLMES AND THE ESPIONAGE ACT CASES

The Espionage Act cases were three cases involving appeals from convictions for violating the Espionage Act of 1917, which forbade causing insubordination in the military forces or obstructing the recruiting service.[252] All three cases came before the Court in late 1918 and involved appeals from convictions for speech that had allegedly violated the Act.[253] Before examining the free speech arguments made by the petitioners in their briefs to the Court, it would be useful to outline the facts in each case.

The first case before the Court, *Schenck v. United States*,[254] was an appeal from the conviction of Charles T. Schenck and Elizabeth Baer for conspiracy to circulate a document calculated to cause insubordination in the armed services and obstruction of the draft. Schenck, the General Secretary of the Socialist Party, and Baer, a

249. *Id.*
250. *Id.*
251. *Id.*
252. *See supra* notes 190, 192, 198, 199 and accompanying text.
253. Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).
254. 249 U.S. 47 (1919).

member of its executive board, were found responsible for sending circulars through the mails to men who had just been drafted to fight in the first World War. The circulars did not directly urge the men to obstruct the draft, but, under the heading "Assert Your Rights," denied that the government had power to conscript individuals and warned readers that "if you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[255]

The second case, *Frohwerk v. United States*,[256] involved the conviction of a publisher, Jacob Frohwerk, who had published several articles passionately condemning both the War and the draft.[257] The articles did not expressly counsel disobedience of the draft law,[258] and were not sent or directed to draftees,[259] as were the circulars in *Schenck*.[260]

The third, and most controversial, of the convictions was that of Eugene Debs,[261] who had several times been the Socialist candidate for President of the United States, garnering almost one million votes in the 1912 election.[262] Debs made a number of stirring speeches in 1918 including the one in Canton, Ohio, for which he was convicted, urging his listeners to join the Socialist Party; a portion of the speech at issue included condemnation of the war and opposition to conscription.[263] Like the articles in *Frohwerk*,[264] the speeches were not directed only at draftees;[265] no direct violation of the draft law was urged,[266] and the government made no showing that anyone broke the law because of the speeches.

As discussed earlier,[267] Holmes had never before been presented in a speech case with an effective argument against Blackstone's view of free speech as constitutional law. The briefs of the appellants

255. *Id.*
256. 249 U.S. 204 (1919).
257. *Id.* at 207-08.
258. *Id.*
259. *Id.* at 208.
260. *See Schenck*, 249 U.S. at 49.
261. 249 U.S. 211 (1919).
262. Debs received 897,011 votes in the 1912 presidential election. 1970 INFORMATION PLEASE ALMANAC 710 (D. Golenpaul ed.).
263. 249 U.S. at 214.
264. *See supra* note 259 and accompanying text.
265. 249 U.S. at 212.
266. *Id.* at 213-14.
267. *See supra* notes 100-29 and accompanying text.

in the Espionage Act cases, however, undertook, with varying degrees of success, the task of attacking Blackstone. Charles Schenck's brief, for example, recited the *Zenger* case, the history of the Alien and Sedition Act, and cited Cooley to substantiate the argument that Blackstone was wrong.[268] The treatment of the material, unfortunately, was sketchy and it lacked a central organizing principle, and the effeetiveness of the brief suffered accordingly.

The main brief for the appellant in *Frohwerk* was only slightly more effective. Joseph Shewalter, the author of the brief, may have blunted the persuasiveness of his attack on Blackstone by his lack of restraint—the brief ran over 334 pages. Half his argument was directed at the impropriety of the draft and the illegality of the war,[269] not surprising when one realizes that Shewalter was actually the author of several of the antidraft articles that Frohwerk had published.[270] The irrelevance of such propagandizing may have led to the brief being largely ignored by the Court. His initial discussion of freedom of speech, however, did cite deTocqueville on the relationship between free speech and suffrage[271] and buttressed this view with quotes on the value of free speech taken from individuals ranging from Socrates to President Woodrow Wilson.[272] There was an extended section on the Alien and Sedition Acts, filled with quotes from their opponents to show their popular repudiation.[273]

The best of the petitioner's briefs was submitted on behalf of Debs.[274] It quoted Cooley and Presidents Wilson and Madison,[275] but placed great emphasis on a growing need for protection of speech:

> American tradition has so far made it unnecessary for this court to give a conclusive reading to the First Amendment in relation to a

---

268. Brief for Plaintiffs-in-Error at 5-7, Schenck v. United States, 249 U.S. 47 (1919) [hereinafter cited as Schenck brief].

269. Brief for Plaintiff-in-Error at 173-334, Frohwerk v. United States, 249 U.S. 204 (1919) [hereinafter cited as Frohwerk brief].

270. Holmes noted in discussing the articles Frohwerk published, "Then comes a letter from one of the counsel who argued here, stating that the present force is a part of the regular army raised illegally; a matter discussed at length in his voluminous brief, on the ground that before its decision to the contrary the Solicitor General misled this Court as to the law." Frohwerk v. United States, 249 U.S. 204, 207 (1919).

271. Frohwerk brief, *supra* note 269, at 20.

272. *Id.* at 68, 72-73.

273. *Id.* at 74-116. For a discussion of the Alien and Sedition Acts, see *supra* note 101.

274. Brief for Plaintiff-in-Error, Debs v. United States, 249 U.S. 211 (1919) [hereinafter cited as Debs brief].

275. *Id.* at 62-63.

> sedition enactment by Congress. With a profound sense of this present determination of the meaning of the First Amendment, for a century and a quarter the palladium of American freedom, we present the language of that amendment to the court as living words pertinent to the world as we know it—not as a harking back to legalistic shadings of restraints put upon opinion under the despotism from which the Revolution freed us.[276]

While this argument alone may have left Holmes unmoved, Debs' lawyers buttressed the argument with citations to Learned Hand's opinion in *Masses*.[277] Hand's references to the "hard-bought acquisition in the fight for freedom" and "the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper"[278] had a tangible effect on Holmes; after reading the briefs, Holmes dropped a brief note to Hand:

> I read your Masses decision—I haven't the details in my mind and will assume for present purposes that I should come to a different result—but I did want to tell you after reading it that I thought that few judges indeed could have put their view with such force or in such admirable form.[279]

Gilbert Roe, an attorney in a case that would be governed by the decision in *Debs*, was permitted to file an amicus brief.[280] His brief drew attention to the power of the jury to determine whether speech violates a criminal statute and its potential abuse unless restricted by the test set forth in Learned Hand's opinion in the *Masses* case. He also quoted St. George Tucker to show an early repudiation of Blackstone's view.[281]

Taken together, these briefs made a reasonable historical argument that the first amendment was intended to protect against some forms of subsequent punishment. The government's reply brief in *Debs*, however, argued forcefully against an overly broad reading of the scope of the amendment's protection.[282] It pointed out that Jef-

---

276. *Id.* at 62.

277. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). *See supra* notes 190-96 and accompanying text.

278. *Masses*, 244 F. at 540.

279. Letter from Oliver Wendell Holmes, Jr. to Learned Hand (February 25, 1919), *reprinted in* Gunther, *supra* note 201, at 758.

280. Brief Amicus Curiae (Roe), Debs v. United States, 249 U.S. 211 (1919).

281. *Id.* at 43. *See* discussion of St. George Tucker, *supra* note 50.

282. Reply Brief for the United States, Debs v. United States, 249 U.S. 211 (1919) [hereinafter cited as U.S. Debs Reply brief].

ferson and Madison, in opposing the Alien and Sedition Acts, were writing on the meaning of the first amendment a decade after its adoption and in the context of support for their partisans who were threatened with jail under the Acts.[283] The Jeffersonian position—that the first amendment prohibited Congress from regulating speech at all—was rooted in a narrow construction of the grants of power to Congress in the Constitution.[284] When Marshall interpreted the Constitution in *McCulloch v. Maryland*[285] to expand Congress' power to legislate under the necessary and proper clause, he pulled the props out from under a narrower construction that would restrict the power of the federal government. If Congress could enact laws necessary and proper to the exercise of their granted powers, they might regulate speech if "necessary and proper."[286] The guarantee of freedom of speech, the government argued, stands on its own bottom, and its definition can be taken from the understanding that the states gave to similar provisions in their constitutions.[287]

In turning to what that understanding might be, however, the government did something critical: it wavered in its support of Blackstone. The brief of John Lord O'Brian and Alfred Bettman for the government did cite Blackstone and *Patterson*,[288] but it then continued:

> This view is to some extent inapplicable to free speech, as a licensing or censorship system can not, in the nature of things, be applied to the spoken as distinguished from the printed word. Some authorities hold that the constitutional provision grants some degree of immunity from punishment and restricts the power of the legislature to the field of those crimes which were punishable according to common-law standards.[289]

The brief then cited Cooley, repudiating Blackstone, and quoted from that text.[290] It also quoted from Pound's article supporting

---

283. *Id.* at 9-10.

284. *Id.* at 7-8. *See supra* note 30 and accompanying text.

285. 17 U.S. (4 Wheat.) 316 (1819). "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

286. *Id. See* U.S. Debs Reply brief, *supra* note 282, at 13.

287. U.S. Debs Reply brief, *supra* note 282, at 15-16.

288. Brief for United States, Debs v. United States, 249 U.S. 211 (1919), at 80-81 [hereinafter U.S. Debs brief].

289. *Id.* at 81.

290. *Id.* at 81-82. *See supra* notes 97-103 and accompanying text.

Cooley's view.[291] As to the arguments from the history of the Alien and Sedition Acts, the brief sidestepped support of the Acts:

> But the clauses of the Espionage Act which are involved in this case bear no analogy whatever to the objectionable features of the old Sedition Law. That law sought to punish libelous attacks on the Government. The Espionage Act carefully avoids that pitfall. It does not seek to punish attacks on the Government, however malicious or libelous.[292]

With both sides citing Cooley's repudiation of Blackstone, Holmes was forced to reconsider his decision in *Patterson.* Against the backdrop of the criticism of Blackstone and *Patterson* he had seen in Chafee's article in the *New Republic*[293]and the approval of Cooley in Pound's article,[294] the briefs must have seemed, to Holmes, the final evidence that Blackstone's view had lost its traditional underpinning. With the weakening of the standard historical view, the policy of tolerance urged by Mill[295] and Hand[296] to which Holmes was sympathetic[297] could finally become a factor in interpreting the constitutional guarantee.

Thus, Holmes finally rethought the meaning of the first amendment. "It may well be," he wrote in *Schenck,* "that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado,* 205 U.S. 454, 462."[298] This tepid disengagement from his earlier opinion is followed by a critical admission—"We admit that in many places and in ordinary

---

291. U.S. Debs brief, *supra* note 288, at 84-88.

292. Id. at 83. "Thus far, however, the government has not advanced this particular contention [Blackstone's version of free speech] in support of the section, for the reason that the cases thus far pressed by it on appeal have been cases involving direct incitement to disobedience." John Lord O'Brian, Civil Liberty in War Time, XLII Report of the New York State Bar Association 275, 307 (1919).

293. *See supra* notes 240-51 and accompanying text.

294. *See supra* notes 235-39 and accompanying text.

295. *See supra* notes 77-82 and accompanying text. "I reread Mill on Liberty—fine old sportsman—Mill." Letter from Holmes to Laski, (February 28, 1919) *reprinted in* HOLMES-LASKI LETTERS 187. *See* John Lord O'Brian, Changing Aspects of Freedom: The Government and Civil Liberties: World War I and After, 1952 John Randolph Tucker, Washington and Lee University, in which O'Brian suggests that Holmes drew his inspiration from the following passage in Mill: "Even opinions lose their immunity when the circumstances in whieh they are expressed are such as to constitute their expression a positive instigation to some mischievous act." J.S. MILL, supra note 158, at 67.

296. *See supra* notes 201-21 and accompanying text.

297. *See supra* note 233 and accompanying text.

298. 249 U.S. at 51-52.

times the defendants in saying all that was said in the circular would have been within their constitutional rights."[299] With this one sentence, Holmes shed the view that government had unlimited power to punish speech, a view he had adhered to most of his life. The search for limits on the power had begun.

XI. THE CLEAR AND PRESENT DANGER TEST

> *The expression that you refer to was not helped by any book that I know of . . . . But I did think hard on the matter of attempts in my Common Law and a Mass case, later in the Swift case (U.S.) And I thought it out unhelped. I noted that Bishop made a slight modification of his text after I had printed but without reference to me—I speak from ancient memory—And much later I found an English Nisi Prius case in which one of the good judges had expressed this notion in a few words.*[300]
>
> Holmes to Chafee, June 12, 1922

Scholarship, advocacy, and history finally persuaded Holmes to abandon Blackstone and to search for some alternative view of the amount of protection to be afforded speech under the first amendment. To aid him in this search, Holmes turned to the source most readily available—the briefs of counsel in the Espionage Act cases.

Although the briefs of counsel in the Espionage cases agreed that Blackstone's definition of liberty of the press was repudiated by our history, they presented widely different views of the scope of protection afforded by the first amendment. The government contended that there was no immunity for any speech generally recognized as harmful.[301] Citing Cooley, the brief suggested that standards for determining what is harmful should be ascertained by looking "to the common law rules which were in force when the constitutional guaranties were established."[302] Such standards were, however, difficult to ascertain some 150 years later. To begin with, constitutional guarantees of free speech were adopted in states at various periods of time beginning in 1776. This makes pertinent the question whether the "common law rules" referred to in Cooley were those of 1776 or 1791, those of England or those of the various states that imparted unique twists to the common law. Further, no one had suggested that the first amendment enshrined the specific eighteenth century appli-

299. *Id.* at 52.
300. Letter from Holmes to Chafee (June 12, 1922), Chafee Papers, *supra* note 20.
301. U.S. Debs brief, *supra* note 288, at 81-82.
302. *Id.* at 82.

cations of common law. Cooley's test envisioned standards deduced by generalizing on the kinds of harms against which the common law offered protection in the late eighteenth century. For such a generalization to be flexible enough to reach the novel problems of life in the twentieth century, however, it would have to be so abstract that its utility as a workable limit on government would vanish.[303] And even Cooley repudiated the common law doctrine of seditious libel as contrary to the ideas of free speech embodied in American constitutions.[304]

In the final analysis, the government's brief in *Debs* did not commit itself to any specific standard. It argued instead that the defendants were properly convicted under any reasonable construction of the first amendment, including several of those proposed by the defendants themselves. This argument succeeded—the convictions were upheld—but its failing to marshal effective arguments for a specific reading of the first amendment left Holmes free to speculate as to what speech the government could constitutionally regulate.

The petitioners, for the most part, were no more helpful than the government in offering a workable test for the first amendment that Holmes might be willing to accept. Counsel for Charles Schenck tentatively proffered the most extreme view: "It can be even urged farther that the right of free speech, if it is allowed fully, gives the right to persuade another to violate a law, since legally, it is only the one who actually violates the law who should be punished."[305] This argument may have been the trigger for Holmes' memorable example: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[306] The example may be remote from the specific leaflets distributed in the *Schenck* case, but, at the outset, it disposes of the

303. Modern telecommunications, for example, enable speakers to invade the home in ways unknown to the framers and picketing in labor disputes created new speech-related issues with which the law had problems dealing, as Holmes' labor opinions in Massachusetts revealed. *See, e.g.*, Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011 (Holmes, J., dissenting); Vegelahn v. Gunther, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (Holmes, J., dissenting).

304. *See* Cooley, *supra* note 95 at 426-30.

305. Schenck brief, *supra* note 268, at 7.

306. *Schenck*, 249 U.S. at 52. John Vento, a colleague at the NEH Seminar at Yale, suggested that Holmes may have had a particular event in mind when formulating his example. For instance, in December of 1913, the front page of *The New York Times* carried a story of a tragedy in Calumet, Michigan. A drunk staggered into a Christmas gathering in that town, and while the children were standing in the aisles waiting to move forward for their gifts, shouted "Fire." In the ensuing panic, eighty persons, including fifty-six children, were trampled to death. N.Y. Times, Dec. 25, 1913, p.1 col. 8.

argument that no speech may be constitutionally punished.[307]

The real core of Schenck's brief was less extreme: It urged the Court to consider, in deciding whether certain speech was protected, "whether an expression is made with sincere purpose to communicate honest opinion or belief, or whether it masks a primary intent to incite to forbidden action or whether it does, in fact, incite to forbidden action."[308] The government responded that Schenck was properly convicted under the very test he proposed.[309] Holmes' opinion seems directed to this point: "Of course the document would not have been sent unless it had been intended to have some effect," he wrote, "and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[310]

It might also be possible to read Schenck's argument as permitting punishment only where the forbidden action actually does occur as a result of the defendant's statements. This was the position of Joseph Shewalter in his brief for Jacob Frohwerk. Although most of his lengthy brief argued that the first amendment was intended to deprive Congress of all power to regulate speech, he scaled down his position in a reply brief to assert that defendants could be punished only if their speech in fact induced an illegal act.[311] Thus, he argued, the indictment was defective for failure to specify that an individual refused to serve when drafted as a result of the articles defendant published.[312] Holmes met this argument in *Schenck*:

> It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper), its tendency and the intent with

---

307. Ernst Freund sharply criticized Holmes' use of the example as inapposite to the facts of the Espionage Act cases, particularly *Debs*, *see* Freund, *The* Debs *Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 13, *reprinted in* 40 U. CHI. L. REV. 239 (1973). Holmes, however, used it as a response to the sweeping claim of Schenck's brief rather than as a narrowly focused examination of conduct in the immediate cases.

308. Schenck brief, *supra* note 268, at 14.

309. Brief for United States at 35, Schenck v. U.S., 249 U.S. 47 (1919).

310. *Schenck*, 249 U.S. at 51.

311. *Compare* Frohwerk brief, *supra* note 269, at 27-34 (arguing that first amendment was intended to deprive Congress of power to regulate speech.), *with* Reply Brief for Plaintiff-in-Error at 11-13, Frohwerk v. United States, 249 U.S. 204 (1919) (modifying argument, stating defendant could only be punished for speech which induced illegal acts) [hereinafter cited as Frowerk, reply brief].

312. Frohwerk, reply brief, *supra* note 311, at 11-13.

> which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.[313]

Arguably the most persuasive speech-protective standard urged by any of the petitioners was the *Masses* test formulated by Judge Learned Hand and pressed earnestly by counsel for Eugene V. Debs:

> It is our contention that the rule as stated by Judge Hand is the correct rule, and that the test for criminal responsibility for expressions leading up to insubordination, etc. is the common law liability as an accessory created by urging violation of law upon others. Beyond purposeful incitement to specific unlawfulness on the part of others, there is no power in Congress to make public utterances criminal.[314]

The government's brief attacked Hand's test by referring to the circuit court's reversal, as well as its inability to reach the speaker who, like Mark Antony in *Julius Caesar*, incites the crowd to violence without actually telling them to commit unlawful acts.[315] In fact, Hand had attempted to deal with that problem. His focus in *Masses* was on whether a reasonable man would understand the speaker to urge his hearers to commit unlawful acts: "While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive."[316] Hand cited neither case law nor specific history for his test, but relied instead on the necessity for stringent standards to protect the speech of the individual who merely sets forth articulately and even passionately his criticism of existing law. As Hand later wrote Holmes, "The responsibility only began when the words were directly an incitement."[317]

Holmes' opinions did not state why he rejected Hand's "reasonable man" test. Part of the reason may have been the government's argument that petitioner's reformulation of Hand's test— "purposeful incitement to specific unlawfulness on the part of others" —was the act for which Debs was convicted under the judge's charge.[318] In addition, Holmes apparently did not, at least immedi-

---

313. 249 U.S. at 52.

314. Debs brief, *supra* note 274, at 71.

315. U.S. Debs brief, *supra* note 288, at 72-75.

316. Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

317. Letter from Hand to Holmes (late March, 1919), *reprinted in* Gunther, *supra* note 201, at 758.

318. *See* U.S. Debs brief, *supra* note 288, at 75-77.

ately, perceive how the test he eventually used—"clear and present danger"—differed from that of Hand.[319] In any event, Holmes was a stylist who preferred to use his own phrases and think things through to his personal satisfaction, rather than rely on others.[320]

What Holmes finally settled on as the source for his test was his own theory of the law of attempt: "I did think hard on the matter of attempts in my Common Law and a Mass case, later in the Swift case (U.S.)."[321] It is not clear what led Holmes to the law of attempt, but the connection may have been inadvertently inspired by the reference in Debs' brief to "common law liability as an accessory."[322] An accessory is only guilty if a crime has been committed; as discussed carlier, Holmes rejected the analogous view that speech tending toward the commission of a crime should only be punishable if the crime is in fact committed.[323] But the analogy to one type of liability under the criminal law suggests analogies to others. Thus it may have sparked Holmes' consideration of the law of criminal attempt. To properly explain why Holmes may have seized on attempt, it is necessary to digress into an analysis of Holmes' peculiar interest and expertise in the area of criminal attempt law.

As Holmes told Chafee, he had thought hard about the law of attempts at various points in his career.[324] This hard thought had sueceeded in producing a distinctive view, which he expressed in the *Common Law*[325] and applied as a judge both in Massachusetts[326]

---

319. "[I] don't quite get your point. . . . I don't see how you [and I] differ." Holmes to Hand (April 3, 1919), *reprinted in* Gunther, *supra* note 201, at 759-60.

320. For example, Holmes was upset over his article in *Harvard Law Review* on Natural Law. *See supra* notes 210, 215 and accompanying text. "After I sent back the proofs the other day I was depressed to think that one little phrase 'for the joy of it' was an echo of Ruskin." Holmes to Pollock (October 31, 1918), *reprinted in* 1 HOLMES-POLLOCK LETTERS 270 (M. Howe, ed. 1941). Holmes told his law clerks to cite first to his prior Supreme Court opinions; if there were none, "then his opinions in Massachusetts were next best; and last you could cite, if you must cite some precedent, the pronouncements of his living or deceased brethren." F. BIDDLE, MR. JUSTICE HOLMES 145 (1942).

321. Letter from Holmes to Chafee (June 12, 1922), Chafee papers, *supra* note 20.

322. Debs brief, *supra* note 274, at 71.

323. *See supra* note 313 and accompanying text.

324. Letter from Holmes to Chafee (June 12, 1922), Chafee papers, *supra* note 20.

325. *See* O. W. HOLMES, JR, THE COMMON LAW 65-69 (1881) [hereinafter cited as THE COMMON LAW].

326. *See* Commonwealth v. Peaslee, 177 Mass. 267 (1901); Commonwealth v. Kennedy, 170 Mass. 18 (1897).

In *Peaslee,* the defendant had been convicted below on a charge of attempted arson. He had arranged materials to burn a building he owned; after unsuccessfully asking someone to light a match to the materials, he started toward the building himself but turned around while still a quarter of a mile away. 177 Mass. at 268-71. Holmes there had an opportunity to

and on the Supreme Court.[327] The accepted doctrine of attempts in Holmes' day made the evil intention of the actor the key to the law of attempts.[328] The act, according to this view, was only evidence to

---

discuss his theory of attempt in cases where the accused had stopped short of completing all the steps necessary to accomplish the crime:

> If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus penitentioe* in the need of a further exertion of the will to complete the act. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite.
>
> . . .
>
> If the accused intended to rely upon his own hands to the end, he must be shown to have had a present intent to accomplish the crime without much delay, and to have had this intent at a time and place where he was able to carry it out.

Id. at 272-74. Because there was no allegation in the indictment that the defendant had ever had the intent to burn the building at a point where he himself could have done so, and because the solicitation was not alleged in the indictment as one of the acts constituting an attempt, Holmes reversed the conviction. *Id.* at 274. *See also* THE COMMON LAW, *supra* note 325, at 66-68 (discussion of this particular species of attempt, including a prescient hypothetical with facts much like those in *Peaslee*).

Holmes' theory of attempt in cases where all the overt acts necessary to complete the crime had been committed was applied in *Kennedy*, where the defendant had been convicted below of attempted murder for putting poison in someone's mustache cup. In affirming the conviction, Holmes wrote:

> As the aim of the law is not to punish sins, but to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. . . . Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd.

170 Mass. at 20-21. *See also* THE COMMON LAW, *supra* note 325, at 66. It is not clear which of these cases Holmes meant when he referred Chafee to "a Mass case." *See supra* text accompanying note 321. The similarity between *Peaslee* and *Swift* as to the type of attempt suggests that Holmes was focussing on *Peaslee. Compare Peaslee with* Swift & Company v. United States, 196 U.S. 375 (1905), discussed *infra* at note 327.

327. *See* Swift & Company v. United States, 196 U.S. 375 (1905). In *Swift*, an antitrust case, the lower court had enjoined the defendants (meat producers) from continuing to combine in restraint of trade in violation of the Sherman Act. The defendants alleged that the overt acts they had committed—failure to bid on certain contracts—were lawful and that the injunction was thus prematurely issued. Holmes upheld the injunction, finding that the companies were reachable beeause the intent with which they acted rendered their conduct sufficiently dangerous:

> Where acts are not sufficient in themselves to produce a result which the Law seeks to prevent—for instanee the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

170 Mass. at 20-21. While not an attempt case, *Swift* is notable because Holmes' focus there, as in *Peaslee*, *supra* note 326, was on intent as an element in determining whether conduct otherwise short of an unlawful act is dangerous enough to warrant state intervention.

328. *See* 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW, 432-66 (7th ed. 1882), *cited in* THE COMMON LAW, *supra* note 325, at 66. *See also* Rogat, *The Judge as*

show the evil nature of the actor.[329] Holmes insisted in focusing instead on the dangerousness of the act.[330] The intention of the actor was relevant to Holmes only insofar as it increased the danger to be apprehended from the act.[331] His analysis assumed that the main function of the law of attempts was to deter conduct that created a serious and unacceptable risk of harm.[332]

Holmes subdivided attempts into two main categories. The first was comprised of those acts whose natural and probable effect would result in a substantive crime, where the crime is prevented by chance or the intervention of another agent.[333] The second category consisted of acts that in themselves would not produce the substantive crime, but are merely steps towards its commission.[334] In the latter case, the intention of the actor is important to show that an otherwise innocent act is pregnant with danger and that the state thus needs to act.[335] The point at which the state should intervene is determined by the "nearness of the danger, the greatness of the harm, and the degree of apprehension felt."[336]

The need to delineate the point at which the state should intervene has its source in the notion of individual autonomy, the right of an individual to do as he or she pleases so long as conduct dangerous enough to be proscribed as criminal is not engaged in. The closer one approaches the commission of such dangerous acts the more compelling becomes the need for the state to sacrifice the good of individual autonomy to prevent the greater risk of harm to others or to society generally. Thus the central concept behind the classifications Holmes used to define attempts was "the degrec of danger shown by experience to attend that act under those circumstances."[337]

The determination of whether conduct in Holmes' second category of attempts—those where the actor has not yet completed all the acts necessary to naturally and probably bring about the proscribed result[338]—is dangerous enough for the state to intervene

---

Spectator, 31 U. CHI. L. REV. 213, 215 (1964).

329. *See* J. BISHOP, *supra* note 328, at 436.
330. *See* THE COMMON LAW, *supra* note 325, at 67.
331. *Id.* at 67-68.
332. *Id.* at 68.
333. *Id.* at 66.
334. *Id.* at 66-70.
335. *Id.* at 67-68.
336. *Id.* at 68.
337. *Id.* at 61.
338. *Id.* at 66-67.

must be made, as we have seen, based upon several factors which bear on dangerousness, including the gravity of the harm risked and how close the attempt has come to bringing about that harm.[339] The focus on conduct in Holmes' analysis thus reduces the actor's evil intent to one of the factors bearing on the dangerousness of the conduct.[340]

It is true that the speeches and pamphlets which were the objects on which the Espionage Act convictions were based do not neatly fit the classifications that Holmes used for the law of attempts. For example, if one views the speech at issue as an attempt to bring about the substantive harm of obstructing the draft, the speaker/writers in the cases had completed all the acts they planned to do, thus presumably triggering the first arm of Holmes' attempt analysis[341] and requiring a focus on whether the natural and probable effect of the speech would be to cause obstruction. This part of Holmes' analysis, however, assumes that if the harm has not been brought about it is because of chance or the intervention of another agent, that apart from such "preventers" the harm would have occurred in the natural course of events.[342] The substantive harm of obstruction, however, is brought about, in a speech case, not by the forces of nature but by the independent decisions of members of the audience. And the second arm of Holmes' analysis postulates a series of steps toward the crime which have yet to be completed;[343] because the speaker/writers in the cases had completed all the necessary steps, that part of Holmes' attempts analysis would also not seem applicable. One might thus conclude that Holmes would have been unlikely to see the connection between attempt and speech.

Such a conclusion, however, fails to recognize, as Holmes surely did, that the broader policy considerations underlying the law of attempt and the law of speech limitation are the same. In both cases the courts are called upon to mediate between the right of an individual to personal freedom and the right of the government to punish dangerous conduct. And in both cases the conduct sought to be regulated is thought to require government intervention only because it increases the probability that other, clearly undesirable results will occur—a policy that requires careful fine tuning because, if read too

339. *Id.* at 68.
340. *Id.*
341. *Id.* at 65-66.
342. *Id.*
343. *Id.* at 66-67.

broadly, it can lead to oppressive interference with individual freedoms of conduct or speech. Thus most conduct, and most speech, should not be regulated, despite a tenuous connection with ultimate harm; as to conduct, Holmes had held, in a Massachusetts attempt case, that such conduct "must come pretty near to accomplishing [the proscribed results] before the law will notice it."[344] As to speech: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[345] Thus, in *Schenck*, Holmes sought to mediate between the power of the government to deal with activities of a harmful nature and the ability of the individual to engage in activities that do not result in harm by analogy to the common law of attempts as he had formulated it in *The Common Law*.

The result of relying on this analogy was that Holmes would naturally turn to the numerous factors he had developed for determining dangerousness in the two kinds of attempt cases—the gravity of the harm risked,[346] its immediacy, and the likelihood that it would result from the speech at issue, the latter to be measured either by the natural effect of the words used or by the speaker's purpose.[347]

---

344. *Kennedy*, 170 U.S. at 20-21. *See supra* note 326.

345. *Schenck*, 249 U.S. at 52.

346. In this respect, Holmes may have noted the new edition of Bishop on Criminal Law, *see supra* note 328, which came out shortly after *The Common Law* was published. In discussing the law of attempt, Bishop retained the traditional emphasis on evil attempt, *see* J. BISHOP, *supra* note 328, at 436, but he added a new section to the seventh edition—§ 768a—dealing with solicitation as an attempt:

> [A]ll sufficiently direct solicitations to commit any of the heavier offenses are punishable attempts. And it would be within established principles to hold that in proportion to the gravity of the particular crime, the solicitation, to come within the law's cognizance, may be less direct.

Id. at 461. This view coincided nicely with Holmes' statement in *The Common Law* that included the greatness of the harm as a factor in defining an attempt. *See* THE COMMON LAW, *supra* note 325, at 68. This addition to Bishop may be the one referred to by Holmes in his letter to Chafee—"I noted that Bishop made a slight modification of his text after I had printed but without reference to me." Holmes to Chafee, Chafee Papers, *supra* note 20. Holmes' chagrin at not being referred to may have been a reaction to a remark made in Bishop's eighth edition:

> Among the legal text-books, there was not any one, English or American, until the present author wrote, which contained on the subject [of attempts] more than a few paragraphs of loose and inadequate statements of doctrine. If more extended expositions have been made by any author since, it has been simply in imitation and following of the present series of books.

J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 437-38 (8th ed. 1892).

347. THE COMMON LAW, *supra* note 325, at 68-69.

Such issues, which are necessarily ones of "proximity and degree,"[348] as Holmes described the test for the constitutionality of punishing speech, also implicate the issue of deciding which factfinder—the judge or the jury—determines whether the line separating lawful from unlawful speech has been crossed.

A rule of law requiring the finder of fact to weigh several factors in determining liability or culpability can present close questions. Holmes suggested in *The Common Law* that, at least initially, such questions be left to the jury:

> [T]he court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore, it aids its conscience by taking the opinion of the jury.[349]

While willing to leave such balancing and weighing initially to a jury, Holmes was also aware that lax application by juries of such complex tests, or perversions of them in times of hysteria, was a danger of peer justice that needed to be guarded against. In *The Common Law*, Holmes mentioned a case in which a slave was convicted of attempted rape when he ran after a white woman but desisted before he caught her.[350] "The degree of apprehension may affect the [jury's] decision," Holmes wrote, "as well as the degree of probability that the crime will be accomplished. No doubt the fears peculiar to a slave-owning community had their share in the conviction which has just been mentioned."[351] It is certainly not difficult to imagine a case where the fears peculiar to a community could sway a jury in a speech case—during a time of particularly strong anti-Communist hysteria, for example, a speech that might otherwise be considered only mildly critical of the American government could be magnified, by a jury gripped in the hysteria, into a dangerous call to revolution. To deal with this difficulty, however, Holmes needed only to turn again to the common law of attempt for assistance—under that law, the court may determine that a verdict should have been

348. 249 U.S. at 52.
349. THE COMMON LAW, *supra* note 325, at 123 (footnote omitted).
350. *Id.* at 68.
351. *Id.* at 69.

directed for the defendant where the acts did not come sufficiently close to the threatened harm.[352]

In sum, the clear and present danger test as Holmes understood it permitted the state to punish any speech that posed a threat of immediate serious harm. The likelihood that the harm would result determined the existence of a threat. It was measured either by the natural effect of the speech or by the intent with which the speech was given. If it was absurd to believe that the intended result would follow from the speech, the speech was not so dangerous as to be forbidden. The proximity of the speech to harm, including the determination of the defendants' intent, was a jury question. A verdict should not be directed for the defendant unless clearly warranted on the facts, although proximity to harm was emphasized, and more experience might legitimately lead courts to intervene and direct verdicts for defendants.

Thus, in *Schenck*, Holmes took a giant step forward from the "no prior restraints" view he had abandoned, establishing the principle that government should not have the power to punish speech subsequent to its publication unless the speech presented a "clear and present danger" of bringing about some substantive harm the government is empowered to prohibit. One might expect that, following the handing down of the opinion, Holmes would be hailed as a visionary, a champion of free speech. As will be discussed, however, quite the contrary was true.[353]

The most obvious reason that the true impact of *Schenck* went largely unnoticed was that in *Schenck*, and also in *Debs* and *Frohwerk*, Holmes applied his new test to uphold the Espionage Act convictions of the defendants,[354] which undoubtedly led all but the most careful readers to feel that it was "business as usual" as far as free speech in the courts was concerned. The next section explores whether Holmes brought the critical tirade on himself by erroneously applying his own test in the Espionage Act cases.[355]

Two other aspects of the clear and present danger test were sufficiently ambiguous that later commentators could misunderstand how far Holmes intended to go in *Schenck*.

The first ambiguity arose because the determination of when an act may be made unlawful normally raises no constitutional

352. *Cf. id.* at 123.
353. *See infra* notes 369-406 and accompanying text.
354. *Debs*, 249 U.S. at 216; *Frohwerk*, 249 U.S. at 210; *Schenck*, 249 U.S. at 53.
355. *See infra* notes 374-425 and accompanying text.

problems. The law of attempts, for example, implicates not a constitutional standard in the criminal law but rather a joint effort by judge and jury to determine when the legislatively mandated violation occurred. Holmes' reference to clear and present danger, based as it was on the law of attempts, might thus have been similarly viewed by critics as an interpretation of the Espionage Act. Hand's standard in *Masses* was, in fact, just such an interpretation.[356] And the Court itself appeared, at one time, to assume that Holmes' opinion in *Schenck* went no further than statutory interpretation.[357] Such an assumption, however, is incorrect. Holmes did speak in *Schenck* on the general limits of speech protected by the Constitution: "[T]he character of every act depends upon the circumstances in which it is done."[358] After giving examples of punishable speech not involving the Espionage Act, Holmes said, "The question *in every case* is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[359] The importation of the clear and present danger standard from the law of attempt into the limits of constitutional protection of free speech changed its nature from a test subordinate to legislative consideration to one which put a limit on the discretion of the legislature. True, it was still unclear, despite the vigorousness of the language in *Schenck*, at what point the judge would intervene to limit the legislature. However, the ability of the judge to check the jury in an ordinary criminal attempt case had been transformed by Holmes into an ability to check the legislature as well and was thus a giant step beyond *Patterson.*

A second issue, which may have misled later critics, lurked in the clear and present danger test formulated by Holmes in *Schenck.* The test referred to proximity to "the substantive evils that Congress has a right to prevent."[360] There was no doubt that Congress could

356. *See supra* note 194 and accompanying text.

357. Gitlow v. New York, 268 U.S. 652, 671 (1925).

358. 249 U.S. at 52. Holmes had said in *The Common Law* that, in determining whether the act could be considered an attempt, "[p]ublic policy, that is to say, legislative considerations, are at the bottom of the matter." THE COMMON LAW, *supra* note 325, at 68. In the context of the statement, however, he was merely saying that public policy is reflected by the legislature and that the point at which an act should be considered an attempt is an issue of public policy. In practice, the point was determined by the judge. By constitutionalizing the issue in *Schenck*, *see infra* note 359 and accompanying text, Holmes removed the issue from the legislative plane.

359. 249 U.S. at 52 (emphasis added).

360. *Id.*

prevent obstruction of the draft, but Holmes did not spell out in the spring of 1919 what substantive evils might be beyond the power of the legislature to prevent. Six years later, in *Gitlow v. New York*,[361] the majority of the Court argued, over Holmes' dissent, that speech tending toward harm was itself an evil with which the legislature could deal.[362] This approach, which may be what the Court thought Holmes meant at the time he wrote *Schenck*, avoided any analysis of the proximity of the speech to the ultimate harm feared.

Long before *Gitlow*, however, Holmes had stated that history was against the notion that the first amendment had left the common law doctrine of seditious libel in force.[363] Thus, he recognized that government could not determine for itself which evils it was permitted to prevent. Although no explicit statement was made in *Schenck* on this point, there is strong evidence to indicate that he had already reached this position. First, the reference in *Schenck* to evils Congress has a right to prevent suggests, by negative implication, the existence of harms beyond the reach of Congress. Second, the repudiation of Blackstone was based largely on a new approach to the history of the first amendment. When Holmes viewed the guarantee of freedom of speech from the perspective of the social concerns that led to its adoption, it became clear to him that the legislative determinations that truth should be a defense in libel were more accurate perceptions of the meaning of freedom of speech than the judicial interpretations to which they were a response.[364] This mode of reasoning would logically result in Holmes' placing greater weight on the popular overthrow of the Alien and Sedition Acts than on statements in judicial opinions upholding them.[365] Finally, in a letter written in May of 1919 defending his Espionage Act decisions, Holmes emphasized the constitutionality of "*the clauses under consideration.*"[366] This emphasis in turn indicates reservations over the

361. 268 U.S. 652 (1925).

362. *Id.* at 667-70.

363. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

364. This recalls the paradox in *Kent's Commentaries*, which Holmes edited in 1873. Kent pointed to the legislative determinations making truth a defense, but permitted the reader to infer that judicial decisions were the proper mode of interpretation. Holmes had accepted the judicial opinion as the basis for definitions of freedom of speech in *Patterson*. *See supra* notes 166-69 and accompanying text. The subsequent rejection of the case law might have pointed him to the legislative reactions to the cases. *See* 2 KENT'S COMMENTARIES, *supra* note 57, at 26.

365. *See* J. MILLER, *supra* note 101, at 235-41.

366. Letter from Holmes to Herbert Croly (May 12, 1919) (enclosed with a letter to Harold Laski (May 13, 1919)), *reprinted in* 1 HOLMES-LASKI LETTERS 202 (M. Howe ed.

constitutionality of other sections of the Act.

None of these factors compels a conclusion that Holmes had fully developed his understanding of the first amendment in the process of writing the Espionage Act cases. They do, however, show that it is erroneous to assume that Holmes' later dissents represented a change in basic views beyond that represented by *Schenck* itself.

XII. APPLICATION OF THE STANDARD IN *Schenck*, *Frohwerk* AND *Debs*

> *"I have never seen any reason to doubt that the questions of law that alone were before this Court in the cases of* Schenck, Frohwerk *and* Debs, *249 U.S. 47, 204, 211, were rightly decided."*[367]
>
> *Abrams v. U.S.* (Holmes, J., dissenting)

Less than a week after the decisions in *Frohwerk* and *Debs* were handed down, Holmes wrote Harold Laski, "I greatly regretted having to write them—and (between ourselves) that the Government pressed them to a hearing."[368] The *Debs* decision touched off a storm of protest from the left and sparked two sharply critical law review comments.[369] In particular, Zechariah Chafee, Jr., wrote that the clear and present danger test could not reach Debs if properly applied.[370] The contrast between Holmes' characterization of the defendants as "poor devils"[371] and his willingness to affirm their convictions raises the question whether he applied his own clear and present danger test or ignored it until his dissent in *Abrams* in the fall of 1919.[372] The quote that begins this section clearly indicates that Holmes himself felt he had properly applied the test in upholding the convictions.

1953).

367. Abrams v. United States, 250 U.S. at 627 (Holmes, J., dissenting).

368. Letter from Holmes to Laski (March 16, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 190 (M. Howe ed. 1953).

369. Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); Freund, *The Debs Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 13, *reprinted in* 40 U. CHI. L. REV. 239 (1979)).

370. Chafee, *supra* note 369, at 967-68.

371. "Now I hope the President will pardon him [Debs] and some other poor devils with whom I have more sympathy." Letter from Holmes to Pollock (April 27, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 11 (M. Howe ed. 1941). "I . . . have said whenever it was proper that I thought the President should pardon a lot of poor devils that it was my misfortune to have to write opinions condemning." Letter from Holmes to Pollock (June 17, 1919), *reprinted in id.* at 15.

372. *See* Gunther, *supra* note 17, at 738-40; Z. CHAFEE, *supra* note 10, at 86.

A reexamination of the facts of each case, keeping in mind the context in which they were heard—just after the end of the First World War—lends considerable support to the view that Holmes was properly applying, in his own mind, the test he had developed in *Schenck*. For example, the circulars distributed by Charles Schenck and Elizabeth Baer were directed at draftees;[373] though they did not directly urge obstruction, the call to "Assert Your Rights,"[374] combined with the targeted audience, showed a clear intention to encourage the draftees to refuse to obey the draft law. This intent, combined with the setting in which the circulars were sent (the midst of war) could quite reasonably have combined to convince Holmes that the circulars posed a clear and present danger to the conscription effort. The setting becomes particularly important when one remembers Holmes' own Civil War experiences and his feeling that the emergency of war allows government greater latitude to "sacrifice individual welfare to its own existence."[375]

While *Frohwerk* would seem, at first blush, to present a weaker case for upholding conviction than *Schenck*, a closer examination reveals that a combination of circumstances made the issue on appeal to the Supreme Court a narrow one. Frohwerk, convicted under the Espionage Act of 1917 for publishing several articles critical of the war and the draft, was represented both at trial and on appeal by attorney Joseph Shewalter.[376] In this case it would have been more fitting if the attorney had been the defendant, both because it was Shewalter's articles that furnished the basis of the prosecution[377] and because it was his poor representation that resulted in the publisher going to jail. Shewalter failed to get agreement on a bill of exceptions and was unable, despite an extention of time, to get the transcript of the trial typed to meet the date for filing the appeal.[378] Consequently, the sole issue appealed to the Supreme Court was the sufficiency of the indictment. Neither the evidence adduced at trial nor the rulings or charge of the judge below were before the Court.

Shewalter argued that the articles could not violate the law, but Holmes replied that they were similar to those involved in

373. *See Schenck*, 249 U.S. at 49.
374. *Id.* at 51.
375. *See supra* note 43 and accompanying text.
376. 249 U.S. at 205.
377. *See id.* at 207.
378. *Id.* at 206.

Schenck.[379] Under normal circumstances, the articles might not violate the law, but they could pose a clear and present danger in some unusual situation. Without the trial transcript, the Supreme Court could not know the situation in which the articles were published. And although the burden was on the government to prove a clear and present danger, a jury had found the defendant guilty on the basis of a charge and evidence that the Court could not review. Thus, Holmes had to assume the charge was proper and supported by the strongest possible evidence consistent with the indictment. "[I]t is impossible to say," wrote Holmes for the Court, "that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[380]

It is likely that Holmes suspected Frohwerk was improperly convicted. His may have been one of the cases Holmes had in mind when he wrote Laski: "The federal judges seem to me (again between ourselves) to have got hysterical about the war."[381] But the narrow question before the Court simply did not open up the conduct of the trial or the evidence there presented, so Holmes had little trouble in affirming the conviction.

The main basis of the attack on Holmes for neglecting his own test and improperly affirming a conviction was the *Debs* case. The speeches for which Debs was convicted did not directly urge the violation of any law, and no one was shown to have broken any law because of the speeches.[382] Further, unlike the circulars in *Schenck*, the speeches were directed to a general audience instead of being targeted to draftees.[383] And, unlike Shewalter in *Frohwerk*, Debs' attorneys had preserved for review the full record of the trial with all the circumstances that surrounded the speeches.[384]

Several preliminary points had already been settled in the previous cases—the constitutionality of applying the Espionage Act to speech had been affirmed in *Schenck*, and the sufficiency of an indictment that alleged a conspiracy to violate the statute through an-

379. *Id.* at 207.

380. *Id.* at 209.

381. Letter from Holmes to Laski (March 16, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 190 (M. Howe ed. 1953).

382. *Debs*, 249 U.S. at 213-14.

383. *Id.* at 212.

384. *See generally* Record, *Debs*.

tiwar and antidraft statements had been decided in *Frohwerk*. Thus these issues were quickly and properly disposed of in *Debs*.[385] Debs also claimed that the trial judge improperly admitted evidence of the convictions under the Act of other persons and of the "Anti-war Proclamation and Program" adopted in St. Louis by the Socialist Party, which called for "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power."[386] Holmes dismissed this claim by finding that both matters were relevant to Debs' intent, for the speeches specifically referred to the persons tried and Debs had stated shortly before making the speeches that he approved the St. Louis platform.[387] One troublesome issue thus remained: Whether the speeches were a clear and present danger to carrying out conscription.

Professor Chafee later criticized Holmes' opinion on the ground that the trial judge's charge permitted the jury to find Debs guilty on the basis of a presumed intent to obstruct the draft—an intent presumed from the tendency of the words to have that effect.[388] Concern over the substance of the judge's charge, however, was not central to Debs' attorneys. Indeed, the original assignment of exceptions made no mention of the charge except for the failure to direct a verdict. An amended assignment of errors did include the failure to sustain an objection to the judge's charge as a whole, and to several portions of it in particular. Nevertheless, even in the amended assignment of errors, the defendants did not focus on the judge's discussion of presumed intent. Thus the government was able to state in its brief:

> The question of the defendant's intent or purpose—that is, the issue between the Government's charge of unlawful purpose and the defendant's defense, of lawful purpose, was placed by the court before the jury in a manner so clear and fair to the defendant that he does not and could not complain of the charge in this respect.[389]

The judge had charged the jury that a person is presumed to intend

385. 249 U.S. at 215.

386. *Id.* at 215-16.

387. *Id.* Holmes passed over rather quickly the gap between opposition to the war by all means as stated in the St. Louis platform and finding a specific intent in a speech to oppose it by means of obstructing the draft. He simply said: "The principle is too well established and too manifestly good sense to need citation of the books." *Id.* at 216. Nevertheless, this point was not mentioned in Freund or Chafee's critiques. *See* Freund, *supra* note 369; Chafee, *supra* note 369.

388. Chafee, *supra* note 369, at 968.

389. U.S. Debs Brief, *supra* note 288, at 75.

the natural and probable consequences of his words.[390] Chafee later argued that this allows juries to find culpable intent from a general discussion of the evils of a law because any criticism of a law may encourage persons to disregard it.[391] Neither Debs nor the government, however, argued or even mentioned any such problem in the briefs. Instead, the government quoted at length the following portions of the charge that consistently reiterated the protected character of statements of opposition to the war:

> In passing upon the question of specific intent, I wish to say something additional thereto. Disapproval of war is, of course, not a crime, nor is the advocacy of peace a crime under this law, unless the words or utterances by which the expression or advocacy is conveyed shall have been willfully intended by the person making them to commit the acts forbidden by this law, and, further, not even then unless the natural and reasonably probable tendency and effect of such words and language as he may use will have the effeet and consequences forbidden by the law.
>
> . . .
>
> If the conscious purpose of the defendant was only to state the truth as he saw it, to convey information to his fellow citizens, with the object only of bringing about the reconstruction or reshapement, by peaceful, ordinary methods, of the national policy in accordance with what he believed to be the right and correct view of the national policy, and that he did not, in so doing, have the intent willfully to do any of the prohibited acts, he would not, in that event, be guilty, and it would be your duty also, to return a verdict of not guilty.[392]

Holmes' opinion picked up on this portion of the charge:

> [T]he jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.[393]

Shortly after the *Debs* decision, Judge Learned Hand wrote Holmes about that case. He suggested that the appropriate test for protection of speech is whether "the words were directly an incite-

390. Record at 279-80, *Debs.*
391. Chafee, *supra* note 369, at 965-68.
392. U.S. Debs Brief, *supra* note 288, at 75-77 (*quoting from* Record at 278-79).
393. 249 U.S. at 216.

ment."[394] He added, "it is very questionable whether the test of motive is not a dangerous test. Juries won't much regard the difference between the probable result of the words and the purposes of the utterer."[395]

Holmes replied that the intent of the speaker was not the only test that he used in determining the limits of freedom of speech:

> As to intent under the Espionage Act I believe I have said nothing except to note that under the instructions the jury must be taken to have found that Debs's speech was intended to obstruct and tended to obstruct—and except further that evidence was held admissible as bearing on intent. Even if absence of intent might not be a defense I suppose that the presence of it might be material.[396]

Holmes then said that he did not understand how Hand's test differed from the one that Holmes had announced in *Schenck*—"clear and present danger."[397] In this context, it is clear that Holmes believed himself to be applying the clear and present danger test in *Debs*, and that, as in his general analysis of attempt, he believed that certain acts are more dangerous if the actor intends them to be steps towards the violation of the law than the same act would be without such intent.[398] In Holmes' view, the proper test for the power of the government to punish speech was the danger posed by that speech, and intent was relevant only insofar as it increased the danger of

---

394. Letter from Hand to Holmes (late March 1919), *reprinted in* Gunther, *supra* note 17, at 758.

395. *Id.* at 759.

396. Letter from Holmes to Hand (April 3, 1919), *reprinted in* Gunther, *supra* note 17, at 759.

397. I don't see how you differ from the test as stated by me [in] Schenck v. U.S. (March 3, 1919). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Id. at 760. It is plain from this note to Learned Hand that Holmes understood the clear and present danger test to be appropriately used in the *Debs* case.

398. Where an aim of speech is to produce criminal conduct, it is appropriate to find the words present a greater danger than those same words spoken without the improper aim for two reasons. First, the speaker's aim indicates that he foresaw the harm would flow from his words. This is some evidence that the speech is, in fact, dangerous. Further, where the speaker's aim is to bring about a result forbidden by the law, it is appropriate for the law to discourage him. The analogy to attempt here may be Holmes' example of shooting at a block of wood; the act is not so inherently dangerous as to give rise to a need to prevent it (although the potential of accidental injury in target shooting always exists), but where the shooter believes the block to be a human being, it may be appropriate to create a standard of conduct which forbids it "in order to make discouragement broad enough and easy to understand." THE COMMON LAW, *supra* note 325, at 70.

violation of law proceeding from the speech. He saw no difference between his test and Hand's "direct incitement" because he thought words that posed a clear and present danger, that were close to the illegal action, would surely be "directly an incitement" even if their form was not that of direct incitement.[399] As long as Hand was willing to acknowledge that an indirect form of words (like Mark Antony's speech) could be punished as a direct incitement, a jury rabid to convict would find the defendant guilty under Hand's standard as easily as under Holmes'. What Holmes failed to appreciate was the greater scope Hand's test might give the trial judge (or reviewing court) for finding that the verdict should be directed for the defendant. Hand's test focused solely on the language of the speaker as it would be understood by a reasonable person in the circumstances in which it was given.[400]

Hand's letter to Holmes states, "I haven't a doubt that Debs was guilty under any rule conceivably applicable."[401] It is possible that Hand was simply trying to soften Holmes up to be more receptive to his argument.[402] Nevertheless, when Debs told the jury "I

399. In *Debs*, Holmes said that the general theme of the promotion of socialism would not protect the speech if in passages in the speech "encouragement was directly given" to obstruct the recruiting service. 249 U.S. at 213. Thus it would appear that Holmes thought a jury could find direct incitement even in Debs' speech.

400. Under Hand's test, if a reasonable man in the audience would not understand that the speaker wanted him to commit a specific illegal act, the speaker would not be liable although the speech in fact incited the audience to violence and the speaker was aware that the speech would have that result. Holmes would find the speaker could be deterred from a speech that created an unacceptable risk of harm despite the speaker's lack of the forbidden purpose. Hand complains of Holmes' use of motive because he fears a focus on subjective motive will permit the jury to find one that is not there, while Holmes' use of motive is tied to the dangerousness. Hand's focus is on speaker responsibility and audience autonomy while Holmes' is on state interest in deterring danger.

This disparity has another, more complex strand in that Hand may have been emphasizing responsibility as statutory construction while Holmes assumed that a statute is pressed to a constitutional limit. Hand's constitutional interpretation in *United States v. Dennis*, 183 F.2d 201, 212 (1950), *aff'd*, 341 U.S. 494 (1951), is clearly derived from Holmes' common law attempt background to the clear and present danger test.

As had been noted, Hand believed his test was a more effective protection from jury emotions, *supra* notes 316-17, 394-95 and accompanying text. Further, Hand's test could have affected the relevancy of the St. Louis platform. The platform was relevant to Debs' subjective intent and Hand's test disclaims inquiry into motive. Nevertheless, it might be argued that a purpose to incite is itself probative on the issue of the capacity of the words to be a "direct" incitement. Even if marginally relevant, their prejudicial effect could outweigh any probative value. *See* Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622 (1977).

401. Letter from Hand to Holmes (late March, 1919), *reprinted in* Gunther, *supra* note 17, at 758.

402. *See* Gunther, *supra* note 17, at 739.

have been accused of obstructing the war. I admit it,"[403] it might have struck Judge Hand that the speeches Debs made were indeed a direct incitement to obstruct the war despite the indirection of the language. Thus, Hand may have been candid in stating that his only objection was to the standards used by the judge in the charge and by Holmes in approving it.

The core of Debs' argument was that he should have been given a directed verdict because the evidence was insufficient to convict him under any standard consistent with the first amendment. Considering the indirection of the speech, this argument has some merit. In a letter, Holmes himself said, "I think it quite possible that if I had been on the jury I should have been for acquittal."[404] Chafee and Ernst Freund in separate law review articles argued that Debs could not be convicted under any test that squared with the first amendment.[405] Finally, Justice Brandeis, who had joined the unanimous opinion of the Court in all three cases, subsequently indicated that he thought the cases should have been put under the war power for they did not fit his conception of the proper meaning of the clear and present danger test.[406]

The nature of these cases as ones of first impression[407] caused Holmes to be more deferential to the jury. Holmes believed, as has

---

403. 249 U.S. at 214.

404. Letter from Holmes to Herbert Croly (May 12, 1919) (enclosed with a letter from Holmes to Laski (May 13, 1919)), *reprinted in* 1 HOLMES-LASKI LETTERS 202-03 (M. Howe ed. 1953). Holmes stated: "Yesterday I wrote the within and decided not to send it as some themes may become burning. Instead I trust it confidentially to you." Letter from Holmes to Laski (May 13, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 202-03.

405. *See supra* note 369 and accompanying text.

406. I have never been quite happy about my concurrence in the Debs and Schenck cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it. Not until I came to write the Pierce and Schaeffer cases did I understand it. I would have placed the Debs case on the war power—instead of taking Holmes' line about "clear and present danger." Put it frankly on the war power—like the Hamilton case (251 U.S.)—and then the scope of espionage legislation would be confined to war. But in peace the protection against restrictions on freedom of speech would be unabated. You might as well recognize that during a war—

F.F.: All bets are off.

L.D.B.: Yes, all bets are off. But we would have a clear line to go on. I didn't know enough in the early cases to put it on that ground.

Conversation between Felix Frankfurter and Louis Brandeis in the Frankfurter Papers at 23 (Aug. 8, 1921) (available at Harvard Law School Library Manuscript Room, copy on file at *Hofstra Law Review*).

407. This contributed to Brandeis' unhappiness with his concurrence. "Of course you must also remember that when Holmes writes, he doesn't give a fellow a chance—he shoots so quickly." *Id.*

been seen in his view of attempt, that where experience had built up, the judge would sometimes be in a better position to determine which acts were innocent and which were not.[408] Several factors combined in the *Debs* case to make Holmes believe that case more appropriate for a jury.

The most obvious factor that would lead Holmes to believe that a jury could legitimately find that a clear and present danger existed in *Debs* was the apprehension of great danger. The draft and recruiting service were being interfered with in wartime—thus, the normal self-intcrested reluctance of an individual to join the armed services was sharply reinforced at the very time when the need for soldiers was greatest. "When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force."[409] The Civil War veteran was likely to remember clearly the draft riots in New York City when Lincoln began conscription.[410]

In addition, Holmes apparently regarded Debs personally as a more serious threat to conscription than the other defendants. Debs' notoriety—as labor leader and presidential candidate—combined with his skill as a speaker, made it far more likely that his audience would be stirred to action by his speech (again, the Marc Antony analogy seems apt). Holmes also seemed to have little sympathy with the man. He described Debs to Pollock as "a noted agitator"[411] and in a subsequent letter told Pollock "I hope the President will pardon him and some other poor devils with whom I have more sympathy."[412] As a judge on the Massachusetts court[413] and on the Supreme Court[414] he had earned a pro-labor reputation, which might

---

408. *See* THE COMMON LAW, *supra* note 325, at 123.

409. Letter from Holmes to Herbert Croly (May 12, 1919) (enclosed in letter from Holmes to Laski (May 13, 1919)), *reprinted in* 1 HOLMES-LASKI LETTERS 202, 203-04 (M. Howe ed. 1953).

410. *See supra* note 43 and accompanying text.

411. Letter from Holmes to Pollock (April 5, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 7 (M. Howe ed. 1941).

412. Letter from Holmes to Pollock (April 27, 1919), *reprinted in id.* at 11.

413. *See* Vegelahn v. Gunther, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting), and Plant v. Woods, 176 Mass. 492, 505 (1900) (Holmes, J., dissenting). Speaking to Pollock on the reaction to his nomination to the Supreme Court, Holmes writes discontentedly, "they don't know mueh more than that I took the labor side in *Vegelahn v. Gunther.*" Holmes to Pollock (Feb. (Sept?) 23, 1902), *reprinted in* 1 HOLMES-POLLOCK LETTERS 106 (M. Howe ed. 1941).

414. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting), and Coppage v. Kansas, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting) are two of the cases in which

appear to indicate that he would be more likely to sympathize with Debs; the reputation, however, was based on Holmes' willingness to permit the "free struggle for life,"[415] as he termed it, and legislation that fostered labor's position. His personal conviction was that all such strife was futile and merely shifted the burdens of poverty from one poor person to another.[416]

As Holmes viewed Debs' disputed speech, it could be understood as "directly"[417] encouraging obstruction of the recruiting service. Debs praised three persons who had been convicted of aiding and abetting another in failing to register for the draft and said they were paying the penalty for "standing erect." He said "the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives."[418] His final exhortation was: "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves."[419] This telescoping of the speech makes it more suggestive than the actual oration by Debs, but it was, Holmes thought, possible for the speech to encourage listeners to obstruct the draft.

This view would be even more likely if the words were uttered for that purpose. On that point, Holmes thought that Debs' statement that "he had to be prudent and might not be able to say all that he thought"[420] provided a basis for finding that he intimated to his hearers "that they might infer that he meant more."[421] How much more could be found in his subscription to the St. Louis Program which called for public opposition to the war through "all other means within our power."[422]

Admittedly, it is difficult to imagine that a court would find the speech a clear and present danger or even a jury question today.[423] It would be misleading, however, to assume that Holmes' later dissents using the clear and present danger test signaled a revision in his views on the correctness of the result in *Debs*. Since the test was

---

Holmes was hailed for a position which coincided with the interests of labor.

415. Vegelahn v. Gunther, 167 Mass. 92, 107 (1896) (Holmes, J., dissenting).

416. *See* Plant v. Woods, 176 Mass. 492, 505 (1900).

417. 249 U.S. at 214-16.

418. *Id.* at 213.

419. *Id.* at 214.

420. *Id.* at 213.

421. *Id.*

422. *Id.* at 216.

423. *See* Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969) (emphasizing the need for incitement to imminent unlawful acts to uphold a speech-related conviction).

derived from his understanding of attempt, he included in his analysis in *Debs* the seriousness of the danger and the apprehension felt by the community as well as the proximity of the act to the proscribed harm.[424] Holmes later said, in *Abrams*, that "[p]ublishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable."[425] That is, the very same words for which Abrams was convicted in the case which elicited Holmes' great dissent would be punishable, according to that dissent, if uttered with intent to interfere with the war effort.[426]

In sum, Holmes' understanding of his own phrase was rooted in the considerations he used to define attempts. Speech that could induce unlawful acts, when engaged in for that purpose under circumstances where the danger was extreme, satisfied this "clear and present danger" test. All of the convictions in the spring of 1919 involved persons of some prominence within a relevant community,[427] challenging the war and conscription in the middle of the war with statements urging their listeners or readers to take some action[428] and jury findings (either actual[429] or assumed,[430] but based on sufficient evidence) that the language was intended to obstruct and capable of doing so. Thus Holmes reasonably believed that, applying his test to the issues presented him, the convictions in *Schenck*, *Frohwerk* and *Debs* were properly upheld.

This fact is important to keep in mind during the forthcoming examination of *Abrams*.[431] It will allow the reader to understand that the differences between the Espionage Act opinions and the leg-

---

424. *See supra* notes 345-48 and accompanying text.

425. 250 U.S. at 628 (Holmes, J., dissenting).

426. *Id.* at 627-28 (Holmes, J., dissenting).

427. Schenck and Baer were ranking officials in the Communist party, Shewalter had been a local judge, Frohwerk was a newspaper publisher, and Debs, of course, had received almost a million votes as Socialist candidate for the Presidency.

428. In *Schenck:* " 'Assert Your Rights,' " 249 U.S. at 51; in *Frohwerk:* "Who then, it is asked, will pronounce a verdict of guilty upon him if he stops reasoning and follows the first impulse of nature: self-preservation," 249 U.S. at 208 and in *Debs*: "Don't worry about the charge of treason to your masters." 249 U.S. at 214.

429. In *Debs,* Holmes emphasized that the jury made appropriate findings under a correct charge, 249 U.S. at 216, while in *Schenck* the same appears to be true, *see* 249 U.S. at 49, but the charge is not clearly attacked or set forth in Holmes' opinion.

430. *See* the discussion of *Frohwerk*, *supra* text accompanying notes 376-81.

431. *See infra* notes 432-513 and accompanying text.

endary dissent in *Abrams*, both in tone and in result, are not due to a major change in Holmes' view of the first amendment between *Debs* and *Abrams*. Instead, as the next section demonstrates, the change in result can be explained by important factual differences between the early cases and *Abrams*, and the change in tone and fervor were the result not of new thinking but rather of frustration at critics' misunderstanding of the strides made in *Schenck* and strong desire to reiterate the change.

XIII. THE *Abrams* DISSENT

> "I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."[432]

The first world war was over by the end of 1918, but the intolerance for unpopular opinions which it had stimulated did not have such a swift termination. A move was afoot among some alumni of Harvard to get rid of Dean Pound and Holmes' friend, Felix Frankfurter.[433] In September, the Boston police went on strike, a strike that was quickly crushed.[434] Harold Laski publicly criticized the conduct of the chief of police during the strike, and he soon found himself in trouble.[435] Thus, between the date of the *Debs* decision and the argument in *Abrams*, several of Holmes' friends had been subjected to critical attack and threatened with the loss of their jobs for unpopular opinions they held.

In addition to private intolerance, the government was engaging in its share of repressive measures.[436] Postmaster General Burleson acted with severity and poor judgment in banning antiwar material from the mail.[437] In May of 1919, William Hard wrote an article in

---

432. *Abrams*, 250 U.S. at 631 (Holmes, J., dissenting).

433. "I had a dear little letter from Pound . . . saying that people there want to push Frankfurter out of the school. He says nothing about himself but I have been led to fear that the push extends to Pound." Letter from Holmes to Laski (June 1, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 210 (M. Howe ed. 1953).

434. *See* letter from Holmes to Laski (October 26, 1919), *reprinted in id.* at 217.

435. "I infer that you have had trouble, I hope not serious, because of your criticism of Curtis. . . . I fear we have less freedom of speech here than they have in England." *Id.*

436. *See* Z. CHAFEE, *supra* note 10, at 97-100.

437. *See* United States *ex rel* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 417, 436 (1921) (Brandeis and Holmes, JJ., dissenting in separate opinions) (dissenting from the Court's affirmance of the Postmaster General's exclusion of the Milwaukee Leader from the mail rates for second class matter).

the *New Republic* criticizing Mr. Burleson.[438] The sentiments on free speech contained in the article tempted Holmes to write:

> I do not know enough of the details of public affairs to have opinions about Mr. Burleson's conduct of his office but the general aspects of the article so stirred my sympathies that I want to express them. As long ago as 1908 when I wrote *Harriman* v. *ICC*, 211 U.S. 407 it seemed to me that we so long had enjoyed the advantages protected by bills of rights that we had forgotten—it used sometimes to seem to me that the *New Republic* had forgotten—that they had had to be fought for and could not be kept unless we were willing to fight for them. Few can sympathize more than I do with Mr. Hard's general way of thinking on the subject.[439]

Burleson's high-handed actions in the executive branch were matched by Congress which, in May of 1919, referred to a Committee of the House the question whether to expel representative Victor Berger from the House, because he had been convicted under the Espionage Act.[440] The ease in securing such a conviction must have been evident to Holmes, for in October of 1919 the Court not only had the *Abrams* case but also had received briefs and heard argument in *Schaefer v. United States*,[441] where a few small mistranslations from German sources[442] were the basis for a substantial prison sentence.[443]

Thus, when Holmes began the October 1919 term, he was aware of the substantial current of intolerance of unpopular opinion both public and private, and this intolerance even touched the lives of his friends. It created an environment in which a strong statement on behalf of freedom of opinion was earnestly desired.

Holmes was also influenced to make such a statement by the criticism he had received after the *Debs* case. The first response he received was from Harold Laski, who indicated his respect: "[T]hough I say it with deep regret they [the *Schenck*, *Frohwerk* and *Debs* opinions] are very convincing."[444] Nevertheless, Laski was

---

438. *See* Hard, *Mr. Burleson, Espionagent*, THE NEW REPUBLIC, May 10, 1919, at 42.

439. Letter from Holmes to Herbert Croly (May 12, 1919) (enclosed with a letter from Holmes to Laski (May 13, 1919)), *reprinted in* 1 HOLMES-LASKI LETTERS 202-03. (M. Howe ed. 1953).

440. *See* Z. CHAFEE, *supra* note 10, at 247-52.

441. 251 U.S. 466 (1920).

442. *Id.* at 473.

443. *Id.* at 482.

444. Letter from Laski to Holmes (March 18, 1919), *reprinted in* 1 HOLMES-LASKI LET-

not satisfied: "[I]n the remarks you make in the *Schenck* case I am not sure that I should not have liked the line to be drawn a little tighter about executive discretion."[445] A way that the line might be drawn tighter was suggested by Learned Hand near the end of the month as he urged Holmes to accept the direct incitement test of *Masses*.[446] Soon the protests from private individuals without legal training came pouring in against the *Debs* decision in such profusion that Holmes remarked about it in letters to Laski,[447] Lewis Einstein[448] and Sir Frederick Pollock.[449]

Criticism took a more serious turn at the very end of April. A young clerk in the post office discovered a number of packages containing bombs sent to prominent people in the United States.[450] The packages had been held aside because of insufficient postage.[451] One of these packages was addressed to Justice Holmes.[452] The attempt on his life brought sympathy from Holmes' friends, but its main effect on Holmes was to make clear to him that he personally was viewed as the embodiment of repression as a result of the Espionage Act opinions he had written for the Court. His first response was a cool note in a letter to Laski: "I suppose it was the Debs incident that secured me the honor of being among those destined to receive an explosive machine, stopped in the Post Office as you may [have] seen. It shows a want of intelligence in the senders."[453] In May, he

---

TERS 191 (M. Howe ed. 1953).

445. *Id.*

446. *See supra* notes 394-403 and accompanying text.

447. "I confess, having had early experience with come-outers, to a general disbelief in them, as embodying the cock-sureness of semi-education. I might say the same of a labor union that yesterday sent me a protest against the *Debs* decision, at once cocksure and hopelessly ignorant of all about it." Letter from Holmes to Laski (April 4, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 193, 194 (M. Howe ed. 1953).

448. Just now I am receiving some singularly ignorant protests against a decision that I wrote sustaining a conviction of Debs, a labor agitator, for obstructing the recruiting service. They make me want to write a letter to ease my mind, and shoot off my mouth; but of course I keep a judieial silence.

Letter from Holmes to Einstein (April 5, 1919) *reprinted in* HOLMES-EINSTEIN LETTERS 184 (J. Peabody ed. 1964).

449. "I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service as far as the law was coneerned." Letter from Holmes to Pollock (April 5, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 7 (M. Howe ed. 1941).

450. R. MURRAY, RED SCARE 70-71 (1955).

451. *Id.* at 70.

452. *Id.* at 71.

453. Letter from Holmes to Laski (May 1, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 199 (M. Howe ed. 1953).

was responding to letters on the subject—Holmes wrote Lewis Einstein:

> As you say or intimate if the senders knew how I think and feel perhaps they wouldn't have wanted to blow me up. I have said several times it brought home to me what, if we don't read into it what is not there, seems to me the greatest saying of antiquity—the words on the Cross: "They know not what they do."[454]

In October, just as he was hearing the *Abrams* case argued, Holmes still reflected on the bombing incident—"It is one of the ironies," he wrote Pollock, "that I, who probably take the extremist view in favor of free speech, (in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it), that I should have been selected for blowing up."[455]

Holmes also reacted strongly to the more literate criticism of Ernst Freund which appeared in the *New Republic* in May of 1919.[456] Freund appeared to advocate a standard of "direct provocation."[457] The professor from Chicago wrote:

> To know what you may do and what you may not do, and how far you may go in criticism, is the first condition of political liberty; to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.[458]

He added, "Justice Holmes takes the very essentials of the entire problem for granted."[459]

Harold Laski asked Holmes if he had read Freund's piece and if he was "at all influenced by his analysis."[460] Holmes' reply was to enclose a letter he had written to Herbert Croly, the managing editor of the *New Republic*, but which he decided not to send because some of the "themes may become burning."[461] With respect to Freund's remarks on the need for a fixed line, Holmes replied

---

454. Letter from Holmes to Einstein (May 22, 1919), *reprinted in* HOLMES-EINSTEIN LETTERS 186 (J. Peabody ed. 1964).

455. Letter from Holmes to Pollock (October 26, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 27, 29 (M. Howe ed. 1941).

456. Freund, *supra* note 369.

457. *Id.* at 14.

458. *Id.*

459. *Id.*

460. Letter from Laski to Holmes (May 11, 1919), *reprinted in* 1 HOLMES-LASKI LETTERS 200, 202 (M. Howe ed. 1953).

461. Letter from Holmes to Laski (May 13, 1919), *reprinted in id.* at 202.

"Freund's objection to a jury 'guessing at motive, tendency and possible effect' is an objection to pretty much the whole body of the law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter of degree."[462] He then quoted from an earlier opinion of his: " 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, from matters of degree.' "[463] The reply is noteworthy, even if it was never sent, because it demonstrates that the criticism of his decisions in *Debs* and *Schenck* evoked a strong defensive reaction in Holmes.

Later that summer, Holmes was subjected to yet another informed critique.[464] Unlike Hand and Freund, however, Professor Chafee did not take direct issue with Holmes' legal standard.[465] He seemed to prefer the direct incitement test of Hand, but he emphasized only that the base line should be a real peril to the public safety and that Holmes' test properly applied could be satisfactory.[466] Unlike Freund, Chafee praised Holmes as a judge,[467] yet he insisted that *Debs* was wrongly decided.[468] After the article was published, Laski had Holmes to tea with Chafee. Concerning that meeting, Holmes wrote Pollock, "[i]n the few minutes talk I had with him a year ago he seemed unusually pleasant and intelligent."[469]

---

462. Letter from Holmes to Herbert Croly (May 12, 1919) (enclosed with a letter from Holmes to Laski (May 13, 1919)) *reprinted in id.* at 202-03. Holmes consistently urged that the nature of every act depends on the circumstances under which it is done. If a test of "direct provocation" or "manifest incitement" insulates from punishment any form of speech that does not literally request the hearer to engage in illegal action, speakers will be encouraged to promote criminal acts by irony and indirection. "You know I cannot tell you what to do," such a speaker might tell a crowd at a draft board, "but I can tell you that this law is evil and is used by evil men with an evil purpose." If a campaign to encourage criminal acts through indirect incitement stands a chance of success, Holmes would not find government powerless to deal with it. A mechanical rule which insulates criticism of laws regardless of the circumstances in which they are uttered violates basic principles of self-preservation. A standard which takes context into account is likely to be "a matter of degree."

Freund argued that Debs "must have known . . . his power to create actual obstruction to a compulsory draft was practically nil, and he could hardly have intended what he could not hope to achieve." Freund, *supra* note 369, at 14. Holmes did not seem quite as sanguine abeut Debs. *See supra* text accompanying notes 409-22.

463. Letter from Holmes to Croly (May 12, 1919) (enclosed with a letter from Holmes to Laski (May 13, 1919)), *reprinted in* 1 HOLMES-LASKI LETTERS 202, 203 (quoting Nash v. U.S., 229 U.S. 373, 377 (1913)).

464. Chafee, *supra* note 369.

465. *See id.* at 967-69.

466. *See id.* at 968-69.

467. *Id.* at 955.

468. *Id.* at 967-69.

469. Letter from Holmes to Pollock (June 21, 1920), *reprinted in* 2 HOLMES-POLLOCK

Perhaps one of the intclligent aspects of Chafee's connection with Holmes was a reiteration of the final phrases of his article—"it is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time."[470]

Even in April of 1919, Holmes referred to freedom of speech in *Schenck* as being "dealt with somewhat summarily."[471] Under the pressure of criticism from people he felt misunderstood him and encouragement to explain himself, Holmes was ready and perhaps even anxious to more fully state his beliefs on freedom of speech. The opportunity came in late October of 1919 when a new case under the Espionage Act of 1918 reached the Court. As John Lord O'Brien has written:

> In the spring of 1918 the Attorney General sought minor amendments of the Espionage Law, chiefly to protect more adequately Liberty Loan solicitation against interference by disaffected persons. As a result and without his approval Congress enacted the so-called Second Espionage Act, which was of such a sweeping character as to be a distinct threat to civil Liberty.[472]

The new statute added attempts to the prohibition against obstructing the recruiting service and made unlawful the saying or doing anything with intent to obstruct the sale of United States bonds, except by way of bona fide and not disloyal advice.[473] It made it a crime to utter, print, write or publish any disloyal, profane, scurrilous, or abusive language or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States; or the Constitution; or the flag; or the uniform of the Army or Navy; or any language intended to incite resistance to the United States or promote the cause of its enemies.[474] The statute

---

LETTERS 45. The casual references to "a few minutes talk" make it unlikely that the conversation resulted in a sudden conversion of Holmes to a significantly different point of view, despite the intimations of Professor Ragan in Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24, 43 (1971).

470. Chafee, *supra* note 369, at 968.

471. "There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case—*Schenck v. U.S.*. . . ." Letter from Holmes to Pollock (April 5, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 7 (M. Howe ed. 1941) (editor's footnote omitted).

472. O'Brian, *Changing Aspects of Freedom: The Government and Civil Liberties: World War I and After, reprinted in* JOHN RANDOLPH TUCKER LECTURES 153 (1952).

473. *See* 40 Stat. 553 (1918). The text of this statute is set out in note 199.

474. *Id.*

also forbade words or acts supporting or favoring the cause of any country at war with us, or opposing the cause of the United States therein.[475] Advocating, teaching, defending or suggesting any of the above was a criminal offense.[476] In short, any criticism of the United States appeared to be made a criminal offense.

The unique character of the Espionage Act of 1918 in condemning contempt for the form of government was the most serious attack on criticism of government and democratic theory in the history of the nation. Not even the majority in *Abrams* was willing to state that such provisions were constitutional.[477] They were repealed in 1921 along with the entire 1918 Act.[478] Yet Abrams was convicted, among other things, of violating that section of the Act.[479]

The Government, in arguing *Abrams*, pressed the constitutionality of the Act of 1918 based in part on the propriety of the Alien and Sedition Acts.[480] The government had made the same argument in the reply brief in *Debs*, but in the context of attempting to show that the petitioner's theory of the first amendment was wrong. Here, the Alien and Sedition Acts were used as the basis for a theory of the first amendment in which it might be legitimate to attempt to point out flaws in the government but it would be impermissible to attempt to bring the government into contempt.

The sacredness of any existing set of ideas had never appealed to the skeptical Holmes.[481] Once he was convinced that the first amendment to the Constitution was designed to overthrow Blackstone and install a limit to the power of government to punish opinions, the argument that government could not suppress dissenting views—an argument he had heard in various philosophical forms throughout his life—had a powerful appeal.

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for

475. *Id.*

476. *Id.*

477. 250 U.S. at 624. *See* text accompanying note 489.

478. 41 Stat. 1360 (1921).

479. 250 U.S. at 616-17.

480. *See* Brief for the United States at 17-25, *Abrams*.

481. "I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd wants." Letter from Holmes to Pollock (April 23, 1910), *reprinted in* 1 HOLMES-POLLOCK LETTERS 163 (M. Howe ed. 1941).

the Sedition Act of 1798, by repaying fines that it imposed.[482]

Abrams and his fellows were also tried for violating the section of the statute which forbade urging any curtailment of production of any things necessary to the prosecution of the war with intent to hinder its prosccution.[483] The basis for these charges was the distribution of circulars which attacked the President's action in sending troops to the Soviet Union and repeated "Awake! Awake! you Workers of the World!"[484] They called the United States capitalistic and condemned capitalism. A second leaflet written in Yiddish complained that the United States was attempting to destroy not only the Germans, but also the Russian revolution. These Russian aliens protested, "Workers in the ammunition factories, you are producing bullets, bayonnets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."[485] It continued "Workers, our reply to the barbarian intervention has to be a general strike!"[486] Finally, a writing which was not distributed stated "in order to save the Russian revolution, we must keep the armies of the allied countries busy at home."[487]

The majority opinion upheld the convictions, finding it unnecessary to consider the validity of the two counts for disloyal utterances about the form of government of the United States and for using language calculated to bring the form of government into contempt, because conviction on the other two counts was appropriate.[488]

> [T]he manifest purpose of such a publication was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.[489]

The majority emphasized the danger to be feared from these articles by noting they were "circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind

---

482. 250 U.S. at 630 (Holmes, J., dissenting).
483. 250 U.S. at 617.
484. 250 U.S. at 620.
485. *Id.* at 621.
486. *Id.*
487. *Id.* at 623.
488. *Id.* at 624.
489. *Id.* at 622.

were at the time being manufactured for transportation overseas."[490] Thus, the Court concluded,

> the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count.[491]

The facts of *Abrams*, however, provide a stark contrast to the cases that had been decided in the spring term. The defendants were little known aliens who had come to this country from Russia. The material was not distributed to large crowds or newspaper subscribers or sent directly to draftees but "[t]he circulars were distributed some by throwing them from a window of a building where one of the defendants was employed and others secretly in New York City."[492] Where Debs and Frohwerk addressed significant sympathetic groups and Schenck addressed his message to persons who might respond from self-interest, Abrams and his codefendants scattered to the winds a message, in a foreign language, that no one had a personal interest in accepting. Thus, despite the majority's strong emphasis on the supposed great danger caused by the *Abrams* materials, *Abrams* presents a far weaker case for upholding this conviction than any of the previous cases.

The majority of the Court, in arguably exaggerating the danger, may have been influenced by the rash of strikes that had swept the country during the year. These began with the Seattle general strike in January of 1919[493] and included the police strike in September which helped make Coolidge a household word[494] and got Laski in trouble.[495] Further, the American Federation of Labor (A.F.L.) inaugurated a strike in the steel industry just as the briefs in the *Abrams* case were submitted to the Court.[496] Concern over crippling strikes and particularly over the violent tendencies of some radicals, as demonstrated by the bombing incidents over the summer, may

490. *Id.*
491. *Id.* at 624.
492. *Id.* at 618.
493. *See* R. MURRAY, *supra* note 450, at 59.
494. *See generally id.* at 122-34 (discussing Boston police strike).
495. *See supra* note 435 and accompanying text.
496. *See* R. MURRAY, *supra* note 450, at 140.

have made the Court majority overly concerned by Abrams' message and less willing to heed counterarguments.

Holmes' perspective was somewhat different. He had long held the view that self-interest was the basic motivating factor in man.[497] Even if he had not, he surely would have been willing to listen to Brandeis explain that men strike to have a say in their working conditions and that those conditions were the nucleus of every strike that had occurred in the country.[498] The American worker has never responded to general idealism but rather asked, in the words of Samuel Gompers, for "More!"[499] Thus, Holmes would have doubted that the workers exposed to Abrams' leaflets would have been moved to strike for purely idealistic reasons.

In addition, despite what he had felt was the legal propriety of upholding the earlier convictions, Holmes had been upset by the prosecutions in the earlier cases and stated to his friends that the sentences there should be sharply reduced and commuted by the President.[500] The overreaction of the judges and juries that he perceived in those cases, though, was mild compared to the fervor exhibited against the *Abrams* defendants in sentencing them to a twenty year imprisonment. Holmes wrote:

> Even if I am technically wrong, and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow.[501]

---

497. "[A]t the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preferenee." THE COMMON LAW, *supra* note 325, at 44.

498. Before coming to the Court, Brandeis had been deeply involved in establishing dispute resolution mechanisms in the garment industry in New York. In preparing the briefs in favor of a variety of worker protective legislation, Brandeis also became acquainted with the conditions of factory life. *See generally* A. MASON, BRANDEIS: A FREE MAN'S LIFE 291-315 (1946) (discussing Brandeis' experience with the New York garment industry). The summer before the *Abrams* case, Brandeis had urged Holmes to study the textile industry to get a grasp on facts. *See* Letter from Holmes to Laski (May 18, 1919) *reprinted in* 1 HOLMES-LASKI LETTERS 204-05 (M. Howe ed. 1953).

499. *See* I. BERNSTEIN, THE LEAN YEARS 91 (1960).

500. "I . . . have said whenever it was proper that I thought the President should pardon a lot of poor devils that it was my misfortune to have to write opinions condemning." Letter from Holmes to Pollock (June 17, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 14, 15 (M. Howe ed. 1941).

501. 250 U.S. at 629 (Holmes, J., dissenting).

Despite the anonymity of the defendants and the unlikelihood of succeeding in the call for a general strike, Holmes would have had difficulty taking the issue of proximity and degree away from the jury if those were the only factors being considered.[502] *Abrams* added one more complication. While all the previous cases involved individuals opposed to the war with Germany, *Abrams* did not. "It is absurd to call us pro-German," one of the pamphlets stated. "We hate and despise German militarism more than do you hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House."[503] The essence of the defendants' position was that President Wilson should remove or be forced to remove troops from Russia. Holmes may even have been familiar with this basic argument from his reading of the *New Republic*, which had carried several articles arguing that the United States should not be concerned with the Soviet-German agreement removing Russia from the war and that the United States should avoid interference with Russia.[504] This clear lack of intent to bring about the proscribed conduct, along with the remote possibility of harm from the speech, added to the frustration he felt at critics' lack of understanding to drive Holmes to dissent, and to dissent vigorously, from the majority's upholding of the conviction in *Abrams*.

The defendant's purpose in halting action against the Soviet Union formed the core of Holmes' dissent. He began on statutory grounds. The statute required the urging of curtailment to be done "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."[505] Holmes pointed out that a patriot might urge reduction in airplanes or cannons for the war because they were being supplied in a wasteful manner.[506] The patriot would intend to curtail production without desiring to injure the war

---

502. "I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable." *Id.* at 628 (Holmes, J., dissenting). *See also* Schaefer v. United States, 251 U.S. 466, 483 (1920) (Brandeis, J., dissenting, joined by Holmes, J.)

> The question whether in a particular instance the words spoken or written fall within the permissable curtailment of free speech is, under the rule enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one.

Id. at 483. See *supra* notes 407-12 and accompanying text for Holmes' discussion in *Debs* of deference to the jury.

503. 250 U.S. at 625 (Holmes, J., dissenting).

504. *See* articles at 15 NEW REPUBLIC 130, 302, 328; 16 NEW REPUBLIC 30, 180, 269, 301 (1918).

505. 40 Stat. 553 (1918), *quoted in* 250 U.S. 626 (Holmes, J., dissenting).

506. 250 U.S. at 627 (Holmes, J., dissenting).

effort. If intent were construed as knowledge that the consequences said to be intended will ensue, the patriot would have the intent to curtail production and to hinder the United States in the prosecution of the war in the sense that he would recognize that curtailment would limit the available munitions for the fighting troops.[507] Thus, Holmes argued that purpose was the critical element under the statute.[508] Curtailment urged because the speaker does not want the United States to fight Germany effectively is reachable, but curtailment urged for other reasons is not.

The statutory interpretation, however, was subordinate to Holmes' position that such a construction was part of the requirements of the first amendment. "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[509] In determining the extent of that danger

> nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt.[510]

In reviewing his previous discussions of attempt, Holmes stated that

> [a]n actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift & Co. v. United States*, 196 U.S. 375, 396. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked.[511]

---

507. *Id.*

508. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specifie act, although there may be some deeper motive behind.

Id. at 627 (Holmes, J., dissenting).

509. *Id.* at 628.

510. *Id.*

511. *Id.*

Violation of the law need not be the "proximate motive" of speech which in the circumstances creates a present danger of an immediate evil with which Congress can deal. Unless such a danger exists, however, speech cannot be punished if the speaker does not have the aim of creating the prohibited effect. The aim may be demonstrated by the words themselves, as in the case of direct solicitation of a criminal act, but the mere possibility that the speech might encourage the commission of a crime is not sufficient to show the necessary "intent." According to Holmes, it was transparently clear that the forbidden purpose did not exist in *Abrams*:

> I do not see how anyone can find the intent required by the statute in any of the defendants' words. . . . To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.[512]

The focus of Holmes' dissent was not the subjective purpose of the defendants. Holmes' discussion of attempt centered on the need for an unlawful purpose to convert acts not in themselves criminal into criminal attempt. In a note to Pollock, he added that he should have included further emphasis that even if the improper purpose existed, the act itself must further that unlawful purpose:

> The general principles laid down by me I think correct, and the particular conclusion I adhere to because even if there were evidence of a conspiracy to obstruct, etc. the overt act laid must be an act done to effect the object of the conspiracy and it seems to me plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion. But that is ancient history now.[513]

XIV. CONCLUSION

The *Abrams* dissent, then, was a product of many factors. The insignificance of the particular defendants, the inherent incredibility of their message being acted upon, and the plain purpose to stop intervention in Russia rather than to oppose the war in Germany made their case an appropriate one for a judicial finding that no clear and present danger existed. And Holmes, as author of the ear-

512. *Id.* at 628-29.

513. Letter from Holmes to Pollock (December 14, 1919), *reprinted in* 2 HOLMES-POLLOCK LETTERS 32 (M. Howe ed. 1941).

lier opinions, felt that he had to make this clear: "As the *Debs case* and two others were assigned to me, in which the convictions were upheld, I thought it proper to state what I thought the limits of the doctrine."[514]

The passion and eloquence of the dissent in *Abrams*, however, had its roots in additional factors. The blind intolerance of opinion was visibly disturbing the country even after the war was over. The Espionage Act of 1918 had shown how the government feeds on success to become ever more arrogant and repressive. And the criticism, even the bomb threat which Holmes had received as a result of the *Debs* case, converged to show Holmes that his position in the earlier cases had been grossly misunderstood. The role of Brandeis, both in his sensitivity to the facts of a case where the harm alleged was the potential for labor unrest, and his willingness to join Holmes so that the Justice was not alone in facing the rest of the Court, which sought unanimity in the face of feared threats to society,[515] may also have been important.

The product of these many forces has had an impact far beyond the specific results of the case, perhaps beyond the limits of the doctrine for which Holmes and Brandeis contended. They were willing to leave the jury with rather broad scope to be sure that the important interests of the government were protected.[516] But no judge or jury in the future would be able to make a determination free from concern for the vitality of free expression after *Abrams*:

> Persecution for the expression of opinions seems to me per-

514. *Id.* (footnote omitted). *See also* Letter from Felix Frankfurter to Harlan Fiske Stone (May 28, 1940), *quoted in* Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion,* THE 1977 SUPREME COURT REVIEW 257, 269 (1978): "I had so many talks with Holmes about his espionage opinions and he always recognized that he had a right to take into account the things that he did take into account when he wrote Debs and the others and the different emphasis he gave the matter in the Abrams case." *Id.* at 269.

515. See the suggestion in the note to Brandeis with respect to Holmes' unpublished opinion in *Pierce* that he would or might "shut up" if all were against him. (Brandeis Papers —Harvard Law School Manuscript Collection.) The other members of the Court apparently called on him at home specially to request him to suppress the *Abrams* dissent. *See* Cover, *The Left, the Right and the First Amendment: 1918-1928* 40 MD. L. REV. 372-73 (1981).

516. *See supra* note 502. Brandeis' eloquent strictures on free speech in Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring) were contained in a concurrence to the affirmance of her conviction. He pointed out that Anita Whitney failed to claim that the statute was void because there was no clear and present danger of serious evil, and thus did not raise the issue for decision by judge or jury. "On the other hand," Brandeis wrote, "there was evidence on which the court or jury might have found that such danger existed. . . . Under these circumstances the judgment of the state court cannot bo disturbed." *Id.* at 379 (Brandeis, J., concurring).

> fectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the basic test of truth is the power of thought to get it—self accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that 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.[517]

In this passage, the philosophy of Holmes' youth finally merged with "the law." Whatever doubts may have existed over the ultimate good of free speech, once Holmes accepted the premise that the first amendment promises more than the absence of prior restraint, the values that Mill articulated and Learned Hand reiterated could be used to buttress judicial protection. Holmes' claim to be a champion of free speech in the letters he wrote in the summer of 1919 indicate that he had adopted this position when he decided *Schenck*, but it was in *Abrams* that he first effectively voiced his rationale for protecting speech. His later opinions showed a deepening of his conviction that the Constitution protected dissent. He hinted at the further rationale that open discussion is the basis of democratic theory when he used the clear and present danger standard as a basis to test state actions under the fourteenth amendment.[518] Nevertheless, it was the

517. 250 U.S. at 630 (Holmes, J., dissenting).

518. "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes J., dissenting). *See also* A. MEIKLEJON, POLITICAL FREEDOM 41-43 (1960).

early Espionage Act cases in the spring of 1919 that marked the emergence of a new perception of the guarantee of freedom of speech and of the press in the career of Mr. Justice Holmes.