

Copyright Warning and Restrictions

Title 17, United States Code of the copyright law of the United States governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions, the New Jersey Institute of Technology (NJIT), Robert W. Van Houten Library is authorized to furnish a photocopy or other reproduction on the condition that either is not to be "*used for any purpose other than private study, scholarship, or research.*" If a person makes a request for or later uses a photocopy or reproduction for purposes in excess of "fair use", that user may be liable for copyright infringement.

Fair Use Guidelines

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Perlman
HSS 491

BY THE SAME AUTHOR

The Liberal College
Freedom and the College
Philosophy
The Experimental College
What Does America Mean?
Education Between Two Worlds

POLITICAL FREEDOM

THE CONSTITUTIONAL POWERS OF THE PEOPLE

BY ALEXANDER MEIKLEJOHN

With a Foreword by Malcolm Pitman Sharp
SCHOOL OF LAW, UNIVERSITY OF CHICAGO



A GALAXY BOOK

NEW YORK OXFORD UNIVERSITY PRESS 1965

THE PENNSYLVANIA STATE UNIVERSITY
COMMONWEALTH CAMPUS LIBRARIES
BEHREND

liefs seemed to those in authority dangerous. That procedure Mr. Brandeis, if I understand him, now flatly repudiates. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." The logical integrity, the social passion of Mr. Brandeis, could not tolerate the essential incoherence, the rabid intolerance, of the "clear and present danger" principle, which would give a hearing to one side while denying it to the other. His lucid and painstaking mind fought its way through the self-contradictions of that doctrine as a theory of self-government. And as he did so, he brought nearer the day when we Americans can again hold up our heads and reaffirm our loyalty to the fundamental principles of the Constitution, can say without equivocation, with confidence that the words mean what they say, "Congress shall make no law abridging the freedom of speech."

CHAPTER III

AMERICAN INDIVIDUALISM AND THE CONSTITUTION

IN THE first and second lectures of this series we have argued that the effect of the "clear and present danger" theory of the freedom of speech, of late adopted by the Supreme Court, has been to merge the First Amendment into the Fifth. Under that interpretation, the freedom in question has become alienable rather than unalienable, subject to restriction rather than safe from restriction, a matter of circumstances rather than a matter of principle, relative rather than absolute. Public discussion has thus been reduced to the same legal status as private discussion. Individual self-seeking has been given the same constitutional rating as national provision for the general welfare. The rights of men as makers of laws are now indistinguishable from their rights as subjects of law. What men possess has the same guarantee of freedom as what they think.

Now, as already stated, the primary interest of these lectures is not in the legal problems of freedom but in the significance of those problems and their solutions for the education of American citizens in the understanding of their own political institutions. The Supreme Court, we have said, is and must be one of our most effective teachers. It is, in the last resort, an accredited interpreter to us of our own intentions. If, then, as Plato has told us, the best wisdom of men can be summed up in the phrase, "Know thyself," it is to our highest court that we must turn when we seek for wisdom concerning our relations to one another and to

the government which, under the Constitution, we have established and now maintain. In this last lecture, then, we shall be trying to discover the philosophy, the view of human institutions, the theory of human destiny, out of which the "clear and present danger" principle springs. We shall be asking, also, whether or not that philosophy is valid. Does it, as I believe, cut away rather than sustain the fundamental roots of our constitutional procedure? That philosophy is, today, largely dominant over our popular thinking. It is possible, therefore, that the Supreme Court, in its recent dealings with freedom of speech, has been confirming us in our errors rather than leading us out of them. We must now try to see whether or not that suggestion is justified.

As we thus proceed with our study of the First and Fifth amendments, we must stop for a moment to take note of the interpretation which the Supreme Court has given to the Fourteenth Amendment. That interpretation throws much light upon our assertion that the two earlier provisions for the freedom of speech have now been made one.

As everyone knows, the First and Fifth amendments deal only with legislation by the federal Congress. After the Civil War, however, it was decided to lay down similar restrictions upon legislation by the several states. To this end, the Fourteenth Amendment was adopted. That amendment, therefore, in defined ways, guards the freedom of speech from "state" interference. Now, in that situation, the Supreme Court has rightly assumed that within the text of the Fourteenth Amendment, words will be found which will do in the state field what the First and Fifth together are doing in the federal field. What, then, are those words?

The clause which seems intended to carry the double burden reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is not hard, in that statement, to single out the clause which is the proper mate of the Fifth Amendment. As a matter of fact, the relevant words are directly copied from the one to the other. The statement, "nor shall any State deprive any person of life, liberty, or property without due process of law," is obviously intended to put upon state action the same restriction which the same words of the Fifth Amendment put upon federal action. In both cases, speech as a private possession, correlative with life and property, is protected from improper restrictions.

But which words of the Fourteenth Amendment reproduce, in their own field, the intention of the First Amendment? What statement corresponds to the dictum, "Congress shall make no law . . . abridging the freedom of speech"? To the nonlegal mind it would seem clear, as Mr. Brandeis once suggested, that the clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," was intended to do that work. The use of the term "abridge" rather than "deprive" suggests the connection. Then, too, the freedom of speech has traditionally been regarded by us as one of our "privileges or immunities." And still again, the clause in question seems suited to match the First Amendment because it speaks, rightly or wrongly, with the same absoluteness. Its temper is not the relative mood of due process but the unqualified mood of absolute prohibition. Unfortunately, the clause in question protects "citizens" rather than "persons," and, hence, resident aliens are not provided for. And yet that difficulty is more apparent than real. The essential point is not that the alien has a right to speak but that we citizens have a right to hear him. The freedom in question is ours.

But, strange as it may seem, the Supreme Court has decided otherwise. With some hesitation and uncertainty, it has thrust aside the "privileges and immunities" clause of the Fourteenth Amendment and has chosen, in the state field, to protect both the freedom of speech of the First Amendment and that of the Fifth, under the due process clause which is taken directly from

the latter. That decision clearly reveals the point of view which the court had already adopted in dealing with federal legislation. The First Amendment had been swallowed up by the Fifth. The freedom of public discussion is, therefore, no longer safe from abridgment. It is safe only from *undue* abridgment. By judicial fiat, the Constitution of the United States has been radically amended.

1

As we now seek to discover and criticize the ideas, the philosophy, which underlie the adoption of the "clear and present danger" principle, we must, of course, deal primarily with the opinions and other writings of Mr. Holmes himself. His position has, however, been given by Professor Zechariah Chafee, Jr., an explanation and elucidation which are exceedingly useful for our purpose. Mr. Chafee does not always agree with the reasonings or the conclusions of Mr. Holmes. If he follows, he does so independently. But he is, on the whole, a sympathetic interpreter. In his *Free Speech in the United States*, he develops a sustained and beautifully organized argument. And his rendering of the "clear and present danger" principle is much more explicit and systematic than that given by the inventor of the phrase. We shall be better able to understand Mr. Holmes if we first follow Mr. Chafee's argument along the two different lines which it takes.

"The First Amendment," Mr. Chafee tells us, "protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course but carry it out in the wisest way."¹⁰

These words reveal, more sharply than anything said by Mr. Holmes, the legal meaning of the "clear and present danger"

¹⁰ Chafee, *op. cit.*, p. 33.

thinking. Mr. Chafee separates, as we have done, the private interest in speech from the public interest in speech. But he assigns to them both the same constitutional guarantee of freedom. He places them both under the protection of the First Amendment. But the effect of that decision is identical with that which puts them both within the scope of the Fifth Amendment. There can be no doubt that a private interest in speech, as such, must be under legislative control. And "the need of many men to express their opinions" is no exception to that rule. If, then, Mr. Chafee is right, a freedom of speech protected by the First Amendment may be abridged. And from this it follows that, so far as the First Amendment is concerned, the freedom of speech in the public interest may also be abridged. By its association with private speech under a common principle, public speech is reduced to the level of "proximity and degree." The camel, once admitted to the tent, knocks it down. The right of the citizens of the United States to know what they are voting about, by an unholy union with a private desire for private satisfaction, is robbed of its virtue. The constitutional defences of public discussion have been broken through.

But as against this position taken by Mr. Chafee, it must be urged again that the absoluteness of the First Amendment rests upon the fact that it is not double-minded in reference. It is single-minded. It has no concern about the "needs of many men to express their opinions." It provides, not for many men, but for all men. The Fifth Amendment, by contrast, gives assurance that a private need to speak will get the impartial consideration to which it is entitled. But the First Amendment has other work to do. It is protecting the common needs of all the members of the body politic. It cares for the public need. And since that wider interest includes all the narrower ones insofar as they can be reconciled, it is prior to them all. The public discussion of it, therefore, has a constitutional status which no pursuit of an individual purpose can ever claim. It stands alone, as the cornerstone of the structure of self-government. If that uniqueness were

taken away, government by consent of the governed would have perished from the earth.

But Mr. Chafee has a second line of argument by which the "clear and present danger" principle is clarified and defended. "The true boundary line of the First Amendment," he says, "can be fixed only when Congress and the Courts realize that the principle on which speech is classified as lawful and unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected."¹¹

That statement reveals more clearly than any other I have seen the fighting issue with respect to the Holmesian interpretation of the freedom of speech. Mr. Chafee is here puzzling, as were Mr. Holmes and Mr. Brandeis, in their earlier opinions, about action appropriate to an "emergency." But he seems to me to take the wrong road. The interest in the public safety and the interest in the search for truth are, Mr. Chafee says, two distinct interests. And they may be so balanced against each other, he says, that on occasion we must choose between them. Is that the relation between public discussion and the public welfare as it is conceived by the Constitution? I do not think so. And I can find nothing in the Constitution which justifies the assertion. Where, in that document, are we told of the balancing of which Mr. Chafee speaks? In what words is it said that if the search for truth imperils the public safety, that search shall be checked, its freedom may be abridged? There are no such words. And, more than that, the logic of the plan of self-government, as defined by the Constitution, decisively rejects the "balancing" theory which Mr. Chafee advances.

In reaching his conclusion at this point Mr. Chafee is, I am

¹¹ *Ibid.*, p. 35.

sure, misled by his inclusion of an individual interest within the scope of the First Amendment. That private interest may, of course, be "balanced" against the public safety. The felt need of an individual to speak on a given occasion may be contrary to the common good. And, in that case, the private need, under proper safeguards, must give way. But the First Amendment, as noted in our first lecture, is not saying that any man may talk whenever and wherever he chooses. It is not dealing with that private issue. It is saying that, as interests, the integrity of public discussion and the care for the public safety are identical. We Americans, in choosing our form of government, have made, at this point, a momentous decision. We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient. The conviction recorded by that decision is not a sentimental vagary about the "natural rights" of individuals. It is a reasoned and sober judgment as to the best available method of guarding the public safety. We, the People, as we plan for the general welfare, do not choose to be "protected" from the "search for truth." On the contrary, we have adopted it as our "way of life," our method of doing the work of governing for which, as citizens, we are responsible. Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.

In his study, *Free Speech in the United States*, Mr. Chafee gives abundant evidence in support of this criticism of his position. The suppression of freedom of speech, he finds, has been throughout our history a disastrous threat to the public safety. As he sums up his results, he takes as a kind of motto the words of John Stuart Mill: "A State which dwarfs its men in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished."¹² Mr. Chafee tells the story, as he sees it, of the futility and disaster which came upon the efforts of President Wilson in World War I as he was driven, by the threat of clear and present dangers, into the suppressions of the Espionage Act.

President Wilson's tragic failure, according to Mr. Chafee, was his blindness to the imperative need of public information and public discussion bearing on the issues of war and peace. He felt bound to prevent imminent substantive evils which might arise from that discussion. In the attempt to do so, nearly two thousand persons, Mr. Chafee tells us, were prosecuted. The fruits of those prosecutions he sums up as follows: ". . . tens of thousands among those 'forward-looking men and women' to whom President Wilson had appealed in earlier years were bewildered and depressed and silenced by the negation of freedom in the twenty-year sentences requested by his legal subordinates from complacent judges. So we had plenty of patriotism and very little criticism, except of the slowness of ammunition production. Wrong courses were followed like the dispatch of troops to Archangel in 1918, which fatally alienated Russia from Wilson's aims for a peaceful Europe. Harmful facts like the secret treaties were concealed while they could have been cured, only to bob up later and wreck everything. What was equally disastrous, right positions, like our support of the League of Nations before the armistice, were taken unthinkingly merely because the President favored them; then they collapsed as soon as the excitement was over, because they had no depth and had never been hardened

¹² *Ibid.*, p. 564.

by the hammer-blows of open discussion. And so, when we attained military victory, we did not know what to do with it. No well-informed public opinion existed to carry through Wilson's war aims for a new world order to render impossible the recurrence of disaster."¹³

As he writes those words, Mr. Chafee seems to me to have changed sides on his own fighting issue. He is not now judging between the interest in the search for truth and the interest in the public safety, balancing one of these against the other. That is what he accuses President Wilson of doing. On the contrary, he is shrewdly and passionately declaring that these two public interests are, in intention and in practice, identical. His complaint against President Wilson is not merely that the president curbed the search for truth. It is that, by doing so, he had made inevitable "the recurrence of disaster," had proceeded to "wreck everything." And that is the final argument upon which the absoluteness of the First Amendment rests. It does not balance intellectual freedom against public safety. On the contrary, its great declaration is that intellectual freedom is the necessary bulwark of the public safety. That declaration admits of no exceptions. If, by suppression, we attempt to avoid lesser evils, we create greater evils. We buy temporary and partial advantage at the cost of permanent and dreadful disaster. That disaster is the breakdown of self-government. Free men need the truth as they need nothing else. In the last resort, it is only the search for and the dissemination of truth that can keep our country safe.

As seen in philosophical terms, the defect in Mr. Chafee's argument becomes clear. That argument is dangerously hostile to the purposes of the Constitution because it implies a theory of the nature and function of intelligence which destroys the belief that men can govern themselves. It undermines the conviction that a man or a society can, by taking thought, guide its own actions. When men decide to be self-governed, to take control of their behavior, the search for truth is not merely one of

¹³ *Ibid.*, pp. 561-562.

a number of interests which may be "balanced," on equal terms, against one another. In that enterprise, the attempt to know and to understand has a unique status, a unique authority, to which all other activities are subordinated. It tells them what to do and what not to do. It judges them. It approves and condemns their claims. It organizes them into inclusive and exclusive plans of action. It has, therefore, an authority over them all which is wholly incongruous with the notion that one of them, or all of them together, might be balanced against it. One might as well speak of the judge in a courtroom as balanced against the defendant. Political self-government comes into being only insofar as the common judgment, the available intelligence, of the community takes control over all interests, only insofar as its authority over them is recognized and is effective.

And it is that authority of these truth-seeking activities which the First Amendment recognizes as uniquely significant when it says that the freedom of public discussion shall never be abridged. It is the failure to recognize the uniqueness of that authority which has led the Supreme Court to break down the difference between the First Amendment and the Fifth. That authority is sadly misconceived or ignored when we bring under the same constitutional protection both our possessions and our wisdom in the use of those possessions. Under the Bill of Rights it is "we" who "govern" our possessions. It is "we" and not "they" that must be free. If we break down that basic distinction we have lost sight of the responsibilities and the dignity of a "citizen." We have failed to see the role which public intelligence plays in the life of a democracy. We have made impossible the understanding and the teaching of government by consent of the governed.

2

Our argument now turns to Mr. Holmes himself, the leading hero, or villain, of the plot. And, first of all, we must pay tribute to his leadership in the defense of the freedom of speech

for half a century. He was a gay and gallant gentleman. No man of his time so captured and excited the spirit of young fighters for Civil Liberties as did he. More effectively than any of his associates he called upon his fellow citizens, young and old, to criticize their prejudices, to dig deep in search for the meaning of their political institutions. The Magnificent Yankee was one of the very great teachers of political freedom.

And yet the thinking of Mr. Holmes about the First Amendment has no such excellence. Without giving the slightest justification in fact or in principle, he thrust into the interpretation of that formula the blank assertion that certain kinds of speech "will not be endured." He declared that if "clear and present danger" is involved, the suppression of speech may be, on that ground, justified. Those assertions were not supported by constitutional reasons. What then, is, for him, the source of these beliefs?

As we seek acquaintance with the mind of Mr. Holmes, we must remember that he brought to the interpretation of the Constitution the results of an eager and lifelong preoccupation with the problems of philosophy. He loved to read, to reflect, to debate with his friends, about men and the universe. His exploring mind searched for those deeper springs of belief and preference and action from which have come the rushing currents of the Constitution. He studied thinking and its uses in the struggle for political freedom. And his opinions on constitutional questions give record of the conclusions which he reached by means of those studies. We cannot, therefore, validly accept or reject his interpretations of our legal customs, unless we meet him on this, his own, ground. We, too, must philosophize. With him we must go down as deep as we can to examine the moral and intellectual foundations of a self-governing society.

The philosophy of Mr. Holmes was, we shall find, one of excessive individualism. In it there is to be found a strange mingling of the new Darwinism of his day, which had not yet found its meaning, with an old and outworn Puritanism which had lost

its ancient virtue. And to these two factors, the early experiences of Mr. Holmes in the Civil War had added the martial spirit of the reminiscent and even sentimental soldier. With these divisive influences at the back of his mind, Mr. Holmes sees a human society as a multitude of individuals, each struggling for his own existence, each living his own life, each saving his own soul, if he has a soul to save, in the social forms of a competitive independence. Always, therefore, he tends to interpret the constitutional cooperation of one hundred and more millions of Americans, together with the past and future generations who belong to the same community, as if they had no fundamental community of purpose at all. The theory of strife he can understand—but not the theory of cooperation. A nation tends to be, for his mind, a huge collocation of externally related human atoms.

It is largely because of the effectiveness of his expression of this individualism that Mr. Holmes stands out as one of the most representative men of his time and country. He differs from his fellow Americans, not in his beliefs, but in the clarity and fearlessness with which he expresses those beliefs. His mind is too honest to evade an issue, too incisive to overlook it. He has an unusual power for devising sharp and challenging phrases. He can say to us what we ourselves would say if we were not too busy to examine our own ideas, too prudent and worldly-wise to risk the danger of discovering what those ideas mean. For these reasons he has, at the present crisis in our history, a peculiar significance for his fellow countrymen. In him we can see ourselves, as it were, under high illumination. And if, as seems obvious, the time has come when leadership in the world has brought to us responsibility for understanding what men are, and where they are going, and why, there can be no doubt that the opinions of Mr. Holmes about self-government provide materials for study on which the mind of every loyal American should be busily at work. That assertion is even more true when we assume Mr.

Holmes to be wrong than it is when and where we assume him to be right.

As a student of philosophy, Mr. Holmes was, of course, deeply interested in the relation between the machinery of the law and the moral purpose of justice. His reflections upon that relation, though partial, were keen and incisive. With the zest of a good craftsman, he was, in legal theory, a mechanist. The activities of legislatures and courts he sees, from this point of view, simply as a play of forces which are in conflict. And he delights in the technical game of the manipulation of those forces. He follows the ups and downs of the contests of the law with lively interest and, at times, it must be said, with ironical glee. Human living is, he tells us, "a roar of bargain and battle." And though, as a dispassionate spectator, he is convinced that there is little, if anything, to be gained by the fighting except the fun of the fighting itself, Mr. Holmes, as a good soldier, plunges gloriously into the conflict.

That Mr. Holmes is a mechanist in legal theory is shown by his fascinating description of "The Path of the Law," in a speech given at the Boston University School of Law in 1897. "If you want to know the law and nothing else," he said, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."¹⁴ And again, "But, as I shall try to show, a legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that by judgment of the court—and so of a legal right."¹⁵ And still again, "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be

¹⁴ Oliver Wendell Holmes, *Collected Legal Papers*. New York, Harcourt, Brace and Howe, 1920, p. 17.

¹⁵ *Ibid.*, p. 169.

feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."¹⁶

With the exception of the phrase, "the vaguer sanctions of conscience," these statements are impressive, both in their audacity and in their validity. As a technician, Mr. Holmes strips "the business of the law" of all "moral" implications. Legal battles he finds to be fought in terms of the conflict of interests, individual and social. Their results are the victories and defeats of forces and counterforces. And they are, for the technician, nothing else, except, it may be, a source of revenue. This is magnificent, clearheaded legal technology.

But there is a philosophic weakness in this mechanistic theory which can be stated in two different ways. First, being partial, it gives no adequate account of the deeper social ends and ideas upon which the legal procedure depends for life and meaning. These battles of which Mr. Holmes speaks are not fought in a jungle, in a moral vacuum. They are fought in the legislatures and courts which have been established by a self-governing society. They are not mere conflicts of interest. They are conflicts under laws which define a public interest. They are, therefore, fought by agreement as well as by difference—an agreement which is accepted by both sides. That agreement provides judges and juries whose duty it is to determine not merely what is going to happen, but what, under our plan of life, should happen. The fighting goes on under a Constitution in which We, the People, have formulated and made authoritative our deepest convictions concerning the welfare of men and of society. And Mr. Holmes' description of the legal machinery, valid as it is technologically, provided these deeper and wider meanings be given assured control, is utterly invalid if it be taken as an account of the total legal process. On this basis it seems fair to say that, as he interprets the freedom of speech which the Constitution protects, the one thing to which Mr. Holmes, the mech-

¹⁶ *Ibid.*, p. 167.

anist, does not pay attention is the Constitution itself. One finds in his arguing little reference to the fact that we of the United States have decided to be a self-governing community. There is not much said about a fundamental agreement among us to which we have pledged "our Lives, our Fortunes, and our sacred Honor." We are, for the argument, merely a horde of fighting individuals, restrained or supported by laws which "happen" to be on the books.

The same conclusion will be reached if we examine carefully what Mr. Holmes says about "the vaguer sanctions of conscience," the demands and principles of morality. As we read his words about law and morality we must recognize that it is not strictly accurate to say that he takes no account whatever of the moral factor. It would be more true to say that he is troubled by it, that he does not know where to place it. As he studies legislation and litigation, morality constantly thrusts itself forward as a disturbing influence which threatens to clog the legal machinery. Mr. Holmes has told us that one cannot understand the law unless one looks at it as a bad man. But meanwhile, he is aware that men are, in some respects, good, even when they are dealing with the law. In the very midst of the conflicting forces of interest Mr. Holmes finds "other things" such as "a good man's reasons for conduct," revealing themselves and claiming relevance. In his statement of the mechanistic theory he says, ". . . I ask you for the moment to imagine yourselves indifferent to other and greater things."¹⁷ But the account of these other things when Mr. Holmes, in other moments, comes back to them, is vague, unclear, and shifting. As contrasted with the sharp and skillful phrases which describe the battles of the courts, the descriptions of morality are neither sharp nor skillful. The mind of Mr. Holmes deals easily, and even merrily, with the "bad man." But the "good man," as an object of philosophical inquiry, mystifies and confuses him. The bad man is clear—too clear to be true. He wants to know what he can get away with.

¹⁷ *Ibid.*, p. 170.

He wants a prediction of the differing consequences of law-breaking, and of law-observance, so that he may have a ground for choosing between them. He hires a lawyer to tell him. The lawyer does what he is paid to do. And Mr. Holmes delights in beating them both at their own game. But meanwhile, what of the good man? What does he want? What is he trying to find out when, if ever, he goes to his lawyer? To those questions Mr. Holmes has no ready answer. His thought has very great difficulty in piercing through the legal machinery to discover those elements of human fellowship and virtue for the sake of which good men have established and maintained, against the assaults of bad men and their legal advisers, the laws and the Constitution of the United States. As against the dogma of Mr. Holmes I would venture to assert the counterdogma that one cannot understand the basic purposes of our Constitution as a judge or a citizen should understand them, unless one sees them as a good man, a man who, in his political activities, is not merely fighting for what, under the law, he can get, but is eagerly and generously serving the common welfare.

3

With respect to the nature of goodness, Mr. Holmes has two very different and conflicting sets of opinions. And it is his failure to resolve that conflict which seems to me to lie at the root of his misinterpretation of the First Amendment. We must, therefore, examine more carefully what he has to say about the principles of right behavior.

On the one hand, scattered through his meditations are such statements as the following:

For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine.¹⁸

With all humility I think, "Whatever thy hand finds to do, do

¹⁸ Oliver Wendell Holmes, *Speeches*. Boston, Little, Brown & Co., 1934, p. 58.

it with thy might," infinitely more important than the vain attempt to love one's neighbor as one's self.¹⁹

But, in the last resort, a man rightly prefers his own interest to that of his neighbors. And this is as true of legislation as in any other form of corporate action.²⁰

The fact is that legislation in this country, as well as elsewhere . . . is necessarily made a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of some one else.²¹

But it seems to me clear that the ultima ratio, not only regum, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy, and all the social feelings, is a justifiable self-preference.²²

Self-preference and force—those are the basic principles of human behavior. According to those principles, a good man takes what he can get. If there are burdens to bear, he sees to it that someone else bears them. Such self-interest should, of course, be intelligent, that is, shrewd. But it is, nonetheless, interest in self. It is not interest in the welfare of others.

But Mr. Holmes cannot be content to leave the matter there. He has another theory of goodness. His phrase, "the vaguer sanctions of conscience," indicates his awareness that, in the midst of all the force and self-preference, another human factor is at work. Of that factor he can speak with an adoring rapture. But his words about it have no clarity. They express little more than mystical meaninglessness. "Life," he tells us, "is a roar of bargain and battle, but in the very heart of it, there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull detail into romance. It reminds us that our only but adequate significance is as parts of the unimaginable whole. It suggests

¹⁹ *Ibid.*, p. 85.

²⁰ Max Lerner, *The Mind and Faith of Justice Holmes*. Boston, Little, Brown & Co., 1943, p. 50.

²¹ *Ibid.*, p. 51.

²² *Ibid.*, p. 59.

that while we think we are egotists, we are living to ends outside ourselves."²³

Are we living to ends outside ourselves? If so, neither Mr. Holmes nor we can rightly think that we are altogether egotists. That "suggestion," as he calls it, is either valid or invalid. And if it is valid, the entire structure of explanation in terms of force and self-preference becomes untenable. It must be abandoned. If the universe as a whole is unimaginable then neither a mystic spiritual tone nor anything else has given meaning to it. It has no meaning. Why pretend that it has? If the dull detail of life is merely selfishness, one can be romantic about it only by sheer self-deception. The words which Mr. Holmes here writes are thrilling in their rhetorical beauty, but they are disastrous in their effect upon the human understanding of human goodness. And his failure at this point is crucial for our argument because, whatever else it may mean, the First Amendment is an expression of human goodness. That amendment, in its own field, stands guard over the general welfare of the community. It protects men as they engage in the moral endeavor to advance that welfare. If that endeavor be reduced to meaninglessness it is little wonder that, in the same hands, the First Amendment has suffered the same fate.

This failure of Mr. Holmes to recognize the sane and solid moral principles which find expression in our national agreement that government shall be carried on only by consent of the governed is obvious at every turn of his writing. His romantic morality has no chance whatever when it comes into conflict with his clear-eyed, tough-minded technology. The outcome of such a battle is readily seen in the well-known letter to Mr. Wu, in which he enters vigorous and radical objection to the moral idealism which says that, under our form of government, every citizen has, and has a right to have, dignity—the dignity of men who govern themselves. With scorn for such idealism, Mr. Holmes writes, "I don't believe that it is an absolute principle or even a

²³ Holmes, *Speeches*, p. 97.

human ultimate that man is always an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough."²⁴

One pig against another! Or, perhaps better, a lot of pigs against one! What shall we say of the man who thus explains the courtesies and the moralities of human society? Harold Laski has just closed a glowing tribute to his revered master with the words, "I have known no man who lived on the heights in whom nobility and kindness were at once so effortless and so spacious in their dignified serenity."²⁵ And many of us who knew him, closely or not so closely, in and around his home on Eye Street in Washington, were deeply moved by the same affection and admiration. But to say that is to speak of the personal quality of Mr. Holmes, rather than of his ideas. And it was a set of ideas, a theory of morality, which ran deeply through all his reflections and seeped down into his interpretations of the Constitution. It is that set of ideas, that theory of morality, which we must critically judge if we seek to determine the validity of the opinions which Mr. Holmes wrote.

Many of us, I am sure, agree with him that the dignity of man is not an absolute principle, if by that is meant a principle of the universe. So far as we can see, the non-human universe has no moral principles. It neither knows nor cares about human dignity, nor about anything else. And further, we may agree that respect for human dignity is not a *human* ultimate. That attitude of mutual regard is created and justified only insofar as groups of men have succeeded in binding themselves together into a fellowship which, by explicit or implicit compact, maintains a "way of life." And that goal is, for humanity as a whole, still far

²⁴ Lerner, *op. cit.*, p. 431.

²⁵ Harold Laski, "Ever Sincerely Yours, O. W. Holmes," book review in the *New York Times Magazine*, February 15, 1948.

off. But when, in the face of our Constitution, someone says that a *fellow citizen* has no "dignity" which "must be respected"—that is another matter. To say that is not merely to ignore the Constitution. It is to deny it. Mr. Holmes, in those words, flatly repudiates the moral compact on which our plan of self-government rests. And, especially, he breaks down the basic principle of the First Amendment. As one makes this accusation, one must, of course, recognize the difference between the intention of our institutions and their success in realizing that intention. Everyone knows how partial is our achievement in the maintaining of self-government. In large measure, we live and act without dignity. But the essential point is that we are pledged together to create a society in which men shall have the status of governors of themselves. They must move, not with bayonets behind, but with purposes ahead. And if we fail in that, as we do, we must have "scruples about it." If we submit to our failure without regret, without scruple, we have abandoned the Constitution. We have divided our community into the "we" who have dignity and the "they" who have not. The battle of the Constitution has been lost.

4

Now, with these reflections of Mr. Holmes in mind, we are ready, or should be ready, to take the final step in our argument. We must now read and try to interpret the famous dissenting opinion in the *Abrams* case, in which Mr. Holmes explicitly stated the positive theory of the Constitution insofar as it relates to the principle of the freedom of speech. The opinion reads, in part, as follows:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or 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 wholeheartedly 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 best test of truth is the power of the thought to get itself 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 on imperfect knowledge. While that experiment is part of our system I think 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. 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 the Sedition Act of July 14, 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."²⁶

These words are beautifully written. They are at once provocative and deeply moving. Mr. Justice Frankfurter has said of them, "It is not reckless prophecy to assume that his famous dissenting opinion in the *Abrams* case will live so long as English prose retains its power to move."²⁷ And Max Lerner, speaking with like hot admiration, has told us, "I can add little to what has been said of Holmes' language. It has economy, grace, final-

²⁶ 250 U.S. 616. Chafee, *op. cit.*, pp. 136-137.

²⁷ Felix Frankfurter, *Justice Holmes and The Supreme Court*. Cambridge, Mass., Harvard University Press, 1938, pp. 54-55.

ity, and it is the greatest utterance on intellectual freedom by an American, ranking in the English language with Milton and Mill.²⁸

An American teacher, reading those words, may join heartily in praise of the rhetorical excellence of the opinion. But its meaning, its logic, have no such excellence. In form it is, as Mr. Lerner says, one of our greatest utterances. But in content Mr. Holmes, here as elsewhere, has spoken eloquently for an American Individualism whose excesses have weakened and riddled our understanding of the meaning of intellectual freedom. To that negative criticism, however, two exceptions must be made.

First, no one who is sensitive to the human values at stake in the case under consideration can fail to thrill with admiration of the gallant conclusion in which Mr. Holmes condemns the judgment of his colleagues. In the lower court, after one of the most disgraceful trials ever held in the history of the nation, a group of helpless, ineffectual Russian immigrants had been literally thrown to the wild beasts of prejudice and hatred which war had let loose upon the country. And their crime was that they had advocated policies which, at the same time, were being urged upon President Wilson by some of his wisest advisers. Those advisers were not indicted and convicted and punished, even though their words might have been expected to have far greater effect. But the defenseless rebels were sentenced to jail for periods ranging up to twenty years. For his castigation of that shameful legal crime, Mr. Holmes will be remembered and honored so long as the Constitution endures.

And, further, we must accept and applaud the assertion that the Constitution is an experiment, in the sense in which all life is an experiment. Our plan of government, being based on imperfect knowledge, must be forever open to amendment, forever on trial. It will change as social conditions change, and as human insight changes. And no one can tell in advance how slow or

²⁸ Lerner, *op. cit.*, p. 306.

how quick, how superficial or how radical, those changes will be. We, the People, acting under the Constitution, will decide, from time to time, on that issue. And our successors will be free, as we are, to determine what form, for them, the government shall take.

But the remarks of Mr. Holmes upon the central issue of the case before him—upon the testing of truth and upon the using of truth in the service of the common welfare—have no such adequacy. He does not, I am sure, at either of these points, give us, as he intends to do, "the theory of our Constitution."

First, there is undeniably a genuine, though partial, validity in the dictum that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." It rightly tells us that the only truth which we self-governing men can rely on is that which we win for ourselves in the give and take of public discussion and decision. What we together think at any time is, for us, our truth at that time. And, in the sense in which words are here used, that test of truth is not merely the "best" test. There is no other. But that partial insight has often been interpreted, by the individualism which Mr. Holmes represents, to be a total characterization of the truth-seeking process. And, in that form, it has become, in our American public life, a fruitful source of intellectual irresponsibility and of the errors which irresponsibility brings. We Americans, when thinking in that vein, have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests. We think, not as members of the body politic of "We, the People of the United States," but as farmers, as trade-union workers, as employers, as investors. We plan and vote for cotton or beets or silver or steel or wheat. Our ideas belong to the East or the West or the North

or the South or the Middle. And our aim, as we debate in those capacities, is not that of finding the truth. The competition of the market will take care of that. Our aim is to "make a case," to win a fight, to make our plea plausible, to keep the pressure on. And the intellectual degradation which that interpretation of truth-testing has brought upon the minds of our people is almost unbelievable. Under its influence, there are no standards for determining the difference between the true and the false. The truth is what a man or an interest or a nation can get away with. That dependence upon intellectual laissez-faire, more than any other single factor, has destroyed the foundations of our national education, has robbed of their meaning such terms as "reasonableness" and "intelligence," and "devotion to the general welfare." It has made intellectual freedom indistinguishable from intellectual license. And to that disastrous end the beautiful words of Mr. Holmes have greatly contributed.

But the other argument of Mr. Holmes, which deals with the using of truth as well as its testing, bears more directly upon our constitutional question. It may be summarized in two statements. First, says Mr. Holmes, men are naturally intolerant. And they are rightly so. Suppression of the hostile opinions of others is justified. It is justified on grounds of self-preference, backed by force. But, second, men have learned by experience that intolerance does not pay. We need the truth as a basis for our actions. But the truth is better attained if men trade ideas freely than it is if each man stays within the limits of his own discoveries. A man's ideas must, therefore, be subjected to the competition of the market. His own self-interest requires of him that his right and natural disposition toward suppression must give way before the clear necessity of trading ideas with anyone else who is studying the same problems.

Is that the theory because of which the Constitution forbids the abridging of the freedom of speech? It is a part of it, but only, I am sure, a secondary and individualistic part. No one can deny that the winning of the truth is important for the purposes of self-

government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves. But the competitive individualism of Mr. Holmes, when it gets hold of him, drives out of his mind the existence of that compact. As he thus reads the First Amendment, his interest is directed, not toward the public freedom which is required for the purposes of self-government, but toward the private freedom of this or that individual who is seeking to understand. And for that reason, he robs the amendment of its essential meaning—the meaning of our common agreement that, working together as a body politic, we will be our own rulers. That meaning is the highest insight which men have reached in their search for political freedom. And Mr. Holmes—at least in his "clear and present danger" thinking—misses it.

5

Here, then, are the charges which I would bring against the "clear and present danger" theory. They are all, it is clear, dif-

fering forms of the basic accusation that the compact of self-government has been ignored or repudiated.

First, the theory denies or obscures the fact that free citizens have two distinct sets of civil liberties. As the makers of the laws, they have duties and responsibilities which require an absolute freedom. As the subjects of the laws, they have possessions and rights, to which belongs a relative freedom.

Second, the theory fails to keep clear the distinction between the constitutional status of discussions of public policy and the corresponding status of discussions of private policy.

Third, the theory fails to recognize that, under the Constitution, the freedom of advocacy or incitement to action *by the government* may never be abridged. It is only advocacy or incitement to action by individuals or nonpolitical groups which is open to regulation.

Fourth, the theory regards the freedom of speech as a mere device which is to be abandoned when dangers threaten the public welfare. On the contrary, it is the very presence of those dangers which makes it imperative that, in the midst of our fears, we remember and observe a principle upon whose integrity rests the entire structure of government by consent of the governed.

Fifth, the Supreme Court, by adopting a theory which annuls the First Amendment, has struck a disastrous blow at our national education. It has denied the belief that men can, by processes of free public discussion, govern themselves.

6

"Congress shall make no law . . . abridging the freedom of speech . . ."

That principle of the Constitution tells us that we may attack the Constitution in public discussion as freely as we may defend it. It gives us freedom to believe in and to advocate socialism or communism, just as some of our fellow citizens are advocating

capitalism. It declares that the suppressive activities of the Federal Bureau of Investigation, of the un-American Activities Committees, of the Department of Justice and its Immigration Service, of the President's Loyalty Order—all these are false in theory and therefore disastrous in practice. It tells us that such books as Hitler's *Mein Kampf*, or Lenin's *The State and the Revolution*, or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States. And the purpose of that provision is not to protect the need of Hitler or Lenin or Engels or Marx "to express his opinions on matters vital to him if life is to be worth living." We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.

The unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any clear and present—or, even, terrific—danger.