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FREE SPEECH ON TRIAL

Communication Perspectives on Landmark Supreme Court Decisions

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Schenck v. United States and *Abrams v. United States*

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Scholarship on the origins of the First Amendment, analysis of free speech theory articulated in response to the Sedition Act of 1798, and more recent exposition of First Amendment jurisprudence during the late nineteenth century demonstrate that since the beginnings of the nation, Americans have struggled to resolve the tensions between order and liberty, between the demands of the community and the rights of the individual. Modern First Amendment interpretation by the United States Supreme Court dates from 1919, when Justice Oliver Wendell Holmes Jr. wrote the unanimous opinion for the majority in *Schenck v. United States* (1919) and the dissenting opinion in *Abrams v. United States* (1919).

The series of Espionage Act and Sedition Act cases from *Schenck* to *Abrams* may well be "the most anthologized cases in American constitutional law" (White, 1996, pp. 312–313), but they are more often noted than explained. While some legal scholars have concluded that "the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely a vain one" (Collier, 1991, p. 194), this essay is grounded on the premise that communication scholars are uniquely qualified to assess the nuances of judicial rhetoric, especially those First Amendment decisions that turn on linguistic constructions and legal assumptions about the nature of communication as an interactive process. Justice Holmes's arguments in *Schenck* and *Abrams* provide fertile ground for just such an analysis.

The Path of *Schenck*

On August 28, 1917, federal agents raided the Socialist Party headquarters at 1326 Arch Street in Philadelphia, seizing copies of a leaflet that challenged the constitutionality of conscription, questioned the reasons for American

involvement in the World War, and solicited membership in the Socialist Party. One side of the leaflet was headed, "Long Live the Constitution of the United States. Wake Up, America. Your Liberties are in Danger," and the other side was titled, "Assert Your Rights." On uncontested evidence indicating that a few of the 15,000 circulars had been mailed to local men subject to the draft, indictments were handed down on Constitution Day, September 17, against William J. Higgins, Jacob H. Root, Charles Sehl, General Secretary Charles T. Schenck, and Dr. Elizabeth Baer, the recording secretary, for obstruction of the draft in violation of the Espionage Act of 1917.

At the trial, the government offered no evidence that the leaflets induced anyone to avoid military service, and it was revealed that several of the recipients brought the letters to the attention of the authorities. Because of lack of evidence regarding their participation, directed verdicts were ordered for the acquittal of Higgins, Root, and Sehl. The jury returned verdicts of guilty against Schenck, who was responsible for printing the materials, and Baer, who recorded the motion to do so in the minutes.

The appeals by Schenck and Baer were argued before the Supreme Court on January 9–10, 1919, and the decision was announced two months later, on March 3, 1919. Associate Justice Oliver Wendell Holmes Jr. was assigned the task of writing the opinion that has been credited with introducing "the Supreme Court to the tentative first steps of First Amendment theory within the context of judicial deliberations and the complex intricacies of the American legal system" (Cohen, 1989, p. 117). Before the decision was announced, Holmes admitted to Harold Laski that he had hoped the case would be assigned to him, yet it "wrapped itself around me like a snake in a deadly struggle to present the obviously proper in the forms of logic" (Holmes, February 28, 1919). Within two weeks after the opinions in *Schenck* and two other cases were delivered, he again wrote to Laski, confessing, "I greatly regret having to write them" (Holmes, March 16, 1919).

Holmes's crafting of the opinion in *Schenck* was constrained both by Supreme Court precedent in earlier cases and by his own judicial career. Examining the tenor of the times, one scholar concluded, "no group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court" (Rabban, 1997, p. 15). During his career as a member of the Supreme Judicial Court of Massachusetts, Holmes showed little consideration for freedom of expression, as evidenced by his opinions in *Cowley v. Pulsifer* (1884), *McAuliffe v. Mayor and Aldermen of New Bedford* (1892), *Hanson v. Globe Newspaper Company* (1893), and *Commonwealth v. Davis* (1895), the

Boston Commons case. The Supreme Court's crabbed view of the history and meaning of the First Amendment was revealed in dicta during the same decade when Justice Henry Brown wrote:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation. (*Robertson v. Baldwin,* 1897, p. 281)

Furthermore, during Holmes's tenure the Court summarily dismissed what were essentially First and Fourteenth Amendment claims by defendants in *Halter v. Nebraska* (1907) and *Mutual Film Corporation v. Industrial Commission of Ohio* (1915), and, more importantly, in Holmes's own opinions in the cases of *Patterson v. Colorado* (1907) and *Fox v. Washington* (1915). The *Schenck* case, however, presented the Court with a clear and present First Amendment challenge to a federal statute.

Henry J. Gibbons and Henry John Nelson, the attorneys for the plaintiffs in error, Schenck and Baer, filed a brief clearly challenging the statute and the convictions on First Amendment grounds. "How can a speaker or writer be said to be free to discuss the actions of Government," they asked, "if twenty years in prison stares him in the face if he makes a mistake and says too much? Severe punishment for sedition will stop political discussion as effectively as censorship." Freedom of speech, they implied, was essential to informed citizens participating in the democratic process, and they asked rhetorically, "How can the citizens find out whether a war is just or unjust unless there is full and free discussion" (cited in Cohen, 1989, p. 34)? Then, in words Holmes would presently ignore but appears to have remembered, they argued, "The spread of truth in matters of general concern is essential to the stability of a republic. How can truth survive if force is to be used, possibly on the wrong side? Absolutely unlimited discussion is the only means by which to make sure that 'truth is mighty and will prevail'" (p. 35).

Rather than seizing upon this opportunity to examine thoughtfully the scope and meaning of the constitutional command that Congress shall pass no law abridging the freedom of speech, or of the press, Holmes approached *Schenck* by the familiar path of the common law and the theory of criminal attempts. In five of the six paragraphs in the opinion, he embraced the government's arguments, upheld the validity of the search warrant, considered the sufficiency of the evidence, expanded the statutory language to include opposition to the draft, treated words as acts, measured those acts against the prohibitions of the statute, and affirmed the convictions of Schenck and Baer.

In the only paragraph acknowledging the First Amendment claims, Holmes's opinion offered a theoretical assertion that freedom of speech could be abridged without offering a reasoned argument for that conclusion. He began the discussion by making an important concession, admitting, "It well may be that the prohibition of laws *abridging the freedom of speech is not confined to previous restraints* [italics added], although to prevent them may have been the main purpose" (*Schenck,* 1919, pp. 51–52), as he had intimated in an earlier opinion (*Patterson v. Colorado,* 1907, p. 462). Yet in making the point he provided no data and no warrant for either claim, no evidence of the framers' intention nor illumination from the meaning of the words. Holmes then offered the constitutional proposition "that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. . . . When a 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,* 1919, p. 52). Again, the basis for that temporally malleable judicial view of First Amendment freedom was pronounced without a constitutionally plausible explanation, although Holmes could well have cited his earlier, equally ungrounded opinion in *Moyer v. Peabody* (1909) as precedent to cover his assertions masquerading as logic.

Conflating words and acts in this instance, Holmes declared that "the character of every act depends upon the circumstances in which it is done" (*Schenck,* 1919, p. 52). In support of that conclusion he offered the precedent of his own opinion in *Aikens v. Wisconsin* (1904) and the opinion of Justice L. Q. C. Lamar in *Gompers v. Bucks Stove & Range Company* (1911), both of which likewise treated truthful words as unprotected acts. It is in this context that Holmes offered his often-quoted but quite inappropriate aphorism that the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic" (*Schenck,* 1919, p. 52).

The cute but inapposite claim did not go unnoticed. Zechariah Chafee Jr., writing shortly after the *Schenck* opinion was delivered, asked: "How about the man who gets up in a theater between the acts and informs the audience honestly but perhaps mistakenly that the fire exits are too few or locked? He is a much closer parallel to Schenck or Debs" (1919, p. 944). Richard Polenberg later refined the analogy when he suggested Holmes would have been more accurate if he had said, "The most stringent protection of free speech would not protect a man falsely advising theatregoers that a 'no smoking' ordinance deprived them of their rights, and causing the audience to turn him in as a troublemaker" (1987, p. 216).

The lasting importance of Holmes's opinion in *Schenck* is that it presented the first judicial formulation of the "clear and present danger test." Although suffering from the same lack of specificity in either the constitutional source of the authority for the test or the grounds for evaluating the evidence in its application as do all such First Amendment tests, Holmes proposed that 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" (*Schenck*, 1919, p. 52). In applying his new test to the fact situation presented in *Schenck*, Holmes found it sufficient justification for finding Schenck's speech unprotected by the First Amendment, a conclusion subsequently confirmed by Holmes's opinions the following week in *Frohwerk v. United States* (1919) and *Debs v. United States* (1919), as well as by the Court's majority in every case it considered involving convictions for violations of the Espionage Act of 1917 and the Sedition Act of 1918.

While purporting to offer a new test to measure the degree of protection afforded speech, Holmes was actually applying the prevailing "bad tendency" test. The government only had to show some remotely possible negative result, and the courts would find that the speaker must have intended this result. Compounding this judicial fallacy, the courts also treated words as acts and, reflecting the rudimentary state of communication theory at the time, applied the conception, if not the language, of a mechanistic "magic bullet" theory of message effects: the helpless audience was assumed to have no choice but direct response, even in cases where there was no evidence of *any* response to the messages.

The magic bullet theory, also known as the hypodermic needle theory, was prevalent in both popular and scholarly thinking during Holmes's years on the Court (Bineham, 1988; Chaffee, 1988; Peters, 1989; Sproule, 1989) and was dominant until after World War II, when it was gradually replaced by the limited-effects model resulting from Paul Lazarsfeld's studies of elections and campaigns (Lazarsfeld, Berelson, & Gaudet, 1944/1968). The primary tenet of the magic bullet theory was that mass media served as a supreme weapon that allowed originators of messages to shoot ideas into a passive, uncritical audience, thereby resulting in the easy shaping of a unified and universal public opinion.

America had changed greatly since the antebellum days when Holmes was a student at Harvard. The population was more mobile and increasingly of foreign birth, the country was becoming more urban, the economy had become industrialized, and traditional mechanisms of social control were weaker. Holmes was not alone in his recognition of these changes and their consequences. The emerging social psychology of Edward Ross (1908), Gustave LeBon (1914), Gabriel Tarde (1969), and Winfred Trotter (1917) posited a new mass society that "fostered an imitative and potentially irrational credulity which created, in turn, the propensity to accept suggestions uncritically" (Bineham, 1988, p. 234). Contemporary public intellectuals such as John Dewey (1922) and Walter Lippmann (1922) surveyed the scene and had little "confidence in the cognitive competence of the public," because modern conditions "rendered the public inherently less competent to reason in the realm of social conduct" (Sproule, 1989, p. 234). The political response to these conditions in the years before World War I was manifested in the suspicions articulated by both Theodore Roosevelt and Woodrow Wilson against "hyphenated Americans," as well as the xenophobia of the reborn Ku Klux Klan.

The concept that mass media messages have immediate effects on receivers gained wide acceptance. It assumed that the injection of persuasive messages into susceptible audiences would trigger a specific desired response. It also engendered the plausible fear that the response created would be potentially devastating to the comfort and stability of American civilization. Such thinking was implicit as early as Anthony Comstock's 1880s crusade against pornography (Comstock, 1883/1967). It informed the efforts of the government's propaganda efforts during World War I (Creel, 1920; Lasswell, 1927; Mock & Larson, 1939), and it fueled the advertising and public relations strategies of the era (Bernays, 1923, 1928).

Under the prevailing public and professional assumptions about media effects, it was hardly surprising that the newly articulated clear and present danger test proved to offer no protection for the expression of Schenck or other defendants when applied by the Court in March 1919. Nonetheless, almost immediately it was criticized, appropriately, as a speech-restrictive rather than a speech-protective instrument in its application and as a justification for affirming the jury decisions instead of a basis for reaching them.

Holmes's opinion has also been attacked for its methodological process, the oblique way in which it was crafted. "In essence," noted one communication scholar of First Amendment history, "Holmes reached a conclusion that had a very direct bearing on the First Amendment without providing a serious discussion of the First Amendment prohibition against the abridgment of speech. Holmes never explained *why* the First Amendment allows speech to be abridged. He only explained when speech may be abridged" (Cohen, 1989, p. 100). And even that Holmes did without offering a convincing judicial rationale.

The Detour to *Abrams*

Within weeks after the decision announcing and applying the clear and present danger test, Holmes complained to his friend Sir Frederick Pollack that his *Schenck* opinion was being criticized by "fools, knaves, and ignorant persons." There was, he scoffed, "a lot of jaw about free speech, which," he acknowledged, "I dealt with somewhat summarily" (Holmes, April 5, 1919)—an error compounded by his dismissive references to *Schenck* as authority to dispose of the First Amendment claims in the *Frohwerk* and *Debs* cases.

Associate Justice Louis Brandeis, who had been a member of the unanimous Court in *Schenck, Frohwerk,* and *Debs,* and who was a close friend of Justice Holmes, later remarked to Felix Frankfurter: "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" (cited in Cohen, 1989, p. 21). Undoubtedly, that described Holmes's situation as well. Until forced to consider the issues and the briefs in those cases, there is no indication that Justice Holmes ever gave much thought to the constitutional dimensions and implications of freedom of speech. The *Schenck* case served as a catalyst to bring political theory for the first time into the realm of judicial consideration regarding the application of the First Amendment to federal statutes, and subsequent events and cases would bring those issues into a clearer focus for both Holmes and Brandeis.

Another case was already on its way to the Supreme Court, one which would provide the opportunity for a more thoughtful and focused consideration of the constitutional issue in play. Jacob Abrams, Samuel Lipman, Mollie Steimer, Jacob Schwartz, Hyman Lachowsky, Hyman Rosansky, and Gabriel Prober, all Russian immigrant factory workers, were arrested in New York

City on August 23, 1918, and indicted in September 1918, for violation of the Sedition Act of 1918. They were charged with printing and distributing 2,500 copies of two leaflets, "The Hypocrisy of the United States and Her Allies" and "Workers—Wake Up," critical of President Wilson and the decision to send United States troops to crush the Russian Revolution. The leaflets disavowed any sympathy for the German cause; however, they did call for a general strike by workers, including by implication those in munitions factories. Schwartz died, allegedly as a result of police brutality, before the trial began in October. Abrams, Lipman, and Lachowsky were convicted and given 20-year sentences; Steimer was sentenced to 15 years; and Rosansky, who cooperated with the government, was sentenced to three years.

By the time the appeal of Abrams, Lipman, Lachowsky, and Steimer reached the Supreme Court for oral arguments on October 21–22, 1919, the thinking of Justices Holmes and Brandeis had evolved considerably since the Espionage Act case decisions only seven months earlier. Published articles by, and conversations and correspondence with, an intellectual circle that included Felix Frankfurter, Harold Laski, Judge Learned Hand, Zechariah Chafee Jr., Ernst Freund, and Sir Frederick Pollock practically constituted a campaign that shaped and changed Holmes's views of the meaning of the First Amendment (Alschuler, pp. 78–79; Gunter, 1994, pp. 151–170; Polenberg, 1987, pp. 218–228; White, 1993, pp. 412–454). This is especially remarkable when considering that Holmes had demonstrated a rather consistent approach to the law for the last 40 years and was then 78 years old.

In his brief for Abrams and the other plaintiffs in error, Harry Weinberger argued, "The discussion of public questions is absolutely immune under the First Amendment to the Constitution, when that is the only intention in the discussion." Quoting Thomas Jefferson that the state has no authority over ideas but only over overt acts—a position beyond even contemporary incitement standards—he insisted that the framers intended to guarantee "the unabridged liberty of discussion as a natural right" (cited in Polenberg, 1987, p. 229). Probably more confidently, however, Assistant Attorney General Robert P. Stewart's brief for the government contended that "no liberty of the press was conceived of which included the unlimited right to publish a seditious libel. No claim of that sort was ever made by any respectable person" (cited in Polenberg, 1987, pp. 232–233).

Justice Holmes was a respectable person, and the circulation of his draft dissent in *Abrams* caused considerable concern among some members of the Court, three of whom called on him at home in an unsuccessful effort to dissuade him from breaking with the majority. When the decision was announced on November 10, 1919, the majority of seven Justices affirmed the convictions of Abrams and the others, while Holmes and Brandeis announced the first of their dissenting views that were to shape the future of First Amendment jurisprudence.

Justice John Clarke's opinion for the majority read like one Holmes might have written the previous March, giving almost no attention to Weinberger's First Amendment argument. Clarke noted impatiently:

> On the record thus described, it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment. This contention is sufficiently discussed and is definitely negatived in *Schenck v. United States* and *Baer v. United States,* and in *Frohwerk v. United States* [citations omitted]. (*Abrams,* 1919, pp. 615–616)

Moreover, Justice Clarke's opinion also revealed that the majority shared the prevailing assumptions about the cognitive competence of audiences and the magic bullet theory's conclusions about the presumed effects of messages. "Men must be held to have intended, and to be accountable for, *the effects which their acts were likely to produce,*" Clarke asserted, and in this case "*the obvious effect of this appeal,* if it should become effective, as they hoped it might, *would be to persuade persons of character such as those whom they regarded themselves as addressing* [italics added], not to aid government loans, and not to work in ammunition factories" (p. 621).

Unlike his earlier opinions, Justice Holmes's dissent here represented a much more sophisticated analysis of the First Amendment; he modified both his views on the framers' intent and the nature of the clear and present danger test. Holmes approached his fundamentally changed view of the First Amendment by engaging in traditional, yet clearly more sympathetic, statutory construction. "It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other," he said. For example, he opined, "A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet, even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime" (p. 627). Moving on quickly to the essence of his constitutional argument, he concluded the paragraph

with an acknowledgment: "I admit that my illustration does not answer all that might be said, but it is enough to show what I think, and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution, that Congress shall make no law abridging the freedom of speech" (p. 627).

Masking the rhetorical move to come, Holmes pointedly professed, "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* . . . were rightly decided" (p. 627). Despite considerable attention to Holmes's opinions, it is impossible to know for certain the reasons for this disclaimer. Most likely, he was somewhat embarrassed by the lack of sophistication and imagination in the *Schenck* analysis and was attempting to provide a facade of consistency in support of precedent and the rule of law.

Leading with another example of what he would consider beyond the protection of the First Amendment as he did with the instance of falsely shouting fire in a theater and causing a panic, Holmes provided a much-revised but unannounced change in his previously articulated clear and present danger test: "*I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent* [italics added]" (p. 627).

In this deft but subtle restatement, Holmes made two very important changes. First, clear and present danger, which in the past was applied as merely a bad tendency test, became (1) a clear and *imminent* danger that it will bring about (2) *forthwith* certain substantive evils that (3) the *United States* (not only Congress) may (4) *constitutionally seek* to prevent (not has a right to prevent). Though still contemplating prior restraint or subsequent punishment without overt acts, Holmes seems to have linguistically morphed his clear and present danger test from *Schenck* to read very much like the incitement test—imminent and likely lawless action—advocated by Judge Learned Hand in *Masses Publishing Co. v. Patten* (1917) and later adopted by the Supreme Court in *Brandenburg v. Ohio* (1969).

Writing a year after the Armistice, Holmes still maintained that the government's "power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same" (*Abrams,* 1919, pp. 627–628). He then reiterated that "It is *only the present danger of immediate evil or an intent to bring it about* [italics added] that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country" (p. 628).

Applying this new standard to the leaflets at issue in *Abrams,* Holmes discounted the probability of *any* danger by suggesting, "Now 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. . . . I do not see how anyone can find the intent required by the statute in any of the defendants' words" (p. 628).

Elaborating on this point, Holmes also revealed a new twist with regard to the harsh punishments meted out by judges and juries under the wartime acts of 1917 and 1918: "In this case, sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them" (p. 629). Holmes suggested: "Even if I am technically wrong, . . . 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* [italics added]—a creed that I believe to be the creed of ignorance and immaturity when honestly held, . . . but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court" (pp. 629–630). Without an admission of error, Holmes here appears to have moved away from his opinion in *Debs* (1919), where he considered Socialist Party doctrine to support the conviction and 20-year sentence given to Eugene Debs.

Concluding his dissenting opinion in *Abrams* with one of the most elegant expressions of his long career on the bench, Holmes demonstrated his understanding of the motives behind much of the enterprise to suppress dissent in society.

> Persecution for the expression of opinions seems to me perfectly 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 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 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* [italics added]. (p. 630)

Rejecting the government's contention and revising his own historical assumptions regarding the framers' intentions, Holmes asserted: "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 1798 by repaying fines that it imposed" (p. 630). "Then, presaging Brandeis's later preference for deliberation and "more speech," Holmes announced his position: "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'" (pp. 630–631).

Holmes was eloquent even in his despair as he admitted regretting "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" (p. 631). The opinion was impressive enough for anyone who engaged in a close reading of Holmes's opinions. As Sheldon Novick concluded, "It is as if we are reading the work of two men. . . . Plainly, there is something in Holmes's great constitutional opinions that we admire and that was not present in his earlier writings" (1994, pp. 347–348).

One clear and very important difference in the Holmes opinion in *Abrams* is that he appears to have rejected the mechanistic paradigm of the magic bullet theory and now implicitly recognized that audiences are competent to assess the ethos of the source and the content of the message in personally judging the utility of the arguments for their own social responses. In sharp contrast to Justice Clarke's articulation of presumed consequences in the majority opinion, Holmes countered dismissively, "Now 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* [italics added]" (*Abrams,* p. 628).

The Rocky Road to the Future

The immediate public response to Holmes's dissenting opinion in *Abrams* was as forceful as the reaction to his majority opinions in *Schenck, Frohwerk,* and *Debs;* yet it was much more diverse. Chafee's *Freedom of Speech* (1920) almost immediately secured Holmes's position as a bold advocate of an important new doctrine, and his intellectual circle of close friends shared that enthusiasm. Interestingly, however, Holmes and Brandeis, though frequently dissenting or concurring together in First Amendment cases during the remaining 13 years they served together on the Court, at times revealed their theoretical differences by dissenting separately (*United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 1921) or even alone, as Brandeis did when he dared to go farther than Holmes was prepared to go in support of freedom of speech (*Gilbert v. Minnesota,* 1920). On the other hand, prominent academic figures such as Dean John Wigmore of Northwestern Law School and Professor Edwin Corwin of Princeton University employed prominent legal journals to launch vigorous attacks on the underlying assumptions and potential consequences of Holmes's new theory of First Amendment freedoms (Wigmore, 1920; Corwin, 1920).

Even today, 80 years after Holmes proposed his revised clear and present danger test and 30 years after it was superseded by the incitement test of *Brandenburg* (1969), the Holmes test and his free speech jurisprudence provide a convenient rhetorical foil for criticism by authors advocating various alternative positions. Louise Weinberg charges Holmes with intellectual rigidity and timidity, as compared with Justice Harlan, even in issues related to the First Amendment and freedom of expression (1997, pp. 715–716). Vincent Blasi, who is generally sympathetic to Holmes, acknowledges that "the problem remains that the *Abrams* dissent reads too much like a personal philosophy of no conceivable constitutional pedigree. One searches for a reading of the opinion that is better grounded in the text, tradition, and philosophy of the Constitution" (1997, p. 1345). Those who profess to understand the essential elements of the clear and present danger test as articulated in the *Abrams* dissent have also challenged its potential consequences. Stanley Fish finds the "basic absolutism of Holmes's position" to be objectionable when opposed to other social values (1993, p. 1075). Other scholars argue strongly that the test is flawed because it is too restrictive. David Dow and Scott Shieldes, for example, contend that the central defect of the clear and present danger test, which is central to interpreting the free speech clause of the First Amendment, "rests on the morally-unacceptable proposition that words alone can overcome human will. The test ignores the morally salient distinction between speech and action, between saying and doing" (1998, pp. 1217–1218). Furthermore, they argue that "the jurisprudential core of Free Speech Clause doctrine is a constitutional embarrassment because it is philosophically untenable. The clear and present danger test has been used for three-quarters of a century, in one form or another, to determine which utterances the government may legitimately restrain. This test, however, is inimical to our core values. While it is thought to be expansive, it in fact protects too little speech" (pp. 1218–1219).

Perhaps what these views reveal is that all such artificial tests become vehicles for supporting the Court majority's personal preferences regarding outcomes rather than a comprehensible and consistent instrument for protecting the fundamental core values of freedom of expression. Nonetheless, the construction and application of such First Amendment tests tell us much about the theoretical assumptions regarding the communication process, as well as the core values, of those holding interpretive power in our constitutional scheme. And, as Holmes's own intellectual journey demonstrates, those assumptions can evolve, and those value schemes are subject to rhetorical negotiation in the conversation between liberty and order, between the expressive rights of the individual and the demands of the community.

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