Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent

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Introduction

In a letter to Justice Oliver Wendell Holmes in the spring of 1919, Learned Hand described his decision in *Masses Publishing Co. v. Patten*[1] as "my little toy ship which set out quite bravely in the shortest voyage ever made."[2] At the time, that certainly must have been the way things looked to Hand. A judge on the Second Circuit had stayed his decision the same day it was issued,[3] and the full appeals court had reversed it three months after that.[4] Moreover, as Hand noted in a subsequent letter to Harvard Law professor Zechariah Chafee, his *Masses* opinion "seemed to meet with practically no professional approval whatsoever."[5] The response was so discouraging that Hand, preternaturally anxious and self-doubting, began to question the decision himself. "I kept up my hopes till Debs's case," he wrote to Chafee, referring to the Supreme Court's ruling in *United States v. Debs*,[6] "and when the whole court affirmed that without laying down anything like what I thought was the rule, I confess I began to wonder whether I had not got some kind of wrong squint on the subject."[7]

Eventually, of course, Hand's *Masses* opinion did meet with approval. Chafee praised it in an article in the *Harvard Law Review* in the summer of

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1. 244 F. 535 (S.D.N.Y. 1917).
2. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Apr. 1, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$20i.
3. Masses Publ'g Co. v. Patten, 245 F. 102, 106 (2d Cir. 1917) (continuing the stay that had been issued on the day of the decision). *See* The Masses *Again Held Up.: Stay Halts Operation of Writ Against Postal Authorities*, N.Y. TIMES, July 27, 1917.
4. Masses Publ'g Co. v. Patten, 246 F. 24, 39 (2d Cir. 1917).
5. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Dec. 3, 1920) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:48408568$1i.
6. 249 U.S. 211 (1919).
7. Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 5.

1919[8] and then dedicated his 1920 book *Freedom of Speech* to Hand.[9] Justice Louis Brandeis cited Hand's decision favorably in his 1927 concurring opinion in *Whitney v. California*.[10] And Hand's biographer, Gerald Gunther, wrote an influential article in 1975 claiming that Hand's opinion—and the "direct incitement" test it advocated—had been embraced by the Supreme Court in its landmark decision in *Brandenburg v. Ohio*.[11] Since then, *Masses* has become a central reference point for First Amendment scholars, and Hand has become a major figure in free speech theory, with Vincent Blasi going so far as to argue that "Hand produced more ideas about free speech of genuine originality and significance than either Holmes or Brandeis."[12]

In my contribution to this symposium, I want to focus not on the eventual acceptance of Hand's *Masses* opinion, but on its more direct impact. Specifically, I want to consider the extent to which Hand's opinion in *Masses*, along with statements he made in letters and personal conversations, influenced Holmes's thinking about free speech. It is well established by now that Holmes changed his view of the First Amendment in the months immediately following World War I, moving from the conservative Blackstonian position that free speech protects only against prior restraints to the then-radical position that speech is protected unless it poses a clear and present danger.[13] It is also well established that Holmes's conversion resulted,

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8. *See* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 960–61 (1919).

9. *See* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH, at iii (1920) ("To Learned Hand United States District Judge for the Southern District of New York Who During the Turmoil of War Courageously Maintained the Tradition of English-Speaking Freedom and Gave It New Clearness and Strength for the Wiser Years to Come").

10. 274 U.S. 357, 376 n.3 (1927) (Brandeis, J., concurring).

11. *See* James Weinstein, *The Story of* Masses Publishing Co. v. Patten, *in* FIRST AMENDMENT STORIES 78–79 (Richard W. Garnett & Andrew Koppelman eds., 2012); Gerald Gunther, *Learned Hand and the Origins of the Modern First Amendment: Some Fragments of History*, 27 STAN. L. REV. 719, 729 (1975). Gunther's claim is highly questionable. *See* Weinstein, *supra*, at 79–81.

12. VINCENT BLASI, *Teacher's Manual* to IDEAS OF THE FIRST AMENDMENT 171 (Vincent Blasi ed., 2006).

13. *See*, *e.g.*, THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013) [hereinafter HEALY, THE GREAT DISSENT]; David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 99 (1982); Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 225 (2008); Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind* Abrams v. United States, 39 J. SUP. CT. HIST. 35 (2014) [hereinafter Healy, *The Justice Who Changed His Mind*]; G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 418 (1992).

at least in part, from an informal lobbying campaign carried out by a group of young progressives that included Hand.[14] But most accounts of this campaign, mine included, have focused on the cumulative impact these young thinkers had on Holmes. In this essay, I will attempt to identify the specific influence Hand had on Holmes and the way that influence manifested itself in Holmes's 1919 dissent in *Abrams v. United States*.[15] I will also attempt to show that, in spite of that influence, Holmes's theoretical justification for free speech ultimately differed from the one Hand articulated in *Masses*.

I. FOUR EXCHANGES

From the summer of 1918 to the fall of 1919, Hand and Holmes had four substantive exchanges on the issue of free speech. These exchanges have been fully documented elsewhere,[16] so I will provide only the details necessary to support my analysis:

- In June 1918, Hand and Holmes met unexpectedly on a train from New York to Boston and began a debate on the subject of tolerance—a debate that Hand renewed by letter a few days later. On the train Hand argued in favor of tolerance, to which Holmes replied, "[you] strike at the sacred right to kill the other fellow when he disagrees."[17] This "horrible possibility" silenced Hand at the time, but his letter offered a rebuttal. "Opinions are at best provisional hypotheses, incompletely tested," he wrote. "The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own."[18] Holmes responded that he agreed with Hand's letter "throughout."[19] "My only

14. *See* HEALY, THE GREAT DISSENT, *supra* note 13; Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 55–66.

15. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

16. *See* HEALY, THE GREAT DISSENT, *supra* note 13, at 24–25; Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 56–57; Gunther, *supra* note 11, at 740–44.

17. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (June 22, 1918) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$11i.

18. *Id.*

19. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y (June 24, 1918) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097580$18i.

qualification, if any," he added, "would be that free speech stands no differently than freedom from vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act."[20]

- At some point prior to February 25, 1919, Holmes read Hand's opinion in *Masses*. It is unclear whether he read it immediately after their encounter on the train or half a year later as he prepared to write his own opinions in the first three Espionage Act cases decided by the Court—*Schenck v. United States*,[21] *Frohwerk v. United States*,[22] and *Debs*.[23] It is also unclear whether Hand sent him the opinion or whether Holmes obtained a copy himself. In any event, shortly after Holmes finished drafting his three Espionage Act opinions, he wrote Hand to say that he had read the *Masses* decision. "I haven't the details in my mind," he explained, "and will assume for present purposes that I should come to a different result, but I did want to tell you after reading it that I thought that few judges indeed could have put their view with such force or in such admirable form."[24]
- On April 1, 1919, a few weeks after the Court issued its decisions in *Schenck*, *Frohwerk*, and *Debs*, Hand wrote Holmes a letter purporting to agree with the result in *Debs* but questioning the legal rule that had been applied.[25] In *Schenck*, Holmes had introduced the "clear and present danger" test, but in *Debs* he had simply quoted the judge's instruction to the jury that it could not convict "unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," and

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20. *Id.*
21. 249 U.S. 47 (1919).
22. 249 U.S. 204 (1919).
23. 249 U.S. 211 (1919).
24. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Feb. 25, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005319$10i. In *The Great Dissent* I interpreted Holmes's letter to mean that he had read the *Masses* decision while preparing his own opinions in *Schenck*, *Frohwerk*, and *Debs*. On further reflection prompted by a re-reading of James Weinstein's article on *Masses*, I now think it possible that Holmes had read Hand's opinion at an earlier point after their train encounter. *See* Weinstein, *supra* note 11, at 88.
25. Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 2.

"unless the defendant had the specific intent to do so in his mind."[26] Hand's letter was not a model of clarity, but he made two basic points. First, he argued that legal responsibility for speech did not depend upon predictions about likely effects. Instead, repeating his *Masses* formula, he claimed that "responsibility only began when the words were directly an incitement."[27] Second, he argued that because "juries are especially clannish groups," a test based on motive or intent was dangerous. "Juries wont [sic] much regard the difference between the probable result of the words and the purposes of the utterer," he wrote, and that would "serve to intimidate, throw a scare into, many a man who might moderate the storms of popular feeling. I know it did in 1918."[28]

Holmes was confused by Hand's letter, responding, "I am afraid that I don't quite get your point."[29] On the question of intent, he explained, he had noted only that in light of the judge's instructions the jury "must be taken to have found that Debs's speech was intended to obstruct and tended to obstruct" and that evidence "bearing on intent" had been admitted.[30] "Even if absence of intent might not be a defence," he added, "I suppose that the presence of it might be material."[31] As to Hand's "direct incitement" test, Holmes did not understand its meaning. Perhaps because he had not read *Masses* recently, he failed to see that Hand's test focused on the substance of the words spoken rather than on predictions about their likely effects. He wondered whether Hand was suggesting that speech could only be punished if it actually resulted in harm, but then dismissed that possibility. "I take it that you agree that words may constitute an obstruction within the statute, even without proof that the obstruction was successful to the point of preventing recruiting," he wrote. "That I at least think plain. So I don't know what the matter is, or how we differ so far as your letter goes."[32]

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26. *Debs*, 249 U.S. at 216.

27. Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 2.

28. *Id.*

29. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Apr. 3, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$24i.

30. *Id.*

31. *Id.*

32. *Id.*

- On November 25, 1919, two weeks after Holmes's dissent in *Abrams* was issued, Hand wrote Holmes a letter expressing his admiration and gratitude.[33] He referred specifically to the final paragraph of the dissent, in which Holmes addressed the value of free speech, and to Holmes's "analysis of motive & intent about which there has been much too meagre discussion in the books."[34] While confident that Holmes's views would prevail "after people get over the existing hysteria," he expressed concern that "the public generally is becoming rapidly demoralized in all its sense of proportion and toleration."[35]

  Holmes received many letters of gratitude from young friends and admirers after his *Abrams* dissent, most of which he appears not to have responded to.[36] But to Hand, he sent an affectionate reply. "Your letter gives me the greatest pleasure and I am very much obliged to you for writing to me," he wrote. "Sympathy and agreement always are pleasant but they are much more than that when they come from one that I have learned to think of as I do of you."[37]

What effect did these exchanges have on Holmes?[38] At first glance, one might think they had very little. At nearly every point in their interactions, Holmes seemed to reject both the general arguments Hand offered in defense of free speech and the specific arguments he made in support of his "direct incitement" test. In responding to Hand's letter after their encounter on the train, Holmes wrote that he agreed with Hand's argument "throughout," but then offered a "qualification" that cast serious doubt on that agreement.[39] After reading Hand's opinion in *Masses*, Holmes made clear that he likely

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33. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Nov. 25, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$36i.

34. *Id.*

35. *Id.*

36. It is possible Holmes did respond and the letters have not survived.

37. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Nov. 20, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005319$16i.

38. In addition to these interactions, Hand sent Holmes a telegram celebrating his seventy-eighth birthday, and Holmes sent back a short reply, neither of which discussed the issue of free speech.

39. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 19. *See also* HEALY, THE GREAT DISSENT, *supra* note 13, at 26–27; Gunther, *supra* note 11, at 734–35; Weinstein, *supra* note 11, at 88.

would have reached a different result.[40] And when Hand objected to the rule applied in *Debs*, Holmes responded that he didn't "quite get" Hand's point.[41]

But although Holmes was not immediately persuaded by Hand's arguments, there are two ways in which Hand may have ultimately influenced him. First, on a practical level, Hand appears to have made Holmes sensitive to the dangers of allowing juries too much latitude in free speech cases, particularly on the question of intent—a sensitivity reflected in modern First Amendment doctrine. Second, on a theoretical level, Hand helped Holmes reconcile his belief in majority rule with judicial enforcement of a right to free speech, although Hand's influence here was mediated by the writings of John Stuart Mill and ultimately led Holmes to adopt a different justification than the one articulated by Hand.

II. INTENT AND THE ROLE OF JURIES

As indicated above, in his *Debs* opinion Holmes cited the judge's instruction to the jury that it could not convict unless "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," and "unless the defendant had the specific intent to do so in his mind."[42] He also noted that evidence "bearing on intent" was admitted at trial,[43] and he spent part of his opinion canvassing that evidence.[44] The implication was that because there was evidence to support the jury's finding of intent, the justices could not overturn that finding even if they disagreed with it. Holmes made this point explicitly in correspondence after *Debs* was issued. Attempting to distance himself from the conviction, he wrote to several friends that had he been on the jury, he likely would have voted to acquit.[45] But because evidence of intent had been admitted, there was little he

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40. *See* HEALY, THE GREAT DISSENT, *supra* note 13, at 22.

41. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 29.

42. Debs v. United States, 249 U.S. 211, 216 (1919).

43. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 29.

44. For instance, he pointed to Debs's praise of others who had been convicted of obstructing the draft, to Debs's approval of the Socialist Party's Anti-War Proclamation, and to Debs's closing argument at his trial, in which he admitted that he hated war and "would oppose the war if I stood alone." *Debs*, 249 U.S. at 213–16.

45. *See* Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Frederick Pollock (Apr. 5, 1919), *in* 2 HOLMES-POLLOCK LETTERS 7, 7 (Mark De Wolfe Howe ed., Harvard Univ. Press 1941); Letter from Oliver Wendell Holmes, Jr., Assoc. Justice Court of the U.S., to Harold Laski, Lecturer, Harvard Univ. (Mar. 16, 1919), *in* 1 HOLMES-LASKI LETTERS 189, 190 (Mark De Wolfe Howe ed., 1953); Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Herbert Croly, enclosed in a letter to Harold Laski (May 12, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra*, at 202, 203–04; Letter from Oliver Wendell

could do. As he put it in a letter to Herbert Croly, the editor of *The New Republic*, "I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact."[46]

Holmes followed a similar logic in *Schenck*. After describing the leaflet circulated by the defendants, he addressed the issue of intent, which was a necessary element for conviction under the Espionage Act.[47] Unlike in *Debs*, prosecutors in *Schenck* had presented no evidence of intent other than the text of the leaflet, which did not expressly advocate unlawful resistance to the draft.[48] But that did not trouble Holmes, who argued that the "document would not have been sent unless it had been intended to have some effect and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[49] Then, as if to insulate that judgment from review, he added, "The defendants do not deny that the jury might find against them on this point."[50]

By the time he dissented in *Abrams* eight months later, however, Holmes was much less willing to defer to the jury, especially on the important—and highly subjective—question of intent. The defendants in *Abrams* had been convicted on four counts under the Espionage Act (as amended by the Sedition Act): 1) conspiring to publish scurrilous language about the form of the United States government; 2) conspiring to publish language bringing that form of government into disrepute; 3) conspiring to publish language inciting resistance to the war against Germany; and 4) conspiring to advocate or incite the curtailment of production of weapons and ammunition.[51] The majority acknowledged that a technical distinction might be drawn between criticizing the *form* of the United States government and criticizing its leaders, as the

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Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Lewis Einstein (Apr. 5, 1919), *in* THE HOLMES-EINSTEIN LETTERS 184, 184–85 (James Bishop Peabody ed., MacMillan and Co. 1964); Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Alice Stopford Green (Mar. 26, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005311$36i; Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Charlotte Moncheur, Baroness (Apr. 4, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097581$12i.

46. Letter from Oliver Wendell Holmes, Jr. to Herbert Croly, *supra* note 45.

47. *See generally* Espionage Act, ch. 30, § 1, 40 Stat. 217 (1917).

48. *See* Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 52 (explaining that the fliers in *Schenck* "urged only that readers should encourage their representatives to repeal the Selective Service Act and that men who opposed the war should register as conscientious objectors. Nowhere did they explicitly encourage unlawful resistance to the draft").

49. Schenck v. United States, 249 U.S. 47, 51 (1919).

50. *Id.*

51. Abrams v. United States, 250 U.S. 616, 624–25 (1919) (Holmes, J., dissenting).

Abrams defendants had done.[52] Therefore, it did not consider the sufficiency of the evidence supporting counts 1 and 2.[53] But with respect to counts 3 and 4, it concluded, based primarily on the text of the leaflets, that "not only . . . some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged."[54]

In his dissent, Holmes made several arguments that demonstrated a heightened sensitivity to the issue of intent. First, he noted that under the statute the defendants could not be convicted on count 4 unless they intended to interfere with the war against Germany.[55] The majority held that this element was satisfied as long as the defendants knew that the leaflet was likely to hinder the war's prosecution. "Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce," Justice John Clarke wrote for the Court.[56] One might have expected Holmes to agree with this statement, since he had said something nearly identical four decades earlier in *The Common Law*. "Intent," he had written then, "is perfectly consistent with the harm being regretted as such, and being wished only as a means to something else."[57] In *Abrams*, however, Holmes argued that the Espionage Act required a more specific kind of intent. "I am aware of course that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue," he wrote. "But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."[58]

Why did Holmes embrace this narrower definition of intent? Because, he explained, any other interpretation of the Espionage Act would be absurd.[59] To illustrate this point, he offered the hypothetical of a patriot who believes the country is wasting money on airplanes, or making more cannon of a certain kind than needed, and who advocates curtailment of weapons. "[Y]et 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," Holmes wrote, "no one would hold such conduct a

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52. *Id.* at 623–24 (majority opinion).

53. *See id.* at 619, 623–24.

54. *Id.* at 624.

55. *Id.* at 626 (Holmes, J., dissenting).

56. *Id.* at 621 (majority opinion).

57. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 49 (John Harvard Library 2009) (1881).

58. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

59. *Id.*

crime."[60] As Vincent Blasi has noted,[61] this explanation echoes Hand's insistence in *Masses* that the Espionage Act should not be interpreted in a way that would suppress "all hostile criticism" of the government or "all opinion except what encouraged and supported the existing policies."[62]

After adopting this narrow definition of intent, Holmes did what he had declined to do in *Schenck*, *Frohwerk*, and *Debs*: second-guess the jury's factual findings. Pointing out that the leaflet circulated by the *Abrams* defendants condemned the United States' interference in the Russian Revolution, not the war against Germany, he wrote, "I do not see how anyone can find the intent required by the statute in any of the defendants' words."[63] Of course, the jury had convicted the defendants on count 4, which meant it *did* think they had the necessary intent.[64] And in defending his *Debs* opinion, Holmes had insisted that the Court lacked the power to overrule the jury's findings of fact. So why was he willing to overturn the jury's factual finding in *Abrams*? He didn't say. Perhaps he thought the jury's finding had been based on the broader understanding of intent he was now rejecting. If so, Holmes could have argued that the jury instructions were erroneous and voted to remand the case for a new trial rather than decide the factual question himself. Or perhaps he thought the jury's finding of intent was so at odds with the evidence as to be unreasonable and hence subject to judicial second-guessing. That is also possible, although it doesn't persuasively distinguish *Schenck*, since there was no evidence of intent in that case other than the text of the leaflet. Nor does it clearly distinguish *Frohwerk* or *Debs*, given that the evidence of intent was also weak in those cases.[65] A more plausible explanation is that Holmes was no longer willing to grant juries the same latitude as in the earlier cases.

This explanation is bolstered by Holmes's constitutional analysis in *Abrams*. Reaffirming the clear and present danger test from *Schenck*, Holmes stated "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[66] He then asserted, without any analysis, that this test had not been met: "Now nobody can suppose that the

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60. *Id.*

61. *See* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 19–20 (1990).

62. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y), *rev'd*, 246 F. 24 (2d Cir. 1917).

63. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

64. *Id.* at 624.

65. *See* Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 54 (discussing the absence of evidence of intent in *Schenck*, *Frohwerk*, and *Debs*).

66. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

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."[67] Again, the jury had convicted the defendants, so presumably it had reached a different conclusion about the danger posed by the leaflets. And if Holmes was concerned that the jury's finding had been based on an erroneous statement of the law—on the natural tendency test applied in *Debs*, for example—he might have indicated as much and voted to remand the case for a new trial. But Holmes indicated nothing of the sort. Instead, he simply disagreed with the jury's factual finding and voted to overturn the convictions on the basis of that disagreement—the very thing he claimed he could not do in *Debs*.

There is one way in which Holmes's dissent in *Abrams* was *in*sensitive to the issue of intent. After asserting that the defendants posed no immediate danger, Holmes added that publishing the leaflet for the purpose of obstructing the war might have posed a greater danger, and "at any rate would have the quality of an attempt."[68] This statement was troubling, since it suggested that the defendants could be convicted on the basis of motive alone.[69] But Holmes mitigated the damage by once again insisting on a narrow understanding of intent (this time as a constitutional matter rather than as a matter of statutory interpretation).[70] He then repeated his conclusion, contrary to the jury's verdict, "that no such intent was proved or existed in fact."[71]

Holmes's newfound willingness to second-guess juries in free speech cases was apparent not only in *Abrams*, but in two subsequent cases in which he joined dissents written by Brandeis. In *Schaefer v. United States*,[72] argued the same week as *Abrams* but decided four months later, the Court upheld the conviction of the editors of a German-language newspaper for making false reports with intent to interfere with the war, as well as obstructing recruiting. Rejecting the defendant's argument that the government had failed to prove either charge, the Court ruled that it was bound by the jury's factual

67. *Id.*

68. *Id.*

69. *See* Blasi, *supra* note 61, at 21–22.

70. The damage was undone entirely by *Brandenburg v. Ohio*, which held that advocacy of unlawful conduct is protected unless it is both intended to produce imminent unlawful conduct *and* is likely to do so. 395 U.S. 444, 447 (1969) (per curiam). *Brandenburg* thus transformed the intent test from a weakness of First Amendment doctrine to a strength, giving speakers a safe harbor in the event they unintentionally create a clear and present danger.

71. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

72. 251 U.S. 466 (1920).

findings.[73] Brandeis, joined by Holmes, disagreed. Noting that the clear and present danger standard is one of degree, he acknowledged that a jury has wide latitude.[74] "But its field is not unlimited," he wrote. "The trial provided for is one by judge *and* jury, and the judge may not abdicate his function."[75] He then added that, in his opinion, "no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger either that they would obstruct recruiting or that they would promote the success of the enemies of the United States."[76]

Brandeis made a similar point in *Pierce v. United States*,[77] decided one week after *Schaefer*. And once again Holmes joined him. The defendants in *Pierce* had circulated a pamphlet printed by the National Socialist Party that repeated many of the standard critiques of the war: that it was being waged to benefit Wall Street, that victory was impossible, and that socialism was the answer to the country's problems.[78] They were convicted of making false statements with intent to interfere with the war and conspiring to cause insubordination in the military.[79] In his opinion for the Court, Justice Mahlon Pitney explained that whether the defendants intended to interfere with the war and whether they posed a risk of doing so were issues of fact for the jury to decide. As long as that decision was supported by evidence, he stated, the Court could not overturn it even if the justices saw the facts differently.[80] Dissenting, Brandeis argued that the statements in the pamphlet were matters of opinion, not fact, and that the jury could not be permitted to conclude otherwise. "To hold that a jury may make punishable statements of conclusions or of opinion," he wrote, "by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental."[81]

As I hope this analysis makes clear, Holmes became less deferential to juries, particularly on the issue of intent, between the early cases of *Schenck*, *Frohwerk*, and *Debs*, and the later cases of *Abrams*, *Schaefer*, and *Pierce*. The question is why he did so, and the likely answer is that he was influenced,

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73. *Id.* at 476.
74. *Id.* at 482–83 (Brandeis, J., dissenting).
75. *Id.* at 483 (Brandeis, J., dissenting).
76. *Id.*
77. 252 U.S. 239 (1920).
78. *Id.* at 245–47.
79. *Id.* at 242.
80. *Id.* at 250–52.
81. *Id.* at 269 (Brandeis, J., dissenting).

at least in part, by Hand. In his letter to Holmes after the *Debs* decision, Hand warned about the dangers of a test based on intent, especially when applied by juries. "[S]ince juries are especially clannish groups," Hand wrote, "it is very questionable whether the test of motive is not a dangerous test. Juries wont [sic] much regard the difference between the probable result of the words and the purposes of the utterer."[82]

It is true that Holmes did not seem persuaded by Hand's argument at the time.[83] But that should not be surprising. As most people who have studied Holmes have concluded, he was defensive, sensitive to criticism, and reluctant to admit when he was wrong.[84] Having just issued an opinion that deferred to the jury's finding on the issue of intent, he was unlikely to confess error and embrace Hand's position at once. But that does not mean he was uninfluenced by it. As students of Holmes also know, he was remarkably open-minded and intellectually curious for someone of his age, background, and stature.[85] He may not have been willing to admit when he was wrong, but he was willing to reexamine his own views and to consider arguments that ran counter to them.[86] So it is possible, even probable, that Holmes continued to dwell on Hand's arguments and that they influenced him, whether consciously or not, when he wrote his *Abrams* dissent.

This possibility is strengthened by the fact that Holmes thought highly of Hand. They had known each other since at least 1913, when Holmes was honored by the Harvard Law School Association of New York and delivered his well-known lecture *Law and the Court*.[87] Hand, then a federal district judge in New York and a Harvard alumnus, had extended the invitation personally, writing to Holmes, "I do not believe you realize what a shining example and an encouragement you have been to us now for many years."[88]

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82. Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 2.

83. *See* Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 29.

84. *See* Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 51.

85. *See* Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 535 (1992) (stating that Holmes was "more than usually willing to study arguments that ran against his firm prejudices").

86. *Id.*

87. It is possible they met before 1913, but Holmes's response to Hand's invitation suggests otherwise. *See* Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Jan. 2, 1913) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43095332$5i ("I wrote a week or more ago accepting the invitation and when the time comes I hope that we may meet and talk.").

88. Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Dec. 12, 1912) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$1i.

Holmes was equally complimentary in his reply, explaining that Hand's letter had led him to break his habit of turning down such invitations and insisting that the admiration was reciprocal. "If I have given any encouragement to younger men they have paid it back, and give me too an intellectual companionship harder to find in their elders," he wrote.[89] Over the next few years, the two men kept in semi-regular contact, with Hand writing Holmes upon the reissuance of his *Collected Speeches* in 1913[90] and then contributing to a celebration in the *Harvard Law Review* in 1916 on the occasion of Holmes's seventy-fifth birthday.[91] They likely also saw each other in person from time to time, either at the House of Truth, the townhouse in Washington, D.C., where Felix Frankfurter lived for a time, or at Holmes's residence.[92]

The correspondence between the two men further demonstrates Holmes's affection for Hand. After their meeting on the train and Hand's follow-up letter, Holmes responded that he "enjoyed our meeting as much as you possibly could have."[93] When telling Hand he didn't quite get his point in his April 1919 letter, Holmes made clear that he was willing to continue the discussion, writing, "I send you my blessing and don't hold you bound by your adieu to this stage."[94] And after Hand wrote to express his admiration for the *Abrams* dissent, Holmes responded that "[s]ympathy and agreement always are pleasant but they are much more than that when they come from one that I have learned to think of as I do of you."[95] In later years, Holmes

89. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 87.

90. *See* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Apr. 21, 1913) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43005322$2i.

91. *See* Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916). Although it doesn't mention Holmes, Hand's essay was part of a tribute the *Harvard Law Review* published on the occasion of Holmes's seventy-fifth birthday.

92. *See, e.g.*, Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Apr. 19, 1918) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097580$9i (inviting Hand to join him and his wife, Fanny, for lunch at the end at the month).

93. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 19.

94. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 29.

95. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 37.

was even more effusive, praising Hand's work as a judge[96] and expressing the hope that he would one day serve on the Supreme Court.[97]

The point is that Holmes deeply respected Hand and was therefore unlikely to disregard his criticisms entirely, notwithstanding his initial response. As often happened with Holmes, he was more likely to brood on the comments over time, and if he found merit in them, to adjust his views accordingly.[98] That, I submit, is what likely happened in 1919. Having initially dismissed Hand's concerns about juries and the issue of intent, Holmes eventually embraced those concerns himself, first in his *Abrams* dissent and then in his decision to join Brandeis's dissents in *Schaefer* and *Pierce*.

Before giving Hand too much credit, I should make clear that he was not the only one who warned Holmes about the danger of juries and the issue of intent. A month after Hand's April 1919 letter to Holmes, *The New Republic* published an article on the *Debs* case by University of Chicago Law Professor Ernst Freund.[99] Like Hand, Freund thought it was a mistake to give juries too much discretion in free speech cases. Doing so would empower jurors to punish speakers they disagreed with and make it impossible for speakers to know ahead of time whether their speech was lawful.[100] And that, Freund believed, would seriously chill political discussion. "To know what you may do and what you may not do, and how far you may go in criticism, is the first condition of political liberty," he wrote. "[T]o be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift."[101]

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96. *See, e.g.*, Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Mar. 10, 1929) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097601$31i ("I never read what you write without being impressed both by the thought and the style."); Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Mar. 18, 1922) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097586$33i (stating that Hand's writing "has a cachet of its own. It delights me, for one, and is bound to delight others").

97. *See* Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Jan. 17, 1923) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:43097588$16i ("I hope that I shall live to see . . . you as a member of this Court.").

98. Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 57–58.

99. Ernst Freund, *The* Debs *Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13.

100. *Id.*

101. *Id.*

Zechariah Chafee also objected to Holmes's deference to the jury in the *Debs* case. In his article in the *Harvard Law Review* in the summer of 1919, he argued that the jury's verdict was not entitled to deference because the trial judge had not instructed it to apply the clear and present danger test.[102] He also faulted the judge for allowing the jury to infer that *Debs* intended to obstruct the draft from the mere fact that he gave the speech. "If the Supreme Court test is to mean anything more than a passing observation, it must be used to upset convictions for words when the trial judge did not insist that they must create 'a clear and present danger' of overt acts," Chafee wrote.[103]

As he had done with Hand, Holmes initially dismissed the criticisms of Freund and Chafee. In a letter to *The New Republic*'s editor, Herbert Croly, Holmes wrote that "Freund's objection to a jury 'guessing at motive, tendency and possible effect' is an objection to pretty much the whole body of the law, which for thirty years I have made my brethren smile by insisting to be everywhere a matter of degree."[104] And in a meeting with Chafee during the summer of 1919, Holmes repeated his claim that, as a judge, he could not second-guess the jury's factual findings.[105] But Holmes also respected Freund and Chafee. Freund was a professor at the University of Chicago Law School who helped pioneer the subject of Administrative Law and was a friend of both Brandeis and Roscoe Pound, dean of Harvard Law School.[106] Moreover, Freund's piece appeared in *The New Republic*, which many of Holmes's young friends contributed to and which was the only publication Holmes regularly read.[107] Chafee, meanwhile, was a rising young professor at Holmes's alma mater and made a positive impression on the justice during their meeting in the summer of 1919.[108] Thus, just as with Hand, it is unlikely that Holmes dismissed their criticisms entirely. The more likely scenario is that when the Court heard *Abrams*, Holmes drew upon their arguments in formulating his own.

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102. Chafee, *supra* note 8, at 967–68.

103. *Id.* at 968.

104. Letter from Oliver Wendell Holmes, Jr. to Herbert Croly, *supra* note 45. After writing the letter, Holmes had second thoughts about the propriety of sending it to Croly, so he sent it to Laski instead.

105. Letter from Zechariah Chafee, Jr., Professor, Harvard Law Sch., to Charles Fremont Amidon, Judge, U.S. Dist. Court for the Dist. of N.D. (Sept. 30, 1919) (on file with the Harvard Law School Library).

106. *See* HEALY, THE GREAT DISSENT, *supra* note 13, at 134–36.

107. *See id.* at 134–35.

108. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Harold Laski, Lecturer, Harvard Univ. (July 27, 1919) (on file with the Harvard Law School Library), https://iiif.lib.harvard.edu/manifests/view/drs:42885053$9i (stating that he "was delighted with Chafee").

In the end, it is impossible to know exactly how much Holmes was influenced by any of these three men. It seems clear, however, that he changed his views on the issue of intent and the deference due to juries and that Hand deserves at least part of the credit.

But does it matter? Should we care that Holmes changed his views on these issues, or is it merely of historical interest? I think it does matter, for the following reason. The division of responsibility between judges and juries in free speech cases has long been a subject of dispute. One of the main criticisms of the common law crime of seditious libel was that judges, rather than juries, were given the power to decide whether a defendant's speech had a seditious tendency. That is why, in more than one colonial sedition case, juries disregarded the judge's instructions and returned a verdict of not guilty.[109] It is also why even the Federalists who drafted the Alien and Sedition Act of 1798 provided that the question of seditious tendency would be decided by juries, not judges. Indeed, it was this feature of the statute, along with its requirement of malicious intent and its inclusion of truth as a defense, that Federalists cited as evidence of their commitment to free speech.[110]

This history might suggest that returning power to judges in free speech cases was a step backward, not forward. But as Hand recognized, juries can also pose a threat to free speech. Being "especially clannish groups," they are just as susceptible as judges to the hysteria and fear that give rise to suppression.[111] It was for this reason that Hand thought the protection offered by juries in free speech cases was "illusory" and that what was needed instead was an objective test based on the speaker's words. Holmes did not embrace Hand's test (largely because he didn't understand it), but he did come to share Hand's concern about juries. And his solution, developed in conjunction with Brandeis, was to empower judges to review the jury's factual findings in free speech cases. This solution did not revive the dangers of the common law approach, however. Instead, it gave speakers an added layer of security. They could rely in the first instance on the common sense and democratic spirit of the jury. But in the event the jury was swayed by prejudice or hysteria, they could appeal to the judge or an appellate court to overturn its findings. And

109. *See* RICHARD KLUGER, INDELIBLE INK: THE TRIALS OF JOHN PETER ZENGER AND THE BIRTH OF AMERICA'S FREE PRESS 261–70, 298 (2016).

110. *See* GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 43–44 (2004).

111. *See* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y. to Zachariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920) (on file with the Harvard Law School Library) ("I think it is precisely at those times when alone freedom of speech becomes important as an institution, that the protection of the jury on such an issue is illusory.").

that has had major implications for the protection of free speech. In the century since *Abrams* was decided, it has become routine for trial judges and appellate courts to independently review the jury's factual findings in free speech cases.[112] In areas of the law ranging from defamation[113] to obscenity[114] to breach of the peace,[115] judges have used this power to rein in the excesses of juries and protect unpopular speakers.[116] These cases trace their lineage directly to the dissents of Holmes and Brandeis in *Abrams*, *Schaefer*, and *Pierce*.[117] And those dissents, as we have seen, were informed by the arguments of Learned Hand. Thus, Hand's influence on Holmes not only made itself felt in 1919 and 1920, but continues to reverberate today.

III. A THREE-PART DIALECTIC

In addition to encouraging Holmes to think more carefully about the role of juries and the issue of intent, Hand may have helped Holmes reconcile his belief in majority rule with the right of free speech. Here again, though, Hand must share the credit, since Holmes was also influenced by the writing of John Stuart Mill and ultimately adopted a different theory of free speech than the one Hand articulated in *Masses*.

Holmes, as is well known, was disdainful of individual rights and of the idea that there are limits on what a democratic majority can do. That was the

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112. *See generally* Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229 (1996); J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483 (1985).

113. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (holding that judges—particularly on the Supreme Court—must review jury findings of fact "in order to preserve the precious liberties established and ordained by the Constitution"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (ruling that in free speech cases, the Court "must examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are" protected by the First Amendment).

114. *See* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (stating that even though it is essentially a question of fact, juries do not have "unbridled discretion in determining what is patently offensive").

115. *See* Cox v. Louisiana, 379 U.S. 536, 545 n.8 (1965) (emphasizing the need for independent judicial review of the record in cases involving free speech so as to ensure that federal rights are not "frustrated by distorted fact finding"); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (stating that even though the state court found defendant's conduct to be a breach of peace under state law, "it nevertheless remains our duty in a case such as this to make an independent examination of the whole record").

116. In some cases, judges have also used this power to overturn jury findings in favor of speakers. For criticism of this practice, see Parker, *supra* note 112.

117. *See, e.g.*, *Bose Corp.*, 466 U.S. at 506 n.24 (citing the dissent in *Schaefer* for the proposition that appellate courts must independently review the record in free speech cases).

premise of his dissenting opinion in *Lochner v. New York*[118] and other substantive due process cases. If the majority wanted to limit the hours of bakers or mandate a minimum wage, Holmes thought, it should be allowed to do so, regardless of whether those laws conflicted with some imagined "right to contract."[119] And he rejected the idea that it was the job of courts to scrutinize the wisdom of the majority's choices.[120] These two beliefs—a belief in majority rule and a corresponding belief in judicial restraint—are captured by two of Holmes's most provocative aphorisms. The first is that "[E]very society rests on the death of men,"[121] by which he meant that collective progress requires the sacrifice of individual interests. The second is, "[I]f my fellow citizens want to go to hell I will help them. It's my job."[122] In other words, it is not the role of judges to reconsider the policies adopted by the legislature.[123]

Holmes's belief in majority rule and judicial restraint initially made him resistant to claims rooted in the First Amendment.[124] Just as the courts should not interfere with the majority's regulation of the economy, he thought, they should not interfere with its regulation of expression.[125] Nor was there anything about free speech rhetoric in the early twentieth century that would have prompted Holmes to question this conclusion. To the contrary, the prevailing rhetoric about free speech confirmed Holmes's instincts, since that rhetoric derived largely from the same libertarian ideology that supported the so-called "right to contract."[126]

Yet Holmes was also skeptical of the idea of objective truth, or at least our ability to discover it. As he wrote to Hand, "[W]hen I say a thing is true I

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118. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

119. *Id.* at 75.

120. *Id.* ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

121. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Sir Frederick Pollock, Editor, Law Reports (Feb. 1, 1920), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 45, at 36, 36.

122. Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Harold Laski, Lecturer, Harvard Univ. (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 248, 249.

123. This idea is also captured by what Holmes jokingly said he wanted written on his tombstone: "[H]ere lies the supple tool of power." Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 249–50 (1964).

124. *See* Healy, *The Justice Who Changed His Mind*, *supra* note 13, at 36–46 (documenting Holmes's early resistance to free speech claims).

125. *Id.* at 36–37.

126. *See* DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 299 (1997) (demonstrating that free speech rhetoric in the late nineteenth and early twentieth centuries derived from a larger vision of individual autonomy).

mean that I can't help believing it—and nothing more. But as I observe that the Cosmos is not always limited by my Can[']t Helps I don't bother about absolute truth or even inquire whether there is such a thing, but define the Truth as the system of my limitations."[127] This skepticism about absolute truth gave advocates of free speech an opening with Holmes, since many of the classic arguments in support of free speech are based on doubt and fallibility. Indeed, this is what Hand emphasized in his letter to Holmes in June 1918.[128] Believing, like Holmes, that democratic majorities are entitled to enact whatever laws they choose,[129] Hand did not argue that individuals have a natural or inalienable right of free speech. Instead, he grounded his defense of free speech in the idea of skepticism, arguing that "[t]olerance is the twin of incredulity" and that "we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own."[130] Failure to do so, Hand argued, would deprive the majority of the wisdom of those who disagreed with it.[131]

Although he shared Hand's incredulity, Holmes did not initially think an acknowledgement of one's fallibility necessitated a policy of tolerance. He made this clear when, in his response to Hand, he compared freedom of speech to freedom from vaccination. "The occasions would be rarer when you cared enough to stop it," he wrote, in reference to freedom of speech, "but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act."[132] Holmes's point was that we are always acting upon a provisional hypothesis. We can never be sure we're right. But that shouldn't stop us from acting—even when the action at issue is the suppression of speech. That Holmes included the suppression of speech in this claim is confirmed by a letter he sent to his friend Harold Laski two weeks later in which he wrote that "we should deal with the act of speech as we deal with any other overt act we don't like."[133]

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127. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 19.

128. *See* Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 17.

129. *See, e.g.*, Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 509 (1908) (criticizing the use of the due process clause to invalidate progressive labor laws).

130. Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 17.

131. *See id.*

132. *See* Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 19.

133. *See* Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Harold Laski, Lecturer, Harvard Univ. (July 7, 1918), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 160, 161.

Hand did not respond to Holmes's argument, either at the time or later. His subsequent letter to Holmes in April 1919 focused not on the theoretical justification for free speech, but on the appropriate test for determining its limits.[134] But Holmes did encounter a response to his argument in February of 1919, when, at the urging of Laski, he reread John Stuart Mill's *On Liberty*.[135]

Like Hand, Mill based his argument for free speech on the fallibility of human judgment.[136] But unlike Hand, Mill anticipated Holmes's response to this argument, which was that even though we are fallible, even though we can never be certain of the truth, we must still act.[137] Mill agreed with this proposition in general. We must act, he acknowledged, and we must assume, for the purpose of acting, that what we believe is true.[138] But that does not mean we can assume our opinions are true for the purpose of suppressing speech.[139] Just the opposite, Mill argued. It is only because our opinions are open to challenge that we are justified in assuming their truth for purposes of action. "Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action," Mill wrote. "The beliefs which we have most warrant for have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded."[140]

Mill's argument not only answered Holmes's objection to Hand; it also fit nicely with Holmes's description of himself as a bettabilitarian.[141] As he had often said, the universe is a mystery. We can never know anything for certain; we can only place bets one way or another. Like any gambler, however, we should gather as much information as possible before wagering our money or our lives. Only then can we be confident in the bets we have made.[142]

The influence of Hand and Mill can be seen in the final paragraph of Holmes's *Abrams* dissent, which reads like a three-part dialectic. Holmes begins by repeating his own long-held view that "[p]ersecution for the

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134. *See* Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 2.

135. *See* Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Harold Laski, Lecturer, Harvard Univ. (Feb. 28, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 45, at 186, 187 (stating that, at Laski's suggestion, he had reread *On Liberty*).

136. JOHN STUART MILL, ON LIBERTY 78 (Gertrude Himmelfarb ed., Penguin Books 1987).

137. *Id.* at 78–79.

138. *Id.* at 78.

139. *Id.* at 79.

140. *Id.* at 81.

141. HEALY, THE GREAT DISSENT, *supra* note 13, at 205; LOUIS MENAND, AMERICAN STUDIES 45 (2002).

142. HEALY, THE GREAT DISSENT, *supra* note 13, at 205.

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."[143] Instead of stopping there, however, as he had always done in the past, he responds to this logic by invoking Hand's argument from incredulity. "But when men have realized that time has upset many fighting faiths," he writes, "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."[144]

Notice how much work the idea of "incredulity" is doing in this sentence. In his letter to Hand in June 1918, Holmes had argued that the role of incredulity was merely to give us "the added grace of knowing that the Enemy is as good a man as thou," but that we should nonetheless "kill him if thou Canst."[145] Now, he argues that incredulity—the realization that time has upset many fighting faiths—is so important that it may lead people to believe they will be better off permitting free trade in ideas than suppressing views that contradict their deepest beliefs.[146]

Why exactly might they come to believe this? This is the third part of the dialectic, and here Holmes turns to Mill, who argued that free speech is the precondition that allows us to act safely in the face of uncertainty. In Holmes's dissent, that argument becomes an assertion about what men may come to believe when they recognize their own fallibility—"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."[147]

I have italicized "that" rather than "truth" in the latter half of this assertion because I believe Holmes is saying not that "truth," in some abstract sense, is the only ground upon which our wishes safely can be carried out. Instead, I believe he is saying that the truth that emerges from the competition of the market is the only safe basis for action.[148] In doing so, he is channeling Mill

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

144. *Id.*

145. Letter from Oliver Wendell Holmes, Jr. to Learned Hand, *supra* note 19.

146. *See Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

147. *Id.* at 630 (emphasis added).

148. Vincent Blasi has made the case for an alternative reading in which the word "truth" is emphasized rather than the word "that." *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 16. In support of this reading, Blasi points out that earlier in the same sentence Holmes used the word "that" as a conjunction rather than as an adjective. *Id.* My own reading is based both upon the similarity of Holmes's argument to Mill's and the placement of a comma between the words "market" and "and." The comma signals the start of an independent

directly. Just as Mill argued that the only *safeguard* for acting in the face of uncertainty is "a standing invitation to the . . . world to prove" our beliefs unfounded, Holmes is claiming we can only act *safely* to carry out our wishes when the beliefs upon which those actions are based have been subjected to the challenge and scrutiny that comes with the competition of the market.

This does not mean Holmes believed the market would inevitably produce an objectively verifiable truth.[149] Instead, he believed that subjecting our ideas to challenge is the only way we can have confidence in the actions we take in the face of uncertainty. To use Holmes's own terminology, this is the only way our beliefs can become "*Can't* Helps." If we have not subjected them to scrutiny, they are necessarily "*Can* Helps" because there is something else we can do before accepting them. Thus, just as Holmes defined truth "as the system of my limitations" in his letter to Hand, in *Abrams*, we might say, he defines truth as the system of *our* limitations—limitations that are inherent in the capacity of the market.

This is a symposium on Hand, not Mill, so it is fair to wonder how much of Holmes's argument was influenced by Hand rather than Mill. In other words, might Holmes have reached this same conclusion on the basis of reading Mill alone, given that Mill also emphasized the role of fallibility and incredulity in his defense of free speech? This is certainly possible. And as with the issues of intent and deference to juries discussed above, we will never know precisely how much influence any single person had on Holmes. But it is worth noting that Holmes had read *On Liberty* prior to 1918.[150] And yet he had not previously embraced the wisdom of a right to free speech. That suggests it was the combination of Hand's argument from incredulity and Mill's argument about free speech as a safeguard for action in the face of uncertainty that helped Holmes realize how his own skepticism could justify a policy of tolerance.

IV. DEMOCRATIC LEGITIMACY V. DEMOCRATIC EFFICACY

In spite of Hand's influence on Holmes, there is one way in which Holmes's justification for free speech differs significantly from Hand's.

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clause with its own subject and object, the subject being "that truth," and the object being "ground."

149. I agree with Vincent Blasi that Holmes was attracted to the market metaphor because of the characteristics he associated with markets—adaptability, change, and evolution—not because he wanted to import an entire economic theory into the realm of the First Amendment. *See id.* at 24–33.

150. *See* Letter from Oliver Wendell Holmes, Jr. to Harold Laski, *supra* note 135, at 139 (noting that, at Laski's urging, he had reread *On Liberty*).

The argument Holmes put forward in *Abrams* explains why a democratic majority might *choose* to tolerate dissenting opinions. But it does not explain why a judge would be justified in imposing tolerance on the majority against its will. Note that Holmes says only that men "*may* come to believe . . . that the ultimate good desired is better reached by free trade in ideas," not that they *must* believe this. So how can one get from *may* to *must*? More importantly, how can Hand and Holmes, two judges who believed strongly in majority rule and judicial restraint, force the majority to accept the principle of tolerance they have come to personally embrace?

Hand has a compelling response to this question. In *Masses*, he argues that the majority must respect free speech because hostile criticism and open discussion are what legitimize the majority's exercise of power. He makes this point several times, referring to "free expression of opinion as the ultimate source of authority,"[151] to "public opinion" as "the final source of government in a democratic state,"[152] and to "political agitation" as a "safeguard of free government."[153] This is the classic argument from self-government that Alexander Meiklejohn would expand upon three decades later.[154] And it made sense for Hand, a progressive reformer who believed fervently in good government and popular sovereignty.[155]

But it didn't make sense for Holmes, who, although he believed in democracy, never spent much time developing a philosophy to justify it.[156] For Holmes, the power of the sovereign was a fact.[157] If you disliked that fact, you could attempt to overthrow the sovereign, but there was no point arguing about its legitimacy. So whereas Hand viewed free speech as the source of democratic legitimacy, Holmes had to identify a different function for speech.[158] And the function he identified was the achievement of the "ultimate

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151. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).

152. *Id.* at 540.

153. *Id.*

154. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 102–03 (1948).

155. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 190–237 (1994) (recounting Hand's involvement with the progressive party).

156. *See* Grey, *supra* note 85, at 524–28.

157. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which it depends.").

158. Hand may have sensed this, which would explain why his letter to Holmes in June 1918 focused not on the issue of democratic legitimacy but instead on the role of free speech in promoting the search for truth. *See* Letter from Learned Hand to Oliver Wendell Holmes, Jr., *supra* note 17.

good desired" by the majority. In other words, Holmes viewed free speech as a tool the democratic majority could use to ensure that its wishes—whatever wishes it settled upon after open debate—were safely carried out. Thus, we might say that instead of conceiving of free speech as the source of democratic legitimacy, Holmes conceived of free speech as the source of democratic efficacy.[159]

If I am right that Holmes's theory of free speech is grounded not in democratic legitimacy, but in democratic efficacy, he still has to explain why the majority must accept his view that free speech is the best way to achieve its wishes. And his explanation in *Abrams* is notoriously thin. After stating what it is that men "may come to believe" about the free trade in ideas, he simply declares, "[t]hat at any rate is the theory of our Constitution."[160] What evidence is there to support that declaration? One piece of evidence, which Holmes cites a few lines later, is the fact that Congress later repaid some of the fines levied under the Sedition Act of 1798.[161] This is certainly probative, since it suggests that Congress came to regret the suppression of dissenting views under the Act. But it's far from dispositive. After all, the Congress that enacted the Sedition Act was much closer to the ratification of the Constitution than the later Congresses that voted to repay the fines.[162] Not to mention that numerous judges upheld the Sedition Act, including several Supreme Court justices who presided over trials brought under the Act while riding circuit.[163]

A better explanation may lie in the sentence that immediately follows Holmes's declaration about "the theory of our Constitution." There he writes, "[i]t is an experiment, as all life is an experiment."[164] It is tempting to read this characterization of the Constitution as a throwaway line, a rhetorical flourish without any connection to his larger point. But Holmes repeats the characterization two sentences later, writing, "[w]hile that experiment is part of our system, I think that we should be eternally vigilant against attempts to

159. Vincent Blasi has argued that Holmes was influenced by Hand's arguments about the connection between free speech and democracy. *See* Blasi, *supra* note 61, at 16–24. I agree with Blasi that Holmes came to share Hand's view that free speech is important to democracy. But I don't think it was on account of legitimacy. I think it was because he came to believe that free speech would best allow the majority to carry out its wishes. One would be hard pressed in looking through Holmes's writing, either professional or personal, to find him expressing any concerns about democratic legitimacy.

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

161. *Id.*

162. *See* STONE, *supra* note 110, at 73.

163. *See id.* at 68–69.

164. *Abrams*, 250 U.S. at 630.

check the expression of opinions that we loathe and believe to be fraught with death."[165] The repetition is not an accident. Instead, I believe Holmes's description of the Constitution as an "experiment" can be read as an argument about the proper way to interpret it.

Holmes often emphasized the constitutive nature of the Constitution, the fact that it was designed not simply to provide a framework for governing but that it brought the nation into existence. He also made clear that he believed the purpose of the Constitution was to ensure that the nation it created would "endure for ages to come," in the words of John Marshall.[166] We can see this in *Lochner*, where Holmes writes that a Constitution is "made for people of fundamentally differing views," implying that it is designed to transcend geographic, ideological, and temporal factions.[167] We can also see it in *Missouri v. Holland*, where Holmes describes the Constitution as a "constituent act" that has "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[168]

The fact that Holmes thought about the Constitution in terms of the nation's survival is not surprising given that the formative experience of his life—the Civil War—was a test of whether that nation would survive. But what is perhaps underappreciated is the implication this has for constitutional interpretation. If one believes, as Holmes did, that the Constitution is an experiment in national survival, then the survival of the nation becomes a paramount consideration when interpreting the Constitution. This means that interpretations that threaten national survival—such as reading into the Constitution an economic theory that "a large part of the country does not entertain"[169]—should be avoided. On the other hand, interpretations that promote national survival—such as recognizing that the Constitution is made for people of fundamentally differing views or inferring "a power which must belong to and somewhere reside in every civilized government,"[170]—should be favored.

What does this have to do with free speech? For a nation to "endure for ages to come," it must be adaptable and open to change. Experiments are

165. *Id.* at 630. For a long time, I read the word "while" in this sentence as a synonym for "although" or "in spite of the fact." I now believe "while" should be read as a synonym for "during" or "for as long as." In other words, Holmes is saying "for as long as that experiment is a part of our system, I think we should be eternally vigilant . . . ."

166. *See* McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

167. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

168. Missouri v. Holland, 252 U.S. 416, 433 (1920).

169. *Lochner*, 198 U.S. at 75.

170. *Holland*, 252 U.S. at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

rarely successful unless one is prepared to adjust course in response to changing conditions. And as Vincent Blasi has persuasively argued, free speech, as envisioned by Holmes, promotes just that kind of adaptability.[171] Dissent, discussion, and debate help institutions remain flexible and capable of evolution, whereas an insistence on orthodoxy leads to rigidity and stasis.[172] In short, free speech promotes national survival, while censorship threatens it. And for a judge like Holmes, who believed that the Constitution was an experiment worth preserving, that was justification enough for invalidating the government's attempt to stifle speech.[173] He might help his fellow citizens go to hell, as he liked to say, but not before they had a pretty good idea of what hell looked like.[174]

CONCLUSION

Far from setting out on the shortest voyage ever made, Hand's opinion in *Masses* has enjoyed a remarkably long life. It is one of the few lower court opinions that has made it into First Amendment casebooks,[175] and it continues to influence both free speech doctrine and theory. Yet long before it took its place in the free speech canon, Hand's opinion—and the ideas upon which it was based—had a more immediate impact on the thinking of Justice Holmes. Hand never persuaded Holmes to adopt his "direct incitement" test, in part because Holmes didn't understand what it meant or how it differed from his own "clear and present danger" test. But Holmes did understand Hand's concerns about intent and the dangers of juries, and both concerns found their way into his *Abrams* dissent. Moreover, Hand's argument from incredulity resonated deeply with Holmes. And once Holmes realized, with the help of Mill, how his own skepticism could support the case for tolerance, he embraced the right of free speech as fervently as anyone. For that, we likely have Hand to thank.

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171. Blasi, *supra* note 148, at 24–33.

172. *Id.* at 27–30.

173. *See id.* at 31 (stating that Holmes's "approach to constitutional interpretation depended on an attitude, if not a theory, about change").

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

175. *See, e.g.*, KATHLEEN M. SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW (6th ed. 2016).