"Fighting Faiths," Error Deflection, and Free Speech

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I. INTRODUCTION: THE FOG OF LAW

Lawyers and lawmakers inhabit a vast fog of law,[1] a surreal realm of uncertainty and doubt about the past, present, and future. We are often uncertain and deeply divided about the historical facts and causal factors that have brought us to the present. We disagree sharply over virtually any effort to describe or characterize the present. And we are even more uncertain about what the future may hold. We can only guess about the future consequences of both individual and government action—or non-action.

Since almost all legal decisions are made under such conditions of radical uncertainty about the past, present, and future, legal rules and outcomes often rest on a patchwork of predictions and unprovable assumptions driven by science, superstition, self-interest, ideology, hope, and fear. Operating within such a chaotic environment of radical uncertainty, error deflection rules that instruct lawmakers, lawyers, and judges about how to behave in the absence of various degrees of certainty that sometimes cannot be achieved necessarily assume

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[1] The notion of a "fog of law" is, of course, a play on the well-known phrase "fog of war" coined in the nineteenth century by Baron von Klauswitz to describe the situational uncertainties of military combat. I am far from the first person to talk of a fog of law. *See* MICHAEL J. GLENNON, THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW (2010).

enormous practical importance.[2] Indeed, I believe that it is error deflection, not substantive knowledge, that most often guides us through the fog of law.

Judicial promulgation and enforcement of enhanced error deflection rules in the context of speech regulation, dating from Justice Oliver Wendell Holmes Jr.'s celebrated dissent in *Abrams v. United States*,[3] is the subject of this essay. Unlike many celebrated students of the power of judges to set aside the actions of democratically legitimate

[2] Error deflection rules operate in those legal settings where we acknowledge the existence of significant risk of error and wish to ensure that, when mistakes inevitably occur, we will err in one direction, as opposed to another. Enhanced burden of proof rules are the most common methods of deflecting error. I discuss the role of error deflection in protecting rights in Burt Neuborne, *The Origin of Rights: Constitutionalism, the Stork, and the Democratic Dilemma*, *in* THE ROLE OF COURTS IN SOCIETY 187 (Shimon Shetreet ed., 1988) [hereinafter *Origin of Rights*].

[3] 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). The direct appeal from the District Court in *Abrams* was argued on October 21 and 22, 1919. The Supreme Court majority and dissenting opinions appeared on November 10, eighteen days later, exactly one year after Armistice Day, celebrating the signing of the armistice that ended armed hostilities in WWI. No trial transcript exists. The best summary of the trial before Judge Clayton (who was brought in from Alabama to preside; while in Congress, Clayton had drafted the Clayton Anti-Trust Act) appears in Zachariah Chafee, Jr., *A Contemporary State Trial—The United States* Versus *Jacob Abrams* Et Al., 33 HARV. L. REV. 747 (1920) [hereinafter Chafee 1920], citing to contemporary sources. According to Chafee, Judge Clayton was relentlessly hostile to the defendants, Jacob Abrams, Samuel Lipman, Hyman Lachowsky, Molly Steimer, Gabriel Prober, and Hyman Rosansky, all of whom were non-citizen Russian emigrants in their twenties. *Id.* at 750, 755–57. Clayton repeatedly indicated his belief in the defendants' guilt and his embrace of the government's legal theory that replaced a requirement of proof of specific intent to bring about unlawful behavior with a general intent to utter words having even a mild tendency to frustrate the war effort. *Id.* at 755–57, 761. One original defendant, Jacob Schwartz (who wrote the Yiddish leaflet), died mysteriously the day before the trial began while in military custody. *Id.* at 750. Judge Clayton refused to investigate charges that Schwartz had been beaten to death. *Id.* at 761–62. Prober was acquitted. Abrams, Lipman, and Lachowsky were sentenced to the maximum of twenty years under the 1918 Amendments to the 1917 Espionage Act and fined $1000 on each of the indictment's four counts. *Id.* at 763. Molly Steimer was sentenced to fifteen years and a $500 fine. *Id.* Rosansky, who had dumped the leaflets from the tenement window, received a three-year sentence in recognition of his cooperation in identifying the other defendants. *Id.*

Chafee had already published an influential law review article in June 1919, arguing that the First Amendment required both convincing proof of specific intent to cause a violation of law, and convincing evidentiary proof that the targeted speech posed an unacceptable level of risk of imminent lawless action. *See* Zachariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) [hereinafter Chafee 1919]. Holmes's dissent in *Abrams*, after having written an unfortunate majority opinion in *Debs v. United States*, 249 U.S. 211 (1919), upholding Debs's conviction for delivering a speech in which he praised draft resistors, was clearly influenced by Chafee's 1919 article and by a personal meeting with Chafee during the summer of 1919.

institutions,[4] I do not believe that judicial invalidation of (1) statutes enacted by duly elected legislatures, (2) administrative actions taken by duly serving executives, and/or (3) verdicts issued by randomly selected juries are necessarily rooted in a judge's allegedly superior ability to identify and define substantive rights codified in a constitutional or statutory text.[5] Rather, I believe that the vast bulk of judicial power to check democratic institutions rests on the articulation and enforcement of judge-made error deflection rules designed to manage the inevitable risk of error that pervades the fog of law. The practical impact of such error deflection rules in a world of uncertainty is to limit or prevent action by democratic institutions in the absence of a judicially defined requisite degree of confidence about the justification for, the need for, or the consequences of governmental action in derogation of textually articulated constitutional values.[6] I believe that it is in the regulatory dead space created by impossibly demanding error reflection rules that the free exercise of autonomy-based rights flourishes.

II. OF SYLLOGISM MACHINES AND THE FOG OF LAW

I've taught Civil Procedure and Evidence for almost fifty years at NYU Law School.[7] A staple of both courses has been the description, analysis, and critique of the power of judges, especially unelected judges, to shape, preclude, and, occasionally, override jury verdicts.[8] At

[4] Among the thoughtful, indeed brilliant efforts to think about rights as "things" described in a text, as opposed to the de facto outcome of a process, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST (1981); JOHN RAWLS, A THEORY OF JUSTICE (1971); and Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[5] Since I do not believe that rights are necessarily embedded in ambiguous texts, I need not wade into the perplexing question of how to read ambiguous texts like the forty-five words of the First Amendment. For my take on reading the First Amendment, see BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015) [hereinafter MADISON'S MUSIC].

[6] *See Origin of Rights*, *supra* note 2, at 199–203.

[7] I ask forgiveness here for a bout of nostalgia occasioned by my decision to retire from full-time teaching at NYU after forty-nine years, at the close of the Fall 2020 semester. I owe an enormous debt to my colleagues and students at NYU who have combined over the years to sustain an environment of mutual respect and intellectual commitment, enabling me to enjoy almost every minute in my classrooms and the faculty library.

[8] The Sixth and Seventh Amendments are designed to reserve the crucial power of adjudicative fact-finding to the people, speaking through a randomly selected, neutral jury that is fundamentally representative of the community. The jury's obvious democratic roots hark back to the process of random selection of officials in Athenian democracy, often called "sortition." *See Sortition*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/sortition (last visited Aug. 1, 2020). In fact, service

the same time, for the past half-century, I've taught Federal Courts and, less often, Constitutional Law at NYU, Stanford, Texas, Berkeley, and Cal-Irvine, exploring the power of judges, especially unelected judges, to shape and, occasionally, override legislative and executive actions.[9] Although the two exercises of judicial authority take place in different legal realms, each involves the exercise of power by an (often) unelected judge to shape and, if necessary, override the judgments of a democratically legitimate institution—the randomly selected jury in one set of cases; a duly elected legislature in the other.[10] Both exercises of judicial power to check the popular will rely heavily on the enunciation and enforcement of a judge-made set of error deflection rules—the "burdens of proof" in the jury context and what I call the "burdens of justification" in the legislative realm—that guide us through the fog of law.

I hope in this brief essay, stimulated by the excellent symposium held in November 2019 at Columbia Law School celebrating the 100th birthday of Justice Oliver Wendell Holmes Jr.'s memorable dissent in *Abrams*, to highlight the extent to which current judicial checks on the power of democratic institutions to interfere with free speech rest on the willingness of judges to impose stringent error deflection rules on democratic institutions—juries and legislatures alike. I will argue, as well, that since judicially imposed error deflection rules inevitably reflect a judicial value judgment about risk management in specific settings, the decision of what level of error deflection to mandate may—and should—vary in different contexts. When, for example, following the path begun in *Abrams*, a contemporary judge declares a statute in violation of the First Amendment, it is most often because the judge finds that government has failed to carry the government's heavy "burden of justification," an error deflection rule at the legislative level

on a jury is one of the three times in our democracy that a citizen exercises direct governing power, as opposed to delegating the power to an elected representative. The other two times are voting and service in the institutions of armed coercion—the military and the police. Despite the jury's powerful democratic pedigree, however, it is routine for judges to intervene in its deliberations by filtering the evidence, instructing juries on the law and burden of persuasion, cutting certain cases off from the jury, directing verdicts, and setting verdicts aside. *See, e.g.*, FED. R. CIV. P. 50, 51. The apogee of the jury's power is reached in criminal cases, where the Sixth Amendment precludes judges from seizing control of the fact-finding process by directing verdicts of guilt. Even in criminal cases, though, judges exercise a significant degree of control over juries by supervising jury selection, deciding what evidence the jurors may hear, instructing them on the law and the heightened burden of persuasion, and directing verdicts of innocence. *See* Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151 (1961).

[9] *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

[10] I noted the common characteristics in *Origin of Rights*, *supra* note 2, at 198–203.

reflecting a judicial value judgment about risk management in the context of a clash between constitutionally recognized values of free speech and constitutionally legitimate concerns about security, efficiency, and order.[11] For reasons aptly described in the *Abrams* dissent and its long progeny, when such a clash occurs, it makes excellent sense to deflect error dramatically in favor of free speech.[12] But when the value clash changes, pitting values like reputation and equality against free speech, it is, I believe, a mistake to reflexively borrow the dramatically pro-speech error deflection rules from the *Abrams* context and use them to resolve other clashes. Each set of clashes deserves its own error deflection rules.

I confess that I'm not sure whether First Amendment regulations designed to protect the equality and autonomy interests of weak hearers and targets should be measured against the disabling error deflection rules designed to control censorship in the name of security, efficiency, and order. The Holmes dissent in *Abrams*, for all its brilliance and importance in protecting free speech against suppression in the name of order, efficiency, and security, does not answer that important question, in large part, because we have never asked it.

III. THE SYLLOGISM MACHINES AT WORK: IDENTIFYING THE RAW MATERIAL FOR POTENTIAL ERROR DEFLECTION

The vast bulk of lawmaking in our democracy consists of decisions by democratically authorized actors[13] empowered to identify important

[11] The *Abrams* dissent is the earliest example of such First Amendment error deflection at the level of the Supreme Court. A year earlier, Judge Learned Hand had flirted with the technique in his opinion in *Masses Publ'g Co. v. Patten*, 244 F. 535 (1917), *stay granted*, 245 F. 102, *rev'd*, 246 F. 24 (1917). *See* Burt Neuborne, *A Tale of Two Hands: One Clapping*; *One Not*, 50 ARIZ. ST. L.J. 831 (2018) (comparing Learned Hand's pioneer District Court opinion in the *Masses* with his disappointing Second Circuit opinion thirty-three years later upholding the criminal convictions of leaders of the American Communist Party in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951)). As we'll see, *infra*, enhanced First Amendment error deflection does not emerge as a fully formed Supreme Court doctrine until *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). I briefly describe the emergence and operation of error deflection and the degree to which it permeates modern free speech protection *infra* Part IV.

[12] Abrams v. United States, 250 U.S. 616, 627–31 (1919) (Holmes, J., dissenting).

[13] Two sets of democratically authorized lawmakers exist—legislators and executives. I omit the task of finding a democratic pedigree for judges—elected and non-elected. I tried to posit one in BURT NEUBORNE, WHEN AT TIMES THE MOB IS SWAYED 135–38 (2019). It is easy to describe the democratic pedigree of elected legislators and elected executives. It is somewhat more difficult to posit a democratic pedigree for administrative officials appointed by members of the Executive branch, especially when they are shielded from day-to-day supervision by elected officials. In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court struck down the

collective interests and impose legal rules designed to use the carrot and the stick to channel individual behavior toward preserving and advancing those interests. The process of making and enforcing the laws usually takes the form of two linked syllogisms.[14] Syllogism I (the lawmaking phase) is constructed at the legislative or executive level by elected representatives of the people or by an appointed administrator who answers to an elected official. The major premise of Syllogism I consists of the articulation of a worthy collective interest, X; the minor premise assesses and describes the impact of behavior, Y, on collective interest X. The conclusion spits out a new rule of law, Z, mandating, encouraging, or forbidding behavior Y because of its assumed impact on collective interest X.

Syllogism I is almost always permissive, allowing but not compelling legislative or executive action. Indeed, much of what passes for debate in our legislatures, courts, and administrative agencies consists of (1) disagreement over the existence or importance of the asserted collective interest, (2) uncertainty about the impact that varieties of targeted behavior will have on the collective interest, and (3) disagreement about whether potentially fairer or more effective rules of law (or no rule at all) will do a better job of advancing the collective interest. So, a law banning homicide begins with the consideration of the collective interests threatened by homicide; continues with the identification of the varieties of homicide deemed most threatening to the collective interests; and ends with the enunciation of a law forbidding certain forms of homicide.

Syllogism II (the implementation phase) usually unfolds at the adjudicative level. It governs efforts to apply and enforce the legal Rule Z established in Syllogism I. In fact, the major premise of Syllogism II is Rule Z, the conclusion of Syllogism I. The minor premise of Syllogism II consists of a historical reconstruction of a defendant's past behavior, Y, and an assessment of whether the reconstructed behavior violates Rule Z. The conclusion, verdict Z, declares whether Rule Z has been violated. If Rule Z is found to have been violated, the implementation process

effort by Congress to create a single autonomous head of the Consumer Financial Protection Bureau removable by the President only for cause, ruling that, as a matter of separation of powers, a single appointed official heading an administrative agency must be subject to Presidential removal to assure the democratic legitimacy of the agency's actions.

[14] I have written about the syllogistic nature of lawmaking and law enforcement in *Origin of Rights*, *supra* note 2, and Burt Neuborne, *Serving the Syllogism Machine*, 44 TEX. TECH L. REV. 1 (2011). *See also* MADISON'S MUSIC, *supra* note 5. This is, however, the first time I have sought to describe lawmaking and law enforcement as two integrated syllogisms.

moves to the remedial phase—sentencing, the setting of damages, or the issuance of equitable relief.

Once a prosecutor or regulator decides to kick Syllogism II into motion, it proceeds without the repeated discretionary branching points present in Syllogism I. Thus, the prosecution of Neuborne for speeding on the Long Island Expressway presents a major premise consisting of the statutory 55 mph speed limit, continues with a minor premise stating how fast Neuborne was clocked on the radar gun, and culminates in an inexorable statement of conclusion as to guilt or innocence. Such a simple version of Syllogism II is, of course, relatively rare. Far more often, the parties disagree over the meaning of the major premise (interpreting the text) and the content of the minor premise (the historical facts of the defendant's behavior). Once, however, the major and minor premises of Syllogism II are formally and finally locked into place, the verdict/conclusion is inexorable.

If it were possible to know the future or the past with any degree of certainty, making and implementing Syllogisms I and II would be relatively easy. Lawmaking would consist of charting the predictable consequences of a range of known potential individual, corporate, and/or government actions (or inactions), and engaging in informed discussions about what behavior law should encourage; what behavior it should ignore; and what behavior it should deter, and by how much. Similarly, adjudication would announce with confidence whether a defendant's known past behavior violated Rule Z, and speedily issue a logically compelled verdict. Alas, however, in the complex fog of law we inhabit, the future and the past are very often—perhaps almost always—shrouded in disagreement and uncertainty. Much of the time, lawmakers and enforcers decide to make and/or enforce (or not make and fail to enforce) legal rules (or the absence of rules) based on guesses about both the likely consequences of the behavior at issue and the historical facts underlying the controversy. The unavoidable consequence of being forced to govern within the fog of law requires an acknowledgment that we can be wrong about almost everything. Once we acknowledge the existence of such a widespread risk of error, we must decide whether and how to manage the risk. That, in turn, leads to a set of error deflection rules based on value judgments about how to behave when we are not sure about the correctness of the major and minor premises in both Syllogisms I and II.

Most of the time, the legal system acknowledges the risk of error inherent in the fog of law but does not seek to skew error in a particular direction, other than marginally favoring the status quo.[15] We deem wide swaths of lawmaking and implementation valid as long as it is based on a good faith, rational assessment of the likely future consequences of the regulated behavior on legitimate collective goals and a good faith, rational exploration and reconstruction of the defendant's past behavior. Under such an anemic risk management approach, lawmakers and juries can be wrong in any direction they wish as long as they act rationally and free from forbidden motives in making guesses about the past and the future. I believe that's what happens in the vast bulk of lawmaking governed by what the Supreme Court calls "rational basis" review and implementation under a correctly administered "preponderance of the evidence" standard.[16]

Sometimes, though, especially when constitutional values are in play, we deflect error in both Syllogisms I and II in favor of a cherished value or to protect a vulnerable group by requiring enhanced levels of certainty from government officials before locking in either or both of the major and minor premises. Most obviously, where "life" and "liberty" are at stake in a criminal prosecution, we radically deflect error at the level of the minor premise in Syllogism II in favor of life and liberty by construing the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial clause of the Sixth Amendment to require the state to prove the historical facts constituting each element of a criminal offense "beyond a reasonable doubt."[17] We know that there will be mistakes during the jury's Syllogism II fact-finding process, no

[15] All burden of proof rules skew outcomes in one direction or another. The least demanding standard, preponderance of the evidence, means that ties result in perpetuation of the pre-litigation status quo as between the parties. The more demanding the burden of proof, the greater the number of cases that will be affected by uncertainty. In settings where a demanding burden is, as a practical matter, insurmountable, stringent error deflection can operate as a de facto rule of law making it all but impossible for the burdened party to obtain legal redress against the benefitted party. To my mind, that comes very close to describing contemporary free speech protection.

[16] Since the New Deal, most legislative judgments are subject to judicial review under a low bar of good faith and rationality—a standard of review that acknowledges the possibility of error but makes no significant effort to deflect the error in a particular substantive direction. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (establishing the borders of rational basis scrutiny); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–58 (1981) (discussing burdens of persuasion and production under Title VII).

[17] *See, e.g.*, In re Winship, 397 U.S. 358, 363–64 (1970) (imposing burden of proving guilt beyond a reasonable doubt in any prosecution involving potential loss of liberty). Justice Harlan's concurrence has been particularly persuasive. *Id.* at 368–75 (Harlan, J., concurring).

matter how carefully it takes place. Once such an inescapable risk of error is acknowledged, the issue shifts to how to manage the risks to liberty and security, respectively, of wrongful conviction and/or erroneous acquittal. The Supreme Court's answer, at least since *Winship*, has been to deflect error radically in favor of liberty and against security by requiring an extremely high level of confidence in the factual accuracy of a guilty verdict before the minor premise in Syllogism II can be announced.[18]

Deprivation of parental status,[19] civil commitment,[20] and deportation[21] also carry enhanced burdens of proof at the level of Syllogism II's minor premise, requiring "clear and convincing" evidence of historical facts—less demanding than "reasonable doubt," but more certain than "preponderance." Judges routinely police the boundaries of such enhanced Syllogism II error deflection, instructing the parties and the jury about the risk of non-persuasion and the required levels of certainty;[22] setting aside jury verdicts that violate error deflection rules;[23] and refusing to permit inadequately proven factual issues from going to the jury at all.[24]

Judges occasionally stray into more controversial waters by imposing enhanced error deflection rules on legislators at the level of the major and minor premises in Syllogism I. The difference, of course, is between interfering with legislators, as opposed to juries. For example, since *Carolene Products*, in settings where a member of a "discrete and insular minorit[y]"[25] is intentionally harmed by governmental action, the Court has imposed demanding burdens of justification on Syllogism I's major premise by requiring the articulation of a "compelling governmental interest"; and on Syllogism I's minor

[18] Interestingly, we do not impose any degree of enhanced error deflection to protect "property," the third value in the Due Process trilogy.

[19] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (imposing minimum burden of clear and convincing evidence).

[20] Addington v. Texas, 441 U.S. 418, 433 (1979) (imposing minimum burden of clear and convincing evidence).

[21] Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 277 (1966) (imposing clear and convincing burden of proof standard).

[22] An incorrect or confusing jury charge is almost always grounds for reversal unless the error is deemed harmless beyond a reasonable doubt. *See* Francis v. Franklin, 471 U.S. 307, 316–18 (1985) (confusing jury charge on issue of intent); Rose v. Clark, 478 U.S. 570, 583 (1986) (applying harmless error to confusing jury charge on intent).

[23] The judge's power to police error deflection rules by ordering new trials, directing verdicts, or setting verdicts aside is noted *supra* at note 8

[24] *See* United States v. Taylor, 464 F.2d 240, 244–45 (2d Cir. 1972) (defining government's production burden in criminal cases).

[25] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

premise by requiring convincing evidence that the challenged law is necessary to advance the compelling interest.[26] Given the uncertainty that is almost always present in the fog of law, it is almost impossible for a law or regulation to satisfy such demanding "strict scrutiny."[27]

As with Syllogism II,[28] less dramatic error deflection than "strict scrutiny" is also possible at the level of Syllogism I. Forms of "heightened scrutiny" that fall short of "strict scrutiny," but exceed "rational basis" seek to deflect error in settings like gender equality in carefully calibrated efforts to impose varying degrees of certainty on government before it acts.[29]

IV. *ABRAMS* AND ENHANCED ERROR DEFLECTION

The five defendants[30] in *Abrams* were charged in a single conspiracy indictment with four counts of circulating approximately 5,000 copies of two leaflets—one in English and one in Yiddish—in violation of the Espionage Act of 1917, as amended in 1918.[31] Both

[26] *See e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (invalidating ban on inter-racial marriage); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (invalidating race-based affirmative action provisions despite lack of racial animus).

[27] It is, however, not impossible. *See* Korematsu v. United States, 323 U.S. 213, 218–19 (1944) (upholding race-based internment camps during WWII). The Supreme Court purportedly overruled *Korematsu* in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) when five Justices upheld President Trump's unilateral imposition of a travel ban on nationals of seven predominantly Muslim nations. Unfortunately, despite the Court's protestations to the contrary, *Trump v. Hawaii* reaffirms the government's power to stereotype on the basis of race and religion. Sadly, therefore, I fear that the ghost of *Korematsu* still walks.

[28] *See supra* notes 19–21 and accompanying text for discussion of "clear and convincing" error deflection in constructing the minor premise of Syllogism II.

[29] For examples of less demanding error deflection rules at the level of Syllogism I, see *Craig v. Boren*, 429 U.S. 190, 204–05 (1976) (heightened scrutiny for gender) and *City of Cleburne v. Cleburne Living Ctr.*, 437 U.S. 432, 446–47 (1985) ("energized" rational basis review in zoning cases involving weak groups).

[30] *See* Chafee 1920, *supra* note 3, at 749–50 for a brief description of the *Abrams* defendants.

[31] The 1918 Amendments, sometimes called the Sedition Act of 1918, substantially expanded the 1917 statute, and significantly increased the penalties. The 1918 amendments read as follows:

> Whoever, when the United States is at war, . . . shall willfully utter, print, write, or publish
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> (Count 1) any disloyal, . . . scurrilous, or abusive language about the form of government of the United States, . . .
>
> (Count 2) or any language intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute, . . .
>
> (Count 3) or . . . any language intended to incite, provoke, or encourage resistance to the United States [in said war with the German Imperial Government], . . .

leaflets attacked President Woodrow Wilson's decision to commit American troops, originally stationed in Europe to fight Germany, to the invasion of post-Revolutionary Russia in an effort to topple the Bolshevik regime.[32] The English-language leaflet excoriated Wilson as a cowardly hypocrite pretending to oppose German militarism, while actually seeking to advance capitalism by overthrowing the Soviet regime.[33] The Yiddish-language leaflet urged recent emigrants from Russia to refuse to support attacks on Russian workers by declining to buy war bonds and refusing to work in munitions plants.[34]

Closely tracking the language of the amended 1918 version of the Espionage Act, Count One charged the defendants with conspiracy to circulate abusive language about the form of government of the United States.[35] Count Two alleged a conspiracy to circulate language intended to bring the American form of government into disrepute.[36] Count Three charged the defendants with conspiracy to circulate language generally detrimental to the war effort.[37] Count Four charged the defendants with conspiracy to circulate language interfering with the production of essential war materiel.[38]

Justice Clarke's opinion for seven members of the Court made short work of defendants' appeals from their 15–20-year sentences. Clarke ruled that it was unnecessary to review or uphold the validity of the convictions under each of the four counts as long as a valid conviction on a single count would justify the 15–20 year sentences.[39] Modern

> (Count 4) or shall willfully by utterance, writing, printing, publication, . . . urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products [to wit, ordnance and ammunition] necessary or essential to the prosecution of the war in which the United States may be engaged, [to wit, said war with the Imperial German Government], with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . . shall be punished by a fine of not more than twenty years or both.

Chafee 1920, *supra* note 3, at 750–51 (alterations in original). Schenck v. United States, 249 U.S. 47 (1919), Frohwerk v. United States, 249 U.S. 204 (1919), and Debs v. United States, 249 U.S. 211 all involved prosecutions under the original version of the Espionage Act of 1917.

32 *See* Abrams v. United States, 250 U.S. 616, 619–23 (1919).

33 *See id.* at 619–20 (Justice Clarke's description).

34 *Id.* at 620–23.

35 *Abrams*, 250 U.S. at 617.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 619. Even under his dubious ground rules, Justice Clarke's refusal to confront Counts One and Two seems indefensible, since Abrams, Lipman, and Lachofsky were each fined $1000 on all four counts. *See* Chafee 1920, *supra* note 3, at 763.

criminal procedure would almost certainly reject such a cavalier approach to the possibility of prejudice from potentially unconstitutional convictions under two, and possibly three, of the four counts.[40] At a minimum, a remand for resentencing solely under the valid counts would be required,[41] to say nothing of careful attention to the extent to which the jury's deliberations on the valid count may have been improperly affected by the invalid counts.[42] Although Clarke was content to focus on Count Four, holding that it was sufficient to justify the sentence, he could not stop himself from delivering a lecture on the pernicious consequences of speech challenging the validity of both the American form of government and a capitalist economic system.[43] As a strict legal matter, though, while Count Four's allegations involving interference with the production of armaments were based on a valid major premise for Syllogism I lawmaking, a desire to insulate the nation's form of government against vigorous verbal criticism, especially verbal criticism as feckless as the 5,000 leaflets in *Abrams*, was not. Accordingly, Justice Clarke concentrated primarily on Count Four charging defendants with speech interfering with the production of armaments,[44] an interest that Holmes agreed satisfied *Schenck* at the level of the major premise of Syllogism I.[45] Justice Clarke then adopted a minor premise for Syllogism II that characterized the Yiddish leaflet as posing a threat to armaments production.[46] Accordingly, he dutifully spat out a conclusion of guilty.[47]

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[40] As Justice Holmes's dissent argues, even under the tender mercies of *Schenck*, *Frohwerk*, and *Debs*, Counts One and Two in *Abrams*, alleging speech that merely abused and disparaged the United States form of government, were probably unconstitutional. *See Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting). Count Three, alleging unspecified interference with the war effort, was closer, but potentially invalid, as well. *See id.* at 629. Only Count Four, alleging language threatening interference with the manufacture of armaments, clearly alleged a facially valid offense under *Schenck*, *Frohwerk*, and *Debs*. *Id.* at 626.

[41] *See* Yates v. United States, 354 U.S. 298, 312 (1957) (citing *Stromberg v. California*, 283 U.S. 359, 367–68 (1931) for the modern Supreme Court's concern over tainting a conviction and sentence with unconstitutional counts). In *Apprendi v. New Jersey,* 530 U.S. 466 , 474–75 (2000), the Court explicitly rejected an argument that the possible imposition of the identical sentence on multiple counts obviated concern over an unconstitutional sentence imposed on one count.

[42] *See infra* notes 22 and 41 for examples of the modern Court's meticulous approach to possible jury confusion and taint.

[43] *See Abrams*, 250 U.S. at 621–23.

[44] *Id.* at 624.

[45] *See id.* at 626 (Holmes, J., dissenting).

[46] *Id.* at 620–21 (majority opinion).

[47] *Id.* at 624.

Justice Holmes did not challenge Clarke's opinion at the level of the major premise, accepting interference with the production of armaments as a valid major premise for both Syllogisms I and II.[48] But, instead of adopting the minor premise utilized by Justice Clarke in both syllogisms that requires target speech to pose merely a barely plausible threat to the government interest set forth in the major premise,[49] Holmes's revolutionary move in *Abrams* was to read the First Amendment as imposing an enhanced burden of justification at the level of the minor premise in both Syllogisms I (lawmaking) and II (enforcement), requiring both the legislature and the jury to find that the challenged speech at issue would have almost certainly imminently endangered the government's valid interest described in the major premise.[50] The "silly leaflets" before the Court in *Abrams*, argued Holmes, came nowhere close to generating the requisite degree of risk that it would have interfered with the manufacture of munitions.[51]

I believe that Holmes's magnificent language in *Abrams* about the contingent nature of fighting faiths and the importance of a marketplace of ideas as the best test of truth[52] is best understood as a warning against the all too human tendency to exaggerate the threats posed by the dissemination of feared and hated ideas. Holmes understood that both the legislature and the jury will usually overestimate the level of threats posed by unorthodox and unpopular ideas, so he stacked the error deflection deck in favor of free speech by imposing heightened burden of proof rules protecting speech against both the legislature and the jury. Thus, for the first time in the Supreme Court, Holmes required the government in a free speech case to identify a genuinely compelling collective interest at the level of the major premise of Syllogism I (Counts One and Two protecting the American form of government from criticism did not qualify) and to satisfy a demanding minor premise requiring proof that the speech in question will almost certainly pose an imminent threat to the only valid major premise in Count Four.[53] Only then would Holmes have allowed the government to announce a conclusion of guilty in a free speech case.

In effect, Holmes required proof by the legislature and the prosecutor of a strong causal link between speech and harm by more than a plausible likelihood. I think he may have required proof beyond

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

49 *See Abrams*, 250 U.S. at 621 (majority opinion).

50 *See id.* at 626–28 (Holmes, J., dissenting).

51 *Id.* at 628.

52 *Id.* at 630.

53 *Id.* at 630 (Holmes, J., dissenting).

a reasonable doubt. At a minimum, though, the evidence proving the causal link must be clear and convincing. Even "more likely than not" will not do. That, of course, is pure error deflection in favor of speech, not all that different from liberty-based error deflection in *Winship*.[54] Risky, of course; no doubt, occasionally harmful. But as with the due process rule in *Winship* requiring proof of guilt beyond a reasonable doubt,[55] the risk is, to my mind, unquestionably worth the cost—at least in settings where free speech collides with concerns over security, efficiency, and order.

It took almost forty years until the per curiam decision in *Brandenburg v. Ohio*,[56] but the error deflection seed planted by Justice Holmes in his *Abrams* dissent eventually became the core of the Supreme Court's current densely-packed and extremely protective First Amendment jurisprudence. Today, a would-be censor confronts a fearsome judicially imposed and administered burden of justification at least four times: (1) identification of a sufficiently important government interest,[57] (2) proof that the speech at issue is extremely likely to injure the government interest,[58] (3) proof that the injury is imminent,[59] and (4) proof that no less drastic means exist to protect or advance the government interest.[60] Lingering doubt about any one of the four results in invalidation of the effort to censor. In addition, the Court has established five procedural sets of free speech protections: (1) an impossibly high burden of justification on prior restraints;[61] (2) a

54 In re Winship, 397 U.S. 358, 363–64 (1970).

55 *Id.* at 361.

56 395 U.S. 444 (1969) (per curiam).

57 The Court has rejected concerns over littering as sufficiently important to justify curbing leafletting and has resolutely refused to decide whether promotion of political equality is a sufficiently important collective interest to warrant limits on the campaign spending of the very rich. *See* Schneider v. New Jersey, 308 U.S. 147, 161–62 (1939) (leafletting); Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976).

58 I have argued that the collapse of First Amendment protections under McCarthyism stemmed from the failure of American judges at every level to enforce error deflection at the level of the minor premise in Syllogisms I and II. Flatly ignoring Hand's warning in *Abrams*, the *Dennis* Court explicitly deferred to Congress's legislative assessment of imminent danger posed by the mere existence of the American Communist Party. *See* Dennis v. United States, 341 U.S. 494, 516–17. The doctrinal importance of *Brandenburg* is its repudiation of *Dennis*'s failure to enforce strict proof of causation rules at the level of the minor premise of both Syllogisms I and II. *See Brandenburg*, 395 U.S. at 447–48.

59 The required imminence of any threatened harm is discussed in *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–801 (2011) (invalidating ban on sale of violent video games to minors in absence of strong evidence of convincing harm).

60 *See Buckley*, 424 U.S. at 44–45.

61 New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (enhanced burden of justification for prior restraint).

facial ban on overbroad statutes;[62] (3) a ban on overly vague speech regulations;[63] (4) a strict equality rule requiring content-neutral enforcement;[64] and (5) a guarantee of speedy judicial review of any effort to censor.[65] Take your pick which doctrine would blow the *Abrams* prosecution out of the water today.

But what about other settings where free speech collides with other government interests like preserving equality and protecting reputation? In addition to littering, the Court has already rejected an abstract interest in truth,[66] preventing hurt feelings,[67] and protecting the flag[68] as sufficiently weighty collective interests to justify a degree of censorship. The Court has split the difference on reputation, rejecting reputation itself as a sufficient interest in the context of the public official, but recognizing an adequate interest in protecting public figures against knowingly false attacks on reputation.[69] The jury is still out on preserving equality.[70] Assuming, though, that the Supreme Court bows to the inevitable and recognizes preservation of equality as a compelling governmental interest, what should the error deflection rules look like for the minor premise in Syllogisms I and II? Should we simply import Holmes's speech protective error deflection rules in *Abrams*? I think not.

The key to Holmes's brilliant insight in *Abrams* was his recognition in his rousing "fighting faith" paragraph that, when asserted government interests in preserving security, efficiency, and order are at

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62 R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (statute forbidding cross-burning unconstitutionally overbroad).

63 United States v. Stevens, 559 U.S. 460, 482 (2010) (statute banning "crush" movies depicting violence against small animals unconstitutionally vague).

64 Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015) (differential regulation of signage size unconstitutional).

65 Freedman v. Maryland, 380 U.S. 51, 59 (1965) (requiring immediate judicial review of administrative censorship). I discuss the Court's First Amendment procedural corollaries in Burt Neuborne, *Where's the Fire?*, 25 J.L. & POL'Y 131 (2016).

66 United States v. Alvarez, 567 U.S. 709, 715 (2012) (invalidating conviction for falsely claiming to have received a Congressional Medal of Honor).

67 Cohen v. California, 403 U.S. 15, 26 (1971) (invalidating conviction for wearing jacket emblazoned with "Fuck the Draft" in a Los Angeles courthouse).

68 Texas v. Johnson, 491 U.S. 397, 420 (1989) (invalidating flag-burning statute in absence of adequate government interest).

69 New York Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

70 In its campaign finance jurisprudence, the Court assumes that advancing political equality is an adequate government interest, then invalidates the statute as unnecessary, overbroad, discriminatory, or inadequately justified. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 17–18 (1976) (less drastic means available); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352–53 (2010) (differential treatment of speakers); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 207–08 (2014) (inadequate government interest; inadequate proof of harm).

issue, the self-interested posture of most legislators disables them from making objective assessments about the imminent risk posed by speech that attacks their cozy perch at the top of the political food chain.[71] Holmes, the greatest common lawyer ever to sit on the Supreme Court, knew well Lord Coke's maxim in *Dr. Bonham's Case*[72] that no person may sit as a judge in his or her own case. It was routine at common law, as it is today,[73] to disqualify a judge for bias or interest. Unlike the adjudicatory context, however, where a neutral judge or juror can be substituted for a self-interested arbiter,[74] as a practical matter, you can't recuse an entire self-interested legislature. In his ultimately triumphant dissent in *Abrams*, Holmes responded to the problem of self-interested legislative censorship in security cases by imposing stringent burdens of justification on the self-interested legislature in Syllogism I rooted in a second judicial opinion about the importance of the government's interest and a requirement of proof of a strong likelihood of harm.[75] For Holmes, failure to satisfy the two stringent burdens was a red flag signaling the self-interested presence of improper legislative motives and/or inadequate legislative consideration of risk.[76]

But such obvious legislative self-interest is not usually present when the legislative majority acts to preserve the equality of members of historically marginalized groups. For example, in settings where the white male majority places limits on its workplace speech to provide people of color, women, and LGBTQ individuals with an equal chance to succeed in the workplace, the Court has affirmed speech regulation since there is no need for an error deflection check on legislative self-interest.[77] In the absence of the psychological tendency to overstate risks associated with speech attacking the hegemony of the majority, there is no need to complicate the regulatory process by imposing error deflection rules to counter a tendency to overregulate that simply is not there.

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

72 8 Co. Rep. 114a, 77 Eng. Rep. 646 (1610).

73 *See, e.g.*, Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).

74 *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927).

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

76 Justice Kagan has expressed a similar view of the role of First Amendment doctrine in smoking out improper motive and inadequate consideration. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

77 *See* Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687 (1997).

V. CONCLUSION

There may be other reasons to impose stringent Syllogism I error deflection rules on campaign finance statutes limiting the spending of the ultra-rich, but they do not flow from Holmes's great dissent in *Abrams*. It is hard enough to persuade the majority to regulate itself in an effort to advance the interests of the politically vulnerable. We should not make it even harder to mitigate the rigors of our deeply unequal society by forcing ameliorative statutes to run the gauntlet of Holmesian error deflection. I don't think Holmes would like it.