Oliver Wendell Holmes, the *Abrams* Case, and the Origins of the Harmless Speech Tradition

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I. INTRODUCTION: THE OTHER PARAGRAPH(S)

For over a century now, abundant attention, almost all of it positive, has been paid to the magisterial final paragraph of Justice Oliver Wendell Holmes, Jr.'s dissenting opinion in *Abrams v. United States.*[1] It was here that Holmes observed that "time has upset many fighting faiths,"[2] that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market,"[3] and that the Constitution "is an experiment, as all life is an experiment,"[4] among the many ideas packed into this one modestly-sized paragraph.

All the praise appropriately lavished upon this paragraph has had the effect, however, of deflecting attention from the remainder of Holmes's opinion. More specifically, the common focus on the final paragraph has obscured Holmes's observation four paragraphs earlier

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[1] 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting). The well-known exception to my characterization of the attention to Holmes's *Abrams* dissent as "positive" is John H. Wigmore, Abrams v. U.S*.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920), describing the opinion as "poor law" and "poor policy," *id*. at 539, while also describing Abrams and his co-defendants as "alien parasites." *Id*. at 549.

[2] 250 U.S. at 630 (Holmes, J., dissenting).

[3] *Id*. The most thorough examination of what Holmes meant and did not mean by this statement is Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

[4] 250 U.S. at 630 (Holmes, J., dissenting).

that the prosecution was based on "the surreptitious publishing of a silly leaflet by an unknown man"[5] and by his characterization of the leaflets distributed by Jacob Abrams and his colleagues and co-defendants not as thoughtful or stirring arguments but as "poor and puny anonymities."[6]

These contemptuous descriptions of Abrams and the writings he distributed are important but not for the same reason that the lines of Holmes's concluding paragraphs are important. Rather, Holmes's sneering words are important because they were false and because he must have known that they were false. Yet by using descriptions that were as erroneous as they were denigrating, Holmes made things easy for himself, clearing a smooth path to his conclusion that Abrams's utterances should be protected by the First Amendment. And in making things easier for himself, Holmes also made it easy—too easy—for subsequent advocates and theorists to evade difficult issues about how and how much to protect speakers who, like Abrams, are far from silly, far from unknown, and far from puny. Most importantly, Holmes, by his disdainful inaccuracies, deflected attention from the central question of free speech theory—why and how much to protect speech that is by no means harmless. In dismissing the consequences of the speech that he wished to protect, and thus reducing the cost of the protection he advocated, Holmes facilitated a persistent and troubling strand of free speech argumentation and free speech theory—the view that the First Amendment protects speech because it is harmless. The First Amendment does and should protect at least some harmful speech, and the First Amendment protects speech not because (or when) it is harmless but despite the harm it may cause.[7] It becomes more difficult to confront when and why that is so, however, if we are lured down the false path of harmlessness that Holmes helped to blaze a century ago.

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[5] *Id.* at 628.

[6] *Id*. at 629. It is easy on quick reading to conclude that this was Holmes's characterization of Jacob Abrams and his colleagues, but closer examination of the text makes it clear that Holmes was talking about leaflets and not people, even though he probably believed it about the people as well. *Id.*

[7] On this framing of one of the central questions—maybe *the* central question—of free speech theory, *see* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981, 986–93 (1997). Earlier, *see* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982). And, more recently, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81; Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's* On Liberty, 39 CAP. U. L. REV. 571 (2011); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

II. THE FACTS

The time has come, a century later, to compare Holmes's portrayal of the Abrams defendants and their speech with reality. And we can start with Holmes's characterization of the leafletting as "surreptitious."[8] Simply put, the characterization is untrue. 5000 leaflets were printed by Abrams himself on an electric printing press, and 9000 had been printed and distributed earlier by Abrams's co-defendant Mollie Steimer.[9] Most of the leaflets were, indeed, anonymously tossed from the top of a tall building, but it is not as if just a few were secretly passed in sealed envelopes from one person to another in a nonpublic setting. Perhaps the leafletting could be called "surreptitious" in the sense that the leaflets were unsigned or that those who tossed the leaflets from the rooftop did not advertise their identities. But the failure of the leafleteers to sign the leaflets or to identify themselves at the time of the leafletting seems no more surreptitious than the behavior of a mugger who, having taken his target's wallet, runs away without leaving identification.[10] By describing the act as "surreptitious," however, Holmes appeared to be suggesting something other than the attempts to avoid detection that characterize most criminal acts. But to the extent that Holmes was implying that Abrams's distribution of the leaflets was both small-scale and more covert than we see in the mine-run of criminal acts, the implication fits poorly with the actual facts.

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[8] 250 U.S. at 628 (Holmes, J., dissenting).

[9] *See* Zechariah Chafee, Jr., *A Contemporary State Trial—The United States* versus *Jacob Abrams* et al., 33 HARV. L. REV. 747, 750 (1920), with corrections made in Zechariah Chafee, Jr., *A Contemporary State Trial—The United States* versus *Jacob Abrams* et als., 35 HARV. L. REV. 9, 10–13 (1921). Chafee describes the press only as a "power" printing press, but a steam-powered press would have been unlikely in the rented Manhattan (Madison Avenue and 104th Street) basement in which the leaflets were printed. Chafee, 33 Harv. L. Rev. at 750. And on the importance of self-printing to the anarchists of the time, *see* Kathy E. Ferguson, *Anarchist Printers and Presses: Material Circuits of Politics*, 42 POL. THEORY 391 (2014).

[10] American evidence law is instructive here. Under Rule 609 of the Federal Rules of Evidence, witnesses can be impeached (that is, their credibility questioned) by evidence of past criminal convictions. Fed. R. Evid. 609. The rule restricts such use to crimes of substantial seriousness, in particular those punishable by one year or more of imprisonment. Fed. R. Evid. 609(a)(1). This restriction, however, does not apply to crimes involving a "dishonest act or false statement," Fed. R. Evid. 609(a)(2), but both the caselaw (see the lengthy discussion in *United States v. Smith*, 551 F.2d 348, 362–65 (D.C. Cir. 1976) and the comments of the Advisory Committee (F.R. Evid. Advisory Committee's Note to 2006 Amendment to Rule 609) make clear that simply attempting to avoid detection does not count as a dishonest act for purposes of the rule. Analogously, efforts to avoid identification would not seem alone to count as "surreptitious."

Of greater import is the way in which Holmes, again misleadingly, sought to trivialize Abrams and his leaflets. The trivialization starts with Holmes's characterization of the leaflets as the product of "an unknown man." Singular. In fact, Jacob Abrams was one of seven defendants charged in the indictment, all but one of whom worked together in creating and distributing the leaflets. One, Jacob Schwartz, died just before the trial was to commence, possibly as a result of police brutality in interrogating him, possibly from pre-existing health issues, and possibly from the 1918–1919 flu epidemic.[11] Another defendant, Gabriel Prober, was acquitted by the jury, the jurors apparently believing that Prober, although connected with the political activities of Abrams and the others, had nothing to do with the production or distribution of the leaflets that provided the basis for the charges.[12]

Not only was Abrams part of a group of at least five (Prober aside), but that group also had numerous connections with the substantially larger and wider movement of militant anarchists and socialists who were active in New York at the time. Specifically, Abrams and his co-defendant Mollie Steimer, as well as the other defendants, were close colleagues of Emma Goldman, Alexander Berkman, and various other radical, albeit less well-known (than Goldman and Berkman), anarchist and socialist activists of the 1890 to 1920 period.[13] And although many members of that larger group were all too often prosecuted and persecuted for expressing opinions that would be easily and properly protected by the First Amendment today, and although the notorious official overreaction to their activities is exemplified by the Palmer raids[14] and what we now call the "Red Scare,"[15] other members of this larger group, and at times the same members, not only actively encouraged political violence but were also often involved in it.[16] At times justifying violent actions by describing them as *propaganda of the*

[11] *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 178–79 (2013); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 88–95 (1987); Zosa Szajkowski, *Double Jeopardy—The Abrams Case,* 23 AM. JEWISH ARCHIVES 6, 10 (1971).

[12] *See* POLENBERG, *supra* note 11, at 48, 124–25, 132, 138.

[13] *Id.* at 64, 74, 131–32.

[14] *See* STANLEY COBEN, A. MITCHELL PALMER: POLITICIAN (1963).

[15] *See generally* BEVERLY GAGE, THE DAY WALL STREET EXPLODED: A STUDY OF AMERICA IN ITS FIRST AGE OF TERROR 119–20 (2009); ANN HAGEDORN, SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 1919 (2007); ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920 (1955); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933 (1963); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 352 (1997).

[16] *See generally* RICHARD BACH JENSEN, THE BATTLE AGAINST ANARCHIST TERRORISM: AN INTERNATIONAL HISTORY, 1878–1934 (2014).

deed,[17] this loose coalition of largely immigrant New York-based anarchists and socialists[18] was implicated in no small number of bombings and other violent acts. Alexander Berkman, to take the most prominent example, served fourteen years in prison for attempting to assassinate—the law called it simply "attempted murder"—Henry Clay Frick in 1892 and was likely at the center of politically-motivated bombings in 1913 and 1915.[19] Emma Goldman was almost certainly a co-conspirator with Berkman in the Frick episode,[20] sympathized with but did not assist (police and public opinion to the contrary) in the assassination of President William McKinley in 1901,[21] and until (and after) she was deported in 1919 frequently spoke about the necessity of violence in support of the anarchist cause.[22] And although the larger group that included Berkman, Goldman, and the *Abrams* defendants was comprised substantially of Jewish immigrants from Russia and Eastern and Central Europe, that group also had many connections with the Galleanists, the followers of the Italian anarchist Luigi Galleani.[23] The Galleanists, also predominantly New York based, and possessing a zeal that outstripped their bomb-making skills, were responsible for numerous bombings from 1915 to 1920, some of which proved fatal to some Galleanists and bystanders, even if never to the targets.[24]

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17 The phrase and its variants ("propaganda by the deed" and "propaganda and the deed," most commonly) had nineteenth century European origins, and was adopted by many of the American anarchists. *See generally* Dan Colson, *Propaganda and the Deed: Violence and the Representational Impulse*, 55/56 AM. STUDIES 163 (2017); Steve Fraser, *Propaganda of the Deed*, 31 LONDON REV. BKS 4 (February 26, 2009) (reviewing EMMA GOLDMAN, A DOCUMENTARY HISTORY OF THE AMERICAN YEARS (2008)); Marie Fleming, *Propaganda By the Deed: Terrorism and Anarchist Theory in Late Nineteenth Century Europe, in* TERRORISM IN EUROPE 8 (Yonah Alexander & Kenneth A. Myers eds., 1982); Mark Shirk, *The Universal Eye: Anarchist "Propaganda of the Deed" and Development of the Modern Surveillance State*, 63 INT'L STUDIES Q. 334 (2019).

18 A coalition, at least according to my father, that included my grandfather Nandor Schauer, who died from influenza at the tail end of the 1918–1919 epidemic. Even had he lived, there is no indication that he was important or influential enough to have attracted the attention of the authorities.

19 *See* GAGE, *supra* note 15, at 56–61; JAMES MCGRATH MORRIS, REVOLUTION BY MURDER: EMMA GOLDMAN, ALEXANDER BERKMAN, AND THE PLOT TO KILL HENRY CLAY FRICK (2014).

20 *See* GAGE, *supra* note 15, at 59; MORRIS, *supra* note 19.

21 EMMA GOLDMAN, LIVING MY LIFE 223 (1931).

22 *See* GAGE, *supra* note 15, at 37, 103–04, 351 n.5. *See generally* GOLDMAN, *supra* note 21; KATHY E. FERGUSON, EMMA GOLDMAN: POLITICAL THINKING IN THE STREETS (2011).

23 *See* PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 48–57 (1991); GAGE, *supra* note 15, at 207–11; Jeffrey D. Simon, *The Forgotten Terrorists: Lessons from the History of Terrorism*, 20 TERRORISM & POL. VIOLENCE 195, 195 (2008).

24 GAGE, *supra* note 15, at 207–58; ROBERT TANZILO, THE MILWAUKEE POLICE STATION BOMB OF 1917 (2010). *See generally* Adam Quinn, *Chronicling Subversion: The* Cronaca Sovversiva *as Both Seditious Rag and Community Paper*, 3 RADICAL AMS. 1 (2018).

I do not mean to suggest in any way that Abrams and his co-defendants were guilty of even what they were charged with, especially because the charges, and those doing the charging, seemed unable to distinguish among support for the Russian Revolution, opposition to the Russian Revolution, communism, socialism, anarchism, Bolshevism, pacifism, and opposition to the First World War. The various "isms" were lumped together by Attorney General Palmer, much of the press, and much of the public, and there can be little doubt that the leaflets, which supported the Russian Revolution and explicitly condemned German militarism, were treated as if they were simply another version of the anti-war and anti-conscription activism that characterized the likes of Charles Schenck,[25] Eugene Debs,[26] and Jacob Frohwerk.[27] Nor is any of the above to be taken as suggesting that the *Abrams* defendants had anything even faintly resembling a fair trial, particularly because Judge Henry Clayton (of Clayton Antitrust Act fame) plainly stifled even the most reasonable of defense requests and motions, thus ensuring that a guilty verdict would be the outcome.[28] Most importantly, none of the above should be understood as suggesting that any of the *Abrams* defendants should have in any way been held responsible for the violence urged and sometimes committed by Berkman, Goldman, the Galleanists, and various others.

These disclaimers are important, but they should not detract from the fact that *Abrams* was decided, and Holmes's dissent was written, during a period of widespread and highly visible political violence, some of it anarchist, some of it socialist, some of it inspired by trade unions, and some of it in the service, even if slightly earlier, of various forms of anti-war and anti-conscription radical activism. And although Abrams and his co-defendants in the *Abrams* case should not be held responsible for the violent activities of those with whom they acquainted, with whom they collaborated in advocacy, and with whom they shared goals and political commitments, I do intend to paint a picture of the political and social environment of the times that diverges from the impression that Holmes wanted to create. Part of this divergence, to repeat, comes from Holmes's attempts to portray Abrams as a lone dissenter or even as part of a very small group of out-of-the-mainstream cranks—the lunatic fringe, as it were. In this, however, Holmes was taking liberties

[25] Schenck v. United States, 249 U.S. 47 (1919).

[26] Debs v. United States, 249 U.S. 211 (1919); *see also* Jill Lepore, *Eugene V. Debs and the Endurance of Socialism*, THE NEW YORKER, Feb. 18, 2019.

[27] Frohwerk v. United States, 249 U.S. 204 (1919). On Frohwerk and his case, see Frederick Schauer, *Every Possible Use of Language?*, *in* THE FREE SPEECH CENTURY 33 (Geoffrey R. Stone & Lee C. Bollinger eds., 2019).

[28] HEALY, *supra* note 11, at 176–80; POLENBERG, *supra* note 11, at 82–117.

with the truth. Of course, Abrams alone could not have started a revolution, initiated a general strike, or done any of the other things the fear of which prompted his prosecution. But nor could any single person, or even a group of seven, have started the American, French, or Russian revolutions, initiated the rebellion and secession of the Confederate states, prevented American entry into the First World War, or secured the vote for women. All of these events required collective and accumulative action, and to single out any very small number of actors as solely responsible for the production of collective action, including collective harms as well as collective benefits, is to fail to recognize that many events, harmful or not, are the consequence of aggregate actions by multiple agents. Holmes knew this well,[29] and his implicit claim that Abrams and his immediate colleagues alone could not have caused massive social disruption, while true, is to set up a straw that was easy—too easy—to knock down.

Consequently, a more accurate picture of the era, and thus a more faithful picture of what was widely feared at the time, would certainly have included the fact that the Yiddish version of the leaflets called for a general strike during a time of war.[30] And the picture would also include a wide range of other violent events that had taken place in recent years. Among these events were, for example, general strikes across 1917–1918 in Springfield, Illinois; Kansas City, Missouri; Waco, Texas; and Billings, Montana, these following the more than 3,000 strikes that took place between April and October of 1917 alone.[31] In addition, the West Virginia Coal Wars—with "war" hardly being hyperbolic—commenced in 1912 and continued in 1918 and 1919,[32] and although the very lengthy Paterson Silk Strike of 1913 was largely nonviolent, it too resulted in two deaths.[33] Accelerating racial violence directed against

[29] Of some relevance here is Holmes's longstanding awareness of how strikes and other large social movements get started, an awareness exemplified in his early and anonymously published comment on the British Gas Stokers' Strike. *See* Oliver Wendell Holmes, Jr., *Summary of Events: Great Britain: The Gas-Stokers' Strike*, 7 AM. L. REV. 582 (1873).

[30] POLENBERG, *supra* note 11, at 51–55.

[31] *See* Paul Michel Taillon, *Labour Movements, Trade Unions and Strikes (USA),* 1914-1918 ONLINE INT'L ENCYCLOPEDIA OF THE FIRST WORLD WAR (Feb. 26, 2017), https://encyclopedia.1914-1918-online.net/article/labour_movements_trade_unions_and_strikes_usa?version=1.0.

[32] *See* DAVID CORBIN, LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880–1922 (2d ed. 2015). *See generally* ELLIOTT J. GORN, MOTHER JONES: THE MOST DANGEROUS WOMAN IN AMERICA (2001); Hoyt N. Wheeler, *Mountaineer Mine Wars: An Analysis of the West Virginia Mine Wars of 1912–1913 and 1920–1921*, 50 BUS. HIST. REV. 69 (1976).

[33] *See* STEVE GOLIN, THE FRAGILE BRIDGE: PATERSON SILK STRIKE, 1913,

African Americans throughout 1919 led to the characterization of the middle of that year as "Red Summer,"[34] and the years from 1915 to 1920 were perhaps the period of the greatest degree of Industrial Workers of the World (I.W.W.)-inspired activism, some although not much of which was violent[35] but which produced considerable violent retaliation by state and local authorities.[36] Similarly, the Boston police went on strike on September 9, 1919, just over a month before the *Abrams* argument, producing "several nights of chaos" in which the state's National Guard had fired into a crowd to restore order.[37] And although the Centralia Massacre did not take place until a day after the *Abrams* decision was delivered,[38] it too emphasizes that the period before, during, and especially after American entry into the First World War was marked by a degree of political and social unrest and violence not seen since. Especially given the confluence of the just-described labor unrest, the Russian Revolution and its aftermath, the flu epidemic,[39] and the violent retaliation and repression of the Red Scare, it is hard to imagine anyone

at 104, 180 (1988); ANN HUBER TRIPP, THE I.W.W. AND THE PATERSON SILK STRIKE OF 1913 (1987).

34 *See* DAVID F. KRUGLER, 1919, THE YEAR OF RACIAL VIOLENCE: HOW AFRICAN AMERICANS FOUGHT BACK (2014); CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA (2011); MARTIN W. SANDLER, 1919: THE YEAR THAT CHANGED AMERICA 65–94 (2019).

35 *See* PAUL FREDERICK BISSENDEN, THE I.W.W.: A STUDY OF AMERICAN SYNDICALISM (1919). The I.W.W. was widely believed at the time to be far more violent than it was, a belief partly fostered by the rhetoric of its leaders, and even more by the rhetoric of anti-labor activists and public officials. *See* Joseph R. Conlin, *The I.W.W. and the Use of Violence*, 51 WISC. MAGAZINE OF HIST. 316 (1968). Much, however, turns on the definition of "violent." If "violence" is restricted to direct physical harm to people, then the I.W.W. can plausibly be taken at its word in cautioning "against violence." RABBAN, *supra* note 15, at 79. But if "violence" includes the form of "sabotage" that involves the destruction of property, *id.*, then understanding the I.W.W. as non-violent is misleading. The most prominent I.W.W. figures were founding member William (Big Bill) Haywood, a victim of Red Scare excesses who fled to the Soviet Union in 1920; Elizabeth Gurley Flynn, also an activist for women's rights and one of the founders of the American Civil Liberties Union; and Joe Hill, whose almost certainly unjustified Utah murder conviction and execution in 1915 not only inspired a century of folk songs, legends, and fictional accounts but was also likely itself the cause of numerous violent protests.

36 *See* MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (2d ed., 1988).

37 *See* FRANCIS RUSSELL, A CITY IN TERROR: CALVIN COOLIDGE AND THE 1919 BOSTON POLICE STRIKE (1975); STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 389 (2019).

38 The Centralia Massacre, as it is commonly labeled, took place on the first Armistice Day (now Veterans Day), November 11, 1919. *See generally* TOM COPELAND, THE CENTRALIA TRAGEDY OF 1919: ELMER SMITH AND THE WOBBLIES (2011).

39 *See* SUSAN KINGSLEY KENT, THE INFLUENZA PANDEMIC OF 1918–1919: A BRIEF HISTORY WITH DOCUMENTS (2013).

being unaware of the fact that officials and the public were living in a period convulsed by exceptional violence and death.[40]

The appropriate punctuation mark to all of the foregoing comes from two episodes of organized bombings directed against officials and other prominent Americans just several months before *Abrams* was argued. On April 29, 1919, at least thirty-six bombs were sent, apparently by several Galleanists and designed to explode on May 1, to a wide swath of prominent Americans, including Albert Burleson, the Postmaster General; A. Mitchell Palmer, the Attorney General; Federal Judge Kennesaw Mountain Landis, soon to become Commissioner of Baseball; several governors, senators, and members of the House of Representatives; and, most relevantly, Supreme Court Justice Oliver Wendell Holmes, Jr.[41] Although some of the bombs did explode and cause injury, most of them, including the one intended for Holmes, were intercepted before delivery.[42] On June 2, however, nine substantially larger bombs were sent and successfully delivered, one causing the death of a night watchman and several more causing various other injuries to staff members of the intended recipients.[43] These bombs, one of which was again addressed to Attorney General Palmer, were also addressed to prominent officials, including, again relevantly, Boston state judge Albert Hayden and Massachusetts Congressman Samuel Leland Powers, both of whom, especially the latter, likely traveled in the same social and intellectual circles as Holmes.[44]

The conclusion to be drawn from the foregoing highly abbreviated account of the 1918–1919 American social and political environment should be plain. Fear of political violence was widespread, and even though the reactions against it were excessive and oppressive, the fears were hardly without basis. And as the intended recipient of one bomb and the acquaintance of other intended and actual recipients, Holmes,

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40 *See* HEALY, *supra* note 11, at 117, also noting the New Year's Eve bombings in Philadelphia, a conspiracy to assassinate President Woodrow Wilson, "violent plots to overthrow the government in Seattle, Chicago, and Pittsburgh," and the Boston molasses explosion, which was probably not caused by political agitators, contemporaneous opinion to the contrary. *See* STEPHEN PULEO, DARK TIDE: THE GREAT BOSTON MOLASSES FLOOD OF 1919 (2003).

41 *See* AVRICH, *supra* note 23, at 140–56, 181–95; HEALY, *supra* note 11, at 132–34; MURRAY, *supra* note 15; POLENBERG, *supra* note 11, at 162.

42 *See* sources cited in note 41, *supra.; see* AVRICH, supra note 23, at 142.

43 *Id.*

44 *Id.* That Hayden and Powers were targets makes it even clearer that Holmes, even though not one to read the daily newspapers, could not have been unaware of the bombings. And that is so even apart from the fact that one of the undelivered bombs was addressed to him.

although not a reader of the daily newspapers,[45] could not have been unaware of the widespread presence of actual and intended political violence in the United States.[46] And equally obviously, Holmes was too smart and too perceptive not to have recognized that speeches, leaflets, and meetings all played a significant role in the spread and organization of this actual and intended violence, as well as other events of actual and intended substantial disruption, including general strikes and industrial sabotage. That Holmes's trivialization of Abrams and his colleagues departed in important ways from the state of affairs that actually existed throughout the country at the time, and that Holmes must have been aware of the departure, is the fairest conclusion to be drawn. That conclusion, however, invites the question of why, to which I now turn.

III. THE URGE TO TRIVIALIZE

So what might have led Holmes to trivialize the *Abrams* defendants and their potential impact? One possibility is that the trivialization simply reflected Holmes's views about death. As a thrice-wounded Civil War veteran, at least once gravely so, Holmes tended to view death with equanimity, almost as a matter of chance.[47] Such a view would hardly be surprising for any survivor of the Civil War, given the inevitability of widespread and almost random death in the mass charges that characterized much of the fighting in that war. In downplaying the dangers that might come from the extensive advocacy of large-scale political violence, therefore, Holmes may simply have been reflecting his own perspective on life and death.[48]

A second possible explanation for Holmes's underestimation of the risks created by the militant anarchist, socialist, and trade union activism of the time is that Holmes was seeking to compensate for the widespread exaggeration of those risks. Although that exaggeration existed throughout the First World War, and even earlier, it accelerated dramatically after the April 28 and June 2 bombings in 1919, partly, and not surprisingly, because Attorney General Palmer was himself a target

[45] *See* David H. Burton, *The Curious Correspondence of Justice Oliver Wendell Holmes and Franklin Ford*, 53 NEW ENG. Q. 196, 201 (1980).

[46] BUDIANSKY, *supra* note 37, at 387.

[47] On Holmes's fatalism, and its likely cause in Holmes's Civil War experiences and injuries, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 49–86 (1993). *See also* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 469 (1994).

[48] Never having myself confronted the possibility of imminent death, except actuarily, I offer no views on how Holmes (or anyone else, for that matter) might react to having had such confrontations on multiple occasions.

of both of those bombing attempts.[49] So although the dangers were real, so too was the official exaggeration of them.[50] The dangers of anarchist and related violence plainly existed, but those dangers were neither as probabilistically great nor as temporally immediate as Attorney General Palmer, his chief subordinate J. Edgar Hoover, most other officials, much of the media, and most people believed and portrayed.[51] To the extent that Holmes was genuinely concerned with the widespread exaggeration of the dangers, and it is pretty clear that he was,[52] he may well have thought it crucial to downplay the dangers as a way of attempting to counteract what he might have perceived as an unjustified panic exacerbated by the government and accepted by the public.

But perhaps there is something more to Holmes's trivialization of Abrams and the efforts of those like him than merely Holmes's fatalism and his possible desire to counteract a government-fueled hysteria. To explore what this something more might be, we must start with Holmes's initial decision to dissent and thus his conclusion that Abrams and his co-defendants should not have been convicted. Moreover, and as has been amply documented,[53] Holmes had also decided that the First Amendment would motivate this conclusion. Assuming that Holmes had initially concluded that the First Amendment required reversal of the *Abrams* convictions, he then faced two options. He could have acknowledged that the *Abrams* defendants were indeed dangerous[54] but

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[49] *See supra* notes 40–43 and accompanying text.

[50] Thus, Holmes may have been engaging, *sub silentio*, in the kind of risk analysis of free speech problems urged in Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1 (2003).

[51] *See* Allan L. Damon, *The Great Red Scare*, 19 AMERICAN HERITAGE, Feb. 1968, at 22–27, 75–77; *see also* MURRAY, *supra* note 15; SANDLER, *supra* note 34, at 95–118; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 220–26 (2004).

[52] *See* BUDIANSKY, *supra* note 37, at 387, 460.

[53] *See* HEALY, *supra* note 11; *see also* David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982).

[54] It is intriguing to speculate about the standard that Holmes used to evaluate the extent of the danger. Under what later came to be understood as rational basis scrutiny, *see* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), *see generally* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373 (2016), a standard arguably inspired by the acceptance of Holmes's dissent in *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting), Holmes could have concluded that legislative determinations about the dangers of advocacy of a certain type, determinations embodied in the 1918 amendment to the Espionage Act of 1917, were entitled to substantial deference. Indeed, such a conclusion might be seen as underlying the toothless version of clear and present danger that Holmes applied in *Schenck*, *Debs*, and *Frohwerk*. By implicitly rejecting this approach in *Abrams*, however, Holmes could be seen as paving the way for what we would now consider heightened scrutiny, *see* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1278–79 (2007); Tara

then argued that the First Amendment nevertheless protected their dangerous activity.[55] Alternatively, Holmes could have argued that the *Abrams* defendants were simply not dangerous at all, making restriction of their speech pointless at the outset, with the First Amendment being the receptacle for the conclusion that an empirically pointless prosecution could not be upheld.

The language that Holmes used to describe the *Abrams* defendants plainly supports the latter explanation. And, interestingly, so too does much of what we know about the psychology of human decision-making. Although a great deal of our lives involves negotiating conflicting goals, desires, reasons, and principles, doing so is often a task that is as unpleasant as it is difficult. In order to make the task easier and reduce the unpleasantness, hardly a surprising motivation, we turn out to be prone to conceptually define or empirically perceive one of the choices in such a way as not to conflict, or at least to conflict less, with the other.[56] The label for the well-known phenomenon, a label often overused or misused by people who know little more than the label, is *cognitive dissonance*, and it is one of the more longstanding and most durable experimental findings in cognitive and social psychology.[57]

A possible locus of cognitive dissonance, and thus of people's desire to seek cognitive consistency,[58] is the tension between protecting

Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475 (2016), even of legislative factual determinations, for restrictions of constitutional rights in general, and First Amendment rights in particular. *See* Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 704–13 (2009).

55 For the argument that Holmes did precisely this—that he created "a privilege to cause harm"—but shouldn't have, see Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 707 (2011).

56 For my own analysis of the phenomenon, with examples from various legal and constitutional topics, see Frederick Schauer, *Rights, Constitutions and the Perils of Panglossianism*, 38 OXFORD J. LEGAL STUD. 635 (2018).

57 Dissonance theory is ordinarily associated with the findings, originally, in LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957), and further developed in LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE (1964); Leon Festinger, *Some Attitudinal Consequences of Forced Decisions*, 15 ACTA PSYCHOLOGICA 389 (1959). Also among the earlier sources is J.W. Brehm, *Postdecision Changes in the Desirability of Alternatives*, 52 J. ABNORMAL & SOC. PSYCH. 384 (1956). For more recent overviews and evaluation, see JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY (2007); Elliot Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback,* 3 PSYCH. INQ. 303 (1992).

58 On cognitive consistency, the desire of people to avoid cognitive dissonance and thus to look for agreement and coherence between conflicting beliefs, see generally ROBERT P. ABELSON, THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK (1968); BERTRAM GAWRONSKI & FRITZ STRACK, COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION (2012); Bertram Gawronski & Skylar M. Brannon, *What is Cognitive Consistency, and Why Does It Matter?*, *in* COGNITIVE CONSISTENCY: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY 91 (Eddie P. Harmon-Jones ed., Am. Psychol. Ass'n 2019). But for a

someone or something and believing that the person or thing we are protecting is dangerous. Concretely, therefore, it is at least plausible, especially in 1919,[59] that protecting speech and believing it dangerous would be seen as inconsistent and, even more concretely, that protecting Abrams and his leaflets while also believing them dangerous would therefore be seen as inconsistent. The remedy for this, for someone who believed that Abrams and the other defendants should not be convicted and for someone unwilling (or not yet conceptually empowered) to argue that harmful speech should be protected by the First Amendment, is thus to insist that the speech was not in fact harmful, reasonable views to the contrary notwithstanding.

If we accept, as I have tried to show, that Holmes's portrayal of the potential harms of the defendants and their leaflets was at least somewhat misleadingly understated, then the three possibilities I have just suggested—relative imperviousness to danger because of his own experiences, counteracting what he perceived as government overreaction to anarchist and socialist violence, and the search for cognitive consistency between constitutional immunity and the degree of danger of the immunized conduct—offer themselves as possible explanations. And without the ability to peer into Holmes's mind a century after the fact, and more than eighty years after his death, there is no way to settle on which of these—or others—might have been the actual explanation. This, however, is about the possible *causes* of Holmes's characterizations of the *Abrams* defendants. Yet perhaps of even greater import is the question of the *consequences* of those characterizations.

skeptical dissent, see Arie W. Kruglanski et al., *Cognitive Consistency Theory in Social Psychology: A Paradigm Reconsidered*, 29 PSYCH. INQ. 45 (2018).

[59] Recent and not-so-recent cases have highlighted the First Amendment's protection of likely harmful speech. *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012) (protecting intentional factually false statements by a local board member in a public meeting); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011) (protecting violent interactive video games); Snyder v. Phelps, 562 U.S. 443 (2011) (protecting display of homophobic signs at a military funeral); United States v. Stevens, 559 U.S. 460 (2010) (protecting the sale and possession of videos depicting animal cruelty); Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting advocacy of violence against African-Americans and Jews). But such applications of the First Amendment were far in the future in 1919. Indeed, it may well be that *Brandenburg* and *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971) (protecting plainly damaging and plainly factually false libel), are the first Supreme Court cases applying the First Amendment to protect uncontroversially harmful speech.

IV. THE "HARMLESS SPEECH" TRADITION

Holmes's decision to write a dissenting opinion in support of the *Abrams* defendants, and thus to depart from his less speech-protective conclusions in *Schenck*, *Debs*, and *Frohwerk*, has been so well-documented[60] that it need not be rehearsed here. But having made the decision to dissent, and having decided to do so on First Amendment grounds, it was still open to Holmes to choose just how to characterize the defendants and their speech. One option would have been to describe with slightly greater accuracy than he actually did the milieu in which Abrams and the others operated. But if Holmes had faithfully depicted the environment of fear described above, he would then have faced the formidable task, especially formidable in 1919,[61] of explaining why the Constitution and the First Amendment should provide special protection for potentially harm-causing behavior.[62] And whether Holmes avoided that formidable task because of the desire for cognitive consistency between protection and harmlessness or whether instead the avoidance was a function of the fact that neither Holmes nor the world of free speech theory yet possessed the theoretical resources to make that case, he still chose the characterization that made the task far less formidable. In doing so, however, he also made things too easy for theorists and advocates in the ensuing century, theorists and advocates who seem to have been only too eager to embrace the harmless speech tradition.

Speech can harm. The time-honored "sticks and stones may break my bones, but names can never hurt me" mantra notwithstanding, words (and pictures) possess the manifested capacity to produce a range of psychic, emotional, and more concrete injuries. Some of those injuries are direct, and the tort of intentional infliction of emotional distress, even though now tightly constrained by First Amendment doctrine,[63] embodies the idea that being the target of words and images

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[60] BUDIANSKY, *supra* note 37, at 390–95; HEALY, *supra* note 11; POLENBERG, *supra* note 11, at 197–242.

[61] *See supra* notes 53 and 59.

[62] The now-classic statement of the basic idea is in Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 204 (1972): "[O]n any very strong version of the doctrine [of freedom of expression] there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions." On the idea of special protection for speech, and not simply thinking of free speech as an instantiation of a broader principle of general liberty, see Frederick Schauer, *Free Speech on Tuesdays*, 34 L. & PHIL. 119 (2015); Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015).

[63] *See* Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Magazine v. Falwell, 485 U.S. 46 (1988). *See generally* David Crump, *Rethinking Intentional Infliction of Emotional*

may produce feelings of distress equivalent to or greater than some of the distresses produced by physical contact. And some speech-produced injuries are mediated by listeners or viewers who respond to speech by causing harm even while not themselves being the victims of it. In particular, the harms coming from advocacy or incitement are mediated harms of this variety. If any of the Klansmen who heard Clarence Brandenburg's speech had proceeded, inspired by that speech, actually to commit acts of "revengeance" against African Americans and Jews,[64] it would be hard to deny that the Brandenburg's speech had caused harm, even though the harm was mediated by the listeners and their subsequent conduct.

This is not the occasion to delve any more deeply into the ways that speech can harm, in part because I have done so on previous occasions[65] and in part because that vast topic, in its full vastness, is neither the focus of this Article nor of the event that inspired it—commemorating the *Abrams* dissent. But noting that speech can harm is important here because of the longstanding tradition of denying the harm-producing capacities of speech, a tradition that I want to label the "harmless speech tradition." And it is a tradition that may owe much, although the causation is far from clear, to the language that Holmes used in *Abrams* to characterize the defendants and their speech.

The view that speech, especially the speech that is worthy of protection, is harmless, and thus protected *because* it is harmless, comes in many versions.[66] The crudest version, of which the "sticks and stones" adage is emblematic, presumes that the kind of mental distress often caused by words is different in kind and lesser in degree than the kinds of harms caused by physical injury. Of course, being shot is more harmful than being called, say, selfish, rude, unfashionable, or a bad golfer. But being the target of a racial epithet—or being reminded by an

Distress, 25 GEO. MASON L. REV. 287 (2018); Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones But Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of* Snyder v. Phelps, 57 WAYNE L. REV. 473 (2011); Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300 (2010).

64 *See* Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

65 *See* Frederick Schauer, *Expression and Its Consequences*, 57 U. TORONTO L.J. 705 (2007); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81; Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993) [hereinafter Schauer, *The Phenomenology of Speech and Harm*].

66 I put aside the claim that speech is protected only *when* it is harmless, *see generally* Jan Narveson, *Freedom of Speech and Expression: A Libertarian View*, *in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 59 (W.J. WALUCHOW ED., 1994), and I do so because that view, its philosophical merits and demerits aside, maps so poorly with American First Amendment doctrine.

epithet of one's physical or mental deficiencies—may, for some people, produce more mental anguish than being pushed to the ground or slapped in the face, both of which can be the basis of criminal and civil liability.[67] And if it is the case that some speech-produced mental distress is greater than the pain or mental anguish produced by some forms of physical contact, or, for that matter, greater than some financial losses, then the question is whether there is reason to believe that speech is systematically less harmful than the remainder of human action. Indeed, although some have made exactly this claim,[68] it is difficult to see how it could be supported. It is, of course, true that most speech is harmless, but it is also true that most nonspeech conduct is harmless. And whether the subset of conduct (or action) that is speech is more or less potentially harmful than the subset that is not speech—whether the category of largely harmless speech is larger or smaller, absolutely or proportionately, than the category of largely harmless conduct—is simply an assertion that can neither be proved nor denied.

The version of the harmless speech claim to which I have just alluded is the claim in its least plausible version. Slightly more plausible is the version of the claim that aims to deny, often by distinguishing harm from "mere" offense,[69] the harms that may ensue when listeners, observers, or readers suffer some form of distress by virtue of what they read or hear or observe.[70] The basic idea, which is captured, I hope, by my comparison of being slapped in the face with being the target of an epithet, is that sometimes people feel distress when they are so targeted.[71] The question, then, is whether this distress is necessarily or

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[67] On a slap in the face as actionable, see, for example, Leger v. Delahoussaye, 464 So. 2d 1, 4 (La. Ct. App. 1984); People v. Althof, No. B155550, 2002 WL 31303535, at 4 (Cal. Ct. App. 2002) (citing People v. Rocha, 479 P.2d 372 (Cal. 1971)).

[68] "[W]e could reasonably decide that speech is less likely to cause direct or immediate harm to the interests of others . . . than is purely physical conduct . . . ." MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19 (1984) (footnote omitted). "It is almost certainly true in the overwhelming majority of cases that speech is less immediately dangerous than conduct." *Id.* at 19 n.48. *See also* Michael Bayles, *Mid-Level Principles and Justification*, *in* 28 NOMOS 49, 54 (J. Roland Pennock & John W. Chapman eds., 1986). For other examples and analysis, see Schauer, *The Phenomenology of Speech and Harm*, *supra* note 65.

[69] A powerful challenge to the distinction between harm and offense is Larry Alexander, *Harm, Offense, and Morality*, 7 CAN. J.L. & JURISP. 199 (1994). But if the distinction between harm and offense is fragile, then this fragility might lead to Alexander's conclusion that the merely offensive ought not to be regulated. But it also might lead to the opposite conclusion that the label "offense" is often tendentiously attached to regulable harms.

[70] *See* David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1660 (2014).

[71] If the distress is unaccompanied by any significant or lasting pain, then it is not clear why being painlessly slapped can ground a cause of action, which it can, while

systematically less consequential than the kinds of physically produced distresses that are routinely understood to justify legal sanctions.

In response to claims of this kind of distress, a common maneuver is to attribute the distress to some weakness on the part of the target. The targets are being "thin-skinned," so it is said,[72] and it is not as if being the target of an epithet or insult is really, truly, or genuinely harmful. One branch of the harmless speech tradition, therefore, focuses on the claims of direct injury and insists that those injuries are, if not nonexistent, at the very least rare and typically exaggerated.

Another branch of the harmless speech tradition focuses on mediated harms, as described above—that is, harms caused by a listener (or reader) and not directly by the speaker. With respect to such mediated harms, the harmless speech tradition can be further subdivided into three subbranches. One of the subbranches, and the one of least interest here, implicitly acknowledges the causation between the speech and some subsequent act but denies that there is anything harmful in the subsequent act. Even if it is true, for example, as nineteenth-century English obscenity law supposed, that sexually explicit imagery caused teenage boys to masturbate, it is, to put it mildly, hardly clear that there is anything to worry about in the ultimate conduct, the views of Victorian England (and late nineteenth-century United States) notwithstanding.[73] And thus, the objection to obscenity law, whether in nineteenth-century or modern versions, is sometimes just the objection to an official concern about the conduct portrayed or encouraged, apart from the question of whether the images did or did not increase the incidence of the conduct.[74] In the context of cases like

being (physically) painlessly insulted face to face cannot. So, too, with spitting. If someone spits in my face and the spittle makes contact with my skin, I have suffered an actionable battery. But if the spittle misses, I have no legal remedy, even though the injury in the former case is mostly (questions of disgust aside) a function of my having been insulted.

[72] Often. *See, e.g.*, RODNEY SMOLLA, SUING THE PRESS (1986) (entitling an entire chapter "The Thinning of American Skin"); Terri R. Day & Danielle Weatherby, *Speech Narcissism*, 70 FLA. L. REV. 839, 848 (2018); Donald E. Lively, *Fear and Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1090 (1985); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1113 (2003).

[73] *See* NOEL PERRIN, DR. BOWDLER'S LEGACY: A HISTORY OF EXPURGATED BOOKS IN ENGLAND AND AMERICA 164, 251 (1969); FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 7–8 (1976).

[74] *See, e.g.*, EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT 135, 287 (1982). Generalizing from the example in the text, it may be that at least some objections to extremely sexually explicit images in films, books, and magazines are objections based on the premise that the proliferation of such images will increase the incidence, societally, of nonprocreative sex, sex outside of marriage, or unconventional sexual practices. The basic point is that the empirical question of causation should not be confused with the normative evaluation of what is caused.

Schenck, therefore, this subbranch of the harmless speech tradition might acknowledge that there was a causal relationship between Schenck's anti-conscription advocacy and the incidence of draft resistance but that the draft itself was either immoral or unnecessary. The speech would be considered harmless, therefore, because the conduct it produced was not itself harmful.

The second subbranch of the harmless speech tradition when applied to mediated harms is one that seeks to deny the causal relationship. For example, the debate in *Brown v. Entertainment Merchants Ass'n*[75] between Justice Scalia for the majority[76] and Justice Breyer, dissenting,[77] was about the existence of (or the evidence for the existence of) a causal relationship between violent interactive video games and the incidence of violent conduct. Unlike the contexts just described, in which the acts allegedly caused by speech are argued not to be harmful at all, here there was no claim that murder, rape, or grand theft were harmless activities. Rather, this subbranch of the harmless speech tradition is manifested in a denial of the causal relationship between the speech and some category of uncontroversially harmful conduct. This debate has surfaced for generations in the context of claims that images of a certain sort affect, in the aggregate, the societal levels of sexual violence,[78] nonsexual violence,[79] cigarette smoking,[80] or alcohol consumption.[81] The denial of the empirical causal relationship also seems implicit in Holmes's characterization of Abrams and the group's pamphlets, where Holmes appears to deny that what Abrams

[75] 564 U.S. 786 (2011).

[76] *Id.* at 787–802.

[77] *Id.* at 840 (Breyer, J., dissenting).

[78] For my own stunningly unsuccessful attempt to clarify some of the issues, see Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737 (1987).

[79] For one side of these debates, see KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996). For the other side, empirically, doctrinally, and normatively, see, for example, Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995); L.A. Powe, Jr., *American Voodoo: If Television Doesn't Show It, Maybe It Won't Exist*, 59 TEX. L. REV. 879 (1981).

[80] *Compare, e.g.*, Jon P. Nelson, *Cigarette Advertising Regulation: A Meta-Analysis*, 26 INT'L. REV. L. & ECON. 195 (2006) (questioning the existence of causation), *with* Joe B. Tye, Kenneth E. Warner & Stanton A. Glantz, *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL'Y 492 (1987) (finding causation).

[81] *Compare* Leslie B. Snyder, Frances Fleming Milici, Michael Slater, Helen Sun & Yuliya Strizhakova, *Effects of Alcohol Advertising Exposure on Drinking Among Youth*, 160 ARCH. PEDIATR. ADOLESC. MED. 18 (2006) (finding causation), *with* John E. Calfee & Carl Scheraga, *The Influence of Advertising on Alcohol Consumption: A Literature Review and an Econometric Analysis of Four European Nations*, 13 INT'L J. ADVERT. 287 (2015) (finding no causation).

and his colleagues urged would have an effect on behavior.[82] And for all of these examples, and many more, the harmless speech tradition is one, Madison Avenue notwithstanding, that can be understood as denying the causal relationship between the speech and the conduct.

Thirdly, some commentators will acknowledge the harmfulness of the ultimate conduct, and the causation between the speech and that conduct, but will seek to attribute the responsibility to the downstream actor and not to the upstream speaker. Even if Clarence Brandenburg did cause some of his fellow Klansmen to commit acts of violence against African Americans and Jews, for example, the responsibility should be attributed to the listeners as "rational" agents with the capacity to decide what to do and not to the speakers nor the speech, mediated as it is by the autonomous decision-making capacities of the listeners.[83]

There is much more to be said about these various branches and subbranches of the harmless speech tradition. In the context of this Article and this Symposium, however, the basic points are that this tradition exists, that it was close to nonexistent before 1919, and that it is presented in bold form in Holmes's *Abrams* dissent. This is not to say, nor do we have good evidence for saying, that the Holmes opinion was causally responsible, for good or for ill, for the subsequent development and growth of the harmless speech tradition. Still, the praise that the opinion attracts, and the frequency with which Holmes's characterization of Abrams and his speech is quoted to support a claim of harmlessness, not only support the inference that Holmes was an early adopter of the harmless speech tradition but also suggests that the *Abrams* dissent was potentially a causal agent in the subsequent growth of a tradition that is now as influential as it is widespread.

V. CONCLUSION

There are various explanations for why Holmes might have referred to Jacob Abrams as an "unknown man" and why Holmes would have referred to the leaflets that formed the basis for the prosecution as "puny anonymities." One explanation, of course, is that these characterizations were true. But I have tried to suggest here that such an explanation may be open to question. And if that is so, then the

[82] Abraham Lincoln apparently thought otherwise. "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?" Letter from Abraham Lincoln to Erastus Corning and others (June 12, 1863), *in* SPEECHES AND WRITINGS 1859–1865, 454, 460 (Don E. Fehrenbacher ed., 1989). And so did the Holmes of *Schenck*.

[83] *See, e.g.*, Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71 (1996); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 813 (2010).

various alternative explanations I have offered here may shed light on why Holmes employed characterizations that seem, at the very least, to involve excess trivialization of the defendants and their activities.

Holmes's trivialization of Abrams and his leaflets can thus be seen as one of the initial landmarks in the harmless speech tradition. And in helping to launch the harmless speech tradition, Holmes may himself have contributed to still another harm—the harm of believing that speech is harmless.