

Holmes’s Understanding of His Clear-and-Present-Danger Test: Why Exactly Did He Require Imminence?

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I. INTRODUCTION

For all the suggestiveness and staying power of his market-in-ideas metaphor, Justice Oliver Wendell Holmes's most significant influence on First Amendment law has turned out to be his notion that only *imminent* harm can justify punishment for expressions of opinion. This emphasis on the time dimension in the calculus of harm is now entrenched in modern doctrine.¹ It is easy to imagine how First Amendment law might have developed differently had Holmes's peculiar focus on imminence not been a factor in shaping how the freedom of speech has come to be understood in the United States.²

Holmes's dissent in *Abrams v. United States*³ in November of 1919 resolved some important ambiguities regarding his understanding of the role of time in identifying the harm-causing potential that can justify regulating political advocacy. He had introduced his clear-and-present-danger test eight months earlier in *Schenck v. United States*,⁴ applying it to uphold criminal convictions of two speakers for distributing pamphlets harshly criticizing the current war and the conscription of soldiers to fight it. The same day, Holmes curiously failed to mention the test while upholding another conviction for war criticism, this time contained in a German-language newspaper.⁵ A week later, he wrote the majority opinion upholding the conviction of Eugene Debs, the most

¹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655 (2009).

² Justice Felix Frankfurter, Justice Robert Jackson, and Judge Learned Hand all embraced interpretations of the freedom of speech that do not limit the power to punish advocacy to situations in which the predicted harm is imminent. See *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring); *Id.* at 561 (Jackson, J., concurring); *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) (Hand, D.J.). See also *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950) (Hand, C.J.). On how advocacy can be punished on the basis of non-imminent harms under the Canadian Constitution, see RONALD KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* 51-52 (New York Univ. Press 2006). On how non-imminent harms figure in decisions of the International Court of Justice and the Court of Justice of the European Union interpreting pertinent international conventions, see Amal Clooney & Philippa Webb, *The Right to Insult in International Law*, 48 COLUM. HUM. RTS. L. REV. 1, 35-37 (2017).

³ *Abrams v. United States*, 250 U.S. 616, 624-31 (1919).

⁴ *Schenck v. United States*, 249 U.S. 47 (1919).

⁵ *Frohwerk v. United States*, 249 U.S. 204 (1919).

famous Socialist in the land, for giving a public speech praising draft resisters.⁶ That opinion also failed to say anything about clear and present danger. Combined, the three decisions left confusion in their wake regarding what test applied in political advocacy cases.

Moreover, parsing the one opinion in which Holmes *did* apply the clear-and-present-danger test, *Schenck*, leaves the reader with several questions regarding the meaning of its terms. For example, under the test as he formulated it, what needs to be “present” as well as “clear” is the *danger* rather than the *realization* of harm. Moreover, “present” can mean “being in view or at hand” (thus, doubling down on “clear”) as well as “now existing or in progress.”⁷ So exactly what role did Holmes ascribe to the passage of time in demarcating the dangers that can justify the regulation of “expressions of opinion and exhortations?”⁸

In *Schenck*, Holmes defended his assumption that harm can justify regulating speech by offering examples of utterances he took to be self-evidently within the government’s authority to punish. His most famous example, of course, was “falsely shouting fire in a theatre and causing a panic.”⁹ That illustration certainly is about the instant effect that an utterance can have. But Holmes included two other examples in *Schenck*: “uttering words that may have all the effect of force”¹⁰ and “if an actual obstruction of the recruiting service were proved.”¹¹ Words “that may have all the effect of force” might, but need not, result in instantaneous consequences, as when a person in authority gives an order for subordinates to act at a specified time in the future. And an “actual obstruction” by means of speech convincing someone to refuse to be conscripted could occur either immediately or eventually. Holmes’s example seemed to encompass both scenarios. Moreover, in *Frohwerk v. United States*, one of the cases in which Holmes upheld a conviction while never mentioning clear and present danger, he cited “the counselling of a murder”¹² as an example of speech that can be punished consistently with the First Amendment. Counseling a murder might occasionally be a call for immediate action, but more often it will be advice to do the evil deed after some planning and waiting on opportunity. Holmes’s use of these examples to show that much speech

⁶ *Debs v. United States*, 249 U.S. 211 (1919).

⁷ See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 921 (Frederick C. Mish et al. eds., 10th ed. 1994).

⁸ *Abrams*, 250 U.S. at 631.

⁹ See *Schenck*, 249 U.S. at 52.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

can be regulated hardly implies that speech can be regulated only when it threatens to cause harm in a very short time period.

But in his *Abrams* dissent, Holmes left little doubt about the role of time in his danger test: “[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”¹³ Here, he clears up the ambiguity regarding “present” by substituting “imminent” and “forthwith,” surely references to time. Later in the opinion he says that what is needed to justify regulation is “the present danger of immediate evil.”¹⁴

Why did Holmes choose, at least as of his *Abrams* dissent, to disallow all justifications for regulating speech that rest upon harms resulting from delayed or cumulative effects? Some such harms can be consequential. Audience members moved by a speaker’s call to mischief might take a while to summon up the will or means to act, but once they do, great damage can result. There are facilitative and enabling harms that play out over time, for example, harms that take the form of recruiting and training persons for future harmful actions. There can be slow-developing but ultimately destructive harms to the discursive and inquisitive atmosphere. By insidious means, speech can cause harm to political goods such as trust, accountability, tolerance, mutual respect, recognition of legitimate authority, acceptance of defeat, fulfillment of duties, and willingness to sacrifice. Speech can undermine the civic standing of individuals and groups. Surely Holmes did not believe that only imminent harms can do much damage. So how might he have defended his emphasis on the time factor of the harm calculus had he taken the trouble to develop his reasons in more detail?

II. EIGHT ARGUMENTS FOR REQUIRING IMMINENCE

I can think of eight arguments for treating imminent harms differently from more remote harms so far as justifying the regulation of speech is concerned. Some arguments, it should be said at the outset, fit better than others with Holmes’s broader patterns of thought.

A. *Argument One: Remote harms from dangerous advocacy can be prevented or contained by refutation.*

Holmes’s assertion in his *Abrams* dissent that “the best test of truth is the power of the thought to get itself accepted in the competition of

¹³ *Abrams*, 250 U.S. at 627.

¹⁴ *Id.* at 628.

the market”¹⁵ could be read to imply the strategic judgment that, absent immediacy of impact, the harm that speech can cause is best contained by refutation. Were that his claim, he would be in good company. In *Areopagitica*, the foundational essay of the free speech literature, John Milton says of falsehood, “Her confuting is the best and surest suppressing.”¹⁶ In his renowned concurring opinion in *Whitney v. California*, Justice Brandeis proclaims, “the fitting remedy for evil counsels is good ones.”¹⁷ Holmes joined that opinion, in which Brandeis eloquently underscored his call to “regulate” dangerous advocacy through informed criticism rather than punishment: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹⁸

Were we to interpret Holmes’s joining of Brandeis’ *Whitney* concurrence as signaling his full agreement with the details of the argument, it would be hard to escape the conclusion that he had considerable faith in the power of refutation. And Holmes does say in the stirring final paragraph of the *Abrams* dissent that ordinarily we should “leave the correction of evil counsels to time,”¹⁹ perhaps implying that what time permits is the opportunity to demonstrate the “falsehood and fallacies” of the speech at issue.

I think that is reading too much into Holmes’s signing on to the *Whitney* concurrence and invoking “time” as the preferred remedy in *Abrams*. In his day, joining a colleague’s opinion proved much less about agreement on specifics than it does in the current age of promiscuous separate opinions. Most telling, in many of his other writings, Holmes commented on the notable persistence of bad ideas in the face of demonstrably telling refutation. Consider this lament he wrote to Frederick Pollock: “Malthus pleased me immensely—and left me sad. A hundred years ago he busted fallacies that politicians and labor leaders still live on. One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe.”²⁰

¹⁵ *Id.* at 630.

¹⁶ John Milton, *Areopagitica*, in *COMPLETE POEMS AND MAJOR PROSE* 716, 746 (Merritt Y. Hughes ed., 1957).

¹⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹⁸ *Id.* at 377.

¹⁹ *Abrams*, 250 U.S. at 630–31.

²⁰ Letter from Oliver Wendell Holmes to Frederick Pollock (Aug. 30, 1914), in 1 *HOLMES-POLLOCK LETTERS* 219 (Mark DeWolfe Howe ed., 1942). For a more colorful reiteration of this observation, see Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 26, 1917), in 1 *HOLMES-LASKI LETTERS* 122 (Mark DeWolfe Howe ed., 1953) (“When

Holmes was deeply interested in the workings of time as a force in human affairs, including as a force shaping the development of societal institutions and understanding. A year before writing the *Abrams* dissent, he observed in a law review article that “property, friendship, and truth have a common root in time.”²¹ In the famous concluding paragraph of the dissent, where Holmes introduces his market “test of truth,” the empirical grounding for his argument is that “time has upset many fighting faiths.”²² But so far as I can find, he never listed among the benefits of “time” that it facilitates the making of counter-arguments.

Regarding Holmes’s intellectual kinship with Brandeis, who lived for detailed, fact-based argumentation, the genuine bond between the two legal titans had something of the quality of opposites attracting. Two months after Holmes wrote his opinions in *Schenck* and *Debs*, he reported to Pollock that:

Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don’t you try something new Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is.²³

Conceding to Pollock that Brandeis had a pedagogic point, Holmes admitted that he could never complete the assignment: “I hate facts. . . . I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore”²⁴

This is not to suggest that Holmes and Brandeis had nothing in common that bears on how they thought about the freedom of speech. On some fundamental matters, they held similar views. Both believed that freedom of speech is primarily for the benefit of audiences and the society beyond (and in the future) rather than the speakers themselves, although Holmes was more single-minded than Brandeis in thinking so. Both cared about the state of public opinion and thought that the freedom of speech can serve the project of producing and maintaining a

I read Malthus, I thought he had ripped the guts out of some humbugs—but they are as alive as ever today. Humbugs have no guts—and live all the better without them.”)

²¹ Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

²² *Abrams*, 250 U.S. at 630.

²³ Letter from Oliver Wendell Holmes to Frederick Pollock (May 26, 1919), in 2 HOLMES-POLLOCK LETTERS 13–14 (Mark DeWolfe Howe ed., 1942).

²⁴ *Id.*

public opinion that enables the “wishes” of the populace to be “safely . . . carried out.”²⁵

Holmes’s concern for audience and societal well-being meant that he had to consider the harm that speech can cause over time. He did not share Brandeis’ faith that possible future harm from speech can be neutralized or contained by refutation, but he did think that his cure-all “time” provides other weapons for limiting harms that do not materialize immediately.

B. Argument Two: Remote harms from dangerous advocacy will be limited by the predictable dissipation over time of energy and will.

Holmes received considerable criticism about his *Debs* opinion from prominent liberals who previously had lionized him for his dissents in *Lochner v. New York*²⁶ and *Hammer v. Dagenhart*.²⁷ That criticism prompted him to write to Herbert Croly, editor of the *New Republic*, defending himself. Holmes said in the letter:

I hated to have to write the *Debs* case and still more those of the other poor devils before us the same day and the week before. I could not see the wisdom of pressing the cases . . . but I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact. . . . When people are putting out all their energies in battle I don’t think it unreasonable to say we won’t have obstacles intentionally put in the way of raising troops—by persuasion any more than by force. But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.²⁸

The justification Holmes gives in the letter for “aeration of all effervescing convictions” may be glib, but the argument that ideas can “get flat” if given time should be taken seriously. The notion that ideas tend to lose their potency over time might justify disallowing consideration of remote harms when determining whether political advocacy can be punished.

²⁵ *Abrams*, 250 U.S. at 630.

²⁶ *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (arguing that states have the power to prescribe maximum hours for bakers).

²⁷ *Hammer v. Dagenhart*, 247 U.S. 251, 277–81 (1918) (Holmes, J., dissenting) (arguing that Congress has the power to prohibit child labor in industries which market their goods in interstate commerce).

²⁸ 1 HOLMES-LASKI LETTERS, *supra* note 20, at 203 (letter of May 13, 1919). He never sent the letter to Croly because he told his trusted correspondent Harold Laski, “some themes may become burning.” But Holmes couldn’t resist sharing the letter with Laski.

Holmes conceived the “competition of the market” in ideas to be largely about contending forces holding irreconcilable, incorrigible beliefs—“Can’t Helps,” he called them²⁹—trying to muster the energy, strength of will, savvy, persistence, and numbers to prevail. In this view, persuasion, enlightenment, empirical proof, and the spirit of inquiry play minor supporting roles at best.³⁰ In 1900, writing an introduction to a new edition of Montesquieu’s *The Spirit of the Laws*, Holmes opined that “the proximate test of a good government is that the dominant power has its way.”³¹ In a speech to the Harvard Law School Association of New York in 1913, he asserted that “the function of private ownership is to divine in advance the equilibrium of social desires”³² In an article published in the Harvard Law Review in 1918, the year before he confronted the First Amendment claims in *Schenck, Debs, and Abrams*, Holmes wrote:

I used to say, when I was young, that truth was the majority vote of that nation that could lick all others and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view.³³

Seven years later, at age eighty-four, the conflating of truth and power remained his theme. In his dissent in *Gitlow v. New York*, Holmes said, “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”³⁴

Someone who believes that the significance of public speech lies more in how it engenders motivation and mobilization than in how it facilitates persuasion or enlightenment might well think that the best force against dangerous messages is time. Would-be inciters of potentially harmful actions and commitments often have difficulty sustaining enthusiasm after the initial iconoclastic excitement wears off. Political energy, whether reformist, revolutionary, or revanchist, is a finite resource and one that usually wanes over time. When in his

²⁹ Holmes, *supra* note 21, at 40.

³⁰ See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 38–44.

³¹ OLIVER WENDELL HOLMES, MONTESQUIEU (1900), *reprinted in* COLLECTED LEGAL PAPERS 250, 258 (Harcourt, Brace & Co. ed., 1921).

³² Justice Oliver Wendell Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), *reprinted in* COLLECTED LEGAL PAPERS, *supra* note 31, at 294.

³³ Holmes, *supra* note 21, at 40.

³⁴ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

Abrams dissent Holmes enjoins us to “leave the correction of evil counsels to time” whenever the dangers they pose are not imminent, he may have been banking on energy diminution.

If so, he was painting with too broad a brush. A full consideration of the matter requires attention to the role that leadership and organization can play in sustaining the energy to use speech to do harm. Isolated demagogues may be defanged by time, but time can be a friend to patient, systematic organizers of harm creation. To address that problem, Holmes would need another argument.

C. *Argument Three: Remote harms can still be addressed under Holmes’s imminence requirement because his test applies only to one type of regulation of one type of speech: criminal or severe civil punishment for expressions of opinion that do not encroach upon private rights.*

A common mistake in analyzing a legal standard, whether adopted or proposed, is to focus too much on the standard’s prescriptions and not enough on its range of coverage. In trying to understand Holmes’s reasons for disallowing the consideration of remote harms in cases like *Abrams*, we need to have a sense of what kinds of disputes about speech he thought should be governed by his clear-and-present-danger test. In fact, Holmes said some things in his *Abrams* dissent which suggest that he did not envision his test having extensive coverage.

The closing sentence of the dissenting opinion begins: “Of course, I am speaking only of *expressions of opinion and exhortations*, which were all that were uttered here”³⁵ Earlier in the opinion, he states his proposed standard: “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to *the expression of opinion where private rights are not concerned*.”³⁶ And again in the famous final paragraph:

[W]e should be eternally vigilant against attempts to check the *expression of opinions* that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.³⁷

Apparently he did not think his demanding clear-and-present-danger test should apply to regulations of speech that do not target expressions of opinion. Moreover, if we take him literally, even the regulation of

³⁵ *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

³⁶ *Id.* at 628 (emphasis added).

³⁷ *Id.* at 630 (emphasis added).

opinion might fall outside the ken of his test when it is designed to protect private rights.

If it is helpful for interpreting Holmes—and it may not be—to look to opinions he wrote while serving on the Supreme Judicial Court of Massachusetts, his differentiating and categorizing various kinds of speech disputes in *Abrams* should come as no surprise. In defamation actions, he ruled that the privilege that protects factual errors made in good faith in a private letter of recommendation does not apply to errors made by a newspaper accusing a private party of fraudulent dealings with public officials.³⁸ He refused to enjoin labor picketing that harms a business by persuading customers, suppliers, or scabs not to deal with it, but permitted injunctions against picketing that urges breach of an existing contract, threatens violence, or blocks physical passage.³⁹ Because he placed speech disputes involving access to government property or employment in a separate category, he had no trouble concluding that a municipality can prohibit its police officers from soliciting political contributions⁴⁰ and disallow public speaking on its commons.⁴¹

Holmes's lifelong practice of refusing to treat all cases involving speech as raising similar issues also explains the examples he adduced in *Schenck* and *Frohwerk* of speech he considered punishable even when the harm it causes is delayed. None of his examples of such speech involve "the expression of opinions where private rights are not concerned."⁴² Like personal defamation, counseling murder threatens the private right of the specifically targeted victim. Giving an order to a subordinate or devoted follower that "has all the effect of force"⁴³ is more than an exhortation or expression of an opinion. In *Frohwerk*, Holmes observed that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."⁴⁴ Clearly he conceived of his clear-and-present-danger test as applicable to only a subset of speech disputes.

³⁸ See *Burt v. Advertiser Newspaper Co.*, 28 N.E. 1, 6 (Mass. 1891).

³⁹ *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896).

⁴⁰ *McAuliffe v. New Bedford*, 29 N.E. 517 (Mass. 1892).

⁴¹ *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895).

⁴² *Abrams*, 250 U.S. at 628.

⁴³ *Schenck*, 249 U.S. at 52.

⁴⁴ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). I am indebted to Frederick Schauer for calling my attention to this important dictum. See Frederick Schauer, *Every Possible Use of Language?*, in *THE FREE SPEECH CENTURY* 33–47 (L. Bollinger & G. Stone eds., 2019).

Dicta and examples such as these might tempt us to think that Holmes understood criminal prosecutions for speech of the sort at issue in *Schenck* and *Abrams* to be the exclusive province of the clear-and-present-danger test, leaving the consideration of remote harms to be permissible in other kinds of prosecutions, civil actions for damages, and disputes over access to government resources, including public employment. It should be noted, however, that in a case that did not involve criminal prosecution, decided the year before his embrace of the imminence requirement in *Abrams*, Holmes took his brethren to task for ruling that the federal contempt-of-court statute applies not just to outbursts in the presence of the judge but also published accusations of judicial incompetence or lack of integrity.⁴⁵ His dissent, although an exercise in statutory interpretation, reads like a dress rehearsal for *Abrams* in its emphasis on the importance of the immediacy factor.⁴⁶

Moreover, it was a case involving naturalization rather than criminal prosecution that provoked Holmes to what may be his most eloquent protest against letting remote harms justify the regulation of speech. In *United States v. Schwimmer*, decided in 1929, the Court ruled that naturalized citizenship can be denied on the basis of the applicant's pacifist beliefs.⁴⁷ The concern that justified the denial of citizenship, said Justice Butler for the majority, was the possibility that in some future war Ms. Schwimmer might express her pacifism publicly, to the detriment of military mobilization.⁴⁸ This preposterous remote harm rationale provoked the eighty-eight-year-old Holmes to take up his potent pen one last time in defense of the freedom of speech. He noted the pacifist beliefs of the Quakers and suggested that few Americans wished for their expulsion from the country "because they believe more than some of us do in the teachings of the Sermon on the Mount."⁴⁹

The appreciation that Holmes was sensitive to the coverage question and did not treat all regulations or categories of speech as warranting identical legal treatment goes some distance to answer the criticism that, for many purposes, any sensible legal regime has to be

⁴⁵ See *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 422–23 (1918) (Holmes, J., dissenting).

⁴⁶ See also *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Bursleson*, 255 U.S. 407, 436–37 (1921) (Holmes, J., dissenting), in which Holmes read the First Amendment to protect speakers from being denied second-class postal privileges on the basis of their prior alleged violations of the Espionage Act. In that case, Holmes did not invoke the clear-and-present-danger test, but he did hold a non-criminal regulation of speech to a high bar of justification. See *id.*

⁴⁷ *United States v. Schwimmer*, 279 U.S. 644 (1929).

⁴⁸ *Id.* at 651–53.

⁴⁹ *Id.* at 655 (Holmes, J., dissenting).

able to consider remote harms caused by speech. But we really cannot judge whether Holmes's imminence requirement can be defended based on its limited coverage without greater elaboration than he provided regarding the scope of application he envisioned for his demanding danger test.

D. Argument Four: Remote harms cannot count because only imminent harms can be predicted and measured with any degree of rigor, objectivity, and accuracy.

The passage of time introduces so many variables that any estimation of the causal relationship between an expression of opinion and remote harm must consist of guesswork untethered by evidence. Consider what proof would be required to establish that the public airing of a despicable opinion caused a subsequent (that is, "remote") harmful consequence such as a terrorist bombing, a sexual assault, or a measurable increase in racially-motivated violence. We might predict that such speech would lead eventually to such consequences, but that judgment would be based on broad assumptions about general patterns of influence rather than anything specific to the particular speech events and the particular harms. Inevitably, the prediction of remote harm is a speculative enterprise, rarely systematic or evidence based.

The speculation is compounded in the case of remote harms that have a cumulative character. How is a court to decide which discrete harms build on each other such that they are best considered together as an entity? Must the process of accumulation have a synergistic dimension, or can numerous independent events sometimes make up a whole? How is a court to know when a critical mass of harm has been achieved? And even if answers to these questions can be stipulated for the purpose of doctrinal formulation and case resolution, how is the phenomenon of accumulation to be proved in individual cases?

Holmes might have required imminence as a way of making consequentialist analysis in the First Amendment realm satisfy standards of objectivity worthy of legal and scientific positivism. As Robert Gordon explains:

Positivism . . . is the belief that explanation must be scientific, and that to be scientific it must confine its investigation to observable phenomena—facts—and its method to induction One can read whole sections of *The Common Law* as Holmes' attempt to turn law into something that permits the exercise of this sort of positivist method.⁵⁰

⁵⁰ Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 723 (1982). On Holmes's attachment to inductive reasoning, see H. L.

In his writing about the common law, Holmes went out of his way to embrace standards of legal liability that are “external,” by which he meant turning on observable phenomena subject to evidentiary proof.⁵¹ For example, in contract law he would have nothing to do with subjective meeting of the minds; he thought that promissory obligations derive from external manifestation.⁵²

Still, whether Holmes should be considered a “positivist” is a complicated question. Knowledgeable students of the Justice differ regarding whether he was a *legal* positivist in the sense of someone like H.L.A. Hart or Joseph Raz who derives legal authority exclusively from objective phenomena.⁵³ Of course, one does not need to be a legal positivist to be a *scientific* positivist in the sense of someone who withholds judgment about physical phenomena, including causal relationships, in the absence of specific objective evidence. It is scientific positivism (more precisely, social science or sociological positivism) that raises questions about whether remote harms from expressions of opinion can be accurately forecast.

There can be no doubt about Holmes’s attraction to the scientific method. When asked whether reading Voltaire had influenced his understanding of the nature of truth, he responded, “Oh no—it was not Voltaire—it was the influence of the scientific way of looking at the world”⁵⁴ Holmes’s father, in addition to being a celebrated poet, was a medical scientist who made a major discovery tracing a certain type of bacterial infection during childbirth to inadequate sterilization.⁵⁵

POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE 127–32 (Harvard Univ. Press 1984).

⁵¹ See MARK DEWOLFE HOWE, 2 JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 85–87, 164, 240 (Harvard Univ. Press 1963).

⁵² See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464–65 (1897).

⁵³ The literature on this subject is rich. See Gordon, *supra* note 50, at 722–27; Henry M. Hart, Jr., Comment, *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1044–45 (1977); Catherine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 SO. ILL. U. L. J. 329 (1994); Robin West, *Three Positivismisms*, 78 B.U. L. REV. 791 (1998). For a powerful refutation of the legal positivist hypothesis, see Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 (1995). For brief accounts of the legal positivism of Hart and Raz, see RAYMOND WACKS, *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION* 26–32, 37–39 (2006).

⁵⁴ Letter from Oliver Wendell Holmes to Morris R. Cohen (Feb. 5, 1919), in Felix Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 14 (1948).

⁵⁵ G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 10 (Oxford Univ. Press 1995).

The senior Holmes said that two things he had learned from studying in Paris with a world-renowned pathologist were “not to take authority when I have no facts” and “not to guess when I can know.”⁵⁶ Justice Holmes once described himself as an even more consistent adherent to the precepts of scientific positivism than was his father:

[T]here was with him, as with the rest of his generation, a certain softness of attitude toward the interstitial miracle—the phenomenon without phenomenal antecedents, that I did not feel. . . . Probably a skeptical temperament that I got from my mother had something to do with my way of thinking. . . . But I think science was at the bottom.⁵⁷

On that occasion, Holmes was writing to a philosopher of science, Morris Cohen, so he could have been aiming to please. Nevertheless, it would have been perfectly natural for him to have extended his characteristic skepticism to the question of how rigorous it is possible to be in predicting the remote harms that expressions of political opinion will cause.

E. *Argument Five: Allowing remote harms to be a basis for regulating speech deprives putative speakers of knowable standards for determining their possible legal jeopardy.*

In common law actions for negligence, Holmes believed that, over time, judges ought to be able to develop specific rules defining which precautions need to be taken in recurring situations. He had no quarrel with having jurors decide based on their experience what precautions a person of ordinary prudence would take in particular circumstances, but he believed that eventually the pattern of jury judgments in recurring situations ought to be crystallized by judges into directive rules to give actors more notice of their legal duties.⁵⁸ This call for directive judge-made common law rules never did take hold, perhaps because most judges do not prioritize doctrinal transparency and stability as much as Holmes did.

In a federal district court case decided two years before Holmes embraced the imminence requirement in his *Abrams* dissent, Judge Learned Hand adopted a test that might be considered the gold standard for notifying potential speakers of what they can and cannot say if they

⁵⁶ See MARK DEWOLFE HOWE, 1 JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 17 (Harvard Univ. Press 1957).

⁵⁷ Cohen, *supra* note 54, at 14–15.

⁵⁸ See WHITE, *supra* note 55, at 162–63; see also Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 40–41 (1997) (“Holmes placed a very high value on making and keeping law predictable.”).

want to avoid criminal liability. Hand interpreted the federal Espionage Act of 1917,⁵⁹ the statute that Schenck, Frohwerk, and Debs were later convicted of violating, to permit all criticism of government policy and actions, even “hostile criticism,” so long as the speaker does not “counsel or advise others to violate the law as it stands.”⁶⁰ Hand elaborated, “To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it.”⁶¹ The Second Circuit reversed Hand and rejected his test,⁶² but he had occasion to urge his test on Holmes in private correspondence, albeit unsuccessfully, shortly after the *Schenck*, *Debs*, and *Abrams* cases were decided.⁶³

Ever since Hand and Holmes failed to resolve their differences, Holmes focusing on danger and Hand focusing on message, students of the First Amendment have set up their respective tests as competing approaches to the task of developing a relatively speaker-protective First Amendment standard.⁶⁴ The contrast can be illuminating, but easily overlooked is how Hand might have influenced Holmes regarding the importance of having a test that gives speakers notice of what they can say with legal impunity.⁶⁵ On that score, Hand’s test certainly is better, but the way Holmes in *Abrams* unambiguously disallowed the consideration of remote harms eliminated the greatest source of uncertainty inherent in a test that turns on predicted danger. Both the Hand and Holmes tests give speakers much better notice than would any test that considered the remote harms caused by expressions of opinion.

One of the most trenchant criticisms of Holmes’s majority opinion in the *Debs* case came from the distinguished University of Chicago law professor Ernst Freund. In an article published in the *New Republic* in May of 1919,⁶⁶ Freund took issue with Holmes on several points,

⁵⁹ Espionage Act, ch. 30, § 1, 40 Stat. 217–31 (repealed 1948).

⁶⁰ See *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Hand, D.J.).

⁶¹ *Id.* Very likely thinking of Mark Anthony’s oration in Shakespeare’s *Julius Caesar*, he said that what matters is the “meaning conveyed” by the speech, not the literal content. The forbidden counseling “may be accomplished as well by indirection as expressly, since words carry the meaning that they impart.” *Id.*

⁶² See *Masses Publ’g Co. v. Patten*, 246 F. 24 (2d. Cir. 1917).

⁶³ See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 758–59 (1975).

⁶⁴ See, e.g., HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 134–35 (Jamie Kalven ed., 1988).

⁶⁵ For an argument that Hand’s *Masses* opinion might have influenced Holmes’s *Abrams* dissent in a variety of subtle ways, including regarding how much juries can be trusted in cases involving harsh criticism of government, see Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent*, 50 ARIZ. ST. L. J. 803 (2018).

⁶⁶ See Ernst Freund, *The Debs Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 14 reprinted in 40 U. CHI. L. REV. 239 (1973)

including the question of whether Debs had had sufficient notice of what speech was punishable. “To know what you may do and what you may not do, and how far you may go in criticism,” wrote Freund, “is the first condition of political liberty”⁶⁷ Holmes read the article and was dismissive of the analysis.⁶⁸ Nevertheless, Freund had a point, and it may well have registered with Holmes enough to have figured months later into his decision in *Abrams* to exclude consideration of remote harms.

F. Argument Six: Remote harms typically depend on so many different contingencies converging that speakers who initiate the causal sequence lack sufficient agency to be held responsible for the harms.

A modern defender of the imminence requirement as a precondition for punishing speech could well think that this argument from attenuated agency has some purchase. One could even cite Holmes in support of the proposition that contingency swallows up agency: “Man is like a strawberry plant, the shoots that he throws out take root and become independent centres.”⁶⁹ But admitting that most speakers and writers have scant control over what audiences do with their ideas provides a reason to protect speech only if we assume that the regulation of speech, or at least criminal punishment for speech, has to track the agency of the speaker. Holmes did not believe that.

Regard for human agency did not play a large role in his legal or political philosophy. About Kant’s postulate that human beings must be treated as ends and not means, Holmes said:

I confess that I rebel at once. If we want conscripts, we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe. The enemy we treat not even as a means but as an obstacle to be abolished, if so it may be. I feel no pangs of conscience over either step⁷⁰

Instead of the blameworthiness of the individual offender, Holmes believed that society’s desire for retribution, deterrence, and prevention

⁶⁷ *Id.* at 240.

⁶⁸ See Healy, *supra* note 65, at 818.

⁶⁹ *Holmes-Cohen Correspondence*, *supra* note 54, at 23 (letter dated Sept. 6, 1920).

⁷⁰ Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 1–2 (1915). See also HOWE, *supra* note 51, at 175–76; Gordon, *supra* note 50, at 724. (“Holmes also uses positivist method to refute Kant’s theory that possession should be legally protected because it is an extension of personality, an exercise of free will.”); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 470 (1994) (“Holmes was skeptical not only of Kant’s system of morality, but of morality as such.”).

via incapacitation is what justifies criminal punishment.⁷¹ He maintained, contrary to the view of almost all criminal law scholars both then and now, that what constitutes a criminal attempt is not conduct revealing sufficiently operationalized bad intentions but rather conduct creating an objective risk of impending harmful conduct.⁷²

One element of the danger test that Holmes put forth in the *Abrams* dissent might seem to cast doubt on this claim that he was unconcerned about speaker agency. His careful formulation of the test reads as follows: “the United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States may constitutionally seek to prevent.”⁷³ In the following paragraph, he restates the test, again with speaker intent serving as an independent basis for regulation: “It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.”⁷⁴

What does it say about Holmes’s understanding of his test that he thought *either* an actual danger of immediate harm *or* an intent on the part of the speaker to produce such a danger of immediate harm should be sufficient to justify government regulation? Why should a speaker’s intention to create a present danger of immediate harm be considered a substitute for creating the danger? Where is the speaker’s agency regarding harm when her advocacy produces no risk? Holmes’s answer in *Abrams* to these questions was, “Publishing those opinions for the very purpose of obstructing [the war against Germany,] however, might indicate a greater danger and at any rate would have the quality of an attempt.”⁷⁵ Recall that his idiosyncratic theory of criminal attempts rested on the objective dangers they create rather than the blameworthiness of the defendants.⁷⁶

In his dissent six years later in *Gitlow v. New York*,⁷⁷ Holmes elaborated on how the concept of criminal attempt might bear on the freedom of speech:

⁷¹ See HOWE, *supra* note 51, at 160–83; see also H.L.A. Hart, *Diamonds and String: Holmes on the Common Law*, in *ESSAYS ON JURISPRUDENCE AND PHILOSOPHY* 278–85 (1983).

⁷² See Francis A. Allen, *Criminal Law*, 31 U. CHI. L. REV. 213, 257–58 (1964); Edward J. Bloustein, *Criminal Attempts and the Clear and Present Danger Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1120–25 (1989).

⁷³ *Abrams v. United States*, 250 U.S. 616, 627 (1919) (emphasis added).

⁷⁴ *Id.* at 628 (emphasis added).

⁷⁵ *Id.*

⁷⁶ See authorities cited *supra* note 72.

⁷⁷ 268 U.S. 652 (1925).

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences.⁷⁸

This is a justification for taking into account the speaker's purposes, but not to identify personal agency as a precondition for assigning legal responsibility, rather as a variable that bears on the likelihood that harm will occur forthwith. As always, Holmes was thinking about collective consequences.⁷⁹

G. Argument Seven: Permitting the government to regulate political advocacy as a means of preventing remote harms enables punishment for seditious libel.

Two of the four counts on which the defendants were convicted of violating the Espionage Act of 1918 were for conspiring to publish "disloyal, scurrilous and abusive language about the form of Government of the United States" and conspiring to publish language "intended to bring the form of Government of the United States into contempt, scorn, contumely, and disrepute."⁸⁰ The majority in *Abrams* declined to rule on the constitutional validity of those counts because it found sufficient evidence in the record to support the convictions on the other two counts: encouraging resistance to the war effort and advocating curtailment of production of ordnance and ammunition.⁸¹ But Holmes perceived in light of the severity of the sentences meted out to the defendants by the trial judge—twenty years imprisonment for three of the defendants, fifteen years for the fourth⁸²—that concerns

⁷⁸ *Id.* at 673.

⁷⁹ The most illuminating, brief account of Holmes's consequentialism can be found in Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 136–38 (S. Burton ed. 2000) ("In political philosophy, Holmes was a preference utilitarian; he thought that people would naturally pursue their desires, and that the best system of government was one that gave them the most of what they wanted at the least cost. He was also a historicist, who believed that people were not solely driven by a universal desire for pleasure and aversion to pain, nor even by a small number of biologically given wants, but also by ideals and tastes that varied widely according to culture and history."). For a thoroughly researched and argued effort to paint Holmes as a utilitarian, see POHLMAN, *supra* note 50.

⁸⁰ *Abrams*, 250 U.S. at 617.

⁸¹ *Id.* at 624.

⁸² See RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 145–46 (Cornell Univ. Press 1987).

about disloyalty and bringing the form of government into disrepute had infected consideration of all the counts in the indictment.

Holmes's suspicion that the prosecutions were about sedition as much as hampering recruitment and war production was possibly triggered by a surprising decision made by the Justice Department lawyers assigned to handle the appeal before the Supreme Court. They chose to mount a full-throated defense of the view that Congress has authority under the First Amendment to punish speakers for seditious libel. They maintained that the infamous Sedition Act of 1798 actually had been constitutional, notwithstanding the opinion to the contrary of James Madison, principal author of the First Amendment.⁸³ The government lawyers' daring attempt in *Abrams* to preserve seditious libel as a regulatory tool was ignored by the Court majority, but it certainly caught the attention of Holmes:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.⁸⁴

The constitutional status of seditious libel was a question that figured prominently in some of the arguments for free speech that were pressed upon Holmes in the months leading up to his *Abrams* dissent. In the *Debs* case itself, Gilbert Roe, a highly respected civil liberties lawyer, submitted an amicus brief contending that the Espionage Act of 1917, the basis for *Debs*' conviction, was a latter-day sedition act, clearly unconstitutional for the reasons advanced by Madison.⁸⁵ Harvard law professor Zechariah Chafee, Jr., wrote an article that Holmes read during the summer of 1919 before meeting the author at Harold Laski's behest. In it Chafee proclaims, "The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of government, without incitement to law-breaking, forever impossible in the United States of America."⁸⁶ And

⁸³ For an account of the government's argument, see *id.* at 232–33. Madison's constitutional critique is reproduced in James Madison, *Report on the Virginia Resolutions* (1800), in JAMES MADISON, *WRITINGS* 644–58 (J. N. Rakove ed., 1999).

⁸⁴ *Abrams*, 250 U.S. at 630.

⁸⁵ Brief of Gilbert E. Roe as Amici Curiae Supporting Plaintiff in Error, *Debs v. United States* at 32–42, 249 U.S. 211 (1919) (No. 714).

⁸⁶ Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 947 (1919). For a detailed critique of this article and an account of how Chafee may have influenced Holmes, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1283–1303, 1315–16 (1983); see also WHITE, *supra*

Learned Hand's opinion in *Masses Publishing Co. v. Patten*, which Holmes read either in 1918 or early 1919,⁸⁷ twice asserts that a publication cannot be denied access to the mails for creating a "seditious temper" or a "seditious disposition."⁸⁸

All these arguments discrediting seditious libel might have given Holmes a straightforward reason to dissent in *Abrams* had the convictions been upheld by the majority on all four counts, including the two counts that sound in sedition. But that was not the case. Justice Clarke's majority opinion studiously avoided relying on those two counts, and the counts that *were* held to warrant affirmance were about encouraging resistance and advocating curtailment of ammunition production, the latter of which at least has no whiff of sedition about it.

What Holmes took from the severity of the sentences and the way the case had been argued, however, was that permitting a conviction for advocacy to be justified by a predicted impact in due course on the production of weaponry would allow seditious libel to enter through the back door. In effect, it would result in war critics being punished, as Holmes put it, "for the creed they avow" rather than the harms they might cause.⁸⁹ That dynamic, unmistakably operating in the case at hand, gave him a prophylactic rationale for restricting the kinds of harm that can justify punishment.

H. *Argument Eight: Permitting remote harms to justify punishing expressions of opinion is inconsistent with highly valuing the freedom of thought.*

Holmes did not become a free speech legend for piercing the veil of a few de facto sedition prosecutions. What has secured his place in First

note 55, at 427–30. For a fascinating narrative of how several progressives made efforts during the summer of 1919 to get Holmes to rethink his views about the freedom of speech, see THOMAS HEALY, *THE GREAT DISSENT* 1–5 (2013). For a discerning brief account of these efforts see Ronald J. Krotoszynski, Jr., *The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited*, 72 SMU L. REV. 415, 422–27 (2019).

⁸⁷ See Healy, *supra* note 65, at 806.

⁸⁸ See *Masses Publ'g Co. v. Patten*, 244 F. 535, 540, 542 (S.D.N.Y. 1917) (Hand, D.J.). Among judges, Hand was ahead of his time in considering seditious libel to be problematic. The Second Circuit noted in reversing Hand's ruling that one of the writings at issue is "not the voice of patriotism, and its language suggests disloyalty." *Masses Publ'g Co. v. Patten*, 246 F. 24, 37 (2d. Cir. 1917); see also James Weinstein, *Learned Hand's Masses Decision: Vindication and Influence*, 50 ARIZ. ST. L. J. 927, 928 (2018).

⁸⁹ Even before *Abrams*, Holmes had indicated that prosecutions which are ostensibly about harm might violate the First Amendment if in reality they are targeted against "speech as such." See *Frohwerk v. United States*, 249 U.S. 204, 206 (1919); see also *Fox v. Washington*, 236 U.S. 273, 277 (1915).

Amendment history, prompting three different law reviews to publish symposia marking the *Abrams* centennial,⁹⁰ has been the power of these words:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁹¹

Much has been written in search of the meaning and implications of these immortal sentences.⁹² As always in matters Holmesian, Thomas Grey is the surest guide. Assessing Holmes's opinions in *Abrams*, *Gitlow*, and *Schwimmer*, he concludes, "It was skepticism, *not* belief in the power of free discussion to reach truth, or in the power of democratic deliberation to make sound policy, that lent such memorable eloquence and passion to these opinions."⁹³ As Grey well demonstrates, Holmes's skepticism was not a form of indifference, denial, or withdrawal but rather engagement.⁹⁴ How else to explain his voracious reading well into old age and the vigorous ongoing exchanges he had with numerous

⁹⁰ In addition to this symposium, see *Symposium: Contemporary Free Speech: The Marketplace of Ideas a Century Later*, 94 NOTRE DAME L. REV. 1505, 1505–1774 (2019); *Symposium*, 72 SMU L. REV. 361, 361–545 (2019).

⁹¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁹² My own few drops in the ocean that is this literature include Vincent Blasi, *Holmes and the Marketplace of Ideas*, *supra* note 30; see also Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343 (1997).

⁹³ Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 532 (1992); see also Grey, *supra* note 79, at 133–57; Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 20 (1997); Grey, *supra* note 53, at 26–27; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 795, 804, 811–12 (1989). I am not alone in judging Professor Grey to be the foremost authority on Holmes. See Richard Posner, *Foreword: Holmes*, 63 BROOK. L. REV. 7, 9 (1997).

⁹⁴ For a contrary view, see Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962); see also Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254 (1963). For Grey's response, see Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, *supra* note 93, at 524–25. I explore Holmes's skepticism in my *Holmes and the Marketplace of Ideas*, *supra* note 30, at 13–23.

regular correspondents young and old, liberal and conservative, even radical?⁹⁵ How else to explain how hard he worked at his job?⁹⁶

The important point about Holmes's engaged skepticism is that it led him to believe that the freedom of speech is much more than a luxury civil liberty⁹⁷ to be extended in a charitable spirit when the cost is not too high. Rather, as his *Abrams* dissent implies and his *Schwimmer* dissent makes explicit, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."⁹⁸

Notice that here Holmes finds the value of speech to lie in the *thought* that it communicates. In that regard, his *Schwimmer* opinion echoes his *Abrams* dissent, where he maintains that the defendants' speech should be protected so as to be tested by "the power of the *thought* to get itself accepted" via "free trade in *ideas*."⁹⁹ Others might treat speaking and writing as uniquely privileged activities partly for reasons that have nothing to do with the ideas which are thereby

⁹⁵ See, e.g., *The Holmes-Cohen Correspondence*, *supra* note 54; THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935 (J.B. Peabody ed., 1964); HOLMES-LASKI LETTERS, *supra* note 20; HOLMES-POLLOCK LETTERS, *supra* notes 20 and 23; *Letters to Dr. Wu*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS (H. Shriver ed., 1937).

⁹⁶ See Charles E. Hughes, *Mr. Justice Holmes*, 44 HARV. L. REV. 677, 678 (1931).

⁹⁷ The term is Harry Kalven's. See KALVEN, *supra* note 64, at xxii. We might think that Holmes treated the freedom of speech as a luxury civil liberty in that he sometimes characterized the speech he was protecting in denigrating terms. He called the speech in *Abrams* "the surreptitious publishing of a silly pamphlet by an unknown man." *Abrams v. United States*, 250 U.S. 616, 628 (1919). Gitlow's manifesto he considered a "redundant discourse." *Gitlow v. New York*, 268 U.S. 652, 673 (1925). Those descriptions might suggest that Holmes would not have protected the speakers had he thought their ideas might be consequential.

We cannot know what he would have done if put to the test. Certainly he went out of his way to say that even speech likely to cause real harm deserves protection when the harm is not imminent. In *Abrams*, he posited a critic who during a war urges curtailment of airplane production in favor of other military procurement. Such a critic must be free, Holmes maintained, to "advocate curtailment with success . . . even if it turned out that the curtailment hindered . . . the United States in the prosecution of the war." *Abrams*, 250 U.S. at 627. What is required to justify criminal punishment, he specified, is an "emergency" such that "an immediate check is required to save the country." *Id.* at 630. Of course, these professions are only dictum, but that is true also of Holmes's disparaging assessments regarding the impotence of the defendants' advocacy in *Abrams* and *Gitlow*. In his contribution to this symposium, Professor Schauer surmises that Holmes had to have been aware that the speakers he wanted to protect in *Abrams* ran in circles where the use of violence as a political tactic was frequently discussed and sometimes practiced. See Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205 (2020).

⁹⁸ *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929).

⁹⁹ *Abrams*, 250 U.S. at 630 (emphasis added).

generated. Such additional reasons—mainly concerning the intrinsic satisfactions of autonomy, solidarity, and participation—played no part, however, in Holmes’s interpretation of the First Amendment. His approach was entirely instrumental and focused on individual thought as it relates to collective understanding and will.¹⁰⁰

An idealist might prioritize the principle of free thought for its contribution to collective well-being via the harnessing of knowledge, affirmation of human dignity, or facilitation of governance based on popular sovereignty. Holmes, the skeptic, prioritized free thought because he believed it helps people coexist amid intractable differences and adapt to inevitable changes in their environment.¹⁰¹

It is noteworthy that in *Abrams*, he begins his riff about truth, competition, power, and acceptance by invoking what people “may come to believe” once they “realize[] that time has upset many fighting faiths.”¹⁰² And what he posits they will come to believe is that our knowledge is “imperfect,” that “all life is an experiment,” and that their understanding of those limits “is the only ground upon which their wishes safely can be carried out.”¹⁰³ Holmes anticipated this line of argument the year before in his amazing five-page law review article *Natural Law*. There he says that “while one’s experience . . . makes certain preferences dogmatic for oneself, recognition of how they came to be . . . leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism.”¹⁰⁴ Perhaps his most powerful and succinct articulation of the point is in his *Lochner* dissent, where he characterizes the Constitution as “made for people of fundamentally differing views.”¹⁰⁵

Holmes believed that by making salient and inescapable the existence of persistent differences of opinion and ineffectual current

¹⁰⁰ See *supra* text accompanying note 79.

¹⁰¹ For an excellent detailed summary of Holmes’s reasons for according high value to the freedom of thought, see Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL OF RTS. J. 661, 685–95, 706–09 (2011). Heyman faults Holmes for failing to be a liberal humanist. That stern critique aside, Heyman’s descriptive account of Holmes’s thought is perceptive, faithful, and well-supported—a major contribution to the literature on Holmes. In his recent article *Holmes, Humility, and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631 (2019), John Inazu develops the coexistence rationale as central to Holmes’s valuing of free speech. See also Grey, *supra* note 53, at 33 (“Marked as he was by his war experience, Holmes was vividly aware of the community not as an organism but as a field of battle—its’ different portions want different things’ as he said.”). I emphasize the adaptation rationale in my *Holmes and the Marketplace of Ideas*, *supra* note 30.

¹⁰² *Abrams*, 250 U.S. at 630.

¹⁰³ *Id.*

¹⁰⁴ See Holmes, *supra* note 21, at 41.

¹⁰⁵ See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

understandings, the freedom to express unpopular, even dangerous, opinions can serve as a force against certitude, rigidity, and stasis. His bottom line was that we have no choice but to learn to live with those differences and with the chronic need to adjust or abandon some of our cherished beliefs in order to survive. That his reasons for attaching supreme importance to free thought are not particularly uplifting does not undercut the claim that Holmes ascribed a great deal of positive value to it.

The positive value that Holmes saw in the freedom to express one's heretical and/or harmful thoughts bears on the question of whether the desire to prevent remote harms can serve as a justification for regulating expressions of opinion. In the construction of First Amendment doctrine, concepts like "harm" and "evil" need not take their meaning exclusively from how the terms might be used in ordinary language or specialized endeavors other than constitutional interpretation. The concept of harm should not be conceived of as a purely empirical phenomenon but rather as an element of the integrated system of concerns, objectives, commitments, and prescriptions embodied in the Constitution. Thus, harm needs to be defined with reference to the values we ascribe to the activities subject to regulation in the name of harm, along with other considerations such as how some definitions of harm might facilitate abuse of the concept for unworthy ends. Conceptions of harm that undermine the best reasons for having freedom of thought and freedom of speech are a misfit.¹⁰⁶

There is a word in Holmes's precise formulation of his clear-and-present-danger test in *Abrams* that deserves careful scrutiny. He says that for expressions of opinion to be punishable, they must have the requisite close causal connection to "certain *substantive* evils that the United States constitutionally may seek to prevent."¹⁰⁷ Interestingly, *Abrams* was not the first case in which Holmes employed the adjective "substantive" to classify harms. He did that in *Schenck* as well, where he said that expressions of opinion can be punished only when there is "a clear and present danger that they will bring about *substantive* evils that Congress has a right to prevent."¹⁰⁸ What did he mean by "substantive"? What kind of evil would be non-substantive?

¹⁰⁶ For an argument along these lines regarding what John Stuart Mill could and could not count as harm in *On Liberty*, see Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POLITICAL STUDIES 410 (1987).

¹⁰⁷ *Abrams*, 250 U.S. at 627 (emphasis added). For an informed view of what Holmes might have meant by "substantive" that differs from my understanding see Leslie Kendrick, *On Clear and Present Danger*, 94 NOTRE DAME L. REV. 1653, 1664–66 (2019).

¹⁰⁸ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (emphasis added).

“Substantive” could be taken to mean something like “significant in degree, duration, effect, or prominence.” I submit, however, that by coupling his references to “substantive” on both occasions with references to what government has “a right to prevent,” Holmes was maintaining that certain consequences we might commonly call harms or evils are consequences that government has no authority to attempt to forestall. Assuming that Holmes was thinking of the First Amendment as the source of such a limitation, the “harms” that Congress cannot consider to be harms in the constitutional sense most likely are such things as beliefs, attitudes, assumptions, objectives, and loyalties, all of which can be considered “non-substantive” in the sense that they are “non-material.”

A non-substantive harm is not the same thing as a remote harm, even as the two categories overlap to a great degree. In trying to understand Holmes’s thinking about remote harms, his explicit refusal to allow non-substantive harms to justify punishment for expressions of opinion is pertinent because it provides an example of his giving controlling significance to the positive value he ascribed to the freedom of thought. Like remote harms, non-substantive harms are real. People who experience those harms suffer. A society that experiences those harms suffers. Nevertheless, in the case of non-substantive harms, Holmes made the calculation that such suffering is insufficient to justify sacrificing the positive value of the freedom of thought. So too, it seems, with the case of remote harms, including remote substantive harms.

There is a striking asymmetry here to his balancing of societal harm and benefit. Nothing could be more evident about Holmes’s understanding of the freedom of thought than that he perceived its benefits to be realized, for the most part, over time. Like Milton before him,¹⁰⁹ Holmes took the long view when it came to identifying the value of freedom of thought. Coexistence and adaptation are not matters of immediate gratification. Yet when it came to identifying the harms that can justify limiting the freedom to express opinions, he made imminence the key consideration, thereby ruling out long-term consequences. That may be asymmetrical, but it is not necessarily illogical. More importantly for Holmes, it is not necessarily indefensible as a matter of learning from experience. The fact that the future is inscrutable and hostage to contingency may be more debilitating for predicting the harms from free thought than for predicting the benefits. That was true for Holmes precisely because he perceived the transcendent benefit of

¹⁰⁹ I document Milton’s prioritization of the claims of posterity in Vincent Blasi, *A Reader’s Guide to Milton’s Areopagitica, The Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273, 308–12.

free thought to lie in its helping us learn to live with uncertainty and the absence of control.

It is no accident that in *Schwimmer*, his valedictory statement about the First Amendment, what Holmes says the constitutional commitment protects at bottom is “the principle of free thought,”¹¹⁰ not the principle of freedom “for every possible use of language.”¹¹¹ In *On Liberty*, John Stuart Mill made the same careful locution, reserving his strongest level of protection for the “Liberty of Thought and Discussion.”¹¹² Holmes reread *On Liberty* in the spring of 1919.¹¹³ Years before, he had dined with Mill in London, then attended a lecture with him.¹¹⁴ The two were far from kindred spirits, however, because at the core of Mill’s philosophy was his fear of majorities,¹¹⁵ while Holmes considered majority understanding and will to be an important source of meaning, as well as basic to creating the ever-evolving, inevitably temporary order that enables individual survival and engagement.¹¹⁶

What Holmes and Mill had in common, despite their profound differences,¹¹⁷ was the belief that for the freedom of thought to operate as a force against stasis it needs to be accorded “absolute” (Mill’s term)¹¹⁸ protection. To rule in particular cases that the benefits of free thought are outweighed by the need to prevent remote harms would be to compromise the elemental, society-defining role that the principle of free thought played for Mill and Holmes. Each considered public opinion to be important and all-too-often dominated by inertia, denial, and resistance to change. A freedom to think that can be overridden by inevitably subjective predictions of remote harm might advance knowledge or adaptation in some ways under certain conditions, but the

¹¹⁰ United States v. *Schwimmer*, 279 U.S. 644, 654–55 (1929).

¹¹¹ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

¹¹² See JOHN STUART MILL, *ON LIBERTY* 86 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

¹¹³ See HOLMES-LASKI LETTERS, *supra* note 20, at 187 (letter of Feb. 28, 1919).

¹¹⁴ See STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* 140 (W. W. Norton & Co. 2019).

¹¹⁵ See MILL, *supra* note 112, at 78–80.

¹¹⁶ See *supra* text accompanying notes 31–34. See also Holmes, *supra* note 21, at 40. On Holmes’s understanding of majoritarianism as a source of order see CATHARINE PIERCE WELLS, *OLIVER WENDELL HOLMES: A WILLING SERVANT TO AN UNKNOWN GOD* 166–73, 196–200 (2020).

¹¹⁷ For a comprehensive and probing comparison of the free speech arguments of Mill and Holmes, see Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses*, 22 *YALE J.L. & HUMAN.* 35 (2010).

¹¹⁸ MILL, *supra* note 112, at 82. I explain how this absolutism is consistent with Mill’s professed utilitarianism in *Shouting “Fire!” in a Theater and Vilifying Corn Dealers*, 39 *CAP. U. L. REV.* 535, 546–48 (2011).

fragile quality of such a contingent mental freedom would be enervating, making it no match for the forces of stasis. The freedom of thought exists to engender, Mill and Holmes agreed, not just discrete discoveries within predetermined bounds but a shared disposition in the populace to hold all conventional understandings to account in the light of time and experience. That Mill believed a sufficiently corrigible public opinion can lead to progress while Holmes's sights were less elevated does not break their bond on this point.

It is noteworthy that throughout his lengthy chapter on the liberty of thought and discussion, Mill never once discusses the harms that free thought might engender, even as in subsequent chapters of *On Liberty* he specifies how harm, carefully defined, can limit other liberties.¹¹⁹ In *Abrams*, Holmes does not employ the term "absolute," but the logic of the imminence requirement, as he presents it, categorically rejects the relevance of all remote harms. Moreover, he does say that whatever else about the defendants' speech and conduct might arguably be a basis for regulation, "the creed they avow" is something "no one has a right even to consider."¹²⁰ On the facts of the *Schwimmer* case, Holmes could have laid waste to the majority's empirical claim that remote harm to future conscription might follow from allowing a fifty-one-year-old pacifist to become a naturalized citizen. Instead, he rested his dissent on the fundamentality of freedom of thought.

Holmes possibly was influenced in this respect by the example of Learned Hand's judgment in the *Masses* case that speech that is of fundamental importance to the democratic process cannot be prohibited even though it is likely to cause considerable harm.¹²¹ Holmes had no use for Hand's theory that permitting "hostile criticism" is essential to legitimating government authority¹²²—Holmes did not think in such terms—but he had other reasons sounding in coexistence and adaptation to consider free thought to be fundamental. His opinion in *Abrams* embraces that assumption by positing instances of speech which simply cannot be made illegal, such as that of a patriot questioning war production priorities or a visionary attempting to "change the mind of the country."¹²³

¹¹⁹ See MILL, *supra* note 112, at 139, 142–43, 156, 160.

¹²⁰ See *Abrams v. United States*, 250 U.S. 616, 629–30 (1919).

¹²¹ See *Masses Publ'g Co. v. Patten*, 244 F. 535, 539–40 (S.D.N.Y. 1917). Holmes had read Hand's *Masses* opinion by the time he wrote his *Abrams* dissent, though exactly when is not established. See Healy, *supra* note 65, at 806.

¹²² See *Masses Publ'g Co.*, 244 F. at 540.

¹²³ See *Abrams*, 250 U.S. at 627–28.

In addition to emphasizing the fundamentality of free thought, Holmes and Mill had in common the belief that speech which causes harm immediately has little to do with freedom of thought. In fact, their shared refusal to conflate the freedom of thought with the freedom of speaking is what made their absolutism regarding free thought tenable. In *On Liberty*, Mill says that telling an audience that corn dealers are starvers of the poor should be protected when the message is conveyed in the press but not when it is “delivered orally to an excited mob assembled before the house of a corn-dealer.”¹²⁴ Conceivably, he treated the two cases differently on the ground that the harm potential is greater in the mob situation. But is it really, given the exponentially greater number of persons who receive the message when it is disseminated via the press? More likely, Mill considered the two situations distinguishable on the ground that in the excited mob example neither the speaker nor the listeners are exercising their “liberty of thought,” even as they might be exercising other communicative or expressive liberties which in the scheme developed in *On Liberty* deserve only qualified immunity from regulation. This is how the preeminent Mill scholar John Skorupski understands the twin corn dealer examples. He interprets Mill’s “liberty of thought and discussion” to be based wholly on the value of “dialogue effects,” defined as “those which occur through the autonomous response of a recipient who engages with the expression critically, as an act of dialogue.”¹²⁵ That is not what is happening in the excited mob example.

Mill judged liberty of thought to be a special freedom, which generates unique, enduring, and radiating societal benefits—benefits he had memorably cataloged in Chapter Two of *On Liberty*.¹²⁶ He took the unique benefits of the freedom of thought to be so fundamental as to require “absolute” protection for the type of communication that generates them, as he explained in Chapter One of *On Liberty*.¹²⁷ In that regard, he treated communication that embodies or facilitates the liberty of thought differently from other types of communication.

Had Holmes addressed the two corn dealer examples, I believe he would have come down just as Mill did, and with the same emphasis on the presence or absence of free thought rather than the lower or higher probability of harm. When Holmes said that “every idea is an

¹²⁴ MILL, *supra* note 112, at 121.

¹²⁵ See JOHN SKORUPSKI, JOHN STUART MILL 371, 374 (1989).

¹²⁶ See MILL, *supra* note 112, at 118–20.

¹²⁷ *Id.* at 82–83.

incitement,"¹²⁸ he did not imply that every incitement is an idea.¹²⁹ Many incitements have nothing to do with thought or discussion. Mill and Holmes had very different notions about why free thought is valuable,¹³⁰ but they were on the same page regarding what activities are encompassed by the concept. It would never have occurred to Mill, for example, to include falsely—or even truthfully—shouting "Fire!" in a theater in his chapter on the liberty of thought and discussion. Like Holmes, Mill would have considered such a warning to be an entirely different kind of activity.¹³¹

Holmes also shared with Mill the view that certain conceptions of harm cannot be employed because to do so would be inconsistent with prioritizing the freedom of thought.¹³² Just as Mill could not count as harm the genuine feelings of moral distress that observers can experience when confronted with ideas they find abhorrent,¹³³ Holmes could not count remote harm as a reason to regulate the freedom of thought despite the undeniable fact that immoral, unwise, and ill-motivated ideas certainly can cause significant delayed or cumulative harm. To allow remote harms to justify punishment for the public expression of ideas, he concluded, would strip free thought of its necessary vitality, something he considered more basic to human survival and coexistence than whatever public safety gains might be achieved by authorizing such punishment.

In his article *Privilege, Malice, and Intent*, published in the *Harvard Law Review* in 1894, Holmes explained how under the common law, a

¹²⁸ See *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

¹²⁹ The majority opinion in *Gitlow* labeled the defendant's verbose, formulaic call for future revolutionary action a "direct incitement," prompting Holmes to cry foul. *Id.* at 665. Professor Chafee had the last word on whether *Gitlow's* pamphlet had the capacity to incite: "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This Manifesto would disperse them faster than the Riot Act." ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 319 (1941).

¹³⁰ See *Ten Cate*, *supra* note 117.

¹³¹ See Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 *ETHICS* 621, 623 (1996) (Mill's liberty of thought and discussion encompasses only "propositions about actual or desirable states of affairs in the world, propositions capable of being accumulated into larger bodies of knowledge.").

¹³² For general discussions of Mill's conception of harm in *On Liberty*, see David O. Brink, *Mill's Liberal Principles and Freedom of Expression*, in *MILL'S ON LIBERTY: A CRITICAL GUIDE* 42 (C.L. Ten ed., 2008); D.G. Brown, *Mill on Harm to Others' Interests*, 26 *POL. STUD.* 395, 396–97 (1978); JOHN GRAY, *MILL ON LIBERTY: A DEFENSE* 57 (2d ed. 1996). For an argument that Mill counts as harm only "perceptible damage," perhaps the closest equivalent to what Holmes called "substantive evil," see JONATHAN RILEY, *MILL ON LIBERTY* 99 (1998).

¹³³ See Waldron, *supra* note 106, at 413.

privilege entitles an actor to cause harm with legal impunity even when the harm is considerable. He maintained that such privileges inevitably are grounded in the policy judgment that the benefit to society of recognizing the privilege outweighs the conceded harm.¹³⁴ Three years later, in his famous article *The Path of the Law*, Holmes returned to the subject of legal privilege to harm:

Why is a false and injurious statement privileged, if it is made honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be subserved by free competition.¹³⁵

Holmes conceived of the freedom of thought as a constitutional privilege also deriving from a consequentialist calculation regarding the public good.¹³⁶

III. CONCLUSION

Holmes simply did not believe that the benefits to audiences, present and future, that flow from the freedom of thought are threatened by recognizing a power in government to punish advocacy that “produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils.”¹³⁷ Criminalizing expressions of opinion to prevent predicted *remote* harms was for him a different matter altogether in terms of the potential deleterious impact on the freedom of thought going forward. During the course of the tumultuous year 1919, he came to believe that the only safe way to prevent dissenters from being prosecuted “for the creed they avow” is to disallow the consideration of remote harms. Ultimately, the high instrumental value of freedom of thought, rather than the unlikelihood, unimportance, or unprovability of remote harms, is what determined the issue for him.

¹³⁴ See Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3–4 (1894).

¹³⁵ Holmes, *supra* note 52, at 466.

¹³⁶ On Holmes’s consequentialism, see Grey, *supra* note 79.

¹³⁷ See *Abrams v. United States*, 250 U.S. 616, 627 (1919).