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Introduction

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1999-2000 Oliver Wendell Holmes Devise Symposium: The Marketplace of Ideas in Cyberspace

by Theodore Y. Blumoff*

On the western front, English, French, and German soldiers spent nights knee deep in water and sewage and disease and the stench of comrades' deaths, all the while lobbing ordnance at each other across a frontier that, at its narrowest, stretched no more than a few yards.[1] Dead replaced dead replaced dead ad infinitum in fetid trenches. Imperial Germany was on the move; western Europe was exploding. In the east, Russia began allied with the West and ended drenched in its own bloodshed—Bolsheviks versus Menscheviks, Reds versus Whites. Russians fought their own battles of ethnic cleansing, then described

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1. *See, e.g.*, ERICH MARIA REMARQUE, ALL QUIET ON THE WESTERN FRONT (A.W. Wheen trans., Little, Brown 1995) (1958).

(euphemistically, in my opinion) as the Russian Revolution. The Reds were on the move; eastern Europe was imploding.[2] And then the Yanks went marchin' in! Over hill over dale! Or something. You get the picture; we were our very own heros.

Closer to home, any potential champions of individual liberties seemed to wait out the conflict; war fever had taken its normal (clumsy) toll on civil freedoms, such as they were in 1919.[3] In June and again in November of that year, A. Mitchell Palmer, President Wilson's Attorney General, led raids in New York City aimed at deporting undesirable aliens; concurrently, the several states, enforcing sedition laws, some of long-standing and dubious constitutionality, moved their own troopers out, arresting somewhere in excess of 1400 people.[4] The "war to make the world safe for democracy"—a/k/a "The Great Crusade"—was on. And just as the executive branch executed and the legislative branch appropriated funds and otherwise engaged the processes of government in support of the war effort, the United States Supreme Court, generally assigned to the third—least dangerous—rung of our triadic governing structure, was asked to join the fray. Appealable decisions in some number of cases had to be decided.[5]

From the long-range view of civil liberties, the returns were not happy. In a number of appeals of criminal convictions decided in 1919, Justice Holmes wrote opinions that were not inconsistent with the feverish context of the times.[6] In *Schenck v. United States*,[7] for example,

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2. *See, e.g.*, N. GORDON LEVIN, JR., WOODROW WILSON AND WORLD POLITICS: AMERICA'S RESPONSE TO WAR AND REVOLUTION 213-14 (1968).

3. *See, e.g.*, David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) (describing the pre-War conditions that would, over time, give rise to contemporary free speech doctrine).

4. DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 20 (1978). For a variety of reasons, the Supreme Court had not reviewed the Sedition Act of 1798, ch. 74, 1 Stat. 596 (prohibiting "false, scandalous and malicious writing or writings against the government of the United States," among other things). The Act was not officially recognized as unconstitutional until 1964. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

5. Throughout the nineteenth century, virtually all appellate review in the Supreme Court arrived via appeal and writ of error. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1845). Late in the nineteenth century and throughout the twentieth century, Congress gradually expanded the Court's discretionary review by way of writ of certiorari. In 1988 Congress made virtually all of the Court's review discretionary. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1990). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 630-34 (3d ed. 1999).

6. There is, of course, nothing new in our history about civic explosions aimed at the new, the foreign, the misunderstood, and the feared. I have tracked some of this history in a prior article. *See* Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 J.L. & RELIGION 591, 601 (1994-95).

Justice Holmes wrote the Court's opinion upholding convictions of several men who circulated among conscripts a document opposing the draft as violative of the Thirteenth Amendment's prohibition on slavery.[8] Applying the "bad tendency" fiction in vogue at the time[9] and introducing into the First Amendment's lexicon the regulatory concept of "clear and present danger," Justice Holmes inaptly likened the antiwar circulars to "falsely shouting fire in a theater and causing panic."[10] Professor Harry Kalven described Holmes' wildly overinclusive analogy years ago, noting that its breadth implied that nothing short of the most outrageous, panic-inducing speech lacks protection; Kalven thus characterized Holmes as "triumphantly impeach[ing] this massive major premise."[11] Kalven also noted that the fire analogy is "wholly apolitical," thereby stripping the example of the complexity likely to arise whenever issues implicating (especially radical) political rhetoric are in dispute.[12]

Just one week later, Justice Holmes again wrote for the Court in two criminal cases implicating political speech and again turned a tone-deaf ear to the democratic theme that the First Amendment evokes.[13] In the first of the two, the Court upheld the conviction of an editor of a German-language newspaper who declared that sending American troops to France was an "inexcusable mistake . . . that . . . appears to be outright murder."[14] In the second, Justice Holmes, writing for the Court, affirmed a ten-year sentence imposed on Eugene V. Debs, the

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7. 249 U.S. 47 (1919).

8. *Id.* at 49-51.

9. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 724 (1975) (explaining that one could be convicted if the natural tendency of the words used was to effect a prohibited result).

10. 249 U.S. at 52.

11. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 133 (1988).

12. *Id.* at 133-34.

13. One of the clearest statements in support of the preferred status of the First Amendment comes from Alexander Meiklejohn:

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion . . . relevant to that issue, just so far the result must be ill-considered . . . . [That is because t]he principle of the freedom of speech . . . is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948).

14. Frohwerk v. United States, 249 U.S. 204, 207 (1919).

socialist leader who later ran for President.[15] According to the Court, Debs had encouraged those present at a Sunday afternoon public speech to the Socialist Party convention in Canton, Ohio "to obstruct the recruiting" effort, although Debs himself refused to make such a statement during the speech because "he had to be prudent and might not be able to say all that he thought."[16] Thus could the Court infer that there was more there than met the trained, nonhysterical eye.[17]

The transformation for Justice Holmes began during the next Term when he dissented in *Abrams v. United States*,[18] in which the Court affirmed twenty-year sentences imposed on a number of Bolshevik sympathizers who had protested the deployment of American Marines to *Russia*![19] Viewing the troop movement as an effort to defeat the Russian Revolution, the immigrants dropped leaflets, roughly half of which were written in Yiddish, calling for a strike. They were convicted under the Espionage Act for conspiring to "cripple or hinder the United States in the prosecution of the war"[20] against *Germany*, a country for whom defendants held absolutely no brief. Despite (or, more likely, because of) the profligacy of the trial court, the Court rejected defendants' First Amendment claims summarily, citing *Schenck* and *Frohwerk*.[21]

For reasons that are shrouded in some mystery, Justice Holmes, joined by Justice Brandeis, broke with the majority.[22] His language, if not

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15. Debs v. United States, 249 U.S. 211, 216-17 (1919).

16. *Id.* at 212-14; *see also* Harry Kalven, Jr., *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235, 237 (1973) (describing the *Debs* conviction as akin to sending George McGovern, the 1972 Democratic Party presidential nominee, "to prison for his criticism of the [Viet Nam] war").

17. 249 U.S. at 213.

18. 250 U.S. 616 (1919).

19. *Id.* at 624.

20. Act of May 16, 1918, ch. 75, 40 Stat. 553, 553 (1919) (amending Act of June 15, 1917, ch. 30, tit. 1, § 3, 40 Stat. 217, 219 (1919)). In several places the leaflets decried the alliance of American capitalism with "German militarism," and at one point noted that its authors "hate and despise German militarism." 250 U.S. at 624-25 (Holmes, J., dissenting).

21. 250 U.S. at 619.

22. The mystery arises for several reasons. First, Justice Holmes stated that he did not question the continuing vitality of *Schenck*, *Frohwerk*, and *Debs*; they were, he declared, "rightly decided." *Id.* at 627 (Holmes, J., dissenting). Thus, his description of defendants as, among other things, "poor and puny anonymities," and their creed as, among other things, one of "ignorance and immaturity when honestly held," suggests that even under prior case law, defendants presented no clear and present danger. *Id.* at 629. As Professor Tribe notes, the cynic might conclude that Justice Holmes was willing to protect speech "only as long as it [was] ineffective." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-9, at 843 (2d ed. 1988). There is ambiguity on doctrinal grounds

his rationale, composes the stuff of which free speech declares a normative victory over our own fascist tendencies.

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition .... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the *competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[23]

The *Abrams* dissent produced two central tenets of First Amendment law: (1) that ideas should be tested rather than censored, and (2) that the antidote to poisonous speech is more speech, not less. Both ideas marked significant new directions in American free speech jurisprudence.[24]

The marketplace metaphor, which we honor in this Symposium, has generated controversy since its first articulation. Professor Wigmore, writing in 1920, asked whether Justice Holmes had "show[n] a blindness to the deadly fact that [while the market tests the idea,] the 'power of thought' . . . might 'get itself accepted in the competition of the market'" such that ultimate victory would have no "practical value for a defeated America."[25] Others have questioned both the general plausibility of the idea, noting that "experience-generating conduct" is as likely as speech to produce understanding, and that the metaphor's underlying faith in rationality is questionable.[26] Still others have

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as well. As Professor Gunther has pointed out, it is unclear whether the requirements of intent and potential effect were independent bases or a conjunctive basis of liability. Gunther, *supra* note 8, at 743.

23. 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

24. *See id.* at 630-31 ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'").

25. John H. Wigmore, Abrams v. United States: *Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 550-51 (1920). Dean Wellington made a similar observation regarding the aftermath of Nazi atrocities. Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106-07 (1979).

26. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974-78 (1978).

challenged the fairness of a marketplace dominated by the voices of the rich and powerful.[27]

One need only read the Court's two recent communication-related opinions, however, to realize that the metaphor is, for the moment at least, alive and well. Striking down legislation intended to regulate offensive Internet communication, Justice Stevens spoke glowingly of "[t]he dramatic expansion of this new marketplace of ideas."[28] In a badly splintered opinion from 1996, the Court considered, among other issues, statutory authority for cable operators to prohibit "indecent programming" on cable television.[29] Justice Breyer, writing for a plurality of four, noted "the changes taking place in the law, the technology, and the industrial structure related to telecommunications."[30] For his part, Justice Stevens, who joined Justice Breyer's plurality opinion, would not put Congress "to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas."[31]

However, no marketplace operates perfectly or without potential problems, and the speakers in this 1999-2000 Oliver Wendell Holmes Devise Lecture and Symposium are particularly well-situated to address these issues. Floyd Abrams, a partner in the law firm of Cahill, Gordon & Reindel and the William J. Brennan, Jr. Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism, has probably argued more First Amendment cases before the United States Supreme Court than any other attorney. Mr. Abrams addresses "Some First Amendment Qualms" with cybertechnology. Specifically, he raises some less than obvious questions about potential backlash attributable to the Internet's very success, such as dilution of press confidentiality protections in a new community in which everyone is a publisher; potential regulatory devices to shield from public scrutiny information that, before the Internet explosion, had been formally available to the public, but was practically inaccessible; and the proliferation of hateful and potentially harmful speech, the dissemination of which much of the rest of the world prohibits.

Our panelists come to these issues from a variety of perspectives. Our morning speakers, Greg Lefevre and Margaret Chon, view the market-

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27. *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5.

28. Reno v. ACLU, 521 U.S. 844, 885 (1997).

29. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

30. *Id.* at 742.

31. *Id.* at 769 (Stevens, J., concurring).

place metaphor from very different angles. Mr. Lefevre, CNN's San Francisco Bureau Chief, watches and reports on the telecommunications phenomenon from a perch just above Silicon Valley and comes to these issues with a traditional, libertarian inclination, rightly noting that the impulse to censor, which Justice Holmes warned against, crosses ideological boundaries. Professor Chon notes that increasing the amount of information has, at best, an imperfect correlation with the value of speech. In contrast to Mr. Lefevre, she wonders whether the continuing articulation of the marketplace metaphor reflects a "failure of legal imagination."

The afternoon's speakers, Daniel Jaffe and Liza Kessler, actively engage in the debate over and drafting of regulatory proposals, especially those that implicate privacy issues. Mr. Jaffe, Executive Vice President of the Association of National Advertisers, examines the fragile balance to which any regulator must be sensitive if the Internet is to survive. Overly restrictive privacy rules, he warns, present a threat to the "unstable economic foundations" of the Internet. At the same time, however, insensitivity in the form of underprotective rules might drive consumers and users away. Liza Kessler, who addresses privacy issues as counsel for the Center for Democracy and Technology, urges end-user regulation, largely in the form of family responsibility for self-regulation.

No one whose career began after the Civil War and ended before World War II could have imagined the technological developments the twentieth century would bring. Imagine telling high school graduates in 1919 that, before they died of old age, human beings would walk on the moon or fax a document to Sri Lanka in real time. Fax? And yet Justice Holmes' prescience about the need to trade ideas freely has never been clearer, and his understanding about the dangers posed by those who "have no doubt of [their] premises or . . . power" remains as vital today as it did over eighty years ago. This Symposium is dedicated to the discussion of these ideas.

Pictured at the *1999-2000 Oliver Wendell Holmes Symposium and Lectureship: The Marketplace of Ideas in Cyberspace* in Macon, Georgia on March 17-18, 2000, from left to right: *Theodore Y. Blumoff*, Professor of Law, Walter F. George School of Law, Mercer University; *Liza Kessler*, Staff Counsel at the Center for Democracy & Technology in Washington, D.C.; *Daniel Jaffe*, Executive Vice President, Government Relations, of the Association of National Advertisers, Inc.; *Sheri Lewis*, Associate Law Librarian for Research Services, Walter F. George School of Law, Mercer University; *Floyd Abrams*, Partner in the New York law firm of Cahill, Gordon & Reindel; *Jacob Edward Daly*, Managing Editor of the *Mercer Law Review*; *R. Lawrence Dessem*, Dean of the Walter F. George School of Law, Mercer University; *Elizabeth Burgess Brown*, Lead Articles Editor of the *Mercer Law Review*; *Nick F. Ivezic*, Editor in Chief of the *Mercer Law Review*; *Margaret Chon*, Associate Professor of Law at Seattle University School of Law; *Greg Lefevre*, Bureau Chief of CNN's San Francisco bureau.