

War and Speech:¹ Cleveland Connections
Philosophical Club, 31 January 2006
Lesley Wells

Some years ago, Ted Brown and I discovered a lingering question we had in common. It was about war and speech, but more precisely, it was about what could have caused America's pre-eminent Justice, Oliver Wendell Holmes, to change his mind, near the end of World War I,² about the protection of speech in time of war?

We were especially interested in the Holmes – Pollock letters, correspondence between Justice Holmes and England's Lord Chief Justice Sir Frederick Pollock.

My own interest in the question was heightened because the courtroom in which I do my work, the magnificent East Courtroom here at the old Cleveland Federal Court House, was the courtroom in which, in 1918, like today a time of war, labor leader and Socialist presidential candidate Eugene V. Debs was convicted and sentenced to prison under the Espionage Act of 1917 as amended in 1918, for publicly, peacefully, stating his antiwar views in Canton, Ohio.³

¹Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. Const. amend I, ratified 15 December 1791).

² The Armistice was signed and fighting had stopped in November 1918; the Versailles Peace Treaty was signed 28 June 1919. Abrams v. United States was decided 10 November 1919.

³ Espionage Act of Congress June 15, 1917, Title 1, Section 3. The 1918 Amendment which became known as the Sedition Act of 1918, was signed into law on 16 May 1918 by President Wilson and added an interference with government borrowing war funds section and beefed up the obstruction of recruiting and enlistment provisions. 50 Stat 553.

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As Professor Harry Kalven has noted, that's very much like convicting George McGovern for his opposition to the Vietnam War.⁴

That conviction and the sentence was upheld in a unanimous U.S. Supreme Court opinion authored by Justice Holmes, before he changed his mind.

Since the protection of civil liberties during war is a matter of current interest, I took the question as timely.

Moreover, letters are of particular interest to me in these times of instant multimedia communication, careless emails and digital footprints.

The remnants of the Holmes – Pollock correspondence of 1918 – 1919, letters crossing one another over the Atlantic before airmail, let alone email, and letters between Justice Holmes and Judge Learned Hand and his friend, Harold Laski, as well as those of Learned Hand with Harvard Law Professor Zechariah Chafee, Jr. – these letters greatly enhance the reading of the case opinions, law review articles, legal tomes and even the actual Debs case file, part of which I've brought copies of to show you.

The correspondence between these judges and law professors and lawyers about this issue of great importance is itself remarkable. I think it unlikely today to find much correspondence on pending issues of great import between our Supreme Court Justices and judges of the trial courts whose opinions they may review, or our Supreme Court Justices and their colleagues abroad.

I think of it, in earlier times, as friendly persuasion by and among judges who felt free to indulge their considerable talents as seasoned legal philosophers. And as

⁴ Kalven, Harry. Professor Ernst Freund and Debs v. U.S. 40 U.Chi. L.Rev. 235 (1973) at 237.

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Justice Holmes famously said in his seminal book The Common Law "the life of the law has not been logic; it has been experience."⁵

Justice Holmes and Judge Hand were well aware that they were the first, in this context of war and speech, to interpret the meaning of the First Amendment to the Constitution of the United States, which had been ratified 126 years earlier.

But let us begin with the Cleveland connections.

On 15 June 1917, two months after the United States declared war on Germany and entered World War I, Congress, for the first time in over a century,⁶ made criminal, in the Espionage Act of 1917, criticism of governmental policies.⁷

President Woodrow Wilson proposed the legislation when he requested a declaration of war.⁸ Wilson was blunt, declaring that: "if there should be disloyalty, it will be dealt with with a firm hand of stern repression."⁹

⁵ Holmes, Oliver Wendell. The Common Law. Boston. February 1881, p.1.

⁶ The Sedition Act of 1798 had punished criticism intended to bring the federal government into disrepute, but by 1800, just two years later, it had fallen into disuse. The Sedition Act, 1 Stat. 596 (1798) [*The Public Statutes at Large of the United States of America, from the Organization of the Government in 1789, to March 3, 1845*, Boston: Little, Brown, 1848, Vol. I, p. 596 (published by Authority of Congress)]. According to Justice Holmes' dissent in Abrams, the United States repaid the fines it had imposed under the controversial Act of 1789. 250 U.S. 630.

⁷ 65th Cong, Spec Sess, 55 Cong Rec Sec 104, 2 April 1917. The court in Times v. Sullivan, 376 U.S. 254 (1964) announced "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." 376 U.S. 275. In Sullivan, the Alabama law was found unconstitutional not under the clear and present danger of substantial evil standard "but because the law looks too much like seditious libel." Kalven, Harry, The New York Times case.

⁸ A declaration opposed by 50 Congressmen and 6 Senators.

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We should note that President Wilson's Secretary of War, from 1916 – 1921, was our own Newton D. Baker, one of the founders in 1902 of our Philosophical Club.

A pacifist, he presided over the country's first nationwide military draft. According to Frederick Palmer, his biographer in the two-volume Newton D. Baker, America at War,¹⁰ Baker returned from France to find the country in the grip of "an era of spy-hunting and one-hundred-percent Americanism." His chief of staff, Major General Peyton C. March, had cabled him on 14 May "vicious attacks made whenever possible on Wilson and others high in Allied governments. Congress given enormous aid to the authorities dealing with this in passing much debated Sedition Act which confers drastic powers."

In the May 4 1918 issue of Harvey's Weekly, George Harvey, retired editor of Harper's Weekly, commented on Baker's return to America:

"He has not now any clearer comprehension of the real condition of the world's affairs than he had when he went away. He is still a pacifist waging academic warfare in an academic way...twittering, twittering day in and day out about things past and things to come with as little heed for the horrifying present as a grasshopper....Nothing but piffle, piddling pacifist piffle, from an American Secretary of War....Smiling Mr. Baker descends upon Washington like a cloud of poison gas and the wheels begin to

⁹ Woodrow Wilson, War Messages, 65th Cong., 1st Sess. Senate Doc. No. 5, Serial No. 7264, Washington, D.C., 1917; pp. 3-8, *passim*.

¹⁰ Palmer, Frederick. Newton D. Baker, America at War. Vol. II, p. 158. New York: Dodd, Mead & Company, 1931.

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slacken...shockingly and dangerously unfit for his job...our gentle, propitiatory Secretary of War."¹¹

On 9 September 1918, as World War I was ending, America's most well-known socialist, Eugene V. Debs was indicted on 10 counts (the government nolleed Counts 1, 2, 5 and 9) and brought to trial here in Cleveland, in the courtroom I now occupy, on six charges of conspiracy and sedition under the Espionage Act of 1917.

The Espionage Act punished interference with troop recruitment or disclosure of information dealing with national defense.

HERE IS A COPY OF THE 123 PAGE INDICTMENT OF EUGENE V. DEBS.

Judge David Westenhaver tried the case in the East Courtroom. Each count was punishable by a \$10,000 fine and 20 years imprisonment. Debs, represented by four lawyers, gave his own closing argument.¹²

HERE ARE COPIES OF DEBS' CLOSING ARGUMENT AND OF THE GOVERNMENT'S FINAL ARGUMENTS.

¹¹ Palmer, Frederick. Newton D. Baker, America at War. Vol. II, p. 161. New York: Dodd, Mead & Company, 1931.

¹²Lawyers Seymour Stedman, William A. Cunnea, Joseph W. Sharts and Morris H. Wolf represented Eugene Debs. The U.S. Attorney on the case was Edward S. Wertz, accompanied by Assistant U.S. Attorneys Francis B. Kavanah and Joseph C. Breitenstein.

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Eugene Debs, founder of the American Railway Union, then America's largest labor organization, had been jailed for his part in the Pullman Strike of 1894 and, while in jail, he converted to socialism. He had enjoyed enormous popularity and he ran several times for President of the United States as a candidate for the social democratic and socialist parties.

In his Canton, Ohio speech, Debs told a crowd of several thousand: "I may not be able to say all that I think, but you need to know that you are fit for something better than slavery and common fodder."

Fellow protestors had been jailed in the Stark County Jail and referring to them, Debs told the crowd: "They have come to realize, as many of us have, that it is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make democracy safe in the world."

As Justice Holmes would later acknowledge in his opinion for the full United States Supreme Court which unanimously upheld Debs conviction: "Debs' main theme was socialism, its growth and a prophesy of its ultimate success." U.S. v. Debs, 249 U.S. 211 at 212.

At trial, Eugene Debs took the stand in his own defense. "I have been accused of obstructing the war," he told the jurors "I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."

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The Court dismissed Counts 6 and 8. Counts 3, 4, 7 and 10 were submitted to the jury of twelve men¹³ who found Debs not guilty on one count, but convicted him of three counts of violating the Espionage Act.¹⁴

HERE IS A COPY OF THE JURY VERDICT AND DEBS' BILL OF EXCEPTIONS.

Judge Westenhaver sentenced Eugene Debs to 10 years in prison. Undaunted, Debs conducted his fifth presidential campaign from the federal prison in Atlanta.

There was considerable public outcry.

Debs was not alone in being prosecuted under the Espionage Act. The Department of Justice prosecuted 2168 people under the Act during the war for their speech, of whom 1055 were convicted.¹⁵

One of those, the editor of the Socialist Jewish Daily News, Rose Pastor Stokes, was convicted and sentenced to 10 years in prison for saying to the Women's Dining club of Kansas City "...I am for the people and the government is for the profiteers."

On March 1920, a federal court of appeals overturned Ms. Stokes conviction, ruling that the district judge had placed "too heavy a burden" on the defendant because

¹³ No women were called to jury duty because they had not yet gained the right to vote.

¹⁴ 1) Attempting to incite insubordination, disloyalty, mutiny and refusal of duty in the armed forces of the United States; 2) obstructing and attempting to obstruct the recruiting and enlistment service; and 3) uttering language to incite, provoke and encourage resistance to the United States. (Espionage Act of Congress June 15, 1917, Title 1, Section 3.)

¹⁵ Stone, Geoffrey R. Perilous Times: Free Speech in Wartime. New York and London: W.W. Norton & Company, 2004. Note 136 at 593.

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of his (the judge's) inappropriate "partisan zeal."¹⁶ More than a year and a half later, on 5 November 1921, the government finally dismissed the charges against Stokes.¹⁷

Just two weeks after Congress passed the Espionage Act, the Postmaster General of the United States, Albert Burleson, ordered the Postmaster of New York City, Thomas Patten, to prohibit from using the U.S. mail, a lively magazine, The Masses, which, with a healthy 30,000 circulation rate, had published antiwar and anti-draft editorials. The New York City Postmaster complied and denied The Masses the use of the U.S. mail.

The magazine filed for relief in the U.S. District Court for the Southern District of New York. Judge Learned Hand, then being considered for promotion to the Circuit Court of Appeals, drew the case.

One of the first judges to interpret the Espionage Act, Learned Hand was an experienced lawyer, legal philosopher, and trial judge. He well understood the significance of this matter of first impression: unpopular opinions in time of war.

Judge Hand issued an order enjoining the New York City Postmaster from prohibiting The Masses from using the U.S. Mail.

Judge Hand's carefully reasoned opinion argued a then novel, though now familiar idea – that the protection of dissent was critical to our constitutional democracy.

Analytically, Hand looked not to the probable consequences of speech, but rather directly to the words uttered.

¹⁶ Stokes v. United States, 264 F. 18, C.C.A.8 (Mo) March 9, 1920.

¹⁷ Stone, Geoffrey R. Perilous Times: Free Speech in Wartime. New York and London: W.W. Norton & Company, 2004. Note 143 at 593.

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If those words counseled violating the law or urged that duty required one to violate the law – express advocacy of unlawful conduct -- they could be forbidden, but otherwise, Judge Hand reasoned, words were protected speech.

To treat legitimate “agitation,” as it was called in those days, as “direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.”¹⁸

However, Judge Hand’s decision was promptly and unanimously reversed outright by the Court of Appeals.¹⁹

Following reversal of his decision, Hand was passed over for appointment to the appellate court, something he had predicted would happen.

On the day he had received the pleadings in the Masses case, Judge Hand had written to his wife, Frances: “I must do the right thing as I see it and the thing I am most anxious about is that I shall succeed in giving a decision absolutely devoid of any such considerations” [as his pending promotion prospect].²⁰

“There are times,” Hand continued, “when the old bunk about an independent and fearless judiciary means a good deal. This is one of them....”²¹

¹⁸ Judge Hand characterized this as an objective “incitement test.”

¹⁹ Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. Nov. 1917.)

²⁰ Hand eventually was appointed to the 2d Circuit in 1924.

²¹ Learned Hand to his wife Frances Fincke Hand personal correspondence, 16 July 1917. Gunther, Gerald. Learned Hand, The Man and The Judge. Knopf, NY 1994; also Stanford Law Review: Gerald Gunther, “Learned Hand and the Origins of Modern First Amendment Doctrine; Some Fragments of History”, 27 Stanford Law Review 719, Appendix of all letters relating to free speech issues between Hand and Holmes and between Hand and Chafee during WWI.

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Upon the Court of Appeals' validation of the Espionage Act, the government prosecuted and tried some of the editors of The Masses for conspiracy to violate the Act. They were each tried twice. Although their trials all ended in hung juries, the magazine folded.

District Judge Hand was disappointed by the rejection of his analysis of protected speech during time of war; but he was undaunted. He wrote letters.

He wrote to his friend, prominent New York lawyer Charles C. Burlingham, "... I never was better satisfied with any piece of work I did in my life...."²²

Some agreed. Harvard Law Professor Zechariah Chafee, Jr. dedicated his book, Freedom of Speech,²³ the first influential study of the First Amendment, "To Learned Hand who during the turmoil of war courageously maintained the tradition of English-speaking freedom and gave it new clearness and strength for the wiser years to come."²⁴

About a year after Hand's Masses decision and months before any Espionage Act case reached the United States Supreme Court, Judge Hand took a chance meeting on a train with Justice Holmes as an opportunity to talk directly with the Justice about the suppression of dissent during war.²⁵

²² Gunther, Gerald. Learned Hand, the Man and the Judge. p. 351.

²³ Chafee, Zechariah. Freedom of Speech in Wartime. 32 Harv. L.Rev. 932, 947. When Harvard law professor Chafee criticized the Supreme Court Sedition Act decisions, Harvard charged him with being unfit to be a professor.

²⁴ Professor Chafee told Judge Hand, "It was really your opinion in The Masses case that started me on my work." (Gunther, Gerald. Learned Hand, the Man and the Judge.)

²⁵ Hand was traveling to his summer home in Cornish, N.H.; Holmes to his summer residence in Beverly Farms, MA.

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Then, still unsatisfied, and while Espionage Act cases were pending before the Supreme Court, District Judge Hand doggedly pursued his Masses' position in letters to the renowned Justice, 30 years his senior, whom Hand had described as "the epitome of what a judge should be....A wise guide and the example of all that I most cherish."

Justice Holmes wrote to Judge Hand in June 1918 that he agreed with Hand's position but for one important distinction.

Holmes contended that free speech should be seen as no different than "freedom from vaccination," a "freedom" that could be trumped by a majority.²⁶

"Situations" Holmes wrote "when you cared enough" to do so might be few, "but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act," he wrote.²⁷

This Holmes' approach set no legal limits whatsoever on the suppression of dissent.

Then three Espionage Act cases were decided by the Supreme Court. Justice Holmes wrote the unanimous opinions upholding the convictions in all three -- in March 1919, four months after The Armistice had been signed and the fighting had stopped.²⁸

Schenck v. U. S., 249 U.S. 47, 52 (1919), the Court's first significant First Amendment decision since passage of the Amendment set forth the "clear and present danger test," one week later, the Court applied that test in Frohwerk v. U.S., 249 US

²⁶ Referring to Jacobson v. Mass., 197 U.S. 11 (1905).

²⁷ Holmes to Hand, 24 June 1918. Gunther, Gerald. Learned Hand, the Man and the Judge. p. 163.

²⁸ The World War I Versailles Peace Treaty was signed 28 June 1919.

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204 (1919), and unanimously rejected Eugene Deb's claim that his conviction violated the First Amendment, Debs v. U.S., 249 US 211 (1919). Holmes wrote: If "one purpose of the speech, whether incidental or not does not matter, was to oppose [the] war, ...and if, in all the circumstances that would be its probable effect, it would not be protected."²⁹

Schenck, a Socialist party officer, was charged with distributing 15,000 leaflets challenging the constitutionality of conscription and calling for resistance. Holmes' opinion acknowledged that Schenck's activity "confined itself to peaceful measures," but noted: "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."³⁰

It was in the Schenck decision that Holmes famously said: "[T]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force."³¹

The question to be asked, according to Holmes, was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right

²⁹ Frohwerk involved a copywriter for a German language newspaper whose articles included criticism of the war and spoke of the "inconquerable spirit" of the German nation.

³⁰ 247 U.S. at 52.

³¹ 249 U.S. at 52.

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to prevent."³² (What clear and present danger the Schenck pamphleteering posed is not apparent.)

Immediately after the unanimous March 1919 Supreme Court opinion upholding the conviction of Eugene Debs, Judge Hand again pursued Justice Holmes, writing that he felt his own Masses position on the First Amendment was "already fast receding in the seas of forgotten errors....I bid a long farewell to my little toy ship which set out quite bravely on the shortest voyage ever made."³³

Holmes responded: "I don't quite get your point"³⁴ and on 5 April 1919 complained to his long-time correspondent, England's Lord Chief Justice Sir Frederick Pollock "I am beginning to get stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service so far as the law was concerned."

"I wondered that the Government should press the case to a hearing before us" wrote Holmes, "as the inevitable result was that fools, knaves, and ignorant persons were bound to say he was convicted because he was a dangerous agitator and that obstructing the draft was a pretence....There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case – Schenck v. U.S., also Frohwerk v. U.S."³⁵

³² 249 U.S. at 52.

³³ Gunther, Gerald. Learned Hand: The Man and The Judge. New York: Alfred A. Knopf, 1994.

³⁴ *Id.* at 164.

³⁵ Howe, Mark DeWolfe, ed. Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932. 2 volumes. Massachusetts: Harvard University Press, 1941.

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Public controversy dogged Justice Holmes over his Debs opinion. Prominent University of Chicago Law Professor Ernst Freund criticized Holmes, arguing that “the peril resulting to the national cause from toleration of adverse opinion is largely imaginary” and “slight compared with the permanent danger of intolerance to free institutions.”³⁶ There were threats; the U.S. Marshals appeared at Holmes’ door.

Helen Keller, on 11 March 1919, wrote to Debs: “Of course the Supreme Court has sustained the decision of the lower court in your case. To my mind, the decision has added another laurel to your wreath of victories. Once more you are going to prison for upholding the liberties of the people. I write because my heart cries out, it will not be still.”³⁷

On 27 April 1919, Holmes wrote to Lord Pollock: “Of course there were people who pitched into the Court for sending Debs to prison under the Espionage Act, but there was no doubt that the Jury was warranted in finding him guilty or that the act was Constitutional.

“Now I hope the President will pardon him,” Holmes wrote Pollock, “and some other poor devils with whom I have more sympathy. Those whose cases have come before us have seemed to me poor fools whom I should have been inclined to pass over

Schenck v. U.S., 249 U.S. 47 (1919).

Frohwerk v. U.S., 249 U.S. 204 (1919).

³⁶ Stone, Geoffrey R. Perilous Times: Free Speech in Wartime. New York and London: W.W. Norton & Company, 2004, at 201. Quoting: Freund, Ernst. The Debs Case and Freedom of Speech. New Republic, 13-15 (30 May 1919), reprinted in 40 U. Chi. L.Rev. 239.

³⁷ Letters of a Nation, edited by Andrew Carroll, Broadway Books, N.Y. 1999, pg.138.

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if I could." And he added, "The greatest bores in the world are the come-outers who are cock-sure of a dozen nostrums. The dogmatism of a little education is hopeless."³⁸

Then on 17 June 1919, in response to a letter from Lord Pollock which is, frustratingly, missing³⁹ Justice Holmes takes a somewhat defensive approach to the Chief Justice of England -- one which strongly suggests Lord Pollock has joined the discussion.

Holmes writes to Pollock: "But I am not quite sure how far we agree in our fundamentals. I can't believe that we differ greatly. I agree with you as to war crimes, and have said whenever it was proper that I thought the President should pardon a lot of poor devils that it was my misfortune to have to write opinions condemning."

We are left with no further clues to the exact nature of Holmes' and Pollock's agreement on "war crimes."

Holmes then tells Pollock about threats: "I suppose it was those opinions [the three Espionage Act cases] that led them to want to blow me up -- but it showed that they were fools and didn't understand the situation....I hear that there are orders to keep a special eye on this house, which I believe to be quite unnecessary. In Washington after a second attempt to blow up the Attorney General I found a policeman stationed near my front door -- which was my first news of the business."

On 19 September 1919, writing from his Beverly Farms retreat to Lord Pollock, Holmes changes his focus and rings the Bill of Rights: "The whole collectivist tendency

³⁸ Howe, Mark DeWolfe, ed. Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932. 2 volumes. Massachusetts: Harvard University Press, 1941. Vol. II, p. 14, fn 2.

³⁹ Id. at p. 14, fn 2.

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seems to be toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for....We have been comfortable so long that we are apt to take it for granted that everything will be all right without our taking any trouble. All of which is but a paraphrase of eternal vigilance is the price of freedom...."

The very next day, which in a pre-instant messaging era when mail crossed the Atlantic slowly, could not have been a next-day response, Lord Pollock wrote to Justice Holmes on "resistance to the temporal power for conscience sake," noting, "(N)or is it any discovery that in extreme cases disobedience to lawful authority may be a moral duty if conscience clearly forbids obedience (at the risk indeed that conscience may be wrongly informed, in which case wholly right action is impossible). This is explicitly allowed" wrote Lord Pollock, "in Roman moral theology...."

And then Pollock writes parenthetically "(Even habitual disobedience in some things is consistent with the rule of law: it is certain that only a minority of motorists observe the statutory speed limit on a clear road, but England is not therefore in a state of anarchy.)"

And speaking to Holmes like a wise elder, Pollock advises: "Conscientious resistance is a matter of conscience not of law: for that very reason, the servants of the law can take notice of it only de gratia or as an element in guiding judicial discretion. But administrators and law-makers remember, if they are wise, that bad trouble may come of provoking it."

In his 26 October 1919 letter to Pollock, Justice Holmes discussed the Espionage Act cases directly: "I hope that we have heard the last, or nearly the last, of the

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Espionage Act cases. Some of our subordinate Judges seem to me to have been hysterical during the war.”

“It is one of the ironies that I, who probably take the extremest view in favor of free speech, (in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it), that I should have been selected for blowing up. I don’t understand the Government doing what it is still doing and what is likely to be sanctioned by legislation – but that is not my business.”

On the same day, 26 October 1919, Holmes wrote to his friend Harold Laski: “I fear we have less freedom of speech here than they have in England. Little as I believe in it as a theory, I hope I would die for it, and I go as far as anyone whom I regard as competent to form an opinion in favor of it.”⁴⁰

The very next day the U.S. Supreme Court heard argument in Abrams, the crucial case in which Holmes modified his opinion on speech in time of war, Abrams v. United States, 250 U.S. 616, 624.

On 6 November 1919, Justice Holmes wrote to Lord Chief Justice Sir Pollock: “Today I am stirred about a case that I can’t mention yet to which I have sent round a dissent that was prepared to be ready as soon as the opinion was circulated. I feel sure that the majority will very highly disapprove of my saying what I think, but as yet it seems to me my duty. No doubt I shall hear about it on Saturday at our conference and perhaps be persuaded to shut up, but I don’t expect it.” Justice Holmes is still tentative but he is changing his mind.

⁴⁰ Howe, Mark DeWolfe, ed. Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935. Massachusetts: Harvard University Press, 1953. p. 165.

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On 10 November 1919, the Supreme Court opinions in Abrams were issued within four days of Holmes' November 1919⁴¹ letter to Pollock.

In Abrams, a leafleting case involving Russian-born alien anarchists, who urged ammunition factory workers to stop producing weapons, the Court majority upheld the defendants' convictions under the Espionage Act on three counts of conspiracy during war.⁴²

But Holmes dissented, joined by Justice Louis Brandeis, and Holmes now articulated his clear and present danger test in newly dressed constitutional terms recognizing a First Amendment right, acknowledging a judicial role on issues of free speech independent of Congress, adding an immediacy factor and providing speech protection. Instead of starting his analysis with what free speech did not protect, Holmes focused on what speech was protected.

"But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same" Holmes wrote. "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...."

⁴¹ Howe, Mark DeWolfe, ed. Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932. 2 volumes. Massachusetts: Harvard University Press, 1941. Vol. II, p. 29 fn. 4. The rest of this letter has not been found.

⁴² To "unlawfully utter, print, write and publish: 'disloyal, scurrilous, and abusive language about the form of Government of the United States,' 'intended to incite provoke and encourage resistance to the U.S.'... 'urge, incite and advocate curtailment of production of things and products necessary and essential to the prosecution of the war.'" 250 U.S. at p. 617.

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“In this case, sentences of 20 years have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the government has to publish the Constitution of the United States now vainly invoked by them...” and echoing Lord Pollock, “the most nominal punishment seems to me all that possibly could be inflicted....”

“Persecution for the expression of opinions seems to me perfectly logical....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. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.”

“While that experiment is part of our system, I think we 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.”

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"...[O]nly 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.'"⁴³

He added: "...I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States." Abrams v. U.S., 250 U.S. 616 (1919).

Dean John H. Wigmore, a long-time friend and distinguished scholar wrote that Holmes and Brandeis were "obtuse" and "blind to the crisis facing" the United States.⁴⁴

Lord Pollock's response to Abrams on 1 December 1919 is straightforward. "Thanks for the opinions herein. I am rather puzzled. The monstrously excessive sentence – twenty years for an offense on which the sentence would have been about six months in England, or twelve at most – is enough to make one astute in favour of the defense....It puzzles me also, I confess, that a special Act of Congress should be necessary to make seditious denunciation of the Government and incitements to rebellion, in time of war, offences of some kind. But as a matter of policy, I believe there were many leaflets of much the same kind distributed in this country on which it was not thought useful to prosecute any one."

Holmes' final response to Pollock on 14 December 1919 regarding his unexpected Espionage Act dissent: "...I am of the opinion that I was right, if I am right in what I devoutly believe, that an actual intent to hinder the US in its war with Germany must be proved...it seems to me plain that the only object of the leaflets was

⁴³ Id. at 630-31.

⁴⁴ Stone, Geoffrey R. Perilous Times: Free Speech in Wartime at p. 207.

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to hinder our interference with Russia. I ought to have developed this in the opinion. But that is ancient history now.”

Meanwhile, Eugene V. Debs languished in federal prison in Atlanta. In 1921, 65 years old and in failing health, he persuaded the U.S. Marshals to transport him to the White House where he sought clemency from President Woodrow Wilson.⁴⁵

President Wilson denied all appeals on Debs’ behalf but, eventually, President Warren G. Harding pardoned him. On Christmas Day 1921, Eugene Debs was released from prison.⁴⁶

So, what caused Justice Oliver Wendell Holmes to change his mind about the protection of speech in time of war?

Dogged, brilliant, Judge Learned Hand, persistently laying out his considered position, nipping at the Justice’s heels in spite of Holmes’ off-putting “I don’t quite get your point” attitude, surely provoked thought, if not uncertainty, in Holmes.

And, as one scholar has noted,⁴⁷ in the summer after the first three Sedition Act cases were decided by the Supreme Court, but before his dissent in Abrams, Justice Holmes read his friend -- political theorist , economist, British intellectual and professor, -- Harold Laski’s book, Authority in the Modern State, which was dedicated to Holmes and Frankfurter and in which Laski proposed that “where the conscience of the

⁴⁵ New York Times, 1 February 1921 “Wilson Refuses to Pardon Debs.”

⁴⁶ On 16 December 1923, President Calvin Coolidge released all war offenders.

⁴⁷ Rabban, David M. Free Speech in its Forgotten Years. 132-44. Cambridge. 1997. 344-55. “The Emergence of Modern First Amendment Doctrine.” 50 U.Chi. L.Rev. 1205, 1208-9 (1983). Sec. Id. At 1311-17.

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individual is concerned, the state must abate its demands, for no mind is in truth free once a penalty is attached to thought."⁴⁸

Given Holmes' stature as the pre-eminent American legal philosopher of his time, his nature (including not a little arrogance), and his long experience on the bench, it is unlikely that Justice Holmes was swayed by the public outcry over Debs' conviction or by threats to himself or his family.

Holmes, however, no stranger to war, having been wounded three times while serving in the Civil War, might well have been affected by and concerned about, the general war hysteria and its excesses in America which permeated public discourse. These excesses were exacerbated between the Schenck and Abrams decisions by the Red Scare of 1919-1920.

Professor Chafee, who championed Holmes, nonetheless dedicated his book, Freedom of Speech, not to Holmes, but to persistent Judge Hand. Professor Chafee's position was that "(t)he First amendment was written by men...who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."⁴⁹

Finally, Holmes' true colleague and long time correspondent, his equal across the seas, Lord Chief Justice Sir Frederick Pollock, to whom he could complain testily about the fools and knaves, gently parried with him, raising, like a good Quaker elder, old

⁴⁸ Laski, Harold J. Authority in the Modern State. 56 (Yale, 1919) 203/276.

⁴⁹ Chafee, Jr., Zechariah. Freedom of Speech in Wartime. 32 Harv. L.Rev. 932, 947.

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points rooted solidly in the natural rights of free Englishmen and policies of governance reaching back not hundreds, but thousands of years.

We'll never really know why Justice Holmes changed his mind on the protection of speech in time of war. The important matter is that he did. This yeasty brew of correspondence had its way.⁵⁰

In 1969, in another Ohio connection, Brandenberg v. Ohio, the Supreme Court summarized our First Amendment principles: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 394 U.S. at 447.

⁵⁰ Brandenberg v. Ohio, 395 U.S. 444, 447 (1969), involved racist speech at a Klu Klux Klan rally by Brandenberg who was convicted under the Ohio Criminal Syndicalism statute for advocating unlawful acts "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race it's possible that there might have to be some revenge (sic) taken." At 446. The Brandenberg case confirmed that only serious unlawful behavior coupled with imminent inducement can be prohibited.)

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¹ Laski, Harold J. Authority in the Modern State. 56 (Yale, 1919).

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