

2016

Book Review: The Great Dissent: How Oliver Wendell Holmes Changed His Mind – And Changed the History of Free Speech in America, by Thomas Healy

Jamie Cameron

Osgoode Hall Law School of York University, jcameron@osgoode.yorku.ca

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>

 Part of the [First Amendment Commons](#)

Recommended Citation

Cameron, Jamie, "Book Review: The Great Dissent: How Oliver Wendell Holmes Changed His Mind – And Changed the History of Free Speech in America, by Thomas Healy" (2016). *Osgoode Legal Studies Research Paper Series*. 174.
<http://digitalcommons.osgoode.yorku.ca/olsrps/174>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

OSGOODE HALL LAW SCHOOL

LEGAL STUDIES RESEARCH PAPER SERIES

Research Paper No. 65

Volume 12, Issue 13, 2016

***The Great Dissent: How Oliver Wendell Holmes Changed his Mind – and Changed the History of Free Speech in America, by
Thomas Healy***

Osgoode Hall Law Journal, Vol. 52(3), 2016.

Jamie Cameron

This paper can be downloaded free of charge from:

<http://ssrn.com/abstract=2821109>

Further information and a collection of publications from the Osgoode Hall Law School Legal Studies Research Paper Series can be found at:

<http://www.ssrn.com/link/Osgoode-Hall-LEG.html>

Editors:

Editor-in-Chief: Carys J. Craig (Associate Dean of Research & Institutional Relations and Associate Professor, Osgoode Hall Law School, York University, Toronto)

Production Editor: Kiana Blake (Osgoode Hall Law School, York University, Toronto)



Osgoode Legal Studies Research Paper No. 65
Vol. 12/ Issue. 13/ (2016)

***The Great Dissent: How Oliver Wendell Holmes Changed his Mind – and
Changed the History of Free Speech in America, by Thomas Healy***

Osgoode Hall Law Journal, Vol. 52(3), 2016.

Jamie Cameron

Abstract:

Thomas Healy's *The Great Dissent* re-treads the familiar story of US Supreme Court Justice Holmes's First Amendment conversion between March and November 1919, when he launched his marketplace of ideas theory and strong-form version of the clear and present danger doctrine. Healy's book demonstrates that fresh perspectives on this vital and ever-intriguing change of mind or transformation on Holmes's part remain possible. The review offers its own perspective by highlighting the process of "reverse mentoring" which took place, in which the older jurist was mentored on free speech issues by the emerging thought leaders of the day – Laski, Frankfurter, Chafee – and showing how Justice Holmes's landmark dissent in *Abrams* was nonetheless and indisputably a product of his own jurisprudential ingenuity.

Keywords:

Book review, Holmes and "the great dissent", First Amendment, clear and present danger, how Holmes became a protector of free speech

Author(s):

Jamie Cameron
Osgoode Hall Law School, York University
E: jcameron@osgoode.yorku.ca

Book Review

**THE GREAT DISSENT: HOW OLIVER
WENDELL HOLMES CHANGED HIS
MIND—AND CHANGED THE HISTORY
OF FREE SPEECH IN AMERICA, by
Thomas Healy¹**

JAMIE CAMERON*

HE FASCINATES US STILL—Oliver Wendell Holmes Jr., valorous Civil War veteran, covert flirt and philanderer, self-styled bettabilitarian,² and legendary, word-pirouetting justice of the US Supreme Court. *The Great Dissent* reprises his legacy once more in a book on one of Holmes’s most dramatic moments at the US Court: The day he dissented in *United States v Abrams*.³

“Clear and present danger” was no more than literary flair in March 1919, when Holmes wrote a trio of decisions upholding *Espionage Act* convictions against ragtag dissidents and Eugene Debs, leader of the Socialist Party and

* Professor, Osgoode Hall Law School.

1. (New York: Metropolitan Books, 2013) 352 pages.
2. A bettabilitarian sees the universe as a mystery and believes that there are no certainties. See Healy, *ibid* at 116. As Holmes explained, “We can never know anything for certain; we can only place bets one way or another. Like any gambler, however, we should gather as much information as possible before wagering our money or our lives. Only then can we be confident in the bets we have made” (*ibid* at 205).
3. 250 US 616 (1919) [*Abrams*].

four-time candidate for US President.⁴ Short months after introducing that artful but limpid concept in *Schenck*, Holmes had an epiphany that changed the course of First Amendment history.⁵ By November, he would reconstitute clear and present danger and pair it with a bravura defence of free speech's timeless virtues. Not only was it an utter surprise, his *Abrams* dissent could hardly have been more convincingly or gloriously written.

Holmes's turnaround from *Schenck* to *Abrams* is a favourite in American constitutional lore, and the intrigue surrounding the justice's dizzying reversal lingers on. Thomas Healy's *The Great Dissent* retreads familiar ground but layers the narrative by humanizing the judge and tracing the genesis of his newfound constitutional faith in free speech. In doing so, the author puts the venerated justice's flaws on view: Not only is Holmes something of a philanderer, he has needs, fears, and insecurities. Approaching his eighties, the judge doubts himself but seeks solace in acolytes who are among the thought leaders of the day. That is how a coterie principally comprising Harold Laski, Felix Frankfurter, and Zechariah Chafee Jr. educated Holmes in the critical period between *Schenck* and *Abrams* and played a central role in the free speech drama of 1919.

Though it is hagiography of a sort, *The Great Dissent* tells an affecting story of how reverse mentoring led to a teachable moment for Holmes. If the justice lacked the humility to admit being wrong in the *Schenck* trilogy, he had the courage and resilience in *Abrams* to abandon his preconceived views and see freedom of speech a completely different way: not as logic but as experience.⁶

I. FROM "CLEAR AND PRESENT DANGER" TO CLEAR AND PRESENT DANGER

The First Amendment commanded little attention before WWI and the enactment of federal espionage and sedition legislation. America's late entry into the war was divisive, and resistance to conscription generated prosecutions, convictions, and the *Schenck* trilogy. By then, Holmes was alert to the crackdown on opposition to the war and other forms of dangerous, radical speech. In June

4. *Schenck v United States*, 249 US 47 (1919) [*Schenck*]; *Frohwerk v United States*, 249 US 204 (1919) [*Frohwerk*]; *Debs v United States*, 249 US 211 (1919) [*Debs*] [the *Schenck* trilogy]. Debs ran for President a fifth and final time in 1920, from his jail cell.

5. US Const amend I [First Amendment]. The First Amendment states, in part, "Congress shall make no law ... abridging the freedom of speech."

6. "The life of the law has not been logic: it has been experience." See Oliver Wendell Holmes, *The Common Law*, ed by Mark DeWolfe Howe (Cambridge, Mass: Belknap Press of Harvard University Press, 1963) at 5.

1918, he was unsuccessfully coached on First Amendment issues by federal court judge Learned Hand during a chance encounter on the train between New York City and Boston. Much enamoured of his own free speech opinion in *Masses Publishing Co v Patten*, Hand had been praised by progressive intellectuals and was looking to promote his ideas up to the US Supreme Court.⁷

Not only was Holmes decidedly unmoved, the Holmes-Hand correspondence of the period shows that the two simply did not connect. At this time, Holmes hewed to logic in his views; as he put it, “Free speech stands no differently than freedom from vaccination.”⁸ He, too, had been praised for his biting dissents in the *Lochner* line of cases, which pushed back against laissez-faire constitutionalism—or “Lochnering”—and adopted a steadfast posture of judicial deference to the legislature.⁹ To be consistent, Holmes needed a reason to treat speech differently and had not found one.¹⁰

Accordingly, there is little suggestion the *Schenck* trilogy posed a challenge to an untroubled US Supreme Court or the judge who wrote unanimous opinions unceremoniously dismissing the First Amendment. Yet Holmes’s love for turn of phrase found voice in the pronouncement that free speech depends on “whether the words used . . . create a clear and present danger that they will bring about the substantive evils that [the US] Congress has a right to prevent.”¹¹ Though a neat touch, clear and present danger was without doctrinal significance at the time.¹²

A few months later, in 1919, three US Supreme Court colleagues visited Holmes at home on Friday, 7 November to entreat him, in the name of national security, to withdraw his upcoming dissent in *Abrams*.¹³

The following Monday, the recalcitrant judge read that dissent in open court. It was an unexpected, stunning, and profound reversal of the *Schenck* trilogy—in spirit and essence if not by the letter of the law. Holmes elevated the casual

7. 244 F 535 (SDNY 1917) [*Masses*].

8. Healy, *supra* note 1 at 24 (quoting a letter from Holmes to Hand).

9. *Lochner v New York*, 198 US 45 (1905) (invalidating hours of work legislation for bakers).

10. Put another way, “[W]e should deal with the act of speech as we deal with any other overt act that we don’t like.” See Healy, *supra* note 1 at 38 (quoting a letter from Holmes to Laski).

11. *Schenck*, *supra* note 5 at 52.

12. The concept was not applied in *Frohwerk* or *Debs*, and the trilogy upheld all convictions. Chafee’s timely Harvard Law Review article suggested how felicitous words could be transformed into commanding doctrine. See Healy, *supra* note 1 at 59.

13. *Ibid* at 213.

language of clear and present danger to an imperative First Amendment standard¹⁴ and scorned the sentence of twenty years' imprisonment for the "surreptitious publishing of a silly leaflet by an unknown man."¹⁵ For good measure, he added a theory of speech that drew on a lifetime of engagement with philosophy.¹⁶ Whereas a more pedantic jurist might have inscribed a bibliographic account of free speech, Holmes was at his stylistic and original best in *Abrams*.

It can be spectacular when judges change their minds. The "switch in time that saved nine" may have averted President Franklin Delano Roosevelt's 1937 plan to pack the US Supreme Court to ensure that his New Deal legislation would survive judicial scrutiny, but Owen Roberts won few plaudits for fatefully changing his vote to save the US Supreme Court.¹⁷ Years later, Learned Hand—who had dared to lecture Holmes on free speech in 1918—played a key role in the First Amendment's nadir during the 1950s.¹⁸ The author of the celebrated *Masses* opinion likewise received few plaudits for masterminding Cold War balancing, which brought free speech to a low and would be all but dismissed in the 1960s.

Abrams stands on different ground; it was pivotal not only because clear and present danger emerged as a doctrinal command but also because Holmes proposed a theory of free speech that is powerful and enduring. To this day, it is one of the First Amendment's ideological bedrocks.¹⁹

II. REVERSE MENTORING

Despite the finesse, Holmes all but reversed his views on free speech between *Schenck* and *Abrams*; a conversion that appeared to take place quickly was in fact painstaking for the judge. Holmes took pride in setting himself apart and

14. *Abrams*, *supra* note 3 at 630 (stating, among other things, that "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").

15. *Ibid* at 628. Abrams and others had urged workers to strike, not in opposition to the war, but to support the Bolshevik Revolution.

16. *Abrams* is best known for its conception of free speech as a "marketplace of ideas." *Ibid*.

17. See *West Coast Hotel Co v Parrish*, 300 US 379 (1937).

18. See *Dennis v United States*, 341 US 494 (1951) (relying on Hand's ad hoc balancing test to uphold the anti-Communist *Smith Act*).

19. See also *West Virginia Board of Education v Barnette*, 319 US 624 (1943) (protecting, under the First Amendment, students from being forced to salute the American flag); *New York Times Co v Sullivan*, 376 US 254 (1964) (protecting defamation under the First Amendment); *Whitney v California*, 274 US 357 (1927) (Brandeis, concurring).

was fond of disdaining “the upwarders and onwarders.”²⁰ He claimed he was an “ideaist,” not a “thingster” like Louis Brandeis and other crusaders who bore down on details in their aspiration to change the world.²¹ By contrast, Holmes was aloof—intellectually regal—and pridefully unconcerned with facts and the tribulations of the day.²²

Still, he was stung by criticism of the *Schenck* trilogy, and especially of *Debs*. Holmes was chastised by *The New Republic*, a relatively new and forward-looking publication, and that hurt: *The New Republic's* views usually aligned with his own, and the magazine was “like family” to him.²³ The quandary was that Holmes could not take a consistent position on laissez-faire and free speech issues without displeasing the progressives but did not see the difference between limits on speech and hours of work legislation. The task of showing him fell to Laski, among others.

Courted by many, Holmes was particularly attracted to Harold Laski—the son he never had—for his “astounding erudition.”²⁴ Laski was “brilliant, prolific, charming, effusive, irrepressible, and a notorious self-promoter;” and “of all the young men who had wriggled their way into the justice’s heart, he was Holmes’s favorite.”²⁵ During Laski’s short years at Harvard, Holmes basked in the intellectual light the younger man brought into his life. Over the New England summer of 1919, Holmes indulged his unquenchable thirst for knowledge, reading more than fifty books, which Laski supplemented with strategically chosen titles. Though he grumbled, Holmes read most of Laski’s selections, and the two men spent happy hours sparring about ideas and thinkers across the ages.

Inviting Zechariah Chafee Jr. for tea that summer was one of Laski’s schemes. Chafee was a rising scholar who had written on free speech and the *Schenck* trilogy in *The New Republic* and the *Harvard Law Review*.²⁶ Holmes was well aware of Chafee’s work on the First Amendment, and the two younger men worked hard at the tea party to bring the judge around to their point of view.

20. Healy, *supra* note 1 at 127.

21. *Ibid.*

22. Like father, like son: Holmes Sr. complained that “facts choked his windpipe when he talked,” and his son confessed that “I hate facts” and “wish to know as little as I can safely go on.” See Healey, *ibid* at 140-41.

23. On 16 November 1918, *The New Republic* published an article by Chafee that was critical of Holmes. See Healey, *ibid* at 59. After the trilogy, *The New Republic* published a scathing critique of *Debs* by Ernst Freund on 3 May 1919 (*ibid* at 134-35).

24. *Ibid* at 33-34.

25. *Ibid* at 30.

26. Laski made sure that Holmes had a copy of the *Harvard Law Review* article, “Freedom of Speech in War Time.” See Healey, *ibid* at 154.

Correspondence suggests that slowly, and guardedly, Holmes began to question his intellectual instincts. In the roiling climate of postwar America, he was not jolted from the complacency of his views until Laski was almost run out of Harvard, in fall 1919, for his radical acts and views.²⁷ Urged to intervene on his friend's behalf and play a broader public role in the service of free speech, Holmes begged off, citing workload. If the judge's refusal to engage disappointed, at some point in this interim, free speech ceased to be a matter of cold logic and became lived experience for him.²⁸

Holmes was notorious for writing with great speed and force of will; as Brandeis quipped, "He doesn't give a fellow a chance—he shoots so quickly."²⁹ The justice wrote at a standing desk and liked to boast that "[n]othing conduces to brevity like a caving in of the knees."³⁰ By any standard, including his own, the *Abrams* dissent was exceptional. The appeal was argued on 21 October 1919, and by 1 November, Holmes was telling Frankfurter about an opinion he had just written "*quasi in furore*," as if possessed.³¹ Once he put the pen down, Holmes would never again flinch, and from that day forward, he defended free speech to the limit.

The *Abrams* dissent was unexpected, though not entirely uncharacteristic of Holmes. Given the "intense lobbying effort" by his closest friends and admirers, some might describe Laski, Frankfurter, and Chafee as opportunists and portray Holmes as an aging jurist seeking to preserve his stature among those who had reflexively praised him over the years.³² But he was a free thinker, and such an unkind view understates the force of Holmes's intellect, which was at once fearless, proud, and resilient. If it might not have happened without the reverse mentoring, the *Abrams* dissent was singular just the same.

III. PURSUE THE UNKNOWN END

Hagiography runs the risk of not being taken seriously. Perhaps that is why Healy steered away from the key narrative to infer that Holmes's marriage was not fulfilling, point out his wandering eye, and exploit the details of his

27. Frankfurter had also come under fire for his views about labour policy. See Healey, *ibid* at 121-31.

28. Holmes's "logic of persecution" was "suddenly, concrete and personal." See Healey, *ibid* at 195.

29. *Ibid* at 104.

30. *Ibid* at 95.

31. *Ibid* at 211.

32. *Ibid* at 201.

lovesick affair with an Irish noblewoman. Otherwise, Holmes's vulnerabilities around aging were assuaged in more constructive relationships. Fearing old age and the prospect he might become useless, Holmes sought intellectual comfort and intimacy in the company of brilliant younger men—principally Laski and Frankfurter. As he affectionately confided to Frankfurter, “You have brought a great deal of comfort and companionship to the natural loneliness of old age.”³³ It was unusual, but fortuitous, that in this instance the mentoring between generations moved in both directions.

Importantly, the *Abrams* dissent marked a turning point in Holmes's thought, when he saw the connection between his deep-seated bettabilitarian skepticism and a sound, philosophic conception of free speech. A few years later he would write, “If I were dying my last words would be: Have faith and pursue the unknown end.”³⁴ At some point between *Schenck* and *Abrams*, Holmes grasped that the unknown cannot be pursued under the logic of persecution he had defended so valiantly. That was the vital difference between free speech and freedom from vaccination, hours of work laws, and assorted forms of regulation—and it was why Holmes came to believe that speech must be fearlessly protected, even to the brink of irreversible peril.

33. *Ibid* at 163.

34. Letter from Oliver Wendell Holmes, Jr. to John Ching Hsiung Wu (1924) in Harry C. Shriver, ed, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers*, 1st ed (New York: Central Book, 1936) at 175.

