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HOLMES' INTELLECTUAL DEVELOPMENT THROUGH THE PRISM OF FREE SPEECH OPINIONS

by
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Chapter I **Introduction**

Holmes' Intellectual Development Through the Prism of Free Speech Opinions

As one of the giants of American judicial history, Oliver Wendall Holmes has held a perennial fascination for students of the law. His writings and decisions have consistently engaged the interest of scholars, inspiring a considerable body of commentary on and critical analysis of his life and works. This essay undertakes to review a number of the key works of this secondary literature, and argues that Holmes' jurisprudence cannot be

adequately evaluated without consideration of the biographical factors that shaped his decision making.

One of the very few works to combine biographical and analytical perspectives on Holmes is an extended review essay by Yosai Rogat in the **University of Chicago Law Review**. (1) The present essay attempts to build upon Rogat's work in its emphasis on the biographical understanding of Holmes' legal philosophy. It is, nonetheless, critical of Rogat on some points of interpretation, and challenges Rogat's central thesis: that Holmes' jurisprudence represented "a comprehensive and integrated way of looking at the world." (2) This paper calls into question Rogat's claim by illustrating the irreducible complexity of Holmes' thought, and the conflicting religious, personal, and intellectual forces that shaped it. The first section of the essay, then, considers the broad connections between Holmes' life and his jurisprudence. The second section focuses more narrowly on Holmes' free speech decisions; this series of decisions, I shall argue, is characterized by a shift in Holmes' ideological posture that undermines Rogat's claim of intellectual consistency.

Interest in Holmes as a person and in his jurisprudence has fluctuated over the years. But, throughout, a number of observations have consistently been made. One is that Holmes is an enigma; scholars like Konefsky refer to his "complex mind," (3) and Boorstin remarks about the "tantalizing elusiveness of Holmes' personal philosophy." (4) Further, he is proclaimed as one of the greatest American legal minds of the twentieth century, if perhaps more a philosopher than a legal scholar. He is admired not only in America, but also in England. For example, Pollock, writing soon after Holmes' death, reinforces his importance to the common law:

There may be a shade of difference, not in substance but in emphasis, between his American and his English admirers, in their remembrance of his achievements. His own people, for whom the decisions of the Supreme Court are matters of practical concern, may naturally think of him in the first place as the greatest expounder of the Constitution since John Marshall,--- That work was great; but here in England we are a little anxious that it should not overshadow Holmes' service to the Common Law on its proper ground, most of which lies farther back in his career. He has been hailed, and justly as the classical successor to Blackstone and Kent (5)

Actually, Holmes may have been a greater figure than Blackstone or Kent, for they were skillful and persuasive synthesizers, while he was more of an original thinker.

Literature relating to Holmes may be divided into three categories: The first consists of biographies. Some have sought to give a glimpse of his life from his childhood days till his appointment to the Supreme Court of the United States. (6) Others go back further to look into his family background. These biographers include Sheldon Novick (7) and Mark DeWolfe Howe (8), who not only give us biographies but attempt to offer an analysis of Holmes' life, too.

The second body of literature encompasses analytical pieces that have appeared in law reviews, magazines, and journals. This category offers in-depth analysis of Holmes' opinions and jurisprudence. It includes pieces by Rogat, Posner, (9) and others too numerous to mention. The third body of literature is Holmes' own legal writings, such as, **The Common Law** (10) and "The Path of the Law." (11) It also includes compilations of his opinions and speeches edited by Lerner(12), Howe (13), and others (14).

Despite the existence of this substantial literature on Holmes, there is a serious imbalance that needs to be corrected. The biographical literature has focused on historical narrative and, while it offers analysis, it does not marry his background to his later judicial philosophy.

The second set of literature, the analytical, has focused on Holmes' jurisprudence in relation to constitutional and legal issues. Such analysis is largely divorced from Holmes' background and intellectual influences. Analysts who do address these matters generally treat them superficially. Yosel Rogat is one of the few scholars who has tried to integrate biographical and analytical perspectives. Yet important aspects of his argument remain problematic. Foremost among these is the claim that "By 1881, Holmes had completely worked out a comprehensive and integrated way of looking at the world." Rogat suggests that Holmes had, by that date, developed a set judicial philosophy, from which he did not stray through the rest of his career or, for that matter, his life. This claim, though credible, does not stand investigation; for in his later years a shift occurred in his philosophy. Even though this shift was not great, it was worthy of note.

Another question arises concerning Rogat's claim. If Holmes had supposedly worked out a "comprehensive and integrated" outlook, what would lead Holmes' scholars to refer to the jurist's "contradictory impulses?" (15) These and other questions suggest inconsistencies in Rogat's piece that deserve a second look.

In What follows, I shall attempt to evaluate Holmes' philosophy of jurisprudence in the context of his biographical development; with this approach, I shall offer a critique of Rogat. I will attempt to show, among other things, that even though Holmes appeared to have a set judicial philosophy he was, in fact, a man torn between his conservative background and a personality open to change. Holmes' philosophy reflected a struggle to resolve these conflicts.

The second part of this paper will focus more narrowly on Holmes' changing views on free speech. In an attempt to illustrate the thesis in part one, I will show that there occurs a significant shift in Holmes' philosophy on free expression. In his early decisions on free speech on the Supreme Judicial Court of Massachusetts (**Commonwealth v. Davis**), Holmes displayed a strong conservative bent. Subsequently, in the **Schenck** case, a similar perspective is evident. This pattern, however, changes with the **Abrams** case, which foreshadowed the cases that followed in the almost twelve years remaining before his retirement.

By carefully integrating biographical and analytical perspectives, I hope to show how early intellectual, family, and other societal experiences influenced Holmes' early decisions, and his later decisions that had a more liberal streak.

Chapter II **Background**

Holmes: The Early Years

"To think about Mr. Justice Holmes is to fall under the spell of a favorite of the gods. Among judges he was granted a preferred position---". (16)

This comment by Yosai Rogat about Holmes is as true today as it was when it was written three decades ago. For the man who received two near fatal wounds in combat and a third that almost led to the loss of a leg, was favored by the gods in the sense that he lived to age ninety three, saw himself become a unique national icon, and left a judicial legacy that continues to endure generations later. To better understand the man Holmes and interpret his achievements, it is appropriate to explore the biographical factors that shaped his outlook. Three aspects of Holmes' background will be highlighted: the dominant role of his father, his formal education; his war experience.

Holmes was born into a family of high social position in Boston. His father was a doctor, a researcher who studied the causes of puerperal fever. He was also noted as a man of letters (an essayist, poet, novelist), and the name behind **The Autocrat of the Breakfast Table** (17). Young Holmes, in short, had the good fortune of growing up in an extraordinarily intellectually stimulating environment.

Holmes and his father did not agree on many things. Holmes believed his father was not completely emancipated from his inherited beliefs. As Holmes put it in 1919:

My father was brought up scientifically--i.e., he studied medicine in France--and I was not. Yet there was with him as with the rest of his generation a certain softness of attitude toward the interstitial miracle--the phenomenon without phenomenal antecedent--that I did not feel. The difference was in the air, although perhaps a few of my time felt it. The Origin of Species I think came out while I was in college--H. Spencer had announced his intention to put the universe into our pockets--I hadn't read either of them, to be sure, but as I say it was in the air....Emerson and Ruskin were the men who set me on fire. (18)

The observation belied the extent of his father's influence. Indeed in "The Path of the Law", Holmes wrote:

Most of the things we do, we do for no better reason than that our fathers have done themselves or that our neighbors have done, and the same is true of a larger part than we suspect of what we think (19)

Among Dr. Holmes' greatest legacies to his son was to foster a sense of free inquiry in his home. Young Holmes' reasoning skills were nurtured through intellectual discourses that his father encouraged:

The children too chattered on, each talking without listening to the others. The doctor enjoyed the talks and would give any of the children an extra helping of marmalade if he or she said anything clever. (20)

The doctor frequently debated with his eldest son. A relatives' letter described the relationship of the doctor and his son.

I used to see both of them, sometimes together and sometimes separately, at least once a week and heard the most brilliant conversation that I have ever heard or ever expect to hear, with absolutely fair give and take. (21)

This early training contributed to Holmes' celebrated quick wittedness and his facility at judicial argument.

Through his father, Holmes was brought into contact with some of the best table conversation of the time. Not only did it offer him an opportunity to listen to clever conversation but also exposed him to serious discussions on important issues. Influenced by such men as Theodore Parker, Wendell Phillips, and Ralph Waldo Emerson, Holmes later described himself as a "pretty convinced abolitionist." (22) In fact, he was so convinced of Phillips' ideas that he carried them from theory to action, becoming "one of a little band intending to see Wendell Phillips through if there was a row after the meeting of the Anti-Slavery Society just before the war." (23) It is of interest that after Holmes' somewhat pro-active approach to the issue of slavery, he later seemed to have lost interest in the issue of race completely. More enduring was Emerson's influence on Holmes' efforts to unite philosophy and law. Writing to Emerson along with his first essay in law, Holmes says:

It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die. Accept this little piece as written in that faith and as a slight mark of the gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind. (24)

Religion played a complex role in Holmes' development. Holmes' father was liberal but tried to bring his children up in a strict Calvinist faith. Holmes followed what his father practiced, and not what he preached. At Harvard, Holmes joined the Christian Union but the statement which he wrote in the autobiographical sketch at the end of his senior year

attests to his desire by act of affiliation to show his devotion to liberalism more than to a moral or religious group:

I was, while in college a member of---the "Christian Union"; not that I considered my life justified belonging to [it], but because I wanted to bear testimony in favor of a religious society founded on liberal principles in distinction to the more "Orthodox" and sectarian platform of the "Xtian Brethren. (25)

Such skepticism bears evidence of Holmes' progressive bent. Yet a deep-seated Calvinism was also manifest in Holmes' perspectives. A Calvinist belief in the redemptive value of work, duty and honor informed Holmes' early commitment to achieve greatness by age forty.(26) If Calvinism did not turn him towards the law, it caused him to invest all his energies in achieving distinction. It also led him to criticize the elder Holmes for dissipating his talents, rather than pursuing excellence:

I think he contented himself too much with sporadic apercus--If he had the patience to concentrate all his energy on a single subject, which perhaps is saying if he had been a different man, he would have been less popular, but might have produced a great work (27)

This ambivalence towards his father's talents points to the tensions that informed their relationship and left their mark on Holmes. On the one hand, his father bequeathed to Holmes a critical and enlightened view of the world and a taste for intellectual renown. On the other hand, he inspired a rebelliousness in his son that may account for certain distinctive features of his writings. It may explain why later in life Holmes seems to have abandoned his abolitionist views and lost interest in the race question. It is known that Dr. Holmes was not an abolitionist, does it follow, therefore, that Holmes became an abolitionist in part to spite his father? Or was it a way for the son to prove his individuality, just as he had joined the Christian Union for the purpose of bearing testimony to a group that was devoted to liberal principles?

Holmes received his early education at Mr. Dixwell's Private Latin School. It was here that he learned Greek, Latin, Mathematics, and Rhetoric, the latter teaching him debating skills and how to think on his feet. Prior to his entrance in Mr. Dixwell's, when he was ten, the principal of his former school recommended him in these terms:

Young as he is, his habits of application are confirmed, while his proficiency in all the English branches and his love of study are remarkable for his age? (28)

Holmes would later go on to explore philosophy and the sciences, becoming familiar with the works of the leading thinkers of his time. He read Herbert Spencer's **Social Statics**. John Stuart Mill's **Logic**, James Mill's **Analysis of the Human Mind**, and such classics as Plato's dialogues.

In 1857, Holmes entered Harvard College, which he found disappointing:

The competent and learned instructors did not give us their best, but having listened to our stumbling recitation and inscribed an estimate of our blunders, would then withdraw to the congenial companionship of erudite neighbors, contented if collegiate discipline had been reasonably secured (29)

His botany professor, however, introduced him to the findings of Charles Darwin and encouraged the students to study them. Yet religion seemed to be worked into even scientific and economics lectures. For example, Francis Bowen, a political economy professor, argued that laissez faire economics was the working of God's plan. Nevertheless, Holmes enjoyed Harvard, if less for its education than for the freedom it gave him:

College is [a] perfect delight, nothing to hold you down hardly, you can settle for yourself exactly what sort of life you'll lead ----(30)

Holmes loved books. In an article written in the **Harvard Magazine** entitled, "Books" (31), he stressed their importance as a source of enlightenment, and the knowledge gained, he believed, should be converted into a search for the truth. He believed this was especially pertinent for scholars in institutions of higher learning. He proclaimed, "we must have every train of thought brought before us while we are young." (32) However, no amount of books could give Holmes the experience that war did.

Most work on Holmes stresses the civil war as a turning point in his life. In **The Mind and Faith of Justice Holmes**, for example, Max Lerner writes, "war proved to be Holmes' real college and testing ground. It left a deep mark on him." (33)

Even before Holmes actually went into combat, we can detect a sense of duty. Holmes volunteered to join the army, an action which a person of his privileged position did not have to take. In fact, it was normal practice for the privileged to pay someone else to serve in order to avoid the draft. This was such a common practice that one cannot argue that avoidance of the draft would bring contempt upon a person by society at large. But, as Holmes later stated, he had to "share the passion and action of his time at the peril of being judged not to have lived." (34)

Holmes went through certain stages in his war experience. Before experiencing actual combat, he wrote home, calling war an "organized bore." (35) He maintained high spirits, when he received his first wound at the Battle of Bali's Bluff. He wrote his mother from the hospital, and seemed to be concerned only that "whatever happened I am very happy in the conviction I did my duty handsomely." (36) It appears at this point that Holmes was interested in fulfilling the expectations of society. He goes down with a bullet through the chest, and behaves as a gentleman with pride and bravery.

Holmes, coming from a background of privilege, had to prove himself to the noncommissioned officers. The enlisted men of the regiment thought he and the other officers with aristocratic backgrounds were "thoroughly and amazingly deficient in

military knowledge." (37) This view changed, however, when Holmes returned after his convalescence. He was considered 'a remarkably brave and well instructed officer.' (38)

Holmes was wounded for the second time at Keedysville. This time, the bullet went through his neck. It is also around this time that his attitude begins to change. Apart from his own physical suffering, he started to experience the death of close friends and all the men who died around him on the battlefield. "The faith" said Holmes years later,

is true and adorable which leads a soldier to throw away his life in obedience to blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use. (39)

It is as if, at this point, he does not see beyond the battlefield experience. He applauds the sense of duty and commitment displayed on the battlefield. There is a possibility that the experience made him cynical. He, however, endures, and this is the strength that is noteworthy. Through all, he maintains his sense of duty.

The campaign has been most terrible; yet, believe me, I was not demoralized when I announced my intention to leave the service next winter if I lived so long. I started I started in this thing a boy; I am now a man, and I have been coming to the conclusion for the last six months that my duty was changed-- I can do a disagreeable thing or face a great danger coolly enough when I know it is a duty--but a doubt demoralizes me as it does nay nervous man--and now I honestly think the duty of fighting has ceased for me--ceased because I have laboriously and with much suffering of mind and body earned the right---to decide for myself how I can best do my duty to myself, to the country, and, if you choose, to God. (40)

His idealism seems chilled, and one cannot help but conclude that at this point. Holmes is functioning on his Calvinist principles of duty and righteousness. At the time he sustained his third injury in the battle of Chancellorville, Holmes seemed ready to abandon his faith and duty. In later years, Holmes would admit that he wished he had lost his foot in order that he would not have had to return to the front. (41) Holmes joined the service believing in ideals such as duty and fighting for a cause. By the end of his military career, he had applied an inner, personal standard to measure his own conduct:

I am not the same man (may not have quite the same ideas) and certainly am not so elastic as I was and I will not acknowledge the same claims upon me under those circumstances that existed formerly. (42)

Holmes came out of the war a different man. Molded by the brutal nature of war, he left with memories that he at first tried to forget but later came to treasure. To understand Holmes' position on free speech and national security, it is important to take into account the memories of the war that he cherished so much. It is important because it seems later

in life Holmes' high regard for the institution of the military led him to look with disfavor at the people who tried to put obstacles in the way of fighting men.

Holmes: A Revisionist's Look

Biographical narrative features prominently in the work of Yesal Rogat, whose extended essay, **Mr. Justice Holmes: Some Modern Views**, is a commentary on the second of the two volume biography of Holmes by Mark Dewolfe Howe.(43)

The first volume of Howe's two part biography had dealt with the early years of Holmes through his apprenticeship clays as a young lawyer. The second volume, the focus of Rogat's essay, involved Holmes' active years as a young legal scholar. It was during this period that Holmes edited the **Harvard Law Review**. tutored at both Harvard College and Harvard Law School, and came out with the twelfth edition of Kent's **Commentaries**. His most notable accomplishment of this period, however, was the series of lectures that were published as **The Common Law**.

It is through a look at **The Common Law** that Rogat introduces his basic thesis: "by 1881 Holmes had completely worked out a comprehensive and integrated way of looking at the world." Rogat further argues that, in subsequent years, Holmes reasserted his stand to the extent that he often literally repeated the same sentences. Rogat depicted Holmes as rigid in his mind set: "Both as an aphorist and as a judge, Holmes rarely changed his mind." (44) In this, Rogat agreed with the philosopher, Morris Cohen, who maintained that it was a mistake to think of Holmes as one of those men who "like Einstein and Socrates continue as long as they live to revise mistaken views." (45) The consequence of this, Rogat believed, was evident in Holmes' certainty and confidence in his judicial decisions in subsequent years. To support his claim that Holmes' work formed a unified whole, Rogat shows that Holmes' Supreme Court decisions were consistently characterized by the use of common law formulas. He supports his analysis with the now famous clear and present danger standard. The **Schenck v. United States** case (46) was the first time this standard was introduced. The defendants in the case were prosecuted for violating a statute that was aimed at prohibiting interference or attempted interference with America's war effort during the first world war. Rogat argues that the standard that Holmes applied to the case was derived from his analysis of the law of attempts in 1881. From his research, Rogat was able to find a connection between the clear and present danger test and Holmes' previous requirement of a "dangerous proximity to success." This requirement, Rogat believes, was expressed in **The Common Law** (47) and also in Holmes' opinion in **Commonwealth v. Kennedy** (48), which stated, "[A]s the aim of the law is not to punish sins, but is to prevent external results, the act done must come pretty near to accomplishing that result before the law will notice it." According to Rogat, this was evidence of Holmes desire to reduce the law of attempts to a measure of extent or what he refers to as "objective probability." (49) Rogat strongly disagrees with Holmes' purported premise and claims that, for Holmes, the external act was not a trigger of the internal phenomenon. The external was the sole focus of legal deliberations.

Rogat concedes that this connection between Holmes' clear and present danger test and the law of attempts had come to the notice of Green (50) and Hall (51). However, Rogat goes on to show problems with Holmes' conception of criminal law, which derive from its common law roots. Using the **Dennis** case (52) and the **Gitlow** case (53), Rogat finds that when "proximity" is used, it should conform to the main elements found in attempts cases. Rogat argues that a legislature is subject to some limitations as in **Gitlow** and **Dennis**, when it curtails the expression of some specific doctrine. However, this has nothing to do with the problem of "proximity". He believed that Holmes moved on with his "proximity" test in the **Gitlow** case without considering its difference from the **Schenck** case. It is Rogat's premise that a sensible ordinance, which affects the distribution of political leaflets would be hard for one to uphold using the proximity doctrine to specify the danger. Rogat maintains that the law was too all encompassing and that attribute called its usefulness into question.

Scholars have acknowledged the insightfulness of Rogat's analysis. Rogat was the first commentator to note the relationship between Holmes' early espionage decisions and his views on criminal attempts. (54)

However, Rogat's sweeping generalization and daring effort to paint Holmes as a rigid figure who was not opened to change, I believe, is a mistaken view. Rogat would have us believe that starting from Holmes' 1881 writing of **The Common Law** and thenceforth, he developed a more or less set mind in his judicial philosophy, which he neither left nor strayed from during his subsequent judicial career of nearly half a century. This statement can be made if one considers other areas of Holmes' judicial decision-making, such as Holmes' positivist views toward economic cases. In these cases scholars have noted Holmes' consistent attitude of toleration for the legislature and his stand for judicial self-restraint. Thus, Richard Posner argues:

The rejections of the doctrine of unconstitutional conditions followed from Holmes' belief that law registers the balance of political power, a belief that led Holmes always to look for the source of power and to make law follow it. (55)

In referring to Holmes as a positivist one means he does subscribe to the existence or intelligibility of forces or substances that go beyond facts and the laws ascertained by science. The most prominent example of Holmes' positivism is his acquiescence to the command of the sovereign majority.

Rogat's argument that Holmes used the common law to solve constitutional law problems is indisputable. However, Holmes' views on free speech at the time were not unique. The application of the common law was not the brainchild of Holmes, as Rogat seems to imply, for as another scholar observed, "the prevailing orthodoxy when Holmes became a Supreme Court Justice was simply a codification of English common law." (56) This is illustrated in the case of **Robertson v. Baldwin** (57), where the Court declared that the Bill of Rights do not constitute "any novel principles of government," but just set "certain guarantees and immunities which we had inherited from our English ancestors, and

which had from time immemorial been subject to certain well-recognized exceptions." (58) On this approach, the First Amendment was not all-encompassing, but had exceptions. It did not extend to libel, obscenity, indecency, and other injurious publications. For example, the court upheld the conviction of a Mormon in the **Davis v. Beacon** case (59) and an anarchist in **Turner v. Williams** (60), both for being affiliated with groups that encouraged socially injurious acts. It was not presented in a clear manner whether the defendants in these two cases had expressed the performance of these injurious acts. White argues that the Court earlier, and Holmes subsequently, adopted Blackstone's view that the First Amendment, by codifying common law, had the purpose of preventing any prior restraint but not any subsequent punishment. In summarizing the common law, Blackstone said "the liberty of the press---consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." (61) Holmes' extensive knowledge of Blackstones' **Commentaries**, noted early on in this paper, and the direction of the Court at this period suggests that the clear and present danger standard was typical of the period, and not a view uniquely developed by Holmes.

Rogat's argument is that Holmes' stress on the "external doctrine" is, in effect, a path to eliminating obstacles that block this positivist end. Rogat further asserts that it is not for reasons of certainty that Holmes advocates these ideas so strenuously, but that in fact he seeks to implement his own devices for interpreting the law. He claims, for instance, that due to the difficulty of separating legal words from their moral meaning, "Holmes contemplated a situation in which every word of moral significance could be banished from the law altogether, and other words adopted, which would convey legal ideas uncolored by anything outside the law." (62)

Rogat might be right, in part, when he says that certainty was not the reason Holmes advocated the "external doctrine". However, even though it might not have been the end sought, it was one of the resulting consequences. His actual end in advocating the external doctrine seems to be a bringing about of a semblance of order and empirical basis to the law -- a law where things and facts were real and tangible is what legal scholar Richard Posner labels "pragmatic jurisprudence" (63)

Holmes maintained that law is the prediction of what a judge will do in a case when presented with certain facts. For his part, Posner asserts that law is the activity of licensed persons, judges, rather than a body of concepts (rules, principles, whatever). Judges employ discretion to change rules, and discretion is not 'principled', although it may be founded or and confined by principles. Indeed, to speak of "employing discretion" may be too grand. Judges change rules, period. In the end, the law is what the judges do with your case. (64) Indeed, both Holmes and Posner seem to oversimplify the point of what law is. By overrating the position of the judge as the law they tend to forget the role of such other institutions as the police. It is true that when one comes before the court the interpretation of the law by the judge is what is law. We however, know that in reality a majority of the citizenry do not get to stand before the judge but certainly meet with those that they consider as "the law" and that is the police. Thus, to many the law is not what the judge says but what the police person says.

If judges have this much discretion, there are certain problems that seem evident. How do judges decide a case if they run out of rules or there are no rules to govern that particular case or, more likely if there is more than one rule? Ronald Dworkin (65) argues that judges bring moral and political values into their decisions. Even though this does not automatically make these decisions lawless, it is still a cause for misgivings.

The question that arises and which scholars including Dworkin attempt to answer is this: if judges are like legislators, why are they not subject to democratic controls? or for that matter why have them, if they only duplicate what another branch does? Hart and Sacks (66) argue that a judge is different, in that "his training, the procedures he follows, and the traditions of legal reasoning entitle us to repose greater confidence in his probity and competence" (67) Their premise is one that many do not hold today, and I believe Holmes would not subscribe to.

Posner makes an argument contrasting a strong positivist (Thrasymachus) against a strong natural lawyer (Plato's Socrates), identifying the two contending schools of jurisprudence while detailing their epistemic differences.

Most though not all legal positivists are skeptical about the claim that law is objective and autonomous. Law to them is too close to politics for that. So while "strong" natural lawyers tend to be the true believers in law, legal positivists tend to be legal skeptics. But these correlations are not necessary. A legal positivist who believed that the methods of legal reasoning enabled the sovereign's commands to be infallibly understood and applied by judges would be a moral but not an epistemic skeptic--that is, he would be skeptical about whether law was good but not about whether it was determined--while a natural lawyer who believed that the methods of legal reasoning often were incapable of discovering moral truth would be an epistemic but not a moral skeptic. That is why a positivist can be legal formalist and a natural lawyer a legal realist; the former conjunction is in fact common (68)

For Posner, Holmes would fall within the formalist positivist role. This is especially important if one is to understand Holmes' "objective" external theory. This theory calls for comprehensive and applicable set of rules that would not take into consideration any indeterminate circumstances in the interpretation of law. Posner would argue that a positivist who is also a formalist holds the view that law is politics, but believes that judges in applying it are non-political, an argument that no one would subscribe to today. It is this that Posner believes makes a jurist of this bent disdainful of politics and natural law.

Holmes falls within a grouping that Posner calls the skeptics, as against the legalists. The skeptics are those who believe that law is a subset of politics and is the will of the stronger. Among Holmes' group, Posner includes Hobbes, Bentham, Thrasymachus, and H.L.A. Hart.

Using Posner's definition of a formalist positivist and skeptic, we can more easily understand and explain Holmes' bent towards an "objective", "external" standard. I argue that Holmes was skeptical in regards to judicial discretion. Legal positivists, like Holmes, are skeptical about the claim of law as objective and autonomous. It is, therefore, no surprise that Holmes advocates an objective theory. Also, as a positivist, Holmes would tend to support a standard that would be more universally applicable. A standard, such as the "external doctrine," would leave less at the judge's discretion and more to the sovereign's command.

Rogat makes the claim along the lines of Professor Hart that it is unjust to treat someone who does not intend or foresee harm the same way as someone who does. This is a moral argument that Rogat seeks to make; however, as Posner remarks, some skeptics have been linked with fascism and other horrors due to their far right conservative views. He goes on to argue that this view is a frequent misperception on the part of critics. (69) The question then is: did Holmes care much for moral arguments, advancing fairness or justice? As he himself stated, "a man might have to answer with his life for consequences... he neither intended nor foresaw." (70) Holmes wanted to separate, if possible, completely laws from morals.

This statement seems to address the question. To Holmes, fairness and justice did not seem to play an overwhelming role in his jurisprudence. What he seemed to believe in was sacrifice, an attitude which seemed to spring mainly from his war experience. The underlying influence, however, was his pre-existing puritanism which invariably shaped his war reaction. Whether this attitude was moral is not of significance here, for we are concerned with the rationale behind the attitude.

Rogat claims that Holmes sought a uniformity of applicable law. He asserts that it is an odd concern for uniformity that would ignore differences in human conduct, for example, the difference between deliberately stepping on one's foot and accidentally doing the same. It is easy for one to empathize with Rogat's and Hart's concern, but a more rational look would find Holmes more in tune with reality and the operation of law. To concede to the argument that each case should be dealt with separately and individually, based on the assertion that no case in actuality is identical to any other, poses complications for applicable law. If one subscribes to Rogat's argument, each case would have to be dealt with based on its own unique circumstances. Imagine the wide extent of discretionary power that would be given to jurists and the resulting threat of misapplication of law. Holmes' standard, even though less congenial, is in a sense more just and fair in a utilitarian way. It offers the greatest good for the greatest number. He tended to give less leeway in judicial discretion and offered a more determinate method.

Holmes' argumentative appeal rests in his conviction that the system has to be clarified. Robert A. Ferguson (71) comments on this by saying, "Holmes gives weight by objectifying them (law) in his own person as the authoritative representative and speaker of civilization." (72) To refute critics and strengthen his argument, Holmes separates morality from law. "The Path of the Law" is an argument to "dispel a confusion between

morality and law" (73) He believes judges ultimately clarify these related levels of discourse. Ferguson puts Holmes' argument together succinctly:

They make the "body of law--more rational and more civilized" by referring every rule "articulately and definitely to an end which it subserves" and by making sure that "the grounds for desiring that end are stated or axe ready to be stated in words." Two premises in "The Path of the Law" turn this mechanical task into a literary adventure of heroic proportions. Holmes believes that the law can be "reduced to a system" through the recognition of some first principles." (74)

Holmes views the law as a technical field, with limitations. As Ferguson argues, Holmes understood a need for change at a time of judicial criticisms. He also states that Holmes understood the pressures for change. However, as Holmes himself states: "[f]or most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized." (75) Holmes sees real change in the law embedded in its development, rather than in reform. (76) This observation tends to conform to Holmes' statement that "the life of the law has not been logic: it has been experience." (77) It, thus, follows that through experience it can be developed, rather than reformed for the better.

Chapter III The Man Holmes

A significant part of, **The Proving Years**, deals with Holmes' peculiar life of isolation-isolation not in the sense of a hermit's life, but in his tendency to concentrate on his work. For example, Henry James was told that "Holmes worked harder than anyone in law." (78) This characteristic of Holmes is attributed to his single-minded desire for excellence, which springs from his resentment of criticism (79) and craving for recognition (80) Around this period, Holmes lived a life of almost total exclusion from his relations. "In his years of full maturity, he had but few friends of his own age." (81) Rogat comments of **The Proving Years**, "The book records few important human contacts and less human warmth" (82): So dedicated was Holmes to achieving high goals that he in a sense alienated his wife. Howe observes, "it seems likely that it was understood by his wife that he would not permit the conventional burdens of marriage to distract him from his search for the goals of achievement..." (83) it is hard to believe that Fanny Dixwell did not realize that, at least for those years, his striving would be far more for an accomplishment of a public mind than for an achievement of private devotion" (84) Observing Holmes' relationship with his own family, one notices that "there [were] no indications that Holmes and his sister were close to one another, or that Holmes followed with any special sympathy the misfortunes of his younger brother---." (85) Rogat, seeking to discover the source of Holmes' distinctiveness, concerns himself with finding out whether Holmes' detachment was peculiar to his personality or a way of responding to his contemporary situation. He proceeds by comparing Holmes with two other distinguished New England intellectuals of the time, Henry Adams and Henry

James. (86) As for Adams, "when Charles Williams Elliot turned Harvard over 'like a flapjack,' Holmes and Henry Adams found themselves companions in the frying pan.." (87) Matthiessen's seminal study, **Henry James: The Major Phase**, (88) is referenced by Rogat to complete the triad "The two New England minds of his own generation with whom [James]--- most enjoyed friendship" were Adams and Holmes." (89) Common to these three figures was a "preoccupation with the theme of the observer--the spectator--or in acting out that role. Each to some extent had stepped out of life. Their participation in public and perhaps even in private experience had an attenuated quality, and they withdrew, perhaps consciously, from important areas of shared human experience." (90)

Rogat compares the three to the "Brahman" in Henry Adams' poem, "Buddha and Brahman"-- "Brahman" representing those in the world, who were both attached and detached. They tended to view society as outsiders, while working within it. Arguing that "certain historical conditions will accentuate any personal predisposition toward withdrawal," (91) he shows how the postwar generation with its Darwinian ruthlessness in business and flaunting of the worst in politics went against the best republican traditions of idealism and public conscience. He speaks of Henry Adams' shock on returning to America after the civil war and his feeling of "dispossessed anachronism" (92) like "the Indians or the buffalo who had been ejected from their heritage by his [Adams'] own people" (93)

Such attitudes may be loosely deemed "aristocratic" but unlike the British aristocracy, Holmes' generation had to prove its own worth. The Calvinist background of the society demanded such a merit system, "In such a society, a special status acquired solely by virtue of faith could not be simply enjoyed; it had to be striven for and justified. (94) This Calvinist ethic "produced Holmes, who combined great ambition and relentless habits of work with a fastidious withdrawal from society," (95) and underpinned Holmes' comment that "[I]f a man was to do anything, he must do it before forty." (96) Holmes shared this outlook with Adams and James, and channeled it into his jurisprudence, "The point is not simply that despite his office he remained a detached spectator; it is that he succeeded in making that perspective the very basis of judicial greatness." (97)

Rogat believes that Holmes also reflected contemporary attitudes in his perception of force. He sees similarities in Holmes', Adams', and James' passive view of power. All three held fatalistic attitudes and were reconciled to the dominant force having its way. He believes none of the three had any beliefs or trust in politics, and that the developing insensitivity of public life was a threat to private values. Rogat concludes, therefore, that their attitude of apartness was in line with their beliefs, "members of a displaced generation who feel an absence of power because they were brought out to exercise it can easily arrive at a passive world - view--." (98)

Rogat argues that the position of observer is sometimes a curious form of an escape mechanism for people, who want to keep from competing for power. One will seemingly become less vulnerable through detachment. (99) The evaluation of Holmes' "withdrawal" serves as a background for Rogat's critique. Rogat maintains that Holmes' detachment negatively affected his jurisprudence and subsequently the law. "In

actuality", he says, "it is because Holmes' interest in the development of the law was not sustained by any larger interest in improving society that he largely ignored social, political or economic realities" (100)

Rogat makes certain assertions in this regard. He believes Holmes' disinterest relates to his view on "consequences." He argues that Holmes considered cases in an abstract manner, and ignored their social consequences, "He would risk brushing aside unique details felt to be most important by those involved." (101) But then one is forced to ask the question; is this the judges job. Rogat states that Holmes was more interested and would get more intensely involved in cases for their "intrinsic intellectual interest" or their "nice academic points."

Rogat also faults Holmes on his method, or what he refers to as the formulation of compendious solutions. He claims Holmes tended, in Brandeis' terms, to say, "--many things in their ultimate terms, and as new instances arise they just fit in." (102) In effect, Brandeis claims, Holmes did not regard the specifics of a case but tended to dwell in generalities.

Rogat implies that Holmes seems blindly to accept the will of the majority in blatant disregard for how wrong it might be. He believes that Holmes' statement that "if my fellow citizens want to go to hell I will help them. It's my job." (103) evidenced an aloofness that acquiesced to the majority. This general deference to the dominant power is the basis of his judicial self-restraint. This on the other hand could have been Holmes' way of serving the purpose of democracy. In the sense that he did not acquiesce to the dominant power because that was what he believed in, as Rogat implies, but seeing himself as a member of an undemocratic institution, the court, he found it his duty to champion the course of democracy by accepting the will of the majority.

He strongly disagrees with the argument that Holmes' philosophical skepticism led him to believe that he might be wrong and the legislature right. Rogat maintains that this could not be so, considering that Holmes was the least hesitant of men. Rogat states, "For example, he had the most definite and dogmatic social and economic views, he was as convinced as any other adherent of Malthusian or Darwinian or Eugenicist doctrines." (104) It was thus highly improbable that Holmes would doubt any judicial decision.

He maintains that Holmes' complete reverence for government was due to his Darwinian belief of survival of the fittest. Government power was inevitable. However, one can also argue that government interference more times than not would seem to interfere with natural "survival of the fittest". Rogat adds that Holmes' detachment even went further than that, citing this letter from Holmes to his friend, the British socialist, Harold J. Laski:

[B]ut as you know some of your yearnings I don't sympathize with and almost believe noxious but the crowd is with you rather than with me and I dare say you will smash a good deal that I will like to keep. (105)

Rogat implies that Holmes was uninterested and did not trust "that his kind of world would last." (106) Rogat admittedly gives an insightful perspective in his critique of Holmes' personal life. He makes a very credible comparison among Holmes, Adams, and James. However, there are some points that, though pertinent, Rogat fails to discuss. The fact is that Holmes' isolation and detachment could not be compared with the other two because of his civil war experience. Edmund Wilson (107) comments on the complexity of James' style and his not participating in the war. He shows Holmes' decisive style to be attributed to the war. Wilson shows these differences in their writing style. I suggest that Holmes' isolation was affected greatly by the war, and comparing him to Adams and James, both of whom had not experienced this turbulent situation, is simplistic. Adams experienced the war as an observer thousands of miles away in England. James lamented that his wartime role was reduced to "seeing---envying---all from too far off." (108) Ferguson comments on this when he says:

The gentleman officer, like the union itself, is proud of both his endurance and his ultimate survival, success reinforces his own superior sense of place, not to mention a certain contempt for the common life. (109)

What this seems to imply is that Holmes' war experiences gave him an added impetus to detach himself. If one has contempt for common life, it is natural that he remove himself as much as possible from any deep interaction. Saul Touster, after long research and study of war diaries and letters, states that the trauma of war and battle initiates a permanent "disassociation between mind and feeling." (110) The war experience plays a large part in distinguishing Holmes' isolation from that of Adams and James.

Holmes' upbringing played a part in his detachment. As Rogat notes, Holmes seemed to have an unaffectionate relationship with his parents, wife, and siblings. This is not surprising, considering that in Howe's first book he did not comment on any signs of affection between Holmes and his parents while growing up in the early days. He mentions their table conversations, letters to each other, and the frequent discussions between the junior and senior Holmes. But this relationship, rather than being one of physical closeness, tended to be on an intellectual level. It is no surprise that William James called Holmes

"the only fellow here I care anything about," acknowledging that he was "perhaps too exclusively intellectual" and added that he "sees things so easily and clearly and talks so admirably that it is a treat to be with him" (111)

Yet, one cannot help but take note of his charming and sociable nature especially to members of the opposite sex.

Holmes' isolated personality might not have resulted from a developed philosophy, but instead may have been an inevitable consequence of growing up in a household that lacked closeness. His relationships were based on a more intellectual rather than

emotional level. His upbringing seemed to identify and manifest itself in later life. The predisposition was there; all it needed was the historical conditions to accentuate it.

It has been noted by other scholars, notably Ferguson, that the position of a judge requires some amount of detachment from the general society. Ferguson argues that judges are "figures divided." A government of laws involves men and women, who govern in its name. This brings about a separation of image and idea. Judges are "of the law"; they are supposed to place the law first and above all interests, advantages, passions, favors, or circumstances." (112) This, is the difference between judges and other officials:

They alone, as formal guardians of the law, are presumed to keep themselves relatively insulated from the interest and pressure groups, advocates, parties, witnesses, and functionaries who appear before them. (113)

He claims that this unavoidably implies that "a government of laws requires the notion of a disinterested judiciary." (114) He also makes the argument that to claim that a government of law requires a disinterested judiciary is not to say that a disinterested judiciary necessarily is equivalent to such a government. He believes the principles of "judicial self-restraint" and "strict construction" emanate from this general discipline of disinterest in judges and is "thoroughly internalized." This implies some, if not complete, subjectivity:

the judicial figure is unavoidably divided, and judicial wisdom begins with that dynamic. The judge as figure or symbol is a strategy for encompassing situations of conflict and is constructed to resolve or contain them. This strategy of mediation both inflates and disembodies the strategist. Judges are in but not of the world. They are not the individuals that they appear to be. They solidify a culture, to borrow one commentator's terminology, by instinctively rising above it in "the appearance of genuine detachment and restraint (115)

Does Ferguson's description of a detached jurist help explain Holmes' isolation? I think to some extent it does. First, it suggests that Holmes' isolation can be, in part, attributed to his profession as a judge. His profession seemed to require a certain amount of detachment. However, the extent of Holmes' isolation cannot easily be explained by Ferguson's analysis. Secondly, Ferguson's analysis attributes some amount of subjectivity to individual judges. What this suggests is that Holmes' personal background could have played a big role, a premise which Rogat holds. These two positions do not contradict each other. If anything, they compliment each other.

Rogat's critique of Holmes' isolation and its effect on his jurisprudence and law is significant for its completeness and dissenting perspective. However, Rogat fails to take note of certain aspects of Holmes' philosophy that do not accord with his analysis.

Rogat argues that Holmes' unusual distance from life led to his equally unusual definition of his judicial role. (116) He believes that Holmes' concern with law lay only in its technicality. He maintains the position that Holmes' interest in the development of the law was not sustained by any larger interest in improving society, and that he largely ignored the good of society or its interest. (117) This argument, to a great extent, seems logical from Rogat's analysis, but only if one looks at Holmes superficially. One tends to doubt Rogat, however, if he considers cases, such as **Buck v. Bell**. (118) For handing down this opinion, Holmes has been accused of having a "Draconian view" of law. He upheld a 1924 Virginia statute permitting the sterilization of inmates in institutions for the feeble minded. This case shows that Holmes, in a Darwinian way, was concerned about society. Present day judgment deplors Holmes' opinion, but that aside, Holmes' concern for society was clearly displayed. He set a decisive social value of preventing the "deterioration of the race." (119) True, Holmes was concerned with the legal structure, but he did not see it as an end, as Rogat would have us believe. He claims that Holmes' interest in society came into focus only when it filtered through his judicial lens. Holmes seemed to believe that through the improvement in law, society could be made better. A Darwinist, he had definite views on society which seemed to filter, as in the **Buck** case, into society.

What Holmes can be blamed for, a point which Rogat aptly makes, is the fact that his disinterest and detachment led to a propensity to brush off important details through his formulation of compendious solutions (120) For example, in the **Buck** case, Holmes does not consider the status of the woman: was she a full human being or half a human being? Whichever one she was, did she fall outside the realm of constitutional protection? Holmes says no, but then goes on to strip her of her rights.

Rogat has dealt with problems of Holmes' deference to the dominant forces in society. He refers to Holmes' statement that "if my fellow citizens want to go to hell, I will help them" as a failing. Rogat makes an effective argument concerning this. On this point, one cannot argue with Rogat much--but it is important to keep in mind that when it came to issues of free speech, Holmes was a completely different person. Comparing his decisions in this area to, say, commerce cases shows a complete turn around. For example, Holmes held a judicial self-restraint stance in commerce cases (acquiesced to the legislature, the dominant power) while in the area of free speech he tended to be a judicial activist and very vocal in protecting free speech. Rogat's argument tends not to put this into perspective.

It will seem to be reasonable that a detached person, such as Holmes, would tend to look at society from outside, observing the players. However, as a Darwinist, Holmes did not want to upset the natural order by imposing his opinions in opposition to the Darwinian forces. In the **Lochner** case, Holmes says, "[M]y agreement or disagreement has nothing to do with the fight of a majority to embody their opinion in law." One can argue against Holmes that helping the dominant group involves an intrusion into the nature of things. But then Holmes was not only a Darwinist but also a positivist. Holmes believes the passage of social legislation is a mistake but he did not deem it his job to correct it. He also seems to find it futile to counter the legislature. Howe quotes Holmes as saying,

"[I]f--- the majority is strong enough to have clear power to enforce its will, and intends to do so, the courts must yield---because the foundation of sovereignty is power---." (121) Rogat argues that "Holmes believed that government should reflect the desires of the dominant power, no matter how unwise those desires were." (122)

Rogat has given significant added insight into the Holmesian enigma. Through his use of background material and a wide variety of sources, he offers a credible critique. Holmes' life is a paradox, Rogat states:

Generally indifferent to civil liberties interest, Holmes is regarded as their champion. Unconcerned with contemporary realities, Holmes inspired a school of legal "realists." (123)

Holmes is a figure who defies understanding and evaluations in any definitive manner - partly by his own design. This situation evidences itself in the area of free speech more than any other.

The Question of Free Speech

Scholars interested in the life and career of Holmes always find it hard to decipher his judicial philosophy. This confusion lies mainly in the difference in approach between his general, positivist judicial self-restraint, legal philosophy and his more liberal free speech stance. It is apparent that his philosophy of detached deference to the legislature in areas such as economics was significantly different from the speech protective stance that he took in First Amendment cases.

Holmes first got the opportunity to deal with the issue of free speech in 1919. His majority opinion in **Schenck v. United States** (124) not only marked his first major treatment of the issue but, as David Rabban states (125), it marked "the starting point for virtually all legal analysis of First Amendment adjudication in the Supreme Court." (126)

The background to these cases, starting with **Schenck**, lies in the Espionage Act of 1917. Congress declared war against Germany on April 6, 1917. To ensure the smooth conduct of war, especially in recruiting and conscription, the third section of Title I of the Espionage Act (127) was passed on June 15, 1917. This act established three offenses:

(1)Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies (2) and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, (3) or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of, the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years or both.

On May 16, 1918, an amendment was added, which came to be called the Sedition Act (128) It inserted "attempted to obstruct" in the third of the original offenses, and added nine new offenses. The cases with which Holmes dealt, **Schenck, Frohwerk v. United States** (129) and **Debs v. United States** were based on the meaning of the three original offenses mentioned above. The only exceptions to this list is **Abrams v. United States** (130).

Prior to the Supreme Court taking on the issue of free speech, Judge Learned Hand in his decision in **Masses Publishing Co. v. Patten** (131) offered an approach to the seditious speech problem. This case is important in so far as it offers an alternative to Holmes' doctrine later in the **Schenck** case. Indeed, some scholars have argued that the **Masses** case was a precursor of Holmes' later opinions.

The **Masses** opinion by Hand, given two years before the Supreme Court grappled with the speech issue, held that a magazine, **The Masses**, should not be banned from the mails under the Espionage Act. He claimed that since the portions of **The Masses** that are selected as offensive by the postmaster did not actually advocate violence, he had no right to suppress the magazine.

Hand goes on to stress that not all language was exempt from punishment under the guise of free speech:

words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation law of cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. (132)

The prevalent view prior to the **Masses** case made speech punishable on the grounds of evaluating its likelihood to cause any forbidden consequences. Suppression of speech was authorized based on the consequences and the ability to show its closeness to illegal action (133) One should take note of the similarities of this prevailing view and Holmes' clear and present danger test. Learned Hand in the **Masses** case offered an alternate approach to the problem. According to his view, criminality or illegality under the Espionage Act should be determined through a strict, "hard", "objective" test, with a focus on the speaker's words: if these words were found to be inciteful to illegal action, they should and could then be curtailed.

Hand's contribution through his incitement test is noteworthy, even though it was disregarded after the clear and present danger test was formulated. It offered one of the first treatments of the issue of free speech. Prior to it and Holmes' string of opinions, the Supreme Court had hardly made any mention of the issue. And any that was made embraced "the Blackstonian view that freedom of expression was protected solely against prior restraint" (134)

How then does this relate to Holmes' free speech approach? Gunther argues that Hand in the **Masses** decision brought out an effective judicial role by focusing on the speaker's

words, not on their probable consequences. He believes that this was an especially speech protective interpretation of the Espionage Act. This contrasted with the lack of sensitivity that marked Holmes' earlier confrontation with the same issues in 1919. Gunther believes that "the values emphasized by Hand in **Masses** inspired his potentially successful appeals to Holmes before **Abrams**---" (135). This poses the question as to why Holmes waited till the **Abrams** opinion to "potentially" agree with Hand.

The difference between Hand's test and Holmes' clear and present danger standard lay in their positioning of emphasis. The clear and present danger formulation was contained in the **Schenck** passage:

The question in every case is 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 substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (136)

Hand's emphasis was more on the meaning of the words, "Direct incitement, direct advocacy of illegal action." It was a focus on content, rather than effect. Gunther argues that these were standards that would have protected much of the unpopular speech of the time, those that were especially condemned by the prevailing clear and present danger doctrine.

From this perspective, Hand's objective literal standard, serves to protect free speech more than Holmes' test. However, as Holmes' states, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic" (137). In effect, his argument is not whether speech is being protected more by one person or the other but is it, within the context advocated, likely to effect harm.

For example, in shouting fire in a theater, it is arguable whether under Hand's objective test anything could be found wrong with the statement. However, with Holmes' clear and present danger test, it is more likely that what is looked at is not the words alone per se but their harmful effect--whether they were proximate to the harm.

How effective was the **Masses** case in influencing Holmes' opinions in **Schenck** and its related cases? Gunther notes that Hand and Holmes confronted the issue on a train ride from New York to Boston one summer on June 19, 1918. (138) On this ride, it is alleged that they talked about the majority's right to suppress dissent. Apparently at this meeting, Hand admits in a letter to Holmes that he gave up rather more easily than he should have.(139) His letter was more to restate his position rather than anything else.

Gunther's argument was that between the **Masses** and **Schenck** opinions, Holmes and Hand's views were completely different, that Hand was a protector of the dissenter while Holmes was not. Gunther finds this gap in both men's philosophy surprising, considering what he believed to be a similarity in outlook in most respects. He believes both men were, or at least appeared to be, skeptics and that they both doubted the effectiveness as well as the legitimacy of judicial restraints on the majority. For example, Gunther

compares their similarity in opposing the economic due process doctrines. (140) What Gunther argues, however, is that Hand was able to derive a speech protective stance "more than a year before Holmes arrived at a parallel conclusion in his **Abrams** dissent" (141).

From the correspondence between Hand and Holmes, it seems hard to state conclusively the influence of Hand over Holmes in his opinions. Gunther attempts to connect words from Hand's letter to Holmes and their striking similar[ity] "to Holmes" **Abrams** dissent" to further his argument of an acquiescence' to Hand's view. Hand in his letter says,

and here we may differ, --- that you may not cut off heads---because the victims insist upon saying things which look against provisional Hypothesis Number Twenty-Six, the verification of which to date may be found in its proper place in the Card Catalogue. Generally, I insist, you must allow the possibility that if the heads are spared, other cards may be added under that sub-title which will have, perhaps, an important modification. (142)

Gunther states that this statement seems to bear a resemblance to Holmes' **Abrams** dissent:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition---.(143)

Even though on the surface these two statements seem similar, they are to me far from identical. Hand argues for the protection of free speech in his letter above, basing his premise on its likely good for society. On the other hand, Holmes' argument seems to take on a Darwinian form. He sees a struggle, in which "the best test of truth is the power of the thought to get itself accepted in the competition ---." (144). Whereas Hand seems to suggest a compliment of ideas and additions to existing ideas, Holmes professes to await the demise of the weaker idea. But even in doing so, he still maintains his majoritarian beliefs. He still believes that free speech "stands in differently than freedom from vaccination" (145) Holmes' opinion might have sounded libertarian but was definitely still majoritarian.

The issue of free speech had not actually been given any authoritative and concise treatment by the court until Holmes' opinion in the **Schenck** case. Zechariah Chafee Jr. states:

The concept of freedom of speech [in Holmes' opinion in the **Schenck** case] received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution. (146)

But even though this was the first important time the Supreme Court had taken on the issue of free Speech, it was not the first time Holmes' philosophy on the general issue was

revealed. Holmes did not hold any sympathy for the "agitator". He talks about approving skepticism, "though I regret irreverence" (147), showing through his own utterance his general attitude. This is important, if one is to understand that Holmes' basic philosophy never went through a major transformation but only took on a mellow form. "Indeed, for a thoroughly civilized man, which Holmes was in the best sense of the word, he shows a remarkable absence of sympathy or compassion for the sufferings and faults of mankind." (148) This statement by Cohen is relevant in understanding Holmes in the areas of free speech. It is my argument that even at the advent of his "liberalism" in the **Abrams** case, Holmes was still in essence a dispassionate individual.

Holmes states at the turn of the century, "what proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community - that is conformity to the wishes of the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way."(149) One can detect these tones in Holmes earlier opinions, when he was on the Supreme Judicial Court of Massachusetts. These cases were not precisely free speech cases or were not viewed from the same perspective, but I believe they give a general feel for Holmes' thought on the issue. For example, his opinion in **Commonwealth v. Davis** (150) shows views that were not especially liberal. In this case, Holmes upheld a city ordinance that made it illegal to speak on the Boston Common, without a permit from the mayor. Holmes took a narrow view, and did not see the issue as one of free speech, but rather as an ordinance "directed towards the modes in which Boston Common may be used." It is clearly evident that Holmes did not want to deal with the problem of free speech.

Holmes seems to have maintained this upon joining the Supreme Court. He does not deal with cases that would seem to fall under free speech with any sort of well defined, ideologically coherent position. to free speech had not changed. In **Patterson v. Colorado** (151), Holmes showed that his attitude had not changed. Even though this case was dismissed for want of jurisdiction, Holmes, in his result, announced an opinion which seemed to be in conformance with the views of many of the time. He saw the constitutional guarantee of free speech to be based on the curtailment of any prior restraint. He stated:

the main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments" and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare---. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend to the false as to the true. (152)

Blackstone maintained this same view on the matter. Blackstone held the view that "the liberty of the press consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published" (153). Holmes did not however, go back to disclaim this view, even though in **Schenck** and subsequent Cases he seems to have deviated from it. (154) In his opinion in the **Schenck** case, he writes:

It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in **Patterson v. Colorado** (155).

This point is important, even if for the sole purpose that it marked a sort of revisionism in Holmes. Whatever it is, the Blackstonian views that Holmes held were put to question. He questioned the view that freedom of the press protects only against previous restraint. It must be kept in mind, nevertheless, that by putting Blackstone off to second place, he did not also include his belief in the right of the state to institute laws. In **Fox v. Washington** (156), Holmes wrote the opinion upholding a state law, which made it illegal to advocate the commission of a crime. The statute made it unlawful to publish and distribute material that was deemed as "advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime." In this opinion, Holmes never makes mention of a degree of danger or whether its proximity had any significance. He implies that incitement in and of itself was sufficient without any regard to its actual consequence. (157)

The **Fox** opinion which was handed down four years prior to the **Schenck** decision, is of special importance because it grew out of the prosecution of a defendant for the circulation of documents. However, in this opinion Holmes made no mention of the extent of damage that would result from the publication. It was implied, therefore, "that incitement to crime or encouragement thereof is sufficient, without reference to its actual consequences." (158)

The **Schenck** case has attained seminal importance due to its premiere position with regard to free speech and national security. It is, thus, of importance that the indictment as described by Holmes is quoted in full:

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Streets chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "if you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the Power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold blooded

ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." (159)

Based on this evidence, the Court upheld the conviction of Schenck, with the majority opinion being handed down by Holmes. It is in this opinion that Holmes lays down the clear and present danger test. But a careful look at the paragraph that lays out this test will reveal that Holmes was not concerned with coming up with a creative new test of constitutionality. This becomes even clearer when one considers the fact that in the two cases decided a few weeks later, in which Holmes wrote opinions upholding convictions, he does not refer to this test or use it explicitly as a basis for his opinions. Holmes wrote in **Schenck**:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force The question in every case is 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 to prevent. It is a question of proximity and degree. 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. (160)

It is clearly evident that Holmes came out with this test for its practical nature. He seeks to curtail free speech for the good of the community as a whole. But at the same time, this seems uncharacteristic of a man who gladly professes to expedite humanity's demise, if it so wishes. It is this paradox that makes it more probable that there were other reasons that contributed to Holmes' not-too-sympathetic attitude towards the anti war agitators in his first three free speech cases. It is most probable that his own war time experience had made him partial to protecting the war effort ("...so long as men fight..."). This attitude can be understood, especially from a man who says of war:

In this snug, over-safe corner of the world we need it, that we may realize that our comfortable routine is no eternal necessity of things, but merely a little space of calm in the midst of the tempestuous untamed streaming of the world..." (161)

There can be little doubt of Holmes' pro war and Darwinist impulse, especially when one considers his statement in "A Soldier's Faith": "war, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine". There seems to be discrepancies that exist between Holmes' clear and present danger test and his opinions. To understand this better, it is pertinent that we look at the words of his test

and those of the opinions. But we cannot limit ourselves to the text, but also must look to the circumstances surrounding the different cases. Let us take a look at the crux of his standard. It posits some sort of clear and present danger that will (not "might") bring about "substantive evil". The emphasis is on the "proximity and degree" of that offense. Even though some may question the meaning of such words as "circumstance," and the actual meaning of how proximate the danger should be before it can be considered a substantive evil (or for that matter what a substantive evil is), these are not of great concern here. What is of concern is whether (1) the crimes of the first three cases were that different from those of the second string of cases to warrant his evident change and (2) a clear and present danger was presented in the first string of cases that was non-existent in his second string of cases, and if not Why the sudden change in Holmes' opinions.

It appears that apart from the content and the fact of their publication, there was no evidence as to the possible or probable effect of the printed matter in the Schenck case. (162) The question that arises, then, is this: "Whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law." (163) Evidently, Holmes considered words as persuasive triggers and in these circumstances potential triggers, of unlawful action.

Holmes wrote the majority opinions for both the **Frohwerk** and **Debs**. (164) Frohwerk, also indicted for conspiracy to violate the Espionage Act, was accused of circulating printed material that was critical of America's war effort. He denounced the conscription. In upholding the conviction in his opinion, Holmes states:

be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country's at war....But we must take the case on record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent that paper out. (165)

The **Debs** case, the last of the string of cases that Holmes writes a majority opinion on, offers insights that I believe might help us understand the change that came about. Holmes wrote to Herbert Croly on May 12, 1919

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, especially when the fighting was over and I think it quite possible that if I had been on the jury I should have been for acquittal but I cannot doubt that there was evidence warranting a conviction on the disputed issues of the fact. Moreover, I think that clauses under consideration not only were constitutional but were proper enough while the war was on. 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. (166)

In a letter to Pollock on April 5, 1919, Holmes expresses some displeasure at letters he was receiving that were critical of the conviction of Debs. There is evidence that Holmes was disturbed by this professional criticism. I would suggest that the onslaught of criticism that came after the trilogy of cases played a substantial role in making Holmes take a more speech protective position starting from the **Abrams** decision until his retirement twelve years later.

Holmes' desire for recognition and achievement has been noted. However during his early tenure on the court, one senses the Holmes is frustrated at the lack of appreciation of his work. It seems from his letters that he felt his reputation was not commensurate with his talents. After befriending Felix Frankfurter in 1912, Holmes came into contact with members of Frankfurter's circle, amongst whom were Harold Laski, Walter Lippmann, Herbert Croly, Learned Hand, Morris Cohen, and Zechariah Chas. White (167) believes there were three distinguishing features of this group that intrigued Holmes. One was that they were men of the twentieth century, modern, progressive, religious skeptics (something Holmes could identify with), and generally men of the future. Two, they were enthusiasts about Holmes as a jurist, and therefore gave him the attention he coveted. Three, the most important thing they did was to provide him with a rationale for continuing in active service on the court. For example, before meeting this group, Holmes had written Pollock expressing his desire to retire once he became eligible to do so on full pension, but after coming into contact with his young friends, he saw no reason to leave the Court. (168)

Holmes' acquaintances had progressive ideas, ideas which Holmes did not hold. Yet Holmes' interest in gaining recognition was somehow tied to how people assessed his work. It is therefore, highly probable that he started to reconsider his orthodox position. Consider, in this light, **Toledo Newspaper Co. v United States**, (169) where a majority of the Court upheld a contempt citation on a newspaper for making remarks critical of the Court, and Holmes dissented. It is most probable that the storm of criticism that came after the **Debs** case served to veer him to a more speech protective stance.

The opinion of Holmes in the **Abrams** case is not just a speech protective opinion but a philosophical "raison de etre" of free speech. In what has been described as "the greatest utterance on intellectual freedom by an American, ranking in the English tongue with Milton and Mill." (170) Holmes wrote:

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. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says he has squared a circle, or

that you do not care whole-heartedly for the result, or that you doubt either your power or your premise. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation 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 that we should be eternally vigilant against attempts to check expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exceptions to the sweeping command, "Congress shall make no law... abridging the freedom of speech." (171)

The philosophical tone of this opinion is indisputable. Reading it out of context would compel one to think it is taken from a philosophical text. Holmes, apart from being a great jurist, was also a great writer. However, the tone of this opinion sets one to think about Holmes' motive. How is it possible for one to come from an almost adversarial role against speech protection to writing an opinion that the most fanatic of liberals would have been proud of.? From the background of Holmes, one can offer only an inconclusive thought. It seems Holmes wanted to leave a great historical document behind, something that would serve as a memorial. This premise is supported by the fact that he craved a reputation of greatness. He was highly ambitious and wanted to achieve a name for himself in the area of free speech. Another explanation would be that, as he himself states, "when men have realized that time has upset many fighting faiths..." they might believe that truth will come out of a free trade in ideas. Did Holmes in his old age abandon some of his long held beliefs? As one reads this opinion, there is a sense that Holmes still to a large extent is the same. There are Darwinian undertones, as he transfers physical survival of the fittest to 'free trade of ideas' and the competition of the marketplace of ideas. There is still a pervasive sense of struggle, an indication that this is still essentially Holmes.

And still this does not deviate from the same clear and present danger test that he adopted in the **Schenck** case. He still refers to the emergency that makes it immediate (notice its resemblance to proximate) and creates a danger that would justify a curtailment of free speech. Was Holmes making this expansive gesture of free speech liberalism purposely because the war was over and he could now afford to? Or was this a genuine turn around? This question cannot be waved off, for it is critical to understanding that if Holmes' ideals drawn out in this opinion were moved back, then he should, and could not have justified the opinions that were handed down from **Schenck** through **Debs**.

All these questions make Holmes appear an enigma. One thing for certain, however, is that by design, Holmes would have preferred it this way.

Conclusion

Searching for the essence of Holmes is a gargantuan and almost impossible task. There is an elusiveness about his life and philosophy that defies immediate understanding. It is as if just when you thought you had him down and finally start to find a pattern he immediately slips away.

Certainly the large body of literature that is available and continues to be written attest to his importance even today. In more contemporary times, interest in Holmes lies more about his character and philosophy. These are the hardest things to grasp. He seems to have taking extra care in leaving no easy clues. Like a mystery, Holmes' elusiveness entices many. The pursuit to find out more about him sometimes becomes frustrating. One can conclude that the uniqueness of the man rests with his complex philosophy.

This complexity was borne of Holmes' own conflicting worlds. His competitive relationship with his father, his seemingly lack of affection and at the same time more than cordial relations with the ladies, his abhorrence of what he saw on the battle field and his love and admiration for soldiering, his search for individuality against his very conservative background, last but most important the struggle between law and his philosophical background.

One must realize that Holmes was a philosopher before a lawyer. "Holmes remained divided in mind. The devotion that law required would oblige him to sacrifice his hopes for success in literature and philosophy". (172) Holmes never left his philosophical background and for that matter his literature background, considering his writing style. He seem to walk a fine line between law and philosophy. Philosophy, however, made Holmes great. His strong Philosophical bent and the fine line he had to walk it and law might be the key to hi s "tantalizing elusiveness." A philosophy that unbeknownst to Holmes has assured a continuing interest in him and a memorable place in history.

Endnotes

1. Yosai Rogat, "Mr Justice Holmes: Some Modem Views," **The University of Chicago Law Review**, 31:213, Winter 1964. This review was prompted by Mark DeWolfe Howe's second Biography of Justice Oliver Wendell Holmes

2 Ibid., p. 214.

3 Samuel J. Konefsky, **The Legacy of Holmes and Brandeis** (New York: Da Capo Press, 1974), p. 65. The full quote is as follows, "So persistent has been the tendency to picture Holmes as a completely 'harmonious and integrated personality'- that few have recognized the contradictions of his complex mind." The phrase "harmonious and integrated personality" was stated by Walter Wheeler Cook in his article, "Oliver Wendell Holmes: Scientist," 21 **Amer. Bar Assoc. J.** 211 (1935).

4 Daniel J. Boorstin, "The Elusiveness of Mr. Justice Holmes," **The New England Quarterly** 14:478 (Sept., 1941), p. 480. Boorstin argues that Holmes' New England conservative background served as a tugging force against his individual liberalism. A predicament that he believes was resolved in Holmes when it "took the form of a faith in conflict, in the process of and struggle of life."

5 Sir Frederick Pollock, 51 **Law Quar. Rev.** 263 (1935).

6 See works by biographer Mark DeWolfe Howe, **Justice Holmes: The Proving Years** (Cambridge, 1963); **Justice Holmes; The Shaping Years** (Cambridge, 1957).

7 Sheldon M. Novick, **Honorable Justice: The Life of Oliver Wendell Holmes**, 1st ed. (Boston: Little, Brown, c. 1989).

8 See Howe, op. cit.

9 See Rogat, op. cit. and Richard Posner, **The Problems of Jurisprudence**, (Cambridge, 1990).

10 Oliver Wendell Holmes, **The Common Law**, ed. Mark DeWolfe Howe, (Cambridge, 1963).

11 Oliver Wendell Holmes, "The Path of the Law", in **Collected Legal Papers** (New York, 1920).

12 Max Lemer, **The Mind and Faith of Justice Holmes**; (Boston, 1938).

13 **The Occasional Speeches of Justice Oliver Wendell Holmes**; Compiled by Mark Dewolfe Howe (Cambridge, Mass., 1962).

14 For example, Richard Posner, and Alfred Lief **The Dissenting opinions of Mr. Justice Holmes**, ed. Alfred Lief (New York, 1929).

15 See Samuel J. Konefsky, **The Legacy of Holmes and Brandeis** (New York, 1974), p. 66. Konefsky discusses Holmes apparent reactionary bent on the bench against his conservative background, arguing that the advent of Brandeis on the court continued to further evidence the resolution of these "contradictory impulses".

16 Rogat, op. cit., p. 213.

17 Holmes, Oliver Wendell, [Sr.], **The Collected Works of Oliver Wendell Holmes** (Boston, 1891).

18 Oliver Wendell Holmes to Morris R. Cohen, February 5, 1919, **Holmes-Cohen Letters** 313, 321. Holmes indicates here that his scientific disposition was influenced by Emerson and Ruskin. It also seemed to be a pre-Darwinian change that was in the air-- see Novick, op. cit. p. 412.

19 Holmes, "The Path of the Law", 10 **Harvard Law Review** 457 (1897).

20 Novick, op. cit., p. 13. Also see, e.g., E.W. Emerson, Oliver Wendell Holms, in **Early Years of The Saturday Club** 143, 156 (1918); M.A. DeW. Howe, "Holmes of The Breakfast Table" 96 (1939).

21 Howe, **Holmes: The Shaping Years, 1841-1870** (Cambridge, 1963). p. 19.

22 **Holmes-Laski Letters** (Cambridge, 1953), vol. II, p. 893, quoted in I Howe, p.65.

23 Loc. cit.

24 Autographed letter, April 16, 1876, transmitting his "Primitive Notions in Modern Law" (Houghton Library, Harvard University), quoted in **1 Howe**, op. cit., p. 203.

25 Quoted in **1 Howe**, op. cit., p. 48.

26 **1 Howe**, op. cit., p. 257.

27 Autographed letter to Clara Sherwood Stevens, July 26, 1914 (Harvard Law School), quoted in **1 Howe**, *ibid.*, p. 19.

28 This memorandum preserved by Oliver Wendell Holmes in a scrapbook, now at the Houghton Library, is ascribed to Dr. Holmes, by Eleanore M. Tilton, **Amiable Autocrat: A Biography of Dr. Oliver Wendell Holmes** (New York, 1947), p. 162. Quoted in **1 Howe**, op. cit., p. 5.

29 Sheldon Novick, op. cit., p. 22, quoting S. E. Momson, "Three Centuries of Harvard" 307 (1936). This is a quote from an undergraduate of about this time.

30 Novick, op. cit., p. 24, quoting Oliver Wendell Holmes letter to Miss [Lucy] Hale, April 24, 1858, OWH Papers, Harvard Law School Library, B 52, "Miscellany."

31 Holmes, "Books," 4 **Harvard Magazine**. 408 (December, 1858).

32 Quoted in **1 Howe**, op. cit., p. 54.

33 Lerner, p. xxiii.

34. [left blank in print original]

35 See Holmes-Pollock Letters, II, page 36. Quoted in I Howe, p. 94.

36 Mark DeWolfe Howe, ed., **Touched with Fire**. pp. 13-14.

37 Quoted I Howe, p 115.

38 Loc. cit.

39 Oliver Wendell Holmes, "The Soldier's Faith," An address delivered on Memorial Day, May 30, 1895, at a meeting called by the graduating class of Harvard University.

40 Oliver Wendell Holmes to his mother, Amelia Lee (Jackson) Holmes, June 7, 1864, **Touched with Fire**, pp. 141-143.

41 Novick, op. cit., p. 78 (Also see I Howe, p. 15, 302, n. 43).

42 Oliver Wendell Holmes to his parents, May 30, 1864, **Touched with Fire**. p. 135.

43 Howe, **Holmes: The Shaping, Years 1841-1870** and **Holmes: The Promising Years 1870-1882**, Cambridge: Harvard University Press, 1963.

44 Rogat, p. 214.

45 A statement by Morris Cohen, quoted by Felix Cohen in the forward to the Holmes-Cohen correspondence, 9J of *The History of Ideas* 3 (1948).

46 **Schenck v. U.S.**, 249 U.S. 47, (1911).

47 See Howe's ed., op. cit., p. 56.

48 **Commonwealth v. Kennedy**, 170 Mass., N.E. 55 (1897).

49 Rogat, p. 216.

50 Green, "Liberty Under the Fourteen Amendment", 27 **Wash. Univ. Law Rev.** 50, 1942.

51 See Hall, "The Substantive Law of Crimes, 1887-1936", 50 **Harv. L. Rev.** 616, 1937.

52 **Dennis v. U.S.**. 341 U.S. 494, 1951.

53 **Gitlow v. U.S.**. 268 U.S. 652, 1925.

54 See White, "The Human Dimension", **Cal. L. Rev.**. Vol. 80, 391, 1992.

55 Posner, **The Problems of Jurisprudence**. p. 18.

56 White, op. cit. p. 398.

57 **Robertson v. Baldwin**. U.S. 275, 1897.

58 *ibid.*, p. 281.

59 **Davis v. Beacon**, 133 U.S. 333, 1890.

60 **Turner v. Williams**, 194 U.S. 279, 1904.

61 William Blackstone, **Commentaries**.

62 Holmes, "The Path of the Law" p.

63 In this sense, Posner means open-minded, no-nonsense inquiry for more effective action.

64 Posner, op. cit., p. 21.

65 Ronald Dworkin, **A Matter of Principle**, 1985, and **Laws Empire**, 1986. He is not the first person though to realize this fact.

66 See Henry M. Hart Sr. and Albert Sacks, **The Legal Process: Basic Problems in the Making and Application of Law**, 1958.

67 Posner, op. cit., p. 21.

68 Posner, op. cit., p. 25.

69 *Ibid*, p.27.

70 **Commonwealth v. Pierce**, 138 Mass., 165, 178 (1884).

71 Robert A. Ferguson, "Holmes and the Judicial Figure", **Univ. of Chi. L. Rev.** 55: 506, 1988.

72 *Ibid*. p. 259.

73 Holmes, "Path of the Law", p. 69.

74 Taking from Ferguson, op. cit., p. 258. Quotations are from 'The Path of the Law', p.186, 169, 170-171, respectively.

75 From Holmes' "Collected Legal Papers", p. 292, 296.

76 Ferguson, op. cit. p. 528.

77 Taking from Howe, **The Proving Years**, p. 156. As stated by Holmes in the **Common Law**.

78 Howe, **The Shaping Years**. p. 273.

79 Howe, **The Proving Years**. P. 137, 203, 231.

80 Ibid, p. 67-68, 71-72, 246. This is a point that Howe makes in regard to Holmes' almost obsessive drive for success.

81 Ibid. p. 256.

82 Rogat, op. cit. p. 228.

83 Howe, **The Shaping Years**. p. 8.

84 Howe, **The Proving Years**. p. 9.

85 ibid. p. 255.

86 Rogat, op. cit. p. 228.

87 Howe, **The Proving Years**. p. 26.

88 Matthiessen, **Henry James: The Major Phase**. 1963.

89 Rogat, op. cit., p. 230.

90 Ibid. p. 230.

91 Ibid. p. 231.

92 Loc. cit.

93 Taking from Rogat p. 231; quoted from Woodward, "The Burden of Southern History" 117 (1960).

94 Rogat, op. cit., p. 232.

95 Loc. cit.

96 Howe, **The Proving Years**, p. 9.

97 Rogat, op. cit., p. 233.

98 Ibid. p. 231.

99 Ibid. p. 237.

100 Ibid. p. 245.

101 Loc. cit.

102 Quoted in Bickel, **The Unpublished Opinions of Mr. Justice Brandeis**, 222 (1957) Taking from Rogat p. 246.

103 Holmes-Laski letters, p. 249.

104 Rogat, op. cit. p. 251.

105 Holmes-Laski letters 1144.

106 Rogat, op. cit., p. 255.

107 Edmund Wilson, **Patriotic Gore**, 1962.

108 Edel, **Henry James: The Untried Years**, p. 188 (1962).

109 Ferguson, "Holmes and the Judicial Figure", **Univ. of Chicago L. Rev.**, 55: 506, p. 523 (1988).

110 Loc. cit.

111 Howe, p. 201.

112 Ferguson, p. 512.

113 Ibid. p. 513.

114 Loc. cit.

115 Ibid., p. 515.

116 Rogat, op. cit. p. 243.

117 Ibid, p. 245.

118 **Buck v. Bell**, 274, U.S. 200 (1927).

119 Max Lerner, **The Mind and Faith of Justice Oliver Wendell Holmes**, p. 356.

120 Rogat, p. 245.

121 Howe, **The Proving Years**. p. 40-41.

122 Rogat, p. 254.

123 Rogat, p. 256

124 **Schenck v. U.S.**. 249 U.S. 47 (1919).

125 David Rabban, "The First Amendment in Its Forgotten Years", **Yale Law Journal**. Vol. 90: 514, 1951.

126 Ibid. p. 580.

127 See the Espionage Act, C. 30, Title I, 3. Also see Zechariah Chafee Jr., **Freedom of Speech**. 1920. He discusses in depth the Espionage Act of 1971.

128 See the Sedition Act, C. 75.31, U.S. Comp. Stat; 1918, 10210c.

129 **Frohwerk v. U.S.**. 249 U.S. 204 (1919).

130 **Abrams v. U.S.**. 250 U.S. 616, 624 (1919).

131 **Masses Publishing Co. v. Patten**, 244 F. 535 S.D.N.Y., rev'd 246 F. 24 (2d cir. 1917).

132 Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 2, 1921, on file in the Chafee Papers. For this particular quote see 244 F. at 540.

133 See Gunther, "Learned Hand and The Origins of First Amendment Doctrine", p. 714.

134 Gunther, p. 724. Also see Holmes' opinion for the court in **Patterson v. Colorado**, (205 U.S. 454, 462 (1907).

135 Gunther, p. 726.

136 249 U.S. at 52.

137 See, 249 U.S. 47 (1919).

138 Gunther, op. cit., describes this meeting on p. 732.

139 A letter from Learned Hand to Holmes, June 22, 1918, on file in Holmes' papers, box 43, folder 30, Harvard Law Library.

140 Gunther, p. 733.

141 Loc. cit.

142 Letter from Learned Hand to Holmes, June 22, 1918, on file in the Holmes papers, box 43, folder 30, Harvard Law Library.

143 250, U.S. 616, 630 (1919).

144 Loc.cit., part of Holmes' dissenting opinion in the **Abrams** case.

145 Letter from Holmes to Learned Hand, June 24, 1918. On file in the Hand papers, Box 103, Folder 24, Harvard Law Library.

146 Zechariah Chafee Jr., **Free Speech in the United States**. Cambridge: Harvard University Press (1941), p. 82.

147 Holmes-Laski letters II 1066.

148 Morris R. Cohen, **Faith of a Liberal**. p. 29.

149 Holmes, Collected Legal Papers, p. 258.

150 **Commonwealth v. Davis** 162 Mass. 510 (1895).

151 205 U.S 454 (1907).

152 Ibid. at 462.

153 Quoted in Chafee, p. 9.

154 For an account of this see, Samuel Konefsky, **The Legacy of Holmes and Brandeis**. The MacMillan Company, 1956.

155 249, U.S. 47, at 51-52 (1919).

156 **Fox v. Washington**, 236 U.S. 273 (1915).

157 See Konefsky, op. cit., p. 189; he quotes Professor Corwin, who was one of the first to call attention to this fact.

158 Corwin, p. 327.

159 249, U.S. 47, at 50-51.

160 249 U.S. 47, at 52.

161 Quoted in Lerner, p. 23

162 This is a point that was stated by Corwin.

163 Chafee, op. cit. p. 23.

164 See **Frohwek v. U.S.** 249 U.S. 204 (1919), and **Debs V. U.S.** 211 (1919).

165 249 U.S. 204, at 208-9.

166 Holmes-Laski letters, p. 203-4.

167 G. Edward White, "The Human Dimension", Cal. L. Rev. Vol. 80: 391, p. 410.

168 Holmes-Pollock Letters, 1875-1932, at 202-5, Dec. 15, 1912.

169 **Toledo Newspaper Co. v. U.S.**, 247 U.S. 402, 422 (1918).

170 Lerner, op. cit., p. 306.

171 250 U.S. 616, at 630-1.

172 Oliver Wendell Holmes to Henry Brownell, Oct 1865, OWH Papers, Harvard Law School. see also I Howe p. 195. Quoted in Novick, op. cit., p. 115.

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