

**PROVE YOURSELVES: OLIVER WENDELL HOLMES
AND THE OBSESSIONS OF MANLINESS**

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I. INTRODUCTION

Practically a convention of legal scholarship, Oliver Wendell Holmes, Jr. has been praised as America’s greatest judge.¹ There are several reasons for

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¹ Benjamin N. Cardozo, the famed Associate Justice of the Supreme Court who would succeed Holmes, called his predecessor “the great overlord of the law and its philosophy.” Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931), reprinted in MR. JUSTICE HOLMES 1, 20 (Felix Frankfurter ed., 1931). Cardozo also said that Holmes “is today for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence.” *Id.* at 684. Still more, one of our great extant judges—Richard A. Posner—has called Holmes “the most illustrious figure in the history of American law.” Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES* ix (Richard A. Posner ed., 1992).

So too Charles Wyzanski, the federal judge, remarked that Holmes is “like the Winged Victory of Samothrace he is the summit of hundreds of years of civilization[.]” Charles E. Wyzanski, Jr., *The Democracy of Justice Oliver Wendell Holmes*, 7 VAND. L. REV. 311, 323

the honorific but chief among them is the acclaim which Holmes has received as the person who did more than anyone else to breathe life into the Constitution's venerable right of speech.² Ahead of his time by decades, Holmes had penned dissenting opinions which would powerfully influence future generations of jurists and lawyers.³ It is indeed *de rigueur* among professors of constitutional law and federal judges to suggest that the scope of the First Amendment owes its conspicuous expansion over the last 60 or so

(1954). Professor Thomas C. Grey at Stanford Law School has called Holmes “the great oracle of American legal thought[.]” Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989). The prominent historian Henry Steele Commager dubbed Holmes “the most distinguished mind of its time[.]” HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S*, at 382 (1950). Holmes was also the only American judge to have been awarded honorary degrees from Harvard, Oxford, and Yale. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 486 (1993). So too was Holmes “the only [J]justice of the Supreme Court to have been the subject of a best-selling historical novel, a hit Broadway play, and a motion picture.” ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 15 (2000). It is worth noting that Holmes's most prominent contemporary critic (hardly a votary, mind you)—Professor Albert Alschuler—has said that Holmes, “more than any other individual, [has] shaped the law of the twentieth century.” *Id.* at 1. A testament to his stature as an American icon, a Michigan law professor remarked, “The automobile industry has Henry Ford; jazz, Louis Armstrong; Hollywood, Marilyn Monroe; and baseball, Babe Ruth. American law has Oliver Wendell Holmes.” Mathias Reimann, *Why Holmes?*, 88 MICH. L. REV. 1908, 1912 (1990).

² Professor Ronald K.L. Collins summarizes Holmes's unparalleled reputation in free speech jurisprudence:

Holmes's footprint on the American life of free speech is gigantic. Like Atlas, he is a titan in that world. No one else quite casts a shadow so long. Although James Madison is the grand pater of the historical First Amendment, its modern father figure is surely Justice Oliver Wendell Holmes Jr. . . . His thought can be found in bold relief in many Supreme Court opinions on freedom of expression, in every contemporary history of the subject, in every casebook and textbook used in law schools and in colleges, and in every serious scholarly treatment of the matter.

RONALD K.L. COLLINS, *THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER* xiii (2010). So too Judge Posner argues, “In his opinions in *Schenck*, *Abrams*, and *Gitlow* . . . Holmes laid the foundations . . . for the expansive modern American view of free speech . . .” Posner, *supra* note 1, at xii; see also Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 723 (2011) (referring to Holmes's great influence on the First Amendment tradition).

³ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 23–25 (1995) (discussing the exceptional influence of Holmes on the First Amendment); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 840 (1984) (describing Holmes's dissenting opinions in the speech cases as furnishing the blueprint for future cases). The title of Professor Thomas Healy's recent book seems to say it all: *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*. See THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013). For specific discussions of Holmes's influence on free speech, see *id.* at 5, 7, 244–45, 249–50.

years to Holmes's judicial dissents, then mostly unpopular, in the early 20th century.

Holmes's dissents were not only noteworthy for their influence but also for the elegant suggestiveness of their rhetoric.⁴ So suggestive was it that scholars have been tempted to speculate that Holmes's judicial outlook was actually animated by some formal political theory. Observers have ascribed to Holmes the status of a Social Darwinist, an unembarrassed advocate for the axiom that might makes right;⁵ others have insisted that he was a liberal progressive with an abiding sympathy for political underdogs.⁶

Neither perspective, I will show, is persuasive. Notwithstanding his own stature as a political figure, Holmes, in his later years, came to possess an aristocratic indifference to political doctrine, and, as a judge, he preferred a scholar's attitude of disengaged observation.⁷ The origins of Holmes's judicial worldview were rooted essentially in the stuff of personal experience. To forward this thesis is not novel; other scholars have done so. Yet these scholars have tended to focus on how Holmes was influenced in his sixties by an energetic circle of critics and young intellectual friends who had goaded him to protect the voices of the most loathsome members of society.⁸ In contrast, I will argue that Holmes's judicial views on the First Amendment were principally influenced by his obsession with manliness and, in particular, its foremost

⁴ See HEALY, *supra* note 3, at 4 (referring to Holmes's magnificent prose); Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 311, 333 (1993) (referring to Holmes's judicial opinions as poetic); Jeffrey O'Connell & Thomas E. O'Connell, Book Review, 44 DEPAUL L. REV. 513, 513 (1995) (referring to Holmes's judicial rhetoric as poetic).

⁵ See, e.g., ALSCHULER, *supra* note 1, at 60–61 (arguing that Holmes was a Social Darwinist).

⁶ See WHITE, *supra* note 1, at 413 (referring to the common view that Holmes was a champion of unpopular speech); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 667–68 (2006) (same); Lyrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 160 (2011) (same); Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2203 (2006) (same); Brad Snyder, *The House that Built Holmes*, 30 L. & HIST. REV. 661, 687 (2012) (discussing the *New York Times* article from 1929 praising Holmes as a protector of political minorities).

⁷ See HEALY, *supra* note 3, at 146; WHITE, *supra* note 1, at 342–43.

⁸ For example, Thomas Healy's recent book is dedicated exclusively to the thesis that Holmes's friends and critics played a vital role in having changed the great man's mind about the First Amendment. HEALY, *supra* note 3. For some explicit treatments, see *id.* at 154–63, 244. Healy's thesis has been aired before, albeit with less detail. See WHITE, *supra* note 1, at 450 (arguing that Holmes's friends and associates were responsible for the shift in his thinking about the right of speech); Isaac Kramnick, *Liberalism, Marxism, and the Enlightenment: The Case of Harold Laski*, in LIBERALISM WITHOUT ILLUSIONS 138, 141 (Bernard Yack ed., 1996); Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24, 39–44 (1971).

virtue of physical courage. It was an obsession that was essentially unreconstructed, one that would find its highest gratification in his experience as a combat soldier in the Civil War.

It should be said at the outset, though, that this Article is more than an exploration into Holmes's mentality, something that will be of interest to Holmes scholars but might be of only passing interest to others. The Article has more universal aims: It seeks to show how Holmes's justification for the right of speech was in fact a bid to proffer a philosophical commentary about the demands of democracy. In essence, Holmes folded into his judicial dissent a lesson about civic responsibility. Drawing from his experiences as a soldier, Holmes urged his audience to embrace physical courage, which in his mind was nearly synonymous with manliness, as a prerequisite for self-government.

This is not to imply that Holmes sought to exclude women from membership in the polity.⁹ Far from it. Notwithstanding his avowed homage to the glories of manliness, the logic of his dissenting opinions inexorably expected *all* Americans, irrespective of gender, to tolerate frightening creeds of communism that foreboded mass violence.¹⁰ Eschewing the tiresome tropes of chivalry, Holmes flatly refused to exempt women from the perils of constitutional democracy.¹¹ Women were in effect expected by Holmes to summon the courage—the manliness, if you will—that was expected of their male counterparts.¹² Moreover, unlike most men of his time, Holmes enthusiastically embraced women as intellectual partners.¹³ Therefore, if the contemporary reader finds morally problematic the proposition that *manliness*, in all its gendered ungainliness, can be enlisted as a civic virtue, she or he would do well to consult the entirety of Holmes's actions and words, a dollop of which I intend to serve up.

The Article is organized as follows. In Part II, I take up the provocative and now popular narrative by scholars that Holmes's celebrated support for the First Amendment was in reality the unseen handiwork of his admirers and detractors, both of whom had offered him copious advice about what he should do differently in future cases before the Supreme Court. Holmes was the one who put pen to paper but it was these interested others, the revisionist story goes, who had supplied him with the substance of his words. However, I show in Part II that a close examination of Holmes's judicial opinions reveals that his arguments do not reflect the views of his purported influencers. What Holmes drew from as a jurist, Part II will suggest, were the moral lessons about

⁹ See *infra* notes 358–69 and accompanying text.

¹⁰ See *infra* notes 358–69 and accompanying text.

¹¹ See *infra* notes 358–69 and accompanying text.

¹² See *infra* notes 358–69 and accompanying text.

¹³ See Posner, *supra* note 1, at xxviii.

manliness, and specifically, manly courage, that he had gleaned from the ordeals and triumphs he had experienced as a combat soldier in the Civil War.

We begin in Part III to chart some of the adolescent origins of Holmes's manliness. Part III dwells mainly on a young Oliver Wendell Holmes as an undergraduate at Harvard College. It was at Harvard that Holmes started to reveal with demonstrative clarity a callow but stubborn manliness whose two constituent properties of independence of thought and a fondness for physical danger would come to form a basic foundation of his judicial philosophy. Part IV follows a 23-year-old Holmes into battle, as he quits Harvard to fight for the North in the Civil War. Thrice wounded, once nearly dying, Holmes deepened his insights about manliness by testing it with almost fatal intensity in the baptism of combat. Chief among these insights was the notion of keeping faith in one's courage in the face of horror and hopelessness.

Part V explains how Holmes, decades later, as a Supreme Court Justice, would enlist this outwardly martial manliness for the orderly ends of civil society. Rather than mining the standard (and well-worn) justifications for the right of speech as a means to discover truth, Holmes argued that the right of speech was vital to instill in Americans, regardless of their gender, the virtue of manliness. For Holmes felt ardently that constitutional democracy logically required a people to steel themselves to tolerate speech that was menacing to public safety, speech that threatened to destroy the federal government and foment violent pandemonium. In other words, as Part V elaborates, Holmes believed that constitutional democracy required of its citizens that they comport themselves with what he styled manliness. Part VI revisits Holmes's landmark dissents in *Abrams v. United States*¹⁴ and *Gitlow v. New York*¹⁵ and explains in detail how his dissenting opinions in both cases evinced a theory of manliness which I had fashioned in Parts IV and V. In the course of doing so, Part VI also clarifies how scholars have tended to misread these dissents as standard liberal Enlightenment arguments that had been championed to immortal fanfare by English philosophers such as the 17th-century John Milton and the 19th-century John Stuart Mill. Holmes's contributions, Part VI will show, were very much his own.

II. MISREADING HOLMES: IT WAS REALLY CHAFFEE AND COMPANY, ALL ALONG

Holmes's achievements as a judge are revered today,¹⁶ yet one might be surprised to reflect that his fame in the area of First Amendment jurisprudence derives from the penning of a mere two dissenting opinions, one

¹⁴ 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

¹⁵ 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

¹⁶ See *supra* note 1 and accompanying text.

in *Abrams v. United States*,¹⁷ from 1919, and the other in *Gitlow v. New York*,¹⁸ from 1925. As recently as 2013, one scholar delivered this exquisite encomium about Holmes's dissenting opinion in the latter case: "Indeed, it is no exaggeration to say that Holmes's dissent—the most important minority opinion in American legal history—gave birth to the modern era of the First Amendment, in which the freedom to express oneself is our preeminent constitutional value and a defining national trait."¹⁹ This paean has been joined by a parade of others throughout the years, from both the academy and the bench.²⁰

Much more will be said about Holmes's role in *Abrams*, as well as in *Gitlow*,²¹ but in order to assess the acclaim showered on Holmes, we would do well to review presently the facts of the cases. In both, communists residing in America had distributed leaflets that the majority of the Supreme Court had construed as either directly or indirectly advocating the destruction of the federal government, and so in violation of applicable law.²² And in both *Abrams* and *Gitlow*, Holmes, joined by only Justice Louis Brandeis, had authored a dissenting opinion in favor of overturning the convictions of the communists.²³

In *Abrams*, Holmes defended the right of speech as indispensable for constitutional democracy, which he dubbed an "experiment":

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 the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²⁴

In *Gitlow*, Holmes offered similarly elegant words. He first responded to the majority opinion's charge that the communist speakers had been guilty of "incitement." "It is said that this manifesto was more than a theory, that it was

¹⁷ *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).

¹⁸ *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

¹⁹ HEALY, *supra* note 3, at 7.

²⁰ See *supra* notes 1–3 and accompanying text.

²¹ See *infra* Part VI.C.

²² *Gitlow*, 268 U.S. at 654–72; *Abrams*, 250 U.S. at 616–18.

²³ *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting); *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).

²⁴ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

an incitement.”²⁵ But the very proposition that incitement differed from other kinds of speech was illusory, Holmes said: “Every idea is an incitement.”²⁶ Every idea, in other words, “offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”²⁷ For Holmes, “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”²⁸ Regardless, “whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.”²⁹

The received view among many academics and judges is that Holmes’s defense of communist speakers was splendidly novel.³⁰ Over time, however, some scholars have challenged Holmes’s reputed originality.³¹ The revisionist explanation of Holmes starts by pointing out—quite rightly—that the great jurist had never been a consistent advocate for civil liberties.³² Just months before his celebrated *Abrams* dissent in 1919, Holmes had nonchalantly upheld criminal convictions for communist speakers in three very prominent cases, *Schenck v. United States*,³³ *Frohwerk v. United States*,³⁴ and *Debs v. United States*.³⁵

What made Holmes change his mind? According to some, the change owed less to Holmes’s intellectual maturation than to the good-natured but persistent cajoling by a group of professional acquaintances and young friends.³⁶ In other words, his critics have claimed that the substance of Holmes’s dissents in *Abrams* and *Gitlow* were largely borrowed. As support, some scholars have stressed that there was noticeable pressure exerted on Holmes by both critics and friends.³⁷ More than a few public intellectuals had

²⁵ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

²⁶ *Id.* (emphasis added).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *supra* notes 1–3 and accompanying text.

³¹ See HEALY, *supra* note 3, at 7; WHITE, *supra* note 1, at 436–37; Yosel Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1378 (1984).

³² See *supra* note 31 and accompanying text.

³³ 249 U.S. 47, 53 (1919).

³⁴ 249 U.S. 204, 210 (1919).

³⁵ 249 U.S. 211, 217 (1919).

³⁶ See *supra* note 8 and accompanying text.

³⁷ See *supra* note 8 and accompanying text.

excoriated Holmes for his indifference to civil liberties.³⁸ His friends also had encouraged the Justice to change his mind.³⁹ Holmes's change of heart, the revisionists argue, was indebted to the influence of arguably better, or at least more liberal, minds.

No one was a more intimate intellectual companion to Holmes in his years as Justice than Harold Laski, a Jewish immigrant from England blessed with prodigious energy and an exceptional mind.⁴⁰ Then an assistant law professor at Harvard, Laski, who was young enough to have been Holmes's son, was cherished as such by the older man, who had no children of his own.⁴¹ The two had corresponded warmly until Laski's untimely death in his mid-fifties.⁴² Evidence of their unusually warm relationship, Holmes, when he had learned that Laski had returned from England to attend the old man's 90th birthday party, gleefully alerted the maid: "My boy will be here Saturday."⁴³ The two men happily and vigorously debated politics and philosophy and the young scholar was pleased to feed the aged Justice a steady feast of books which the latter devoured with pleasure.⁴⁴

But there was tension between the two men after Holmes had published his opinions in *Schenck*, *Frohwerk*, and *Debs*. Laski, the socialist freethinker, was disappointed by Holmes's decisions in those three cases to uphold criminal convictions for leftwing speakers who were critical of the government.⁴⁵ He therefore sought to change Holmes's position.⁴⁶ And according to some observers, Laski had succeeded. Thus, Isaac Kramnick has written, "It was . . . Laski's outspoken defense of the rights of the individual conscience and of the freedom of thought and expression against the state in his pluralist writings which was the source of his immense appeal to people like Oliver Wendell Holmes"⁴⁷ So too Ronald K.L. Collins has suggested that "Laski's

³⁸ Ragan, *supra* note 8, at 39 ("The conviction of *Debs*, if not those of *Schenck* and *Frohwerk*, unleashed a barrage of criticism.").

³⁹ Thomas Healy has remarked, "Through the intervention of his friends and his own willingness to adapt, he had come to see free speech from a different, more personal perspective." HEALY, *supra* note 3, at 244. According to Healy, "from that moment forward, he became the champion of the First Amendment we know him as today, writing passionate dissents on behalf of radicals and subversives throughout the rest of his career." *Id.*

⁴⁰ *Id.* at 28–46.

⁴¹ *Id.* at 35.

⁴² *Id.* at 246.

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 36, 154.

⁴⁵ *Id.* at 110.

⁴⁶ *See id.*

⁴⁷ Kramnick, *supra* note 8, at 141.

Authority in the Modern State not only was dedicated to Holmes but also set out ideas that would later resonate in the great jurist's opinion.⁴⁸

The other important scholar who is said to have influenced Holmes was Zechariah Chafee, who, like Laski, was a young professor at Harvard Law School.⁴⁹ In his scholarship, Chafee had criticized Holmes's failure to respect the First Amendment in those cases that preceded *Abrams* and *Gitlow*.⁵⁰ Laski, who knew both men well, had hoped that Chafee would convert Holmes.⁵¹ To that end, Laski arranged for the two to have social tea at his summer residence in Rockport, Massachusetts.⁵² We do not know the precise details of what had transpired at the meeting, but we do know that Chafee and Holmes had discussed their competing views of the First Amendment.⁵³ While the meeting was cordial, Chafee had departed without much hope that he had persuaded the Justice.⁵⁴

Scholars, however, have speculated that the professor had underestimated his effect. Laura Kalman has proposed, "Falling under the influence of Chafee and other civil libertarians who lobbied him, Holmes himself subsequently decided to argue in his *Abrams v. United States* dissent that the Court must intervene to protect speech."⁵⁵ David Rabban likewise has insisted that "Holmes's dissent in *Abrams*, written less than four months after this talk, provides the best evidence of Chafee's influence."⁵⁶

I will not stubbornly press the point that Chafee and Laski and Holmes's other colleagues and friends failed to exert any influence on the jurist; they probably did. But a given individual's actions are impelled by complicated, even contradictory, reasons, and some of these reasons are unknown, or not easily apparent, to himself.⁵⁷ Regardless, this Article does not serve as a quest to pinpoint the exact chronological catalyst which was responsible for igniting Holmes's decision to change course. My focus is broader. While Holmes's friends and detractors may have stirred him to

⁴⁸ COLLINS, *supra* note 2, at 214.

⁴⁹ See generally Ragan, *supra* note 8.

⁵⁰ See HEALY, *supra* note 3, at 61, 154–157, 189, 201–02. See generally Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

⁵¹ HEALY, *supra* note 3, at 158–63.

⁵² *Id.*; WHITE, *supra* note 1, at 427.

⁵³ HEALY, *supra* note 3, at 158–59.

⁵⁴ *Id.*

⁵⁵ LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 170 (1996).

⁵⁶ DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 354 (1999); see also Jamal Greene, *The Alchemy of Dissent*, 45 TULSA L. REV. 703, 705 (2010) ("The Chafee article appears to have helped change Holmes's mind." (reviewing STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008))).

⁵⁷ See JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 8, 213 (1999); WILLIAM IAN MILLER, *FAKING IT* 28 (2003).

change, I want to argue that the seeds for said change had already been sown many years prior, in Holmes's youth. That is, while Holmes may have appeared to heed others, the substance of his dissenting opinions was deeply idiosyncratic and personal.

To be sure, Laski and Chafee may have prompted Holmes to reconsider his old views about free speech, yet when we examine what Laski and Chafee had written, and compare their arguments to what Holmes had written in *Abrams* and *Gitlow*, we find a conspicuous difference. Both Chafee and Laski valued the right of speech as a means to uncover "truth."⁵⁸ Chafee had written in the *Harvard Law Review* that "[t]he true meaning of freedom of speech seems to be" that "[o]ne of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern."⁵⁹ And such discovery is, Chafee added, "possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest."⁶⁰ Chafee explained that the First Amendment protected

the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.⁶¹

The search for truth was especially vital in wartime, Chafee insisted. "Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects."⁶² And "[t]ruth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends."⁶³

Like Chafee, Laski tried to conscript the First Amendment as a means to sift good ideas from bad. Like Chafee, Laski was confident that unfettered speech was capable of aiding society's advancement. In his 1917 *Studies in the Problem of Sovereignty*, he wrote, "The one thing that seems to be historically sure in an uncertain world is the fact that progress is born from disagreement

⁵⁸ See *infra* notes 59–67 and accompanying text.

⁵⁹ Chafee, *supra* note 50, at 956.

⁶⁰ *Id.*

⁶¹ *Id.* at 958.

⁶² *Id.*

⁶³ *Id.*

and discussion.”⁶⁴ Two years later, Laski, in his effort to justify free speech, published complementary remarks in *Authority in the Modern State*: “The one thing in which we can have confidence as a means of progress is the logic of reason.”⁶⁵ For Laski, to accept as legitimate a government that could squelch the First Amendment rights of a minority in the name of democracy was to invite disaster.⁶⁶ “[I]t is historically obvious[,]” Laski declared, “that any general acceptance of such an attitude is entirely subversive of progress.”⁶⁷

Both Laski and Chafee accordingly hinged their support of the First Amendment on the classic liberal faith that freedom of speech could foster the search for truth and, hence, for progress.⁶⁸ But Holmes understood the First Amendment very differently. For him, truth and progress were not especially pertinent. Indeed, for him, their very concepts, in some ultimate sense, were illusory and, in his judicial opinions, Holmes did not express any hope of finding them through speech. In a letter to his friend John Chipman Gray, a Harvard law professor, Holmes jotted in 1905 that “all I mean by truth is what I can’t help believing.”⁶⁹ “I can’t help preferring port to ditch-water,” Holmes explained, “but I see no ground for supposing that the cosmos shares my weakness.”⁷⁰ One line in the letter to Gray seemed to sum up Holmes’s mentality: “[O]f course one can’t disprove reason by reason[.]”⁷¹ In a different letter, this one to Felix Frankfurter, future Supreme Court Justice and then a Harvard law professor, Holmes complained half-jokingly that his judicial clerk at times had tried his patience by resorting too often to a naïve faith in the ameliorative powers of reasoned argument: “When he talks of more rational

⁶⁴ HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 236–37 (1917) [hereinafter LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY*]. Professor Isaac Kramnick argues that this passage from Laski’s book was especially influential for Holmes’s dissent in *Abrams*. Kramnick, *supra* note 8, at 141.

⁶⁵ HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 121 (1919) [hereinafter LASKI, *AUTHORITY IN THE MODERN STATE*].

⁶⁶ *See id.* at 374.

⁶⁷ *Id.*

⁶⁸ I am referring to *liberalism* in its meaning as a political theory—that is, as a normative commitment to individual freedom, limited government, political tolerance, and so on—not as shorthand for those partisan beliefs associated with the Democratic Party.

⁶⁹ Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to John Chipman Gray, Royall Professor of Law, Harvard Law Sch. (Sept. 3, 1905) (on file with the Harvard Law School Library), <http://pds.lib.harvard.edu/pds/view/42880794?n=10&imagesize=1200&jp2Res=.25&printThumbnails=no>.

⁷⁰ *Id.*

⁷¹ *Id.*

methods [of settling disputes, I] get the blood in my eye and say that war is the ultimate rationality.”⁷²

Such aversion to the possibility of finding truth through untrammelled speech was more than a private confession for Holmes. He expressed it in his judicial opinions. Consider his much lauded dissent in *Abrams*. All the Justices save Holmes (and Brandeis who signed the latter’s dissent) decided to uphold criminal convictions for Abrams and the other socialist pamphleteers.⁷³ The majority opinion, authored by Justice John Hessin Clarke did not even discuss the First Amendment.⁷⁴ He merely argued that Abrams had violated the Espionage Act of 1917, specifically its provision prohibiting interference with America’s war effort.⁷⁵

Holmes, on the other hand, directly addressed the First Amendment.⁷⁶ But what he wrote was not consistent with what was expounded by Laski and Chafee. According to Holmes’s dissent in *Abrams*, “To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.”⁷⁷

For Holmes, you are likely to permit speech, not because you believe in its potential to contribute to truth or progress, but because it is “impotent.”⁷⁸ You permit some fool to say that “he has squared the circle” precisely because you do *not* believe that he will contribute anything to truth or progress.⁷⁹ Or, in the alternative, Holmes says that you are only likely to permit the other fellow to speak if you are unsure whether you are right (not because you think the other might be), or because you are unsure whether you have the means to suppress him.⁸⁰ In either case, Holmes did not attempt to justify the right of speech as a means to find truth or progress.

Other passages from *Abrams*, on first impression, appear to be consonant with the pursuit of truth and progress, but on closer inspection, these too gesture to something else. Later in his dissent, Holmes makes a bid for

⁷² Letter from Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S., to Felix Frankfurter, Professor of Law, Harvard Law Sch. (Mar. 27, 1917) (on file with the Harvard Law School Library), <http://pds.lib.harvard.edu/pds/view/42879148?n=15&imagesize=1200&jp2Res=.25&printThumbnails=no>.

⁷³ See *Abrams v. United States*, 250 U.S. 616, 623–24 (1919).

⁷⁴ See *id.* at 616–24.

⁷⁵ *Id.*

⁷⁶ *Id.* at 627, 630 (Holmes, J., dissenting).

⁷⁷ *Id.* at 630.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

metaphor, one that would become one of the most celebrated in Supreme Court history.

[The Constitution] 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 the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁸¹

The metaphor of an “experiment,” considered in the abstract, is one that is easily compatible with the arguments of Laski and Chafee. One might even say that the search for truth and progress necessarily entails experimentation.⁸² For how can we know what is true or know how to seek progress unless we are willing to try out—experiment with—different proposals?⁸³

Yet Holmes does not use the term *experiment* in this manner. Read the words again: “[The Constitution] 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.”⁸⁴ Observe what is missing in Holmes’s description of experiment: any mention of progress or truth. There is, indeed, no mention of *what* is the purpose of the experiment. Is it to find truth? To unearth the path to progress? And *how* may we discern that the experiment has produced something that we may reasonably call truth or progress?

Holmes is silent. Nor may we casually read into Holmes’s reference to experiment an implicit expectation that its ends are for truth and progress. Reread Holmes’s words: “[The Constitution] 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.”⁸⁵ It is a curiously idiosyncratic exposition of what an experiment entails. For Holmes, the

⁸¹ *Id.*

⁸² See, e.g., MOHANDAS K. GANDHI, AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (Mahadev Desai trans., Beacon Press 1993) (discussing Gandhi’s experimentation with various experiences in order to discover how he should live a moral life).

⁸³ Laski, indeed, explicitly commended experimentation as indispensable for progress, albeit in a critique of his generation for failing to live up to the robust example of the Founding Fathers: “The generous enthusiasm of 1789 is hardly to be perceived. It is a cynical generation, mistrustful, wearied, without conviction of progress, without courage to experiment.” LASKI, AUTHORITY IN THE MODERN STATE, *supra* note 65, at 287.

⁸⁴ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

⁸⁵ *Id.*

Constitution, as well as life itself, is an “experiment” because we are deprived the comforts of certainty. Because we must “wager our salvation” upon our beliefs, even if we “loathe” the contrary opinions and “believe them to be fraught with death,” we should permit the socialist Abrams to distribute leaflets that could be dangerous.⁸⁶

Six years after he penned his *Abrams* dissent, Holmes echoed similar thoughts in *Gitlow*.⁸⁷ Like *Abrams*, *Gitlow* involved socialists who distributed leaflets which were held at trial to be a threat to the United States.⁸⁸ And like in *Abrams*, Holmes, in his dissent in *Gitlow*, mentioned nothing about the possibilities for speech to further truth or progress. Instead, he merely shrugged and remarked that the speakers were harmless: “If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”⁸⁹

Such examples suggest that there was an element of exaggeration if not basic inaccuracy in the popular supposition that Professors Chafee and Laski had exercised strong influence over Holmes’s opinions in *Abrams* and *Gitlow*.⁹⁰ If not the fabled search for truth and progress, what *did* move Holmes? In the next section I will begin to limn an answer. I will argue that Holmes was not really interested in the explicitly political goals conventionally associated with the search for truth or progress. He was obsessed with something more personal: the longing to obtain manliness.

III. THE INFANTILISM OF HARVARD COLLEGE

At the outset it should be said that mine is not a formal effort at psychological analysis. I have no desire (nor the competence) to give a psychological account for *why* Holmes embraced certain views of courage and manliness. I do not know, and perhaps Holmes himself did not know, the extent to which his father or mother or college friend or school rival or jilted lover—or some random event—affected his worldview; nor do I know (and again, Holmes himself may not have known) if or what event or events in his life caused him to shun cowardice so vehemently and to idolize the idea of mortal valor. These and their related issues I contentedly leave to psychiatrists and psychologists to explore. What I wish to do is to describe the manner in which Holmes’s manliness took shape in its youth and, later, influenced how he

⁸⁶ *See id.*

⁸⁷ *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

⁸⁸ *Id.* at 654–72 (majority opinion).

⁸⁹ *Id.* at 673 (Holmes, J., dissenting).

⁹⁰ *See supra* note 8 and accompanying text.

thought about the First Amendment's right of speech. Mine, in other words, is an endeavor of narration rather than analysis.

Before I proceed to this narration I need first to clarify some key terms, although as the reader will find, there is nothing unique about my definitions. In this Article *manliness* will refer to two concepts. One, it will refer to the idea of being an autonomous individual, as in the old saw of being “your own man.”⁹¹ Two, it will refer to being courageous, and in particular, of being physically courageous.⁹² There is much overlap between these two versions of manliness.⁹³ To be one's own man requires that you sometimes have to be courageous, including in scenarios where you are risking life and limb; to do a courageous deed, you—as your own man—had to have chosen to do so, instead of having been coerced by another.⁹⁴ Also, in both instances, manliness is constituted by power: against bullies or the like, you have to summon the power to assert your right to decide matters for yourself; to be courageous, you have to muster the power to steel yourself before frightening forces.⁹⁵ In this regard it is telling that the antithesis of manliness is emasculation, the condition of having your power, and hence, your gender, taken from you.⁹⁶ None of this is to suggest that women cannot be “manly” in either sense, and no reader should misinterpret what I have written as a banner for chauvinism. My definitions originate from a fidelity to etymology and anthropology.⁹⁷ (Whether it is morally proper for society to have ascribed the meanings that it did to manliness is, alas, beyond the scope of this Article.)

Against this backdrop of manliness, two other terms must be introduced—patriarchy and infantilization—both of which are informed indelibly by what I have said about manliness. The word *patriarchy* derives from *patri*—“father” in Latin.⁹⁸ By “patriarchy,” then, I mean a regime of hierarchy in which authority is placed in the oldest male adults.⁹⁹ Worth

⁹¹ See John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261, 265, 293, 323, 324 (2009) [hereinafter Kang, *Manliness and the Constitution*].

⁹² See John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477, 486–95 (2010) [hereinafter Kang, *Burdens of Manliness*]; John M. Kang, *Does Manly Courage Exist?*, 13 NEV. L.J. 467, 467–68, 470–72 (2013) [hereinafter Kang, *Courage Exist*].

⁹³ See Kang, *Manliness and the Constitution*, *supra* note 91, at 323.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ Kang, *Courage Exist*, *supra* note 92, at 467–68.

⁹⁷ Kang, *Burdens of Manliness*, *supra* note 92, at 487–95; Kang, *Courage Exist*, *supra* note 92, at 468.

⁹⁸ RUSSELL F. ANDERSON, *LECTIONARY PREACHING WORKBOOK, SERIES V, CYCLE A*, at 312 (rev. ed. 2007).

⁹⁹ For consonant definitions, see NATHAN HARTER, *CLEARINGS IN THE FOREST: ON THE STUDY OF LEADERSHIP* 13 (2006); JOSEPH PAUL MOSER, *IRISH MASCULINITY ON SCREEN: THE PUGILISTS AND PEACEMAKERS OF JOHN FORD, JIM SHERIDAN, AND PAUL GREENGRASS* 4 (2013);

stressing is that patriarchs justify their authority because of their gender and age; they are said to be owed obedience chiefly because of *who* they are, and much less directly because of what they can do or their present abilities. The logic of patriarchy is that a man's age and his accumulation of experience has entitled him to deference as one who has presumably garnered the requisite wisdom and perseverance to justify his authority to command others.¹⁰⁰ Although time has bereft him of the physical vigor he once possessed, the aged patriarch continues to be regarded as manly by virtue of his institutional power.¹⁰¹

The extent of patriarchal manliness becomes clearer when we understand what it seeks to do. Patriarchy can exist only by infantilizing those under its authority.¹⁰² Infantilization is the process by which subjects are deprived of their self-esteem and made to feel that they are akin to infants: incompetent and helpless, and therefore requiring instruction and discipline from a properly installed patriarch.¹⁰³ A zealous patriarchal regime tries to quash the subject's desire for deliberation, his desire, in other words, to exercise independence to think for himself—to be his own man—rather than to defer to appointed superiors.¹⁰⁴

Holmes, I will suggest, felt himself infantilized as an undergraduate by the professors and administrators, his provincial patriarchs, at Harvard College. As a young man, he would test his manliness against them. Later, Holmes would seek a more solemn test by joining the Northern Army in the Civil War in which he would be thrice wounded and nearly killed.

In charting the chronology of Holmes's outlook on manliness we should begin with his experiences as an undergraduate at Harvard. For it was here that Holmes's penchant for risk and, sometimes, danger became apparent. It was here that he challenged authority, broke school rules, and behaved with a newfound unruliness. These, I will argue, were attempts to assert his burgeoning manliness.

SUSAN E. WALTZ, HUMAN RIGHTS AND REFORM: CHANGING THE FACE OF NORTH AFRICAN POLITICS 41 (1995).

¹⁰⁰ See DIRK GEERAERTS, WORDS AND OTHER WONDERS: PAPERS ON LEXICAL AND SEMANTIC TOPICS 317 (2006).

¹⁰¹ See Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 MICH. J. GENDER & L. 195, 210 (1995).

¹⁰² Kang, *Manliness and the Constitution*, *supra* note 91, at 279, 283, 285, 302, 324.

¹⁰³ ALAN DUNDES & LAUREN DUNDES, *The Elephant Walk and Other Amazing Hazing: Male Fraternity Initiation Through Infantilization and Feminization*, in BLOODY MARY IN THE MIRROR: ESSAYS IN PSYCHOANALYTIC FOLKLORISTICS 95, 118 (2002); MICHAEL ROGIN, RONALD REAGAN, THE MOVIE: AND OTHER EPISODES OF POLITICAL DEMONOLOGY 152 (1987); Kang, *Manliness and the Constitution*, *supra* note 91, at 276–87.

¹⁰⁴ See Kang, *Manliness and the Constitution*, *supra* note 91, at 276–87.

Harvard College is now celebrated (or condemned) as a foremost bastion of left liberalism where students are formally encouraged to be free thinkers who question intellectual orthodoxy.¹⁰⁵ But back in Holmes's undergraduate years from 1857 to 1861, the school was unrecognizably different.¹⁰⁶ Gothic times, these: professors deflected, discouraged, and occasionally trounced on undergraduate curiosity and regarded discipline as the College's primary mission.¹⁰⁷ It was Harvard that imposed on Holmes a stern patriarchy which infantilized its then all-male student body.

To propose that the goings-on at Holmes's Harvard College approximated the oppression of tyrannical governments is to invite eye-rolling jeers. No undergraduate was thrown in the Tower of London by college administrators; no student was lashed with the cat-o-nine tails on his raw back by intolerant professors. Harvard was a place of learning and, by cultural consensus, a grand one at that. In addition, Holmes's cohort generally hailed from eminent or at any rate accomplished families; the young men tended toward a sense of entitlement and would not be easily cowed.¹⁰⁸

However, in its way, Harvard bore the traits of patriarchalism. For starters, there was the institutional opposition to independent judgment. Even as it imparted information, the college prodded, or sometimes, sternly coerced, undergraduates away from critical thought. Mark De Wolfe Howe—Holmes's judicial clerk on the Supreme Court who would become his biographer, as well as a law professor at Harvard—sketched this glum portrait of Holmes's alma mater in the 1850s and 1860s: "A freshman coming to Harvard with a mind uninitiated to inquiry and a temperament unaccustomed to skepticism would not have been likely to have either his habit of mind or the bent of his temperament affected by his first year's curriculum."¹⁰⁹ Skepticism, normally nurtured in today's university, was eyed with suspicion at Harvard.¹¹⁰ The Harvard undergraduate "had no opportunity in his formal studies to consider critically the problems either of method or of substance with which science was challenging conventional belief."¹¹¹ Howe continued, "A young man with an

¹⁰⁵ DOMINIC HOOD, *COLLEGE PROWLER: HARVARD UNIVERSITY OFF THE RECORD* 67–69 (Adam Burns & Meryl Sustarsic eds., 2006).

¹⁰⁶ LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 77–83 (1991).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 81.

¹⁰⁹ MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841–1870*, at 42 (1957).

¹¹⁰ *Id.*

¹¹¹ *Id.*

already matured intelligence accustomed to inquiry could scarcely find in such a curriculum as this a freshening stimulus for his capacities.”¹¹²

Even the snobbishly intellectual Henry Adams (class of 1858) who would become an eminent historian at Harvard recalled that during his undergraduate years there he had never heard of anyone named Karl Marx and the latter’s exotic credo of world revolution.¹¹³ Adams reminisced about his school’s limp and cloistered pedagogy:

Any other education would have required serious effort, but no one took Harvard College seriously. All went there because their friends went there, and the College was their ideal of social self-respect. . . . In effect, the school created a type but not a will. Four years of Harvard College, if successful, resulted in an autobiographical blank, a mind on which only a water-mark had been stamped.¹¹⁴

Perhaps counting himself among the watermarks, Charles Eliot, class of 1853, who would rise to Harvard’s presidency, quoted a warning from his math professor Benjamin Peirce: “Eliot, your trouble is that your mind has a skeptical turn. Be on your guard against that tendency or it will hurt your career.”¹¹⁵

If not tutorial stimulation, what, we may ask, had absorbed the faculty’s passions? The answer is the second feature of patriarchalism: a nonnegotiable insistence on obedience.¹¹⁶ Consider the formal commendation conferred by the Harvard faculty to its president James Walker upon his retirement in 1860. Walker was congratulated for the “efficiency with which he has maintained order and discipline, so essential to [Harvard’s] prosperity.”¹¹⁷ It was a compliment that would have been more fitting for the warden of Boston’s Deer Island Prison. Walker did not deserve all the credit, though; Harvard already had in place fastidious controls for the regulation of student conduct.¹¹⁸ No better example was there than the eccentrically obsessive point system.¹¹⁹ During Holmes’s undergraduate years, Harvard ranked a student by the number of points that he had collected through his exams.¹²⁰ A perfect

¹¹² *Id.*

¹¹³ BAKER, *supra* note 106, at 74.

¹¹⁴ *Id.* at 78.

¹¹⁵ *Id.* at 74.

¹¹⁶ Kang, *Manliness and the Constitution*, *supra* note 91, at 277–79.

¹¹⁷ DEWOLFE HOWE, *supra* note 109, at 38 (quoting Minutes of Harvard Faculty Meetings (1857–61) (on file with the Harvard University Archive)).

¹¹⁸ *Id.* at 36–38.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 36–37.

recitation of a Greek poem might earn the student eight points, for example.¹²¹ But the student would be deducted points for misconduct including that unrelated to academics. The eight points for the recitation would be snuffed out if the student were late for morning chapel, for instance.¹²²

So zealous was Harvard's monitoring of students that faculty meetings were dominated by issues of undergraduate infractions.¹²³ Here is a dreary—or, depending on your disposition, droll—litany of what America's greatest minds deliberated and eventually decided at a typical gathering:

“Runkle, Senior, be privately admonished for bringing a cigar into the choir, and ordered to sit down stairs for the future, and that H. P. Tobey, Junior, be appointed to blow the organ in his place”: “Voted that Garrison and Holmes [yes, *that* Holmes—J. K.], Freshmen, be fined one dollar each for writing on the posts in Tutor Jennison's room”: “Voted that Swinerton, Senior, be privately admonished for playing on a violin and smoking in the Yard”: “Voted that Magenis, S. M. Weld, Sherwin and Skinner, Seniors, be privately admonished by the President, for galloping around the Yard on Friday[.]”¹²⁴

The queasy mixture of minute discipline and the willful dwarfing of intellectual growth made the undergraduate men feel like children.

One of Holmes's contemporaries, Henry Munroe Rogers, who became a Boston lawyer and writer, recounted in his eighties how “[o]ne of the best scholars in our class” had grumbled, years later, to him about Harvard's condescending pedagogy. Here was Rogers's recollection of the young man's words:

I have now been through Harvard College, and consider the system of education there to be radically defective, necessitating the loss of about three hours a day for recitations, destroying as far as it can any genuine scholarly tastes, reducing all things to a bundle of dry formulas and dead rules, the tendency being to drag the finer intellects down to a level with the lowest; in short, the College being rather a primary school, on a grand scale, than the first University in the country. The system of marks is too absurd to require condemnation; the system of discipline too puerile to call forth anything but contempt; the standard of scholarship required to

¹²¹ *Id.* at 36.

¹²² *Id.* at 37.

¹²³ *Id.* at 37–38.

¹²⁴ *Id.*

obtain a degree, so low that any fool can have the distinction of graduating with full honors from the University¹²⁵

Assessing such scenes, Liva Baker, a Holmes biographer, concluded that at Harvard “[i]ntellectual humility was rewarded, aggressiveness was punished.”¹²⁶

For the same reason, Harvard College also offered itself to young Holmes as a monolithic foil that he could dent and kick, a stuffy ogre against which he could exert his coltish manliness. By publicly flouting Harvard’s rules and mocking its authorities, Holmes would prove to himself and others that he was his own man. He hence boasted during freshman year to Lucy Hale, a romantic interest:

College is [a] perfect delight, nothing to hold you down hardly, you can settle for yourself exactly what sort of a life you’ll lead. And it’s delightful

Today I’ve been out to row twice, this after sacrificing History to the fowls [and] afterward reading my letter over in the class clandestinely.¹²⁷

Here was a kinetic celebration of his newfound manliness. His merry defiance said it all: “[Y]ou can settle for yourself exactly what sort of life you’ll lead.”

Further disobedience ensued. In his freshman year, Holmes and his friend were fined for “writing on the posts in Tutor Jennison’s room.”¹²⁸ Holmes lost points three times for “playing,” “whispering,” or being unprepared in class.¹²⁹ After his final sophomore exam, he was “privately admonished” by school officials for “creating a disturbance in the College Yard,” and in his senior year, he was “publicly admonished,” once for “repeated and gross indecorum in the recitation of Professor [Francis] Bowen,” and another time for “breaking the windows of a member of the Freshman class.”¹³⁰

Turn first to Holmes’s reported indecorum in Professor Bowen’s class (more on the broken window later). Even more than the other instructors, Francis Bowen, the Alford Professor of Natural Religion, worked tirelessly to insure that his undergraduates would not be corrupted by the bane of intellectual curiosity.¹³¹ An authoritarian bloated with a Christian righteousness

¹²⁵ HENRY MUNROE ROGERS, MEMORIES OF NINETY YEARS 55–56 (1932).

¹²⁶ BAKER, *supra* note 106, at 74.

¹²⁷ WHITE, *supra* note 1, at 27.

¹²⁸ *Id.* at 25.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See BAKER, *supra* note 106, at 79.

that would have been at home in medieval Spain, Bowen insisted in 1849 that there has “seldom been a time” when the study of religion was more vital than then.¹³² For instead of bowing to revered leaders, previously quiescent subjects in Europe were starting to think for themselves, an unsettling prospect for Bowen.¹³³ “The thirst for innovation has greatly increased,” Bowen warned, “and all restraint upon speculation in science, philosophy, politics, and social economy is taken away.”¹³⁴ Anxiously, Bowen added: “Skepticism, also, appears at one time as the hardened advocate of recklessness and vice, throwing off at once every cover and veil of licentious speculation and practice, and assumes at another the garb of a refined philosophy, and the sentiments . . . of an austere and Stoical morality.”¹³⁵ What Europe needed was a firm return to traditional Christianity and its respect for reflexive deference to received superiors. At Harvard, Bowen did his own part by shielding his students from the temptations of secular skepticism—the “hardened advocate of recklessness and vice”—by sequestering their readings to his own authored books.¹³⁶

The 19-year-old Oliver Wendell Holmes authored an essay in *The Harvard Magazine* that impishly pricked Bowen’s worldview and, indirectly, his teacher’s authority. Holmes’s “Notes on Albert Durer” was mostly a staid review of a 15th-century printmaker.¹³⁷ But in the middle of the essay Holmes unexpectedly lit upon a critique of Christianity. “Without stirring the dogmas of the Church,” he wrote, “it is clear that a noble philosophy will suffice to teach us our duties to ourselves and our neighbors, and some may think also to our God.”¹³⁸ Note the normative connection being made: Christianity, young Holmes declared, was ordered by “dogmas” while philosophy was “noble.” What ennobled philosophy in Holmes’s mind was that it refused to resort to the childish trappings of Christianity, with its reliance on extravagant fables and promises of heaven.¹³⁹ Perhaps having Bowen as the butt of his derision, Holmes quipped that some unfortunate beings were incapable of accepting moral tenets unless they were dressed in stylized reconstructions of religious narratives: “[I]t is certainly now true, however, that the weaker faith of the

¹³² See FRANCIS BOWEN, *LOWELL LECTURES ON THE APPLICATION OF METAPHYSICAL AND ETHICAL SCIENCE TO THE EVIDENCES OF RELIGION* xii (Applewood Books 2009) (1849).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 204.

¹³⁶ See BAKER, *supra* note 106, at 79–80.

¹³⁷ See *id.* at xii–xiii; 1 OLIVER WENDELL HOLMES, *Notes on Albert Durer*, in *THE COLLECTED WORKS OF JUSTICE HOLMES* 153, 153–57 (Sheldon M. Novick ed., 1995) [hereinafter *COLLECTED WORKS*].

¹³⁸ *Id.* at 154.

¹³⁹ *Id.*

majority of mankind prefers for these pure abstractions [of philosophy] a clothing of more concrete fact, and demands the stimulus of a story and a life to excite their souls, sluggish to receive the highest truth”¹⁴⁰

A tart inversion was being dispensed. As young Holmes had depicted it, Christianity was the poor man’s philosophy, a saccharine tale for childlike (perhaps, *childish*) minds; and by implication, he was taking a surly jab at those like Professor Bowen. Holmes, the undergraduate, congratulated himself as the brave one for embracing the harsh truths of life.¹⁴¹ The sophomore was not finished, though. While Bowen and a few other religious authoritarians held power at Harvard, Holmes bet that their days were numbered: “[C]ertainly the growth of civilization increases our faith in the natural man, and must accordingly detract from the intense and paramount importance attached in darker times to the form of the story embodying the popular religion.”¹⁴² Civilization’s progress was attributed to “natural man,” not God’s grace. Here was, it seemed, a bid for secular humanism. Holmes issued consonant sentiments elsewhere in his essay: “[N]owadays we see that [moral] duty is not less binding had the Bible never been written”¹⁴³

These words were printed in the college magazine—for all to read. Unsurprisingly, in due time, Holmes and Bowen clashed, with Holmes being “publicly admonished” by Harvard for “repeated and gross indecorum in the recitation of Professor Bowen.”¹⁴⁴ No other details of the infraction survive, and one might suppose that Bowen had gotten the last word by punishing Holmes. One can make the case, however, that it was Holmes who emerged manly. As a senior at Harvard (and a repeat offender in terms of school disciplinary rules), Holmes certainly knew the consequences of his intended misconduct in Bowen’s class.¹⁴⁵ He nonetheless opted to inflict on Bowen one parting shot of bucking impudence, or, to borrow a pithy phrase from one scholar, of “upward contempt.”¹⁴⁶ That the misconduct took place in Holmes’s senior year was probably not coincidence.¹⁴⁷ It was not hard to imagine a young Holmes, who, by then, had long suffered Bowen’s obnoxious blend of fulsome piety and middling intellectualism, and had spitefully resolved to pay back the professor with the undergraduate’s traditional arsenal of abrading insolence. Look again at the indictment which the Harvard faculty bestowed young Holmes. It was plain that Holmes’s misbehavior was neither isolated nor

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 154–55.

¹⁴⁴ WHITE, *supra* note 1, at 26.

¹⁴⁵ *Id.* at 44.

¹⁴⁶ See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 221 (2009).

¹⁴⁷ WHITE, *supra* note 1, at 44.

unplanned: according to faculty records, he had been disciplined for *repeated* and *gross indecorum* in Bowen's class.¹⁴⁸

And speaking of boisterousness, Holmes, you recall, was also publicly admonished by the school for "breaking the windows of a member of the Freshman class."¹⁴⁹ The offense, which was the result of drunken horseplay, did not occur when Holmes was a feral freshman, ecstatic in his new freedom; he was a *senior* at this time. While the result of drunken horseplay, not malice, *this* was when he had broken the dorm windows.¹⁵⁰ The breach, Harvard's president informed Holmes's father, would have normally resulted in expulsion, but the faculty pardoned Holmes because he had apologized and confessed.¹⁵¹ (Holmes was also exempted surely because his father was the president's friend and, no less relevant, dean of Harvard's medical school.)¹⁵²

All for naught. The next day Holmes left Harvard—for good, as far as he was concerned—to join the Massachusetts militia in the Civil War.¹⁵³ He had not bothered to get permission from Harvard to leave during the semester; he did not consult his father either.¹⁵⁴ As weeks passed, the unexcused absences piled up and his class standing dwindled to 52 out of 96.¹⁵⁵ Worse, by failing to show for his senior exams, he flunked college at semester's end.¹⁵⁶ Later, Holmes *père* successfully pled for the college to grant his son a degree if he returned and passed his exams, which Holmes *filis* eventually did, begrudgingly.¹⁵⁷

Holmes's decision to join the military, while perhaps impetuous to some, was, in large part, the natural outcome of his admiration for manliness and his longing to achieve its most sublime state.¹⁵⁸ Unfortunately for us, no direct record survives for why he joined; the indirect evidence is probative, however. Two documents particularly shed light. One is an essay that honored

¹⁴⁸ *Id.* at 26.

¹⁴⁹ *Id.*

¹⁵⁰ SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 35 (1989).

¹⁵¹ WHITE, *supra* note 1, at 26.

¹⁵² PETER GIBIAN, *OLIVER WENDELL HOLMES AND THE CULTURE OF CONVERSATION* 176 (2009).

¹⁵³ WHITE, *supra* note 1, at 26.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ It is true that Holmes had volunteered to fight in the Civil War for the cause of abolitionism. WHITE, *supra* note 1, at 46. But even when he was eager to support abolitionism, he, as a college student, desired to participate in a manner that would permit him to gratify his yearning for manliness. *Id.* Specifically, he had worked as a bodyguard for Ralph Waldo Emerson when he gave public lectures in Massachusetts. *Id.* at 32.

Plato and Socrates for their manly faith in themselves;¹⁵⁹ the other is an obituary in which Holmes framed manliness as chivalry.¹⁶⁰

Let us examine first the essay. In an undergraduate essay published in the *Harvard Magazine* in 1860, Holmes reflected on Plato and his teacher, Socrates.¹⁶¹ “I should wish my last words to be those of the reverence and love with which this great man [Plato] and his master [Socrates] always fill me,” he waxed.¹⁶² What enamored Holmes was that each man possessed

a really great and humane spirit fighting the same fights with ourselves, and always preserv[ed] an ideal faith and a manly and heroic conduct; doubly recommended, moreover, to our hearts by the fact of [Plato and Socrates each] having only himself to rely on, and no accepted faith that killed a doubt it did not answer; the spectacle, I say, of these two grand old heathen, the master the inspired fighter, the scholar the inspired thinker, fills my heart with love and reverence at one of the grandest sights the world can boast.¹⁶³

Great faith, Holmes argued, required great manliness; Plato and Socrates were both alone in their struggle, “having only himself to rely on.” Even when they were isolated and uncertain, Plato and Socrates, Holmes stressed, manfully refused the comforts of illusion (both had “no accepted faith that killed a doubt it did not answer”). Yet it was faith itself—“an ideal faith,” as Holmes put it—that undergirded the resolve of the Greek philosophers to refuse another faith, a corrupting sort that eschewed hard questions in favor of emotional sanctuary.¹⁶⁴

While the essay spoke to Holmes’s ideal of manliness as fierce self-reliance, Holmes’s obituary, written about the same time as the essay, revealed his admiration for manly chivalry. Holmes authored the obituary for Francis Lowell Gardner, a fellow member of the student-run Porcellian Club, who had died during a hunting trip to Cape Cod.¹⁶⁵ In Professor Edward White’s definitive biography of Holmes, references to the hunting trip appear suggestively as an event where perhaps Gardner may have been accidentally shot, and therefore, an event where the boyish Holmes may have mulled over the meaning of death, a subject that occupies a prominent place in manliness’s cosmology.¹⁶⁶ But White does not clarify if Gardner had been shot, a

¹⁵⁹ HOLMES, *Plato*, in 1 COLLECTED WORKS, *supra* note 137, at 145, 145.

¹⁶⁰ HOLMES, *Francis Lowell Gardner*, in 1 COLLECTED WORKS, *supra* note 137, at 160, 160.

¹⁶¹ HOLMES, *supra* note 159, at 145.

¹⁶² *Id.* at 153.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ WHITE, *supra* note 1, at 28.

¹⁶⁶ *See id.* at 28–29.

significant detail because in which case his death would have been the result of violence, and thus would have been graced with a patina of manliness.¹⁶⁷ If one had the improbable inclination to rummage the *Necrology of Alumni of Harvard College, 1851–52 to 1862–63*, one would learn, however, that Gardner had died from a nasty cold caught while on the cape; he ended up infecting the doctor who treated him as well, lamely killing him too.¹⁶⁸

Wanting to pay homage to his friend, Holmes substituted these embarrassing ironies with an absurdly pious salute to Gardner’s manliness. The paeans did little to illumine Gardner; they seemed airy, melodramatic:

[I]t needed not intimacy to feel the courage and courtesy which never deserted him, even when most tried, but which always walked hand in hand; his high breeding restraining all needless display of his bravery, and that, in turn, giving to his manner dignity and weight.

. . . .

[He was] one who did honor to his College, his Class, his Club, as a truly chivalrous gentleman.¹⁶⁹

“Courage” and “bravery” are lobbed up in Holmes’s obituary, but Holmes fails to sketch any corresponding examples to justify their mention. (The ellipsis that I have inserted in the middle of the passage is not meant to conceal any proffered illustrations, only to spare the reader Holmes’s slightly wincing platitudes about Gardner’s “graceful bearing” and “beauty of features.”)¹⁷⁰ And the tribute to Gardner being a “truly chivalrous gentleman” was just daft. *Chivalry* is the province of the knight, the warrior, one who will kill and die for others.¹⁷¹ Gardner’s only claim to the title rested on what he “did [to] honor . . . his College, his Class, his Club.”¹⁷² So too chivalry presupposes the likelihood of a splendidly violent end to its hero, not the fey misfortune of death by cold.¹⁷³ To anoint Gardner as “chivalrous,” as Holmes fatuously did, was to indulge the unearned hyperbole of a college boy.

Yet we should not discard Holmes’s obituary. For while it did not elucidate Gardner’s character, it did so illumine Holmes’s. We learn that for

¹⁶⁷ *Id.*

¹⁶⁸ JOSEPH PALMER, *NECROLOGY OF ALUMNI OF HARVARD COLLEGE, 1851–52 TO 1862–63*, at 379 (1864).

¹⁶⁹ HOLMES, *supra* note 160, at 160.

¹⁷⁰ *Id.*

¹⁷¹ RUTH A. JOHNSTON, *ALL THINGS MEDIEVAL: AN ENCYCLOPEDIA OF THE MEDIEVAL WORLD* 429 (2011); RICHARD W. KAEUPER, *CHIVALRY AND VIOLENCE IN MEDIEVAL EUROPE* 153 (2001); JEFFREY STRICKLAND, *KNIGHTS OF THE CROSS* 47 (2012).

¹⁷² HOLMES, *supra* note 160, at 160.

¹⁷³ STRICKLAND, *supra* note 171, at 47.

Holmes, the highest virtue a man could have was not measured by charity, chastity, mercy, or moderation—none of the Christian virtues; for Holmes, a man's best virtue was manliness itself.¹⁷⁴

Embedded in his obituary for Gardner and his tribute to the ancient Greeks were the basic elements of Holmes's post-adolescent view of manliness. Chivalry formed one part: a man should bravely sacrifice himself for others as Gardner purportedly did. Faith in himself formed the other: like Plato and Socrates, a man should have the courage to rely, when appropriate, only on himself, even if doing so consigned him to dreadful isolation and existential doubt. As Holmes left the infantilizing environs of Harvard and plunged into the field of military combat, his manliness would be tested in harshly physical terms. And, after some horrific skirmishes, he would congratulate himself, seemingly to no end, for having passed with the brightest of colors.¹⁷⁵

IV. COMBAT: "A SPLENDID CARELESSNESS FOR LIFE"

Notwithstanding their received collective image as bearers of heroic valor, combat soldiers as a class tend in public to regard their individual achievements with the air of earnest self-effacement.¹⁷⁶ If they broached courage at all, they usually described it as mysterious—ambivalent, fleeting, illusory, paradoxical.¹⁷⁷ That was them, however, those other soldiers; such angst, Oliver Wendell Holmes assured his reader and perhaps himself, never visited him.

Ever.

This was at any rate the impression that Holmes assiduously crafted and guarded. We know that he had destroyed some letters and diary entries from the Civil War, and cannot help but surmise that he did so because of their tremulous admissions.¹⁷⁸ Those private documents he saved furnished a portrait of Holmes's manliness as untroubled, unassailable, and incorrigibly romantic. There was, as one will infer from which documents, a conscious campaign of

¹⁷⁴ For a short discussion of the differences between the Christian virtues and the secular ones, see JUDITH N. SHKLAR, *ORDINARY VICES* 11 (1984).

¹⁷⁵ WHITE, *supra* note 1, at 72, 206, 210, 477.

¹⁷⁶ FRANCIS B. CATANZARO, *WITH THE 41ST DIVISION IN THE SOUTHWEST PACIFIC: A FOOT SOLDIER'S STORY* ix (2002); PAUL FUSSELL, *WARTIME: UNDERSTANDING AND BEHAVIOR IN THE SECOND WORLD WAR* 292 (1989); WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 43, 64, 87 (2002) [hereinafter MILLER, *MYSTERY*].

¹⁷⁷ See ALFREDO BONADEO, *MARTIAL VALOR FROM BEOWULF TO VIETNAM* 182 (2010); MILLER, *MYSTERY*, *supra* note 176, at 3, 4, 40, 78, 86, 112, 113, 281.

¹⁷⁸ OLIVER WENDELL HOLMES, JR., *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR.* xxiii (Mark De Wolfe Howe ed., 2000) [hereinafter *TOUCHED WITH FIRE*].

self-invention, and the reader would be wise to receive Holmes's words with due skepticism. On the other hand, Holmes should be permitted some allowance. For the rhetorical style of manliness usually (perhaps necessarily) involves self-glorification, not humility.¹⁷⁹ And as will be shown, Holmes's deeds are not fabricated; they are based on actual feats but embellished and sometimes enhanced with dramatic recounting.

His story begins with a close call. The 20-year-old Oliver Wendell Holmes was lying supine, after being shot by a Confederate soldier at Ball's Bluff on the Virginia shore.¹⁸⁰ Only his first battle, Holmes already felt, or claimed to feel, that he had proved his manliness, and he wished for his mother to know it. The letter, dated October 23, 1861, began: "My Dear Mother, Here I am flat on my back after our first engagement—wounded but pretty comfortable—I can't write an account now but I felt and acted very cool and did my duty I am sure . . ." ¹⁸¹ The brief passage contained a jolting contrast. First, Holmes gave his mother the bad news: I was "flat on my back." Then, immediately after, the good news: "I felt and acted very cool and did my duty I am sure."

Quite the cocksure opening. Holmes, in his fashion, heartened his mother with the report that his manliness had not faltered. That he was lying flat on his back was not a condition of emasculated immobility, Holmes strongly implied. It was a pose which signified that he had endured battle but had survived. Self-acclamation was inadequate in Holmes's view, however. More needed to be said, and Holmes etched for his mother the salient details.

I was out in front of our men encouraging 'em on when a spent shot knocked the wind out of me & I fell—then I crawled to the rear a few paces & rose by help of the 1st [Sergeant]; & the Colonel who was passing said, "That's right Mr. Holmes—Go to the Rear" but I felt that I couldn't without more excuse so up I got and rushed to the front where hearing the Col. cheering the men on I waved my sword and asked if none would follow me when down I went again by the Colonel's side . . . ¹⁸²

This was not the tender Ivy League-chivalry ascribed to the haplessly ill Francis Gardner whose chief demonstrations of manliness related to his contributions to Harvard College and its student clubs. Holmes's gallantry, it

¹⁷⁹ See JERRY H. BRYANT, "BORN IN A MIGHTY BAD LAND": THE VIOLENT MAN IN AFRICAN AMERICAN FOLKLORE AND FICTION 11 (2003); ROBERT HOGG, MEN AND MANLINESS ON THE FRONTIER: QUEENSLAND AND BRITISH COLUMBIA IN THE MID-NINETEENTH CENTURY 179 (2012); MILLER, MYSTERY, *supra* note 176, at 3, 4, 40, 78, 86, 113, 281.

¹⁸⁰ Letter from Oliver Wendell Holmes to Mother (Oct. 23, 1861), in TOUCHED WITH FIRE, *supra* note 178, at 13, 13.

¹⁸¹ *Id.*

¹⁸² *Id.*

seemed, was the real thing. The sergeant and colonel, concerned for the wounded Holmes, had directed him to the rear, yet in a cinematically plucky gallop, the greenhorn officer, beholden to his more vaunted standard of manliness, charged again: "I felt that I couldn't without more excuse so up I got and rushed to the front."

He survived, yes, but others did not, he informed his mother.

Lt. Putnam is dead. Capt. Putnam lost his right arm . . . Schmidt badly wounded—Lowell wounded—Colonel Major & Adjutant probably prisoners Babo & Wesselhoeft probably dead—Dreher shot through the head—[Sergeant] Merchant shot dead (in the head) From a third to a half of our company killed and wounded & prisoners.¹⁸³

This roster of morbidity was another piece of evidence tendentiously arranged by Holmes to prop up his professed manliness. *Look mother*, Holmes appeared to be saying, *I could've been taken prisoner like the Colonel and the Adjutant, or killed like Putnam or Babo or a third to a half of the company. I could have—but I wasn't.*

That he not only escaped these bleak fates but, whilst shot, sprinted back to the front, hungry for more action, read as a demonstrative testament to his manliness. After cataloguing the gruesome endings that befell Putnam, Schmidt, and the rest, Holmes returned to his favorite subject—himself. While other men perished, Holmes told his mother, her son had distinguished himself as a man: "And now seem to think I have a fair chance and all my friends whatever happens I am very happy in the conviction I did my duty handsomely."¹⁸⁴

Our 22-year-old Oliver Wendell Holmes targeted his fulsome bragging to his mother, and I suspect that Holmes's decision to do so was quite deliberate. Holmes appeared to be disabusing his mother of any lingering doubt she may have had about her son's manliness. He was attempting to excise any residual instinct for protective nurturing that his mother may have harbored. For a mother's smothering protection can be more lethal to a young soldier's manliness than can enemy fire. Writing during the Vietnam War, the young combat soldier Philip Caputo, for one, trembled at the prospect that he would be rejected by the Marines, and shipped back to the smothering arms of his parents in the appallingly safe world of suburban Illinois:

It was not their criticism I dreaded, but the emasculating affection and understanding they would be sure to show me. I could hear my mother saying, "That's all right, son. You didn't

¹⁸³ *Id.* at 18.

¹⁸⁴ *Id.*

belong in the Marines but here with us. It's good to have you back. Your father needs help with the lawn."¹⁸⁵

Caputo was terrified of this scenario. Holmes too refused to suffer such condescending emasculation. Thus he represented himself in the letter as carrying a full stock of manliness's psychological accoutrements: arrogance, cavalierism, and a lust for danger. Holmes was trying to tell his mother in Massachusetts, as Caputo had wanted to tell his in Illinois, that he did not belong back at home. He was a warrior now, Holmes had declared, a true man: "I am very happy in the conviction I did my duty handsomely."¹⁸⁶

But did not Holmes panic or weep or call out for his mother after he was shot and thought he was dying? Other soldiers did. Tim O'Brien, in his classic memoir of military combat, said of his fellow soldiers in the Vietnam war that "they carried themselves with poise, a kind of dignity," but

[n]ow and then, however, there were times of panic, when they squealed or wanted to squeal . . . when they twitched and made moaning sounds and covered their heads and said Dear Jesus and flopped around on the earth and fired their weapons blindly and cringed and sobbed and begged for the noise to stop and went wild and made stupid promises to themselves and to God and to their mothers and fathers, hoping not to die. In different ways, it happened to all of them.¹⁸⁷

Holmes never admitted to such unmanly lapses in dignity, even as he thought he was dying:

Of course when I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness—Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud—then I thought I couldn't be guilty of a deathbed recantation—father and I had talked of that and were agreed that it generally meant nothing but a cowardly giving away to fear¹⁸⁸

¹⁸⁵ PHILIP CAPUTO, *A RUMOR OF WAR* 10–11 (1996).

¹⁸⁶ Letter from Oliver Wendell Holmes to Mother (Oct. 23, 1861), *supra* note 180, at 18.

¹⁸⁷ TIM O'BRIEN, *THE THINGS THEY CARRIED* 19 (1990).

¹⁸⁸ Oliver Wendell Holmes's Diary Entry No. 2, in *TOUCHED WITH FIRE*, *supra* note 178, at 23, 27–28.

Like the letter to his mother, Holmes's diary entry seemed to blur the line between confession and bravado, a common trope of manliness.¹⁸⁹

Not only was Holmes dying, he may have been "*en route* for Hell," a recognition that "came up with painful distinctness." And do not mock me for mentioning hell, he chided: for "the majority vote of the civilized world" accepted hell as real.¹⁹⁰ But Holmes was tough. There would be no deathbed recantation begging God to admit him to heaven. Elsewhere in his diary Holmes swaggered to a friend, "Well Harry I'm dying but I'll be [Goddamned] if I know where I'm going," and later Holmes "swore frightfully—to the great horror of John O'S. who tried to stop me thinking I was booking myself for Hell rapidly." In lieu of a deathbed confession to God, Holmes made what he thought was an affirmation, a final one, of manliness, his manliness. Thus he recorded in his diary: "I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud"

Proud, indeed. So proud was Holmes that he would pit his manliness against God's Wrath. By deciding for himself what counted as a worthy life, and a noble death, Holmes overthrew God and replaced Him with him. Holmes elevated manliness—and specifically, *his* manliness—above the degraded cellar of effeminacy, but also above the traditional ceiling of divinity. There was nothing that reigned over his manliness in Holmes's cosmology. He pressed his claim with arrogant insistence by trading arrogance for argument. "I die like a soldier anyhow," he declared, "I was shot in the breast doing my duty up to the hub—afraid? No, I am proud." These brash pronouncements might seem stubbornly haughty but, as claims for his manliness, Holmes had found an apt style of expression. For bragging and profane defiance are the rhetorical motifs of manliness.¹⁹¹ Holmes's manliness simply announced itself, "I am proud," as though that would suffice, and should the reader disapprove, Holmes was brazenly indifferent to it. Besides, for Holmes, to recant his atheism or agnosticism, as he was dying, would have been "nothing but a cowardly giving away to fear."¹⁹² Holmes's allusion to Jehovah ("I said—by Jove, I die like a soldier anyhow") was a formal invocation of God, to be sure. But Holmes was not reaching out to Him. Holmes was abasing His name, and in fact treating it as a profane segue to a deathbed celebration of his own stubborn manliness.

Holmes's narrative was thus an inversion of the Book of Job. There, another proud man learned, after an excruciating hazing, that his manliness was an illusion of strength, just another thing at the mercy of God's unquestionable whim.¹⁹³ Inexplicably tormented by God, Job, an otherwise righteous man,

¹⁸⁹ See MILLER, MYSTERY, *supra* note 176, at 3, 4, 40, 78, 86, 113, 281.

¹⁹⁰ Oliver Wendell Holmes's Diary Entry No. 2, *supra* note 188, at 27–29.

¹⁹¹ See *supra* note 179 and accompanying text.

¹⁹² Oliver Wendell Holmes's Diary Entry No. 2, *supra* note 188, at 27–28.

¹⁹³ See *Job* 1:1–12.

insisted that God justify His abuse; throughout, God was obstinately mum.¹⁹⁴ Job continued to pester God to explain Himself.¹⁹⁵ Finally, He had had enough: God furiously exclaimed that Job had no right even to make the request because the two were hardly equals, with God being one who “can do all things.”¹⁹⁶ God could “behold every one that is proud, and abase him”;¹⁹⁷ Job was no exception.¹⁹⁸

Holmes, on the other hand, did not acknowledge God’s existence; he was prouder than Job. From one angle, Holmes even appeared to switch the roles in Job’s story: Holmes, a mortal, refused to answer to God. At the end of their respective narratives, Job chastened his manly pride,¹⁹⁹ Holmes reveled in it.²⁰⁰ Holmes even cursed at his deathbed, sounding almost as if he was cursing God as his final act of manliness. I will not bow to you, Holmes seemed to say, even if “I’ll be [Goddamned] if I know where I’m going.”²⁰¹

Not only was he manly, Holmes relished being something of a bully; Holmes cheerfully coerced cowards to man up. On June 2, 1862, Holmes relayed to his parents that when his troops began “to waver a little and fall back,” he commanded sharpshooters “to shoot any man who ran and they lustily buffeted every hesitating brother.”²⁰² A hands-on approach was warranted for one coward: “I gave one (who was cowering) a smart rap over the backsides with the edge of my sword—and stood with my revolver & swore I’d shoot the first who ran or fired against orders.”²⁰³ One who had almost perished in combat, Holmes acted as if he had earned the right to compel other men to assume the duties of manliness.

Even when he wept, Holmes said he did so because of manliness. On December 12, 1862, he was confined to a hospital bed where he was, as he wrote his parents, “miserably sick with the dysentery, growing weaker each day from illness and starvation.”²⁰⁴ What broke his heart, though, was being rent from his troops: “I see for the first time the Regt going to battle while I remain behind—a feeling worse than the anxiety of danger, I assure you—Weak as I

¹⁹⁴ *Id.* at 30:20.

¹⁹⁵ *Id.* at 34:29.

¹⁹⁶ *Id.* at 42:2.

¹⁹⁷ *Id.* at 40:11.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 42:2–6.

²⁰⁰ Oliver Wendell Holmes’s Diary Entry No. 2, *supra* note 188, at 27–28.

²⁰¹ *Id.* at 28.

²⁰² Letter from Oliver Wendell Holmes to Parents (June 2, 1862), *in* TOUCHED WITH FIRE, *supra* note 178, at 47, 51.

²⁰³ *Id.*

²⁰⁴ Letter from Oliver Wendell Holmes to Mother (Dec. 12, 1862), *in* TOUCHED WITH FIRE, *supra* note 178, at 74, 74.

was I couldn't restrain my tears—I went into the Hosp . . . listless and miserable.”²⁰⁵ He repeated later that war was “a terrible sight when your Regt is in it but you are safe—Oh what self reproaches have I gone through for what I could not help”²⁰⁶

These letters were penned by a 20-something Oliver Wendell Holmes, not long gone from the undergraduate halls of Harvard. The manliness to which they paid homage would deeply structure his subsequent worldview, to which I turn next.

V. MANLINESS AS CIVIC PEDAGOGY

In this section, I introduce the thesis that manliness formed the basis, not only for Holmes's general worldview, but also for what would become his civic pedagogy. By civic pedagogy, I mean to refer to what Holmes had in mind about trying to educate the public at large about the nature and obligations of citizenship in a constitutional democracy.²⁰⁷ For Holmes, citizenship was more than a legal identity. If Americans flattered themselves worthy of participation in an unprecedented regime of self-government, they also, Holmes believed, had to summon the courage that was associated in his mind with a certain variety of manliness. For constitutional democracy, in Holmes's view, was not a luxury; it was instead a sum of obligations, and among them was the obligation that citizens had to bear the dangers of subversive speech. In this section I limn the origins of Holmes's civic pedagogy, the same pedagogy that would furnish the foundation for his judicial worldview.

A. *Blind Faith in One's Courage*

Reflect back on Oliver Wendell Holmes, the college boy, prior to his military enlistment. The record of his laddish manliness was unforgettable. The Harvard undergraduate had clashed with the faculty, especially Professor Bowen;²⁰⁸ Holmes, drunk with other boys, had recklessly broken a dormitory window;²⁰⁹ he had been privately and publicly admonished by administrators for several infractions;²¹⁰ but for his father's intervention, he probably would

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 76.

²⁰⁷ For consonant definitions, see KWASI WIREDU, A COMPANION TO AFRICAN PHILOSOPHY 456 (2008).

²⁰⁸ See *supra* note 131 and accompanying text.

²⁰⁹ See *supra* note 150 and accompanying text.

²¹⁰ See *supra* note 130 and accompanying text.

have been expelled on at least one occasion;²¹¹ and, not least, he left Harvard—without permission—to join the Massachusetts militia, cavalierly passing up a college degree.²¹² These heady deeds from 1857 to 1861 were in large part those of a willful youth trying to foot his independence on the road to manhood.

Fast forward to May 1895, 34 years after Holmes had left college.²¹³ He had lived a full life by then. Notwithstanding his troubles with the Harvard faculty, he had been esteemed by his classmates who had voted him Class Poet back in 1860.²¹⁴ He had fought in the Civil War for three years after graduation and was thrice wounded and nearly killed.²¹⁵ After his service, Holmes enrolled in and graduated from Harvard Law School.²¹⁶ He married Fanny Dixwell, the daughter of his high school teacher, in a relationship that would endure for their lifetime.²¹⁷ He became a well-paid law professor at Harvard and a distinguished scholar.²¹⁸ He then accepted a judicial appointment on the Massachusetts Supreme Court.²¹⁹

It is at this point in his life, as a judge and seven months after his father's death, that Holmes gave the 1895 Memorial Day Speech to Harvard's graduating class.²²⁰ One might imagine that Holmes, now late into his middle age—about a decade removed from retirement for most men—had outgrown his youthful infatuation with manliness, perhaps even remembering it with amused embarrassment. If anything, Holmes's fondness for manliness had, over the years, organized itself into an overwrought celebration that was spiked with cranky contempt for effeminacy.

Titled “The Soldier's Faith,” Holmes's speech started by taking measure of how the world had changed since he was an undergraduate.²²¹ He bemoaned that in the 1890s, success in business, not sacrifice in war, had become the emblematic fulfillment of manliness. “For although the generation born about 1840, and now governing the world, has fought two at least of the greatest wars in history, and has witnessed others, war is out of fashion, and the man who commands the attention of his fellows is the man of wealth.”²²²

²¹¹ See *supra* note 151 and accompanying text.

²¹² See *supra* notes 153–54 and accompanying text.

²¹³ COLLINS, *supra* note 2, at ix, x.

²¹⁴ Posner, *supra* note 1, at ix.

²¹⁵ WHITE, *supra* note 1, at 3.

²¹⁶ COLLINS, *supra* note 2, at ix.

²¹⁷ WHITE, *supra* note 1, at 103–04.

²¹⁸ *Id.* at 196, 198–99.

²¹⁹ *Id.* at 255.

²²⁰ HOLMES, *The Soldier's Faith*, in 3 COLLECTED WORKS, *supra* note 137, at 486, 486.

²²¹ *Id.*

²²² *Id.*

Holmes did not mean to condemn the pursuit of wealth.²²³ What disgusted him was that it seemed to be the only worthy ideal in American society.²²⁴

The new generation desired above all, Holmes disdainfully commented, an easy placidity that came from material comfort: “The society for which many philanthropists, labor reformers, and men of fashion unite in longing is one in which they may be comfortable and may shine without much trouble or any danger.”²²⁵ The sentiment was everywhere, Holmes complained. Animal rights activists, socialists, labor unions, and the idle rich—they all condemned suffering, whatever the suffering, as inherently wrong.²²⁶ In suffering’s place, Americans welcomed hedonism, as they drowned in “literature of French and American humor” while “revolting at discipline, loving flesh-pots, and denying that anything is worthy of reverence.”²²⁷

In his youth Holmes had bucked the infantilizing tentacles of Harvard College. In his late middle-age his manliness feared that it was besieged by a new foe—effeminacy. And let us be clear: it was effeminacy, not femininity, that was the object of Holmes’s scorn. Femininity, the traditional province of women, was imputed with the virtues of tenderness, love, maternalism, meekness.²²⁸ For Holmes to have condemned femininity would have been for him to condemn these as well. True, effeminacy’s etymon—*femi*—derives from femininity, but effeminacy is not graced with femininity’s redemptive charm.²²⁹ Effeminacy is not the condition of being womanly; it is the circumstance of being unmanly, with none of the virtues of man *or* a woman.²³⁰ Effeminacy for Holmes was a vice stuffed with narcissism, materialism, and sloth.

He commended war as a needful remedy. More than a political necessity for Holmes, war was an opportunity for moral regeneration. Through war, men found or rekindled that most worthy ideal to govern their lives: manliness. “The ideals of the past for men,” Holmes explained, “have been drawn from war, as those for women have been drawn from motherhood.”²³¹ According to Holmes, today’s gentleman was not the antithesis of the soldier, but the latter’s heir. “Who is there who would not like to be thought a gentleman?” Holmes asked.²³² “Yet what has that name been built on but the

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 489.

²²⁸ MILLER, MYSTERY, *supra* note 176, at 233.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ HOLMES, *supra* note 220, at 487.

²³² *Id.*

soldier's choice of honor rather than life?"²³³ Note how Holmes used the term "gentleman." Holmes, in his usage, silently truncated the *gentle* in "gentlemanliness," leaving only the warrior's manliness; used thusly, *gentlemanliness* was divorced from its connection to civility and restraint,²³⁴ and hearkened back to its older, pre-liberal meaning in a culture of honor that prized chivalry and duels.²³⁵

Holmes thereby distanced himself from those contemporaries who shunned hypermasculine violence as ungentlemanly. This is not to imply that Holmes relished manly violence as an unequivocal good. Holmes instead most valued violence when it was done as an existential enterprise, a mystical test of one's faith in one's self; hence the title of his speech, "The Soldier's Faith."

In the speech he confessed his own uncertainty about life and the meaning of death. "I do not know what is true," Holmes confided, "I do not know the meaning of the universe."²³⁶ Yet there was one thing to which he always held fast:

in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a 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.²³⁷

Purportedly a meditation about faith, the passage is oddly paradoxical. On the one hand, Holmes "in the midst of doubt" refused to surrender his faith in one very dear ideal—the soldier's manliness. This manliness itself seemed to be in the epistemic dark, however: Holmes himself had acknowledged that the soldier was marshaled "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." How could Holmes then turn to the soldier for inspiration?

He could do so, he claimed, because a true soldier never relinquished his faith in *himself*. "Most men who know battle know the cynic force with which the thoughts of common-sense will assail them in times of stress; but they know that in their greatest moments faith has trampled those thoughts

²³³ *Id.*

²³⁴ CHRISTINE BERBERICH, THE IMAGE OF THE ENGLISH GENTLEMAN IN TWENTIETH-CENTURY LITERATURE 17 (2013); Kang, *Manliness and the Constitution*, *supra* note 91, at 263 .

²³⁵ STEPHEN BANKS, A POLITE EXCHANGE OF BULLETS: THE DUEL AND THE ENGLISH GENTLEMAN, 1750–1850, at 9 (2010); MARSHALL MYERS, ONLY IN OLD KENTUCKY: HISTORIC TRUE TALES OF CULTURAL INGENUITY 119 (2014).

²³⁶ HOLMES, *supra* note 220, at 487.

²³⁷ *Id.*

under foot.”²³⁸ These men “who know battle” were probably a minority among the well-heeled, mixed-gender audience listening attentively to Holmes on the Harvard campus. Holmes therefore had them imagine what combat might be like so that they might gain a depth of feeling about the incredible faith required of a soldier.

Picture yourself, he said,

in line, suppose on Tremont Street Mall [not far from Harvard], ordered simply to wait and to do nothing, and have watched the enemy bring their guns to bear upon you down a gentle slope like that from Beacon Street, have seen the puff of the firing, have felt the burst of the spherical case-shot as it came toward you, have heard and seen the shrieking fragments go tearing through your company, and have known that the next or the next shot carries your fate²³⁹

Or, suppose:

[Y]ou have ridden by night at a walk toward the blue line of fire at the dead angle of Spottsylvania, where for twenty-four hours the soldiers were fighting on the two sides of an earthwork, and in the morning the dead and the dying lay piled in a row six deep, and as you rode have heard the bullets splashing in the mud and earth about you; if you have been on the picket-line at night in a black and unknown wood²⁴⁰

Against these grotesque scenarios,

[i]f you have had a blind fierce gallop against the enemy, with your blood up and a pace that left no time for fear—if, in short, as some, I hope many, who hear me, have known, you have known the vicissitudes of terror and of triumph in war, *you know that there is such a thing as the faith I spoke of.*²⁴¹

Holmes continued, “You know your own weakness and are modest; but you know that man has in him that unspeakable somewhat which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief.”²⁴²

Holmes’s speech deeply resonated with the reflections about Plato and Socrates which he had penned as an undergraduate. Holmes admired both

²³⁸ *Id.*

²³⁹ *Id.* at 487–88.

²⁴⁰ *Id.* at 488.

²⁴¹ *Id.* (emphasis added).

²⁴² *Id.*

philosophers for “having only himself to rely on” against a world of existential doubt.²⁴³ In “The Soldier’s Faith” he situated such faith under the harshest of tests—combat.²⁴⁴ It was here that faith would be tested as a manly virtue. And Holmes brimmed with optimism that against staggering odds the soldier was “capable of miracle.”²⁴⁵ By this, Holmes did not mean to suggest man was capable of surviving the impossible. For manliness was not necessarily measured by whether it survived. Manliness was chiefly measured by its willingness to exert everything that it had to the fullest such that the “might of [the soldier’s] own soul, unaided, [is] able to face annihilation for a blind belief.”²⁴⁶

The point of combat, for Holmes, was not necessarily to win, but to test his mettle, his manliness. Holmes summarized this mindset in a passage worth quoting in full:

That the joy of life is living, is to put out all one’s powers as far as they will go; that the measure of power is obstacles overcome; to ride boldly at what is in front of you, be it fence or enemy; to pray, not for comfort, but for combat; to keep the soldier’s faith against the doubts of civil life, more besetting and harder to overcome than all the misgivings of the battlefield, and to remember that duty is not to be proved in the evil day, but then to be obeyed unquestioning; to love glory more than the temptations of wallowing ease, but to know that one’s final judge and only rival is oneself: with all our failures in act and thought, these things we learned from noble enemies in Virginia or Georgia or on the Mississippi, thirty years ago; these things we believe to be true.²⁴⁷

The point of manliness lay not necessarily or mainly in political victory but in cultivating a *faith* in one’s manliness, a faith whose value was only measured by its ability to endure terror and hardship. Thus, Holmes implored men “to pray, not for comfort, but for combat” and “to love glory more than the temptations of wallowing ease.” So conceived, Holmes was grateful for “noble enemies in Virginia or Georgia or on the Mississippi” for having taught him about manliness by trying to kill him.

The theme of manliness—specifically, its unwavering faith in itself—had been rehearsed earlier in Holmes’s Memorial Day speech in 1884, before

²⁴³ HOLMES, *supra* note 159, at 153.

²⁴⁴ See Kang, *Burdens of Manliness*, *supra* note 92, at 495.

²⁴⁵ HOLMES, *supra* note 220, at 488.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 490.

the Grand Army of the Republic.²⁴⁸ Again, Holmes announced that war was a barbed paradox where the soldier had to muster a magnificent faith even as he was enveloped by tormenting uncertainty:

To fight out a war, you must believe something and want something with all your might. . . . without being able to foresee exactly where you will come out. All that is required of you is that you should go somewhither as hard as ever you can. The rest belongs to fate.²⁴⁹

Those who survived knew life at its highest, Holmes said, as memorialized in his oft-quoted line, “Through our great good fortune, in our youth our hearts were touched with fire.”²⁵⁰

The fire imagery—along with the references to chivalry, to caring “nothing for their lives,” to a soldier’s “splendid carelessness for life”—appear to avail themselves as evidence that Holmes was a 19th-century Don Quixote, one who, seen in his most harmless light, was boyishly reckless in his craving for danger, and regarded more darkly, nurtured a death wish of sorts. This impression, however, must be mitigated by Holmes’s decision, which I address next, to quit the militia for the comforts of peace, safety, and home.

B. *Quitting Combat, Choosing Life*

Recall Holmes’s letter of December 12, 1862, to his mother, where he welled up at the wrenching sight of his companions trudging to combat while he lay safely immobilized in a hospital: “I see for the first time the Regt going to battle while I remain behind—a feeling worse than the anxiety of danger, I assure you—Weak as I was I couldn’t restrain my tears—I went into the Hosp . . . listless and miserable.”²⁵¹

Only a miser would begrudge the genuineness of Holmes’s frustrated lament. Unit cohesion is more than a slogan: soldiers, unlike civilians, find themselves besieged by a lethal enemy and reflexively willing to sacrifice themselves for each other; it is common and inevitable that a powerful mutual affection would bind them.²⁵² But war exhausts every soldier and most want to go home, eventually.²⁵³ Holmes was no different; when he had the chance to reenlist in 1864, he wanted out.²⁵⁴ That decision risked his manly honor,

²⁴⁸ HOLMES, *Memorial Day Speech*, in 3 COLLECTED WORKS, *supra* note 137, at 462, 462.

²⁴⁹ *Id.* at 463.

²⁵⁰ *Id.* at 467.

²⁵¹ Letter from Oliver Wendell Holmes to Mother (Dec. 12, 1862), *supra* note 204, at 74.

²⁵² SEBASTIAN JUNGER, WAR 214–15 (2011).

²⁵³ JOSHUA S. GOLDSTEIN, WAR AND GENDER 258–63 (2009).

²⁵⁴ WHITE, *supra* note 1, at 62.

however. Holmes had laurelled his manliness with ostentation. Now, desiring exit, he risked appearing a coward, or one whose manliness was much less than it seemed, a spoiled status that was barely better than being the former.

How did Holmes attempt to extract himself from this dilemma? By doing what any hypermasculine, self-congratulatory male braggart like he would do: by reasserting his manliness, of course.²⁵⁵ He had strenuously puffed up his manliness before his mother after he had been shot at Ball's Bluff. In that letter penned in 1861, which we had examined, Holmes had gloried in his own gallantry.²⁵⁶ In 1864, he would write another letter to his mother, this one also dwelling on his manliness. Yet in lieu of praising his manliness in war, Holmes, this time, sought to use it as a justification to extricate himself from war. Holmes explained to his mother:

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 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 has changed.²⁵⁷

In the letter Holmes insisted that he had earned the right—as a man—to leave the military: “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 has changed.”

A fuller announcement followed in the same letter:

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 any 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 which I denied Willy Everett to decide for myself how I can best do my duty to myself to the country and, if you choose, to God.²⁵⁸

Parse Holmes's explanation for withdraw from the militia. He reassured his parents that he could face anything including “great danger,” but “a doubt demoralizes me as it does any nervous man.” This was a rare concession of humility for Holmes, and he did tender a confession of sorts: “and now I honestly think the duty of fighting has ceased for me.”

²⁵⁵ See *supra* note 189 and accompanying text (arguing that boasting is a salient trope of manliness).

²⁵⁶ Letter from Oliver Wendell Holmes to Mother (Oct. 23, 1861), *supra* note 180, at 13.

²⁵⁷ Letter from Oliver Wendell Holmes to Mother (June 7, 1864), in *TOUCHED WITH FIRE*, *supra* note 178, at 142, 142–43.

²⁵⁸ *Id.* at 143.

His was no admission of emasculation, however; it was an explanatory preamble to Holmes's insistence that he, as a veteran combat soldier, had now obtained the right to think for himself as a man. Reread the relevant passage: "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 which I denied Willy Everett to decide for myself how I can best do my duty to myself to the country and, if you choose, to God . . ." Holmes had *earned* the right to judge for himself because he had *proved* his guts in battle; he was entitled to judge as a man because he had shown in combat that he was one.²⁵⁹

Holmes thereby implied that the right of self-direction was not something to which a man was entitled as a matter of course but that it had to be purchased through some demonstration of courage.²⁶⁰ He could hence properly deny the right of self-direction to Willy Everett, a Harvard classmate who dodged military service for study in England.²⁶¹ As a presumptive coward who abandoned his civic duties, Everett, Holmes suggested, lacked manly standing to decide what was in his best interests. This was a very different understanding of manly autonomy from the one advocated by the Founding Fathers. The latter had argued that the right of independent deliberation was not only a right but a duty of any man in a government where the people were self-sovereign; for the Founding Fathers, the act of deliberation, depending on the risks, could *itself be* an act of bravery.²⁶²

For all his martial strutting, however, Holmes had revealed by refusing reenlistment that gentlemanliness in its conventional sense, with its civility and desire for peace, was ultimately preferable over hypermasculinity. In spite of the decorative paeans to heroic valor (others' and his own), his tough-guy shrugs to God, and his cocky indifference to death, Holmes's actions, in the end, spoke louder than his words. He opted for life, and a safe and sedentary one at that, becoming a lawyer, then a professor and, eventually, a judge. Holmes therefore did not take his own summons for martial manliness without qualification.²⁶³

²⁵⁹ Worth mentioning in this context is the exchange between the 20-something Oliver Wendell Holmes and his eponymous father. His father had asked him, "How are you, Boy?" The young combat soldier had replied, "Boy nothing," a perfectly apt response for one whose manliness had been tested under conditions whose vaguest glimmerings his father had never known. The son was, in effect, disabusing the father to refrain from the patronizing affection more suitable for an adolescent. Alexander Woollcott, 'Get Down, You Fool!', 1938 ATLANTIC MONTHLY 169, 173, <http://pds.lib.harvard.edu/pds/view/43393926?n=15>.

²⁶⁰ In this sense, Holmes was adhering to the conventional view that manliness was not a product of biology but the earned work product of physical courage. See Kang, *Burdens of Manliness*, *supra* note 92, at 486–94; Kang, *Courage Exist*, *supra* note 92, at 467–68.

²⁶¹ Letter from Oliver Wendell Holmes to Mother (June 7, 1864), *supra* note 257, at 143 n.1.

²⁶² See Kang, *Manliness and the Constitution*, *supra* note 91, at 323.

²⁶³ In effect, Holmes was arguing, against reigning convention, that a man need not feel pressured to demonstrate his manliness through acts of physical valor till his life's end. See

And neither should we. In his speeches, Holmes had unabashedly exhorted men to risk life and limb to obtain a glorious manliness. Holmes himself had exemplified such abandon. Yet in the end he also demonstrated that there was more to life than manliness, at least the martial kind, and that physical courage was not an end in itself. So too by relinquishing his obsession with war and seeking readmission to civilization, Holmes implied that manliness alone could not sustain him. In a sense, Holmes represented a modern-day noble (a Boston Brahmin as he was called)²⁶⁴ who romanticized war and violent death—much as nobles did in the 16th century;²⁶⁵ unlike many of those nobles, however, Holmes realized after enduring the state of war that civil society was better.

To be sure, Holmes, as his speeches stubbornly bear out, never ceased to romanticize and commend the manliness of physical courage;²⁶⁶ without such courage men would wallow in materialism and sloth, effeminacy's vices.²⁶⁷ But he also showed through example that the gentleman's desire for safety and civil society was more important. What he sought in essence was a balance between these two positions. As I will illustrate, his jurisprudence on the Supreme Court reflected this balance. Holmes believed that a manly courage to endure physical danger was a necessary civic ethos to underwrite constitutional democracy.

VI. REVISIT THE CASES

Manliness did not make any explicit appearances in the legal opinions which Holmes wrote; some of his most enduring opinions (which are among the Court's most enduring) were animated by it nonetheless. In them, Holmes evinced again his admiration for physical courage as an essential virtue for all Americans. He could not however simply put on offer the same courage which he had exalted before in his letters, speeches, and diary entries. In those, he had written of courage chiefly as a *moral* virtue, a restorative for a man's pride and self-esteem. As a Supreme Court Justice he had to explain why such courage was relevant for politics, and specifically for constitutional democracy; Holmes had to work up a theory of manliness as a civic virtue.

Serendipitously for Holmes, the cases that would showcase his famous dissents involved factual circumstances that were near and dear to him,

Kang, *Courage Exist*, *supra* note 92, at 467–68; Kang, *Burdens of Manliness*, *supra* note 92, at 486–94. Instead, for Holmes, a man could obtain a status of manliness that would remain unimpeachable if he had willingly endured a certain requisite amount of peril.

²⁶⁴ Holmes's father, incidentally, had coined the term "Boston Brahmin." COLLINS, *supra* note 2, at 2.

²⁶⁵ Kang, *Manliness and the Constitution*, *supra* note 91, at 268–76.

²⁶⁶ See *supra* notes 225–27 and accompanying text.

²⁶⁷ See *supra* notes 225–27 and accompanying text.

circumstances that united violence and his obsession with manliness: war. Holmes would use the cases to test whether the American people were manly enough to support constitutional democracy, an enterprise which Holmes regarded as inherently unsafe and only befitting a people who could bravely face physical danger.

A. *The Socialist Threat*

In *Abrams v. United States*²⁶⁸ one will find perhaps Holmes's greatest legal opinion.²⁶⁹ It is a dissent, and dissenting opinions generally fail to elicit much support from future generations of judges. Holmes's dissent in *Abrams* was different, however. Over the years, it would become one of the most influential legal opinions in American history, easily eclipsing the majority opinion in the case.²⁷⁰

Let us attend to the historical context in which the facts of *Abrams* played out. Three years ahead of Holmes at Harvard College, Henry Adams, reflecting back, had rued the intellectual somnolence of his alma mater: Having graduated in 1853, Adams claimed never to have heard as an undergraduate the name of Karl Marx.²⁷¹ If the alleged omission were real, it was also surreal given Marx's future stature as perhaps the most powerful intellectual of the 20th century.²⁷² Marx had condemned capitalism as an efficiently ordered moral barbarism that gorged a handful of industrialists by exploiting and, in time, destroying workers toiling away in monstrous factories.²⁷³ In a grotesque inversion of ethical priorities, capitalist governments, Marx argued, valued the objects of production, not the beings who made them.²⁷⁴ Vladimir Lenin, in the early 20th century, subsequently incorporated Marx's ideas into a program of political action that called for violent overthrow of capitalist governments. In

²⁶⁸ 250 U.S. 616 (1919) (Holmes, J., dissenting).

²⁶⁹ Max Lerner's influential biography of Holmes extols the *Abrams* dissent as "the greatest utterance on intellectual freedom by an American." MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS* 306 (Transaction Publishers 1989) (1943); see also COLLINS, *supra* note 2, at 291 (praising Holmes's dissent as an exceptional achievement); MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 108 (1991) (same); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 81 (2011) (same).

²⁷⁰ See HEALY, *supra* note 3, at 245.

²⁷¹ See *supra* note 113 and accompanying text.

²⁷² ROBERT FREEDMAN, *THE MARXIST SYSTEM* 135 (1990); MARY KLAGES, *KEY TERMS IN LITERARY THEORY* 50 (2012).

²⁷³ KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 67 (2013).

²⁷⁴ Karl Marx, *From the Economic and Philosophical Manuscripts of 1844*, in KARL MARX: *A READER* 35, 37 (Jon Elster ed., 1986).

their place, there would be rule by the workers, Lenin foretold—a dictatorship of the proletariat, in his parlance.²⁷⁵

By 1917 an ignorance of Marx would not have benighted any undergraduate at Harvard. For by then, Socialist revolutionaries purporting to enact the tenets of Marxism-Leninism had waged war against Russia's tsarist regime.²⁷⁶ After the revolution, the Socialists installed a Communist government, the first of its kind, that professed to represent only the rights of the workers.²⁷⁷

This achievement was just the beginning. For the Socialists publicly threatened that, as required by their Marxist-Leninist principles, they planned to destroy all other governments, including the one in the United States; only then would the liberation of the world's workers begin in earnest.²⁷⁸ Any sensible American would have weighed the threat gravely. For it was issued by a regime that had no qualms about murdering defenseless aristocrats, and exploiting its immense resources to wage wide-scale war.²⁷⁹

Socialism's brunt, indeed, was felt at home in the states. Seeking to hasten the revolution, Socialists (who were sometimes assisted by, and sometimes went under the name of, anarchists) set upon a campaign of terrorism. On April 28, 1919, a homemade bomb, embedded in a package, was delivered to Seattle's mayor.²⁸⁰ The next day, another bomb was sent to the home of a former U.S. Senator from Georgia; when the package was opened, it exploded.²⁸¹ On April 30, police discovered 16 packages in a postal office, all of them contained bombs set to explode on May Day—International Workers Day.²⁸² The packages were addressed to millionaire capitalists John D. Rockefeller and J. P. Morgan as well as various political leaders.²⁸³ Another bomb was sent to Attorney General A. Mitchell Palmer's home.²⁸⁴ Attached to the bomb was a note signed "The Anarchist Fighters" along with this threat: "There will have to be bloodshed; we will not dodge; there will have to be murder; we will kill."²⁸⁵ There were, in sum, 36 targets to whom bombs had

²⁷⁵ JAMES RYAN, *LENIN'S TERROR: THE IDEOLOGICAL ORIGINS OF EARLY SOVIET STATE VIOLENCE* 34 (2012).

²⁷⁶ See CHARLES E. ZIEGLER, *THE HISTORY OF RUSSIA* 66–72 (2009).

²⁷⁷ *Id.* at 77–78.

²⁷⁸ *Id.* at 78.

²⁷⁹ SHEILA FITZPATRICK, *THE RUSSIAN REVOLUTION* 45 (2d ed. 1994).

²⁸⁰ RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 162 (1999).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

been mailed.²⁸⁶ Together, the campaign of terrorism amounted to the largest assassination plot in American history.²⁸⁷

Among the targets was a certain federal judge: Oliver Wendell Holmes.²⁸⁸ Holmes's friend, the diplomat and historian Lewis Einstein, was vexed with concern. "I am writing you," he conveyed to Holmes, "a brief note to say how shocked we are to hear of the outrageous attempt made on you and how thankful that it was frustrated."²⁸⁹ Holmes responded in the words of his inimitable hardboiled persona. "I haven't thought much about it except," he told Einstein, "when reminded by letters . . . for, as I said to my wife, if I worried over all the bullets that have missed me I should have a job."²⁹⁰

Perhaps Holmes was phlegmatic about the violence but the rest of America was terrified. New York City issued an edict that forbade displaying the flag of Communist Russia in any public gathering.²⁹¹ The city's police commissioner, Richard Enright, told the head of the Bomb Squad that the flag was

emblematic of unbridled license and anarchy; it, like the black flag, represents everything that is repulsive to the ideals of our civilization and the principles upon which our Government is founded. . . . I consider that the preservation of public order and the peace and welfare of the community at large, demand the absolute prohibition of its employment.²⁹²

Anarchists frightened the F.B.I. as well, where a tenacious 24-year-old named J. Edgar Hoover commanded a division within the Bureau that obsessively tracked subversive activities.²⁹³ By 1919, half the F.B.I.'s field force was dedicated to monitoring political radicalism.²⁹⁴

Enter Jacob Abrams, the namesake defendant of *Abrams v. United States*.²⁹⁵ Abrams, and his four fellow defendants were Eastern European Jews who had immigrated to New York City.²⁹⁶ They were also communists and anarchists, and they were breathlessly devoted to Russia's new regime.²⁹⁷

²⁸⁶ HEALY, *supra* note 3, at 133.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 132–33.

²⁸⁹ *Id.* at 133.

²⁹⁰ *Id.*

²⁹¹ POLENBERG, *supra* note 280, at 163.

²⁹² *Id.*

²⁹³ *Id.* at 165.

²⁹⁴ *Id.* at 164.

²⁹⁵ *Id.* at 22–23.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 22–27, 42.

Abrams and his codefendants distributed two leaflets, one written in Yiddish and incomprehensible to most of the readers, the other in English.²⁹⁸

These leaflets alarmed Americans, and why they did so requires some explanation. America in 1917 was fighting Germany in World War I.²⁹⁹ Abrams, like other communists, could not have been giddier at the prospect of capitalist America and monarchic Germany beating each other senseless.³⁰⁰ However, Abrams feared that America, using the pretext of combating Germany, was furtively shutting troops to Russia with the goal of toppling its fledgling communist regime.³⁰¹ Abrams and his friends endeavored to sway Americans to oppose this suspected intervention.

Samuel Lipman, author of one leaflet (the one in English), wrote, “The President was afraid to announce to the American people the intervention in Russia.”³⁰² One part of the leaflet accused America of colluding with Germany to destroy communist Russia:

[President Wilson] is too much of a coward to come out openly and say: “We capitalistic nations cannot afford to have a proletarian republic in Russia.” Instead, he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the [R]ussian Revolution. Do you see now how German militarism combined with allied capitalism to crush the Russian revolution?³⁰³

The leaflet next urged workers to take up arms against their respective governments, including the American government:

THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP.

The Russian Revolution cries: “WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!”

Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.

It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight THE WORKERS’ REPUBLIC OF RUSSIA.

AWAKE! AWAKE, YOU WORKERS OF THE WORLD!

²⁹⁸ *Id.* at 49–51.

²⁹⁹ SPENCER TUCKER & PRISCILLA MARY ROBERTS, *THE ENCYCLOPEDIA OF WORLD WAR I*, at 471 (2005).

³⁰⁰ POLENBERG, *supra* note 280, at 50, 134.

³⁰¹ *Id.* at 52, 114.

³⁰² *Id.* at 50.

³⁰³ *Id.*

REVOLUTIONISTS³⁰⁴

The second leaflet, authored by Jacob Schwartz, was in Yiddish.³⁰⁵ Translated into English by the New York Police Department, it read “the preparatory work for Russia’s emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!”³⁰⁶ Schwartz made a pressing plea: “You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the Workers Soviets? . . . Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?”³⁰⁷ Portentously, the leaflet announced what needed to be done:

Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian worker fights for freedom, but also here in America lives the spirit of revolution.

Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to *fight*.³⁰⁸

The reference to *fight*, while ambiguous, could be reasonably read as implying militancy, perhaps violence. “Three hundred years had the Romanoff dynasty taught us how to fight,” Schwartz added for good measure.³⁰⁹ (The Romanovs were the royal family who had ruled Russia and were murdered in 1918 by the communists.)³¹⁰ “Let all rulers remember this,” the leaflet warned in conclusion, “from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.”³¹¹

For distributing these leaflets, Abrams and his codefendants were charged with conspiring to violate the Espionage Act of 1917.³¹² The first count charged Abrams with having proffered “disloyal, scurrilous and abusive language about the form of government of the United States;”³¹³ the second with “intend[ing] to bring the form of government of the United States into

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 51.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 52.

³⁰⁸ *Id.* (emphasis added).

³⁰⁹ *Id.*

³¹⁰ See generally ROBERT K. MASSIE, THE ROMANOVs: THE FINAL CHAPTER (2012).

³¹¹ POLENBERG, *supra* note 280, at 52.

³¹² Abrams v. United States, 250 U.S. 616, 616 (1919).

³¹³ *Id.* at 617.

contempt, scorn, contumely, and disrepute;”³¹⁴ the third count with “intend[ing] to incite, provoke and encourage resistance to the United States in said war[;]”³¹⁵ the fourth count charged them with “unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.”³¹⁶ Abrams and his cohorts were found guilty of all four counts, a decision upheld by the U.S. Supreme Court.³¹⁷

I want to attend, first, to Justice Clarke’s opinion for the Court, and second, to Holmes’s famous dissenting opinion. By comparing the two, I want to elucidate what Holmes would call the spirit of manly courage that impelled the latter, and the conspicuous fear, perhaps cowardice, that coursed through the former.

Let us begin with Clarke’s majority opinion. It is striking by our contemporary lights, not for what it said, but for what it did not. Even a non-lawyer would recognize that the most pertinent question in *Abrams* was whether the communists had a First Amendment right to pen and distribute their leaflets. Whether they did or did not was open to debate. After all, as the Communist Party and its affiliated members showed through their actions, these were, literally, murderous times. Perhaps a plausible argument could be mustered from the bench that Abrams and his cohorts went too far. Either way, though, one would expect that the Court should want to discuss the First Amendment. Stunningly, there was no mention of the First Amendment *anywhere* in Justice Clarke’s majority opinion. He did not discuss it or quote it; he did not even acknowledge its existence. Clarke confined himself to a discrete technical task: to prove that Abrams’s leaflets satisfied the statutory requirements of the Espionage Act. We are not privy to the secret motivations behind Clarke’s conspicuous silence regarding the First Amendment. What we have instead is the uncomfortable impression that Clarke’s decision was spurred by the fear that merely to have acknowledged the existence of the First Amendment would have been to hasten the chaos of unfettered political freedom.

Buffeting this semblance was Clarke’s repeatedly expressed worry over the hostile *tone* of the leaflets. After reviewing an especially provocative passage, Clarke fretted that in one leaflet “the spirit” (the tone) “becomes more bitter as it proceeds.”³¹⁸ He stressed too the spiky insolence by which Abrams

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 624.

³¹⁸ *Id.* at 621.

spewed “contempt and disrepute” for the President and Congress.³¹⁹ Clarke’s preoccupation with poor etiquette was bewildering: for purposes of First Amendment protection, what mattered if Abrams were bitter or contemptuous? Clarke, I suppose, would have pointed out that Count One of the criminal indictment had charged Abrams with “abusive language” about America’s form of government and that Count Two had charged Abrams with bringing the “form of government of the United States into contempt . . . and disrepute.”³²⁰ His hands were tied, Clarke might have asserted; the federal law required him to evaluate Abrams’s words for the requisite tone. If this line of justification was what Clarke would have ushered in his defense (and I cannot fathom what else he would have been able to say), he would have failed regardless to explain why the criminalization of one’s expressed *tone* should have been held consistent with the Constitution.

Turning from tone, Clarke inspected Abrams’s intent. There was again in Clarke’s opinion an uneasy mood of fear. After quoting from one leaflet, Clarke warned the public, “[T]his is not an attempt to bring about a change of administration by candid discussion . . . the *manifest purpose* of such a publication was to create an attempt to defeat the war plans of the government of the United States.”³²¹ After quoting another passage, Clarke again emphasized Abrams’s intent: “Thus was again avowed *the purpose* to throw the country into a state of revolution, if possible, and to thereby frustrate the military program of the government.”³²² In fairness to Clarke, there was, to be sure, a visible froth of intimidation in Abrams’s leaflet. It was impossible for Clarke not to think about the leaflet’s connection to the horrific recent events in the Russian Revolution and the frightening bombings that the latter had inspired in America.

Whatever Clarke’s failings as a jurist, his decision to uphold the criminal convictions for Abrams found a sympathetic audience in the American public who were frightened of the burgeoning power of Communist Russia.³²³ Holmes, however, would craft a dissenting opinion in which he goaded Americans to accept, and even embrace, life’s uncertainty. Holmes would, in other words, goad the public to become more manly.

³¹⁹ *Id.* at 624.

³²⁰ *Id.* at 617.

³²¹ *Id.* at 622 (emphasis added).

³²² *Id.* (emphasis added).

³²³ POLENBERG, *supra* note 280, at 43, 82–85, 158–60, 162–64.

B. Holmes's Dissent

Clarke's opinion, in spite of its flaws, commanded the assent of every Justice—except Holmes and Brandeis.³²⁴ Holmes had written a dissenting opinion, which Brandeis co-signed, to overturn Abrams's convictions.³²⁵ Subsequent generations of judges and law professors would canonize his opinion as among the most important in American history.³²⁶ That would happen decades later, however, and mostly after Holmes's death.³²⁷

In the meantime Holmes's contemporaries on the Court greeted the dissent with distress. Before he published his opinion, Holmes had circulated a draft to the other Justices, a common courtesy on the bench.³²⁸ After reviewing it, the Justices worried that his tolerance for Abrams's advocacy might hurt America's war effort.³²⁹ Three of the Justices, along with Stanley Morrison, Holmes's judicial clerk, paid him a visit at home to urge him to join Clarke's majority opinion.³³⁰ Many years later, the future secretary of state Dean Acheson, then Brandeis's clerk, recounted what his friend Morrison had told him about that visit.³³¹ "They laid before him," Morrison had said, "their request that in this case, which they thought affected the safety of the country, he should, like the old soldier he had once been, close ranks and forego individual predilections."³³² Holmes, who had expected this pressure, respectfully refused.³³³

That Holmes's colleagues would enlist the soldier metaphor was easily understandable. It was also ill-considered. They had assumed that Holmes, once a proper soldier in the Civil War, would appreciate the needs of his unit—the Supreme Court majority—and accordingly subsume his individualism. Doing so was a mistake. For the notion of "closing ranks and forgoing individual predilections" did not resonate with Holmes's reasons for military enlistment, or his heroism in combat, or his continued fighting in the militia after having been shot. These acts were the result—not the negation—of Holmes's predilection for individualism. Remember, it was the soldier's faith

³²⁴ *Abrams*, 250 U.S. at 624.

³²⁵ *Id.*

³²⁶ W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 8–9 (1994).

³²⁷ Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 1992, at 55, 55.

³²⁸ POLENBERG, *supra* note 280, at 236.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

in *himself* that Holmes found uniquely majestic.³³⁴ The consolations of conformism that were promised to bloom from “closing ranks” did not inspire Holmes. Worth noting in this regard is that Holmes’s famous speech was an homage to the individual, not the group; it was, you recall, titled “The Soldier’s Faith,” not “The Soldiers’ Faith.”³³⁵

So too, as a college student, he had admired Socrates because the great master had resolutely done what he thought right and refused to kowtow to community expectations. Like Holmes, he had been a soldier when young, a legendarily brave one, in fact.³³⁶ Yet far from closing ranks or forgoing individual predilections, Socrates, as an old man, identified himself in Plato’s *Apology* as a “gadfly.”³³⁷ He wanted to “bite” his beloved Athens and awaken it from its complacent slumbering.³³⁸ By disrupting it, he had hoped to provoke his city to embrace the search for truth despite its risks.³³⁹ Socrates’s lone courage, the same courage that had impelled him as a soldier to defend Athens, caused him as an old man to unsettle his beloved city.³⁴⁰

It was this maverick valor that bonded Holmes, as a college sophomore, to Socrates. Socrates, for Holmes, represented

a really great and humane spirit fighting the same fights with ourselves, and always preserving an ideal faith and a manly and heroic conduct; doubly recommended, moreover, to our hearts by the fact of [him] having only himself to rely on, and no accepted faith that killed a doubt it did not answer.³⁴¹

What made Socrates “manly” was that instead of “closing ranks,” he had “only himself to rely on,” and rather than finding solace in forgoing “individual predilections,” Socrates never surrendered his own views, and refused the comforts of a “faith that killed a doubt it did not answer.” For Holmes, Socrates’s manliness rested on courage and the willingness to accept grave uncertainty. As Holmes presented it, Socrates’s manliness, in other words, rested on those qualities which Clarke appeared to find severely discomfiting in politics.

Keep this contrast in mind as you reflect on the foregoing discussion of Holmes’s dissent. “In this case,” he wrote, “sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I

³³⁴ HOLMES, *supra* note 220, at 486, 487.

³³⁵ *See supra* note 220 and accompanying text.

³³⁶ LAWRENCE A. TRITTE, A NEW HISTORY OF THE PELOPONNESIAN WAR 54 (2010).

³³⁷ PLATO, THE APOLOGY OF SOCRATES 22, 61 (D. F. Neville trans., 1901).

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ TRITTE, *supra* note 336, at 54.

³⁴¹ HOLMES, *supra* note 137, at 153.

believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.”³⁴² The statement reads like a taunt against Clarke and his ungainly, and arguably cowardly, evasion of the First Amendment. How did Holmes justify his pronouncement? Rather than making a direct case for free speech, Holmes discredited intolerance as politically dangerous and morally embarrassing.

If you were certain of your rightness, Holmes began, you naturally would rule out the possibility that anyone else could be right. The proposition may seem a yawning platitude but Holmes spins out its political consequences:

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 that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.³⁴³

Those who profess to own some sacrosanct truth were inclined to wipe out their dissenters, Holmes argued; theirs was a mentality incompatible with democracy.

Intolerance, in Holmes’s opinion, was also a moral vice, the handmaiden of cravenness, not manliness. While Clarke depicted Abrams and his codefendants as millenarian provocateurs, Holmes scoffed at all the fuss: “Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, . . . the most nominal punishment seems to me all that possibly could be inflicted.”³⁴⁴ Holmes added, “Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger.”³⁴⁵ Note the difference in exposition. Clarke had quoted long, looming passages from Abrams with the intent of frightening the reader. Holmes nudged the reader to ignore Abrams: “*nobody* can suppose” Abrams posed an immediate danger; Abrams and his confederates were “poor and puny anonymities”; his was “a silly leaflet by an unknown man.” Abrams was not to be feared, but to be ridiculed, Holmes suggested. His tacit civics lesson was that Americans had to be tougher, more manly, if they expected to live in a world of political freedom.

³⁴² Abrams v. United States, 250 U.S. 619, 629 (1919) (Holmes, J., dissenting).

³⁴³ *Id.* at 630.

³⁴⁴ *Id.* at 629.

³⁴⁵ *Id.* at 628.

Long before *Abrams*, Holmes had believed that courage, and by extension, manliness, was necessary to endure the inherent uncertainty of life. Recall here how a 20-year-old Holmes had admired the manly Socrates for having “no accepted faith that killed a doubt it did not answer.”³⁴⁶ For Holmes, Socrates was manly because he was unafraid of existential doubt.³⁴⁷ Recall too what a 54-year-old Holmes had said to Harvard graduates about “The Soldier’s Faith.”³⁴⁸ Holmes had indignantly denounced the public’s cowardly desire for safety: “The society for which many philanthropists, labor reformers, and men of fashion unite in longing is one in which they may be comfortable and may shine without much trouble or any danger.”³⁴⁹ To this, Holmes had retorted, “For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine.”³⁵⁰ Holmes indeed did not repine. He lauded what he thought was at the core of manliness, the “splendid carelessness for life” and the “divine folly” of courting mortal danger.³⁵¹ By enduring horrors, the soldier would develop a faith in himself, in his manliness.

Well and good for the soldier, but why was such faith pertinent, let alone beneficial, for the denizens of, say, New York City, who were subject to *Abrams*’s leafletting? It took a while for Holmes to answer this question, and when he did, he delivered an oblique response requiring the reader to supply intermediary steps of inference.

Here is a brief roadmap of Holmes’s argument. We civilians, he said, also inhabit a world broadly similar to that of the soldier: we too must live in a world that is and forever will be unsafe. To be sure, those of us who are safely ensconced in civil society generally need not worry—at least to the same extent as combat soldiers in war—about the prospect of violent death or ghastly injuries. Yet that hardly implies that civilians are secluded behind some Maginot Line that keeps public violence at bay; cities are prone to riots, bombings and political upheaval. Holmes argued that these dangers were exacerbated in a constitutional democracy that honored the First Amendment’s right of speech. For such freedom permitted speakers to stoke, sometimes unwittingly, the embers of public unrest. Some types of speech were harmless; others were dangerous. And as far as Holmes was concerned it was much too hard to sift the one from the other: speech that posed a “clear and present danger” often bore only subtle differences from speech that was fiercely provocative yet otherwise “safe.” If we were to take the First Amendment seriously, Holmes asserted, we had to err on the side of freedom. And that in

³⁴⁶ HOLMES, *supra* note 159, at 145.

³⁴⁷ See *supra* notes 159–63 and accompanying text.

³⁴⁸ See *supra* notes 224–27 and accompanying text.

³⁴⁹ HOLMES, *supra* note 220, at 486.

³⁵⁰ *Id.* at 487.

³⁵¹ *Id.*

turn required civilians to summon the resources of manly courage, the sort of courage which found paradigmatic expression in the combat soldier. Yet in lieu of the soldier's martial valor, civilians were expected to refrain from punishing hostile speakers until they raised genuine threats to public safety; civilians, Holmes urged, should comport themselves with the courage to tolerate speech that appeared inflammatory.

Justice Clarke, in his opinion for the Court, had strangely refrained from mentioning the First Amendment, or even the Constitution, but Holmes did not hesitate to announce in his dissent that there existed a "theory of our Constitution." That theory rested on the premise that the Constitution was far from being a bedrock of political stability. For Holmes, it was an "experiment":

It is an experiment, as all of 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 the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.³⁵²

In ordinary usage, *experiment* signifies a process of trial and error to sort truth from falsehood.³⁵³ If we were to situate the experiment, so understood, in the proverbial marketplace of ideas, the experiment would involve consumers as metaphoric scientists who vet ideas and arguments, trying to discern the good from the bad.

This scenario however was not quite what Holmes had in mind by experiment. Consider again Holmes's words: "[The Constitution] is an experiment, as all of life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."³⁵⁴ Under Holmes's theory it was not an idea that was being tested; it was we, the public. The Constitution, as an experiment, sought to discern this vital question: were Americans manly enough to be "eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death"?³⁵⁵ As subjects in this purported experiment, Americans would be tested over and over. Indeed, for Holmes, there was no theoretical end to his "experiment" because for him there was no truth patiently awaiting

³⁵² *Abrams v. United States*, 250 U.S. 619, 630 (1919) (Holmes, J., dissenting).

³⁵³ Olaf Rieper, *Theory of Knowledge and Use of Evaluation: Popper's Relevance for the Concept of Streams of Evaluation Knowledge*, in *FROM STUDIES TO STREAMS*, at 271, 276 (Ray C. Rist & Nicoletta Stane eds., 2011).

³⁵⁴ *Abrams*, 250 U.S. at 630.

³⁵⁵ *Id.*

discovery. The only reward—if reward it was—for this experiment where people vigilantly guard speech “fraught with death” was in a sense the experiment itself. Holmes seemed to value the enterprise of experiment because it engendered a civic life where people were compelled to summon their courage, their manliness.³⁵⁶

And here, Holmes revealed himself to be something other than the public persona which he often adopted. In the style of a 20th-century Don Quixote, Holmes had sang grandiloquent paeans to chivalry in his obituary for Francis Lowell Gardner as well as in his speeches about the Civil War.³⁵⁷ But the Don would never brook a villain like Abrams to affront the delicate Dulcineas of the world, let alone frighten them.³⁵⁸ Holmes, on the other hand, serenely forced women to bear the same risky experiment of constitutional democracy as did their men. Dulcineas were not exempted from having to toughen themselves to opinions that “we loathe and believe to be fraught with death.” Holmes therefore was an unsentimental liberal who tacitly, or at least in effect, accorded women equal treatment.³⁵⁹ Phrased otherwise, in his dissent in *Abrams*, Holmes did not wish for women to be shielded by a Don Quixote in the form of the federal government; one could argue that the logical consequence of his jurisprudence was for them to man-up like the nameless warrior in “The Soldier’s Faith.”

How different was the mindset of classic conservatives. Edmund Burke—esteemed today as the father of intellectual conservatism³⁶⁰—had lavished contempt in 1790 on the Frenchmen who had failed to protect Marie Antoinette during the revolution.³⁶¹ A grubby mob inflamed by anti-monarchic rage had brutally cut off her hair, had stuffed her in a cart and wheeled her in front of heckling crowds; eventually, the berserk crowd had consummated their

³⁵⁶ Thirty-three years before he dissented in *Abrams*, Holmes had alluded to the connection between courage and experiment. Speaking at the 250th anniversary of Harvard University, Holmes had declared in 1886 that law professors and lawyers should “hold that science like courage is never beyond the necessity of proof, but must always be ready to prove itself against all challengers.” HOLMES, *The Use of Law Schools*, in 3 COLLECTED WORKS, *supra* note 137, at 474, 475.

³⁵⁷ See *supra* note 169 and accompanying text.

³⁵⁸ MIGUEL DE CERVANTES SAVEDRA, DON QUIXOTE 189 (James H. Montgomery trans., 2009).

³⁵⁹ Holmes’s relationship with women was complicated. See WHITE, *supra* note 1, at 31. A comprehensive examination of which relationship is beyond the purview of this Article but, it seems to me, that Judge Posner sums up well Holmes’s views: “It is true that he held basically conventional views—today regarded by some as vicious—of women, and in particular that he sometimes belittled their intellectual capacities; yet he also valued their conversation to a degree unusual in his day.” Posner, *supra* note 1, at xxviii.

³⁶⁰ See generally DREW MACIAG, EDMUND BURKE IN AMERICA: THE CONTESTED CAREER OF THE FATHER OF MODERN CONSERVATISM (2013).

³⁶¹ EDMUND BURKE, *Reflections on the French Revolution*, in 2 SELECTED WORKS OF EDMUND BURKE 85, 169 (1999).

reverie by ostensibly beheading her on the guillotine.³⁶² “I thought ten thousand swords must have leaped from their scabbards to avenge even a look that threatened her with insult,” Burke had bewailed with disgust. “But,” he had moaned, “the age of chivalry is gone.”³⁶³ Very much a romantic traditionalist, Burke had charged men to kill and die for a woman’s honor.

About 150 years later, the *Abrams* case from 1919 had also contained a narrative of revolution, one where aristocratic dames like Madame Antoinette, along with their children, had been coolly ushered into their palace’s basement by the communists, and then unblinkingly shot;³⁶⁴ such were the men whom Abrams and his cohort were cheering for. If chivalry had bestirred Holmes’s heart, he would have joined Burke’s call. True, Holmes’s Civil War days of summoning troops to unsheathe their scabbards were long gone. But he could have at least signed Clarke’s majority opinion to uphold the prison sentences against Abrams and to upbraid the latter for his threatening tone before the ladies.

Holmes did the opposite, though. In his *Abrams* dissent he never alluded to female frailty or the need to protect it; nor did Holmes rebuke Abrams and his ilk for indulging a thuggish rhetoric that needlessly frightened women. If anything, Holmes in effect sought to expose the women back home to some of the anxiety of war experienced by men in the field. Clarke solemnly affirmed magnificent prison terms for Abrams and his codefendants,³⁶⁵ a decision that would have deeply pleased the chivalric Burke.³⁶⁶

On the other hand, Holmes did not seek to shield the audience from Abrams. He frostily told his readers, including his female readers, that there was no haven for them: “[A]ll of life is an experiment,” he had intoned, and “[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”³⁶⁷ The inclusive “we” and its possessive “our” cannot possibly be read to exclude women; how could women be exempted if *all* of life was a precarious experiment in survival? (Certainly, Marie Antoinette and the murdered Russian duchesses could not procure exemptions of sympathy owing to their gender.)³⁶⁸ Women, like men, also wagered their “salvation upon some prophecy based on imperfect knowledge.” *Gird your loins, ladies*, he can be read as announcing, *because in a constitutional democracy I won’t protect you from terrifying speech—nor will I*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ GUNTER FAURE & TERESA MENSING, *THE ESTONIANS: THE LONG ROAD TO INDEPENDENCE* 171 (2012).

³⁶⁵ *Abrams v. United States*, 250 U.S. 619, 624 (1919).

³⁶⁶ BURKE, *supra* note 361, at 169.

³⁶⁷ *Abrams*, 250 U.S. at 630.

³⁶⁸ *See supra* note 351 and accompanying text.

permit the government to do so. For Holmes, a precondition for constitutional democracy was not feminine virtue but, as he had written in his *Abrams* dissent, “eternal vigilance.” And *vigilance*, understood as “watchfulness against danger,” could not operate in a mood of panic and fear.³⁶⁹ It required calm courage from the public, and therefore required courage from women as well. Holmes, for all of his celebrations of manliness, also expected women to be manly.

That said, Holmes knew intimately that manliness could exact a murderous price. Just as he had done in begging off battle after three years, Holmes, as a judge, would not barter safety. He had trumpeted citizens to be “eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.”³⁷⁰ Otherwise, the Constitution was imperiled. There was a limit, however: The First Amendment, Holmes stipulated, should not protect speech if it “so imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”³⁷¹ Manliness was noble and necessary; being too manly was suicidal. In its fashion Holmes’s *Abrams* dissent furnished a lesson about how to live in a constitutional democracy.

Not everyone could understand its import, however. No one penned a more furious public response to Holmes than did John Henry Wigmore, once Holmes’s good friend and admirer.³⁷² Wigmore was the first fulltime dean of Northwestern University’s law school.³⁷³ He had also served as a colonel in World War I, but unlike Holmes, he had never seen combat, having applied, in his fifties, for appointment on the Reserve Corps of the Judge Advocate General’s Office.³⁷⁴ What Wigmore lacked in combat experience he tried to make up for with his zeal.³⁷⁵ According to his associate, Wigmore “worked as if the outcome of the war depended on him alone.”³⁷⁶ Another remembered: “[H]e was in a colonel’s uniform; and his pride in it was evidenced by his abrupt correction of him as Dean. He fully radiated the military tradition; and he bore himself as a soldier.”³⁷⁷ Wigmore even composed a song for the military for which John Philip Sousa provided the orchestration.³⁷⁸ There was in Wigmore’s patriotic heart a special place of contempt for conscientious

³⁶⁹ *Vigilance*, OXFORD ENG. DICTIONARY, <http://www.oed.com/> (last visited Feb. 26, 2016).

³⁷⁰ *Abrams*, 250 U.S. at 630.

³⁷¹ *Id.*

³⁷² POLENBERG, *supra* note 280, at 250.

³⁷³ *Id.* at 249.

³⁷⁴ *Id.* at 250.

³⁷⁵ *Id.* at 250–51.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 251.

³⁷⁸ *Id.*

objectors.³⁷⁹ “Some of these men are merely . . . trouble makers, and must be shut up for the duration of the war,” he exhorted.³⁸⁰ Wigmore proposed that men of draft age should wear a metal button visible to all that they had registered for military service.³⁸¹ “Men would not dare to hold back with such a prospect ahead,” he predicted.³⁸²

It was from this place of fervent patriotism that Wigmore delivered his excoriation of Holmes’s dissent in *Abrams*. Writing in what would later be called the *Northwestern University Law Review*, Wigmore charged Holmes with having guaranteed to “a band of thugs and murderers” the right to “freely go about publicly circularizing and orating upon the attractions of loot, proposing a plan of action for organized thuggery, and enlisting their converts, yet not be constitutionally interfered with until the gathered band of thugs actually sets the torch and lifts the rifle[.]”³⁸³ An indignant question was posed to Holmes: “Then where is the dead-line to be drawn at which Freedom of Speech does not become identical with Freedom of Thuggery?”³⁸⁴ There was fear—even terror—in Wigmore’s voice. In juxtaposition to his own trembling anxiety, Wigmore condemned Holmes for his appalling indifference. Holmes’s dissent, Wigmore charged, was “shocking in its obtuse indifference to the vital issues at stake in August 1918, and it is ominous in its portent of like indifference to pending and coming issues.”³⁸⁵ There was an uncanny inversion of roles being suggested by these statements. Wigmore (the lifelong academic) delivered in the voice of an enraged soldier his indictments against Holmes (the one who had been a true combat soldier) for his posture of professorial apathy.

Something more important was amiss in Wigmore’s indictments. By calling Holmes’s approach one of “indifference,” Wigmore misunderstood its philosophical significance. It was not indifference, exactly, that Holmes commended to the public. What Holmes commended was a form of civic courage. His outward attitude of indifference was really the expression of a battle-tested war veteran who had seen physical threats firsthand as a young man in war and, as an older man, refused to be intimidated by them. (Remember: the socialists had sent the bomb to Holmes’s house, not Wigmore’s.)³⁸⁶ Wigmore had fearfully dubbed *Abrams* and his ilk “thugs” and

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* at 252.

³⁸² *Id.*

³⁸³ John H. Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in Wartime and Peace-Time*, 14 ILL. L. REV. 539, 552 (1920).

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 545.

³⁸⁶ See *supra* note 288 and accompanying text.

“murderers.”³⁸⁷ By contrast, Holmes breezily ridiculed them as “puny anonymities” who should be laughed at and ignored.³⁸⁸ The irony of his accusations appeared to be lost on Wigmore. He had contributed to the war, yes, but he had spent most of the war safely ensconced in the Judge Advocate’s General office in Washington, D.C.³⁸⁹ Holmes had served as a combat soldier from 1861 to 1863.³⁹⁰ He had been shot three successive years, once nearly dying.³⁹¹ Holmes had proven himself in battle. He had reflected solemnly, and for the rest of his life, about the meaning of war. Compared to Wigmore, Holmes grasped far better what were the costs of political upheaval. Therefore, Holmes could not have been calling for “indifference” in some straightforward sense as Wigmore suggested. Holmes was arguing, rather, that a hearty nonchalance was a prerequisite for constitutional democracy.

Holmes would elaborate his views in another dissenting opinion in *Gitlow v. New York*.³⁹²

C. *Gitlow v. New York*

Four years after his decision in *Abrams* Holmes dissented again in *Gitlow v. New York*. Benjamin Gitlow was a member of the Socialist Party’s more radical “Left Wing Section.”³⁹³ The Socialist Party opposed governments that supported capitalism but sought to change them through lawful means; the Left Wing Section of said Party sought to do so through violence, mass revolts and political strikes, a program of action which it had consolidated in its manifesto.³⁹⁴ As business manager for the Left Wing, Gitlow paid for 16,000 copies to be printed and had some of them mailed out and left others to be sold from the Left Wing’s office in New York City.³⁹⁵

For these actions, he had been found guilty at trial of violating New York’s law prohibiting “criminal anarchy.”³⁹⁶ New York law defined criminal anarchy as “the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.”³⁹⁷ Gitlow

³⁸⁷ Wigmore, *supra* note 383, at 552.

³⁸⁸ *Abrams v. United States*, 250 U.S. 619, 629 (1919).

³⁸⁹ POLENBERG, *supra* note 280, at 250–51.

³⁹⁰ COLLINS, *supra* note 2, at ix.

³⁹¹ JOHN R. VILE, *Oliver Wendell Holmes, Jr.*, in 1 GREAT AMERICAN JUDGES 383, 386 (2003).

³⁹² 268 U.S. 652 (1925).

³⁹³ *Id.* at 655.

³⁹⁴ *Id.* at 655–56.

³⁹⁵ *Id.* at 656.

³⁹⁶ *Id.* at 654.

³⁹⁷ *Id.*

appealed his conviction and the case eventually wound up in the Supreme Court. Justice Sanford, writing the Court's opinion, upheld the conviction.³⁹⁸ He admitted at the outset that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."³⁹⁹ No matter, Sanford asserted, "[t]hat utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear."⁴⁰⁰ Such utterances, "by their *very nature*, involve danger to the public peace and to the security of the State" and the "immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen."⁴⁰¹ "The State," Sanford continued, "cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale."⁴⁰² For him, "[a] single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."⁴⁰³ In Sanford's view New York rightfully "seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."⁴⁰⁴

But not all sparks were equally combustible, and some exhortations, while rhetorically scorching, were harmless; some speech was more hot air than lit fuse. What had so alarmed Sanford about Gitlow's pamphlet? Something that would have reverberated with Justice Clarke in *Abrams*: its intimidating posture. And like Clarke, Sanford thought that the ideal manner to convey his apprehension was by dishing out for the reader a heaping dollop of socialism's portentous prose. In a judicial opinion that numbered only ten pages, Sanford allotted a generous three for the nearly uninterrupted reproduction of Gitlow's pamphlet. And there was valid cause for such lengthy excerpts; some of the passages, read in light of the Russian Revolution and the spree of bombings in America, were genuinely unnerving. Thus read one excerpt, "[labor] strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike against Capitalism and the state."⁴⁰⁵ The militancy crescendoed:

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 656.

⁴⁰⁰ *Id.* at 669.

⁴⁰¹ *Id.* (emphasis added).

⁴⁰² *Id.* at 656 n.2.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 659.

[T]he bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state * * * It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie* The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed.⁴⁰⁶

Only four years removed from the Russian Revolution, Gitlow's pugnacity was not lost on the Court which upheld his prison sentence.

Holmes dissented in an opinion joined only by Brandeis. As with his *Abrams* dissent, Holmes's *Gitlow* dissent would be adopted by future generations as a cornerstone of First Amendment jurisprudence. Overturning the lower court's conviction, he enlisted his own words from his *Abrams* dissent six years prior: "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 the State has a right to prevent."⁴⁰⁷ Holmes then explained, "If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."⁴⁰⁸

The casual reference to "small minority" was a feckless (and only half-serious) gambit for empirical accounting: how did Holmes know that Socialists in America were but a "small minority"? Even if it were a small minority, it was no mere minority. It had the formal backing of the very large majority in Communist Russia. And even if Gitlow was outnumbered in America, what was to prevent him and his zealous cabal from wreaking mayhem by terrorizing cities? (It goes without saying that a handful of operatives could have blown up a bomb in Grand Central Station.) Holmes himself had warned us in *Abrams* that there were no guarantees in life: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."⁴⁰⁹

Therefore, Holmes's belittling of Gitlow as a member of a fringe group was not an earnest attempt to weigh evidence. It was, I think, more properly understood as a bid to quell the public's fear. *Be more confident, more manly*, Holmes intimated, and *ignore Gitlow and his group, who are a dwarfish few*. Here was a less arched version of Holmes's condescending dismissal in *Abrams* where he had ridiculed the Socialists as "poor and puny anonymities" responsible for a "silly leaflet." Only a coward would be intimidated by such clowns, Holmes implied. Perhaps this was too much reassurance for the reader

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 672–73 (Holmes, J., dissenting).

⁴⁰⁸ *Id.* at 673.

⁴⁰⁹ *Abrams v. United States*, 250 U.S. 619, 629 (1919) (Holmes, J., dissenting).

to take on faith. But, as Holmes had suggested in “The Soldier’s Faith,” much of courage, and thus much of manliness, demanded its possessor to have faith in himself to withstand the fear of the unknown.

At any rate, Holmes reminded the reader that a longing for an Eden of serenity in public discourse was childish; not a firewall but a gauzy veil separated placid prose from calamitous instigation. “It is said [by Justice Sanford] that [Gitlow’s] manifesto was more than a theory, that it was an incitement,” Holmes wrote.⁴¹⁰ The distinction on which this claim rested was wishful thinking, Holmes objected. For “[e]very idea is an incitement.”⁴¹¹ Every idea, he elaborated, “offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”⁴¹² As such, “The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”⁴¹³ “Eloquence may set fire to reason,” he remarked.⁴¹⁴ Beautiful phrases can stir a riot, and reason lives at passion’s whim.

And there was nothing that Holmes, or the Supreme Court, could do to stop the Socialists, he said. Indeed, the Constitution’s logic of self-government, according to Holmes, forbade meddling by the judiciary: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community,” Holmes observed, “the only meaning of free speech is that they should be given their chance and have their way.”⁴¹⁵ Such were the risks of political freedom. If Americans wanted constitutional democracy to endure they would have to sustain it the hard way, the right way: they would have to persuade each other in the marketplace of ideas to resist socialism. Holmes stressed that the Supreme Court, in keeping with the logic of popular sovereignty, could not coddle the public. Americans had to tolerate—*man up*—to the terrors of subversive speech, not plead for protection from the federal government. Holmes suggested that if such courage was unforthcoming, Americans probably did not deserve the democracy that they ceremoniously cherished. Look again at Holmes’s nonchalant conclusion from *Gitlow*. “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”⁴¹⁶ With these words, Holmes was in a sense bringing his war home to civilians by

⁴¹⁰ *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

making them struggle to defend their democracy; he was testing their manliness. Should they falter, they would have shown that theirs was a proper fate deserving an unmanly people.

VII. "LIVE, I AM COMING"

Two days shy of his 94th birthday, Oliver Wendell Holmes died on March 6, 1935.⁴¹⁷ His dear wife had predeceased him by six years, and he had never fathered children.⁴¹⁸ Yet he had left behind a considerable sum of money, well over \$4 million by today's rates.⁴¹⁹ He had bequeathed which money to his nephew, his maid, and a few others.⁴²⁰ Yet the bulk of his fortune had been put aside for a being who is seldom designated a beneficiary of a personal estate—The federal government of the United States of America.⁴²¹ The gesture was no doubt peculiar in the eyes of many. On the other hand, for the reader who has faithfully trod this Article to its present end, Holmes's gift to America's government may appear fitting, even somewhat inevitable. As a young man, he had risked his life, and been wounded on three occasions to save the Union; as a Supreme Court Justice he had crafted judicial opinions intended to scaffold America's constitutional democracy.

In his will, Holmes had left some mementos for the public. They were found in a safety deposit box which his executor opened after the great man's death.⁴²² Inside was a very small parcel wrapped in paper.⁴²³ Once opened, it revealed two old musket balls.⁴²⁴ On the crumpled paper which had enveloped them, Holmes had inscribed an explanatory message for their discoverer: "These were taken from my body in the Civil War."⁴²⁵ Inside his bedroom closet were discovered two old Civil War uniforms, both stained with blood.⁴²⁶ A piece of paper was pinned to them, on which Holmes had written, "These uniforms were worn by me in the Civil War and the stains upon them are my blood."⁴²⁷ The statements concerning his uniforms and the musket balls were

⁴¹⁷ WHITE, *supra* note 1, at 471.

⁴¹⁸ *Id.* at 89, 459.

⁴¹⁹ *Id.* at 472.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² Letter from John Spalding Flannery to Mark de Wolfe Howe 2 (May 13, 1942) (on file with the Harvard University Library), http://pds.lib.harvard.edu/pds/view/43123803?n=7&image_size=1200&jp2Res=.25&printThumbnails=no.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 3.

plain accounts of fact and absent aggrandizement. But they obviously exuded Holmes's enduring pride in his martial heroism, and one senses how vital it was for him that posterity not forget his manliness.

We could therefore be led to believe that Holmes's final public avowal of his character was an unvarnished display of narcissism. Maybe it was; if so, he could hardly be faulted for it. He had proved himself a splendid American and, regardless, one is generally hard pressed to deny a dying man one last indulgence of vainglory. There was more than vanity, however, in the legacy which Holmes intended to bestow for posterity. In 1931, on the occasion of his 90th birthday, Holmes was invited to give a radio address.⁴²⁸ He confessed at the beginning that the subject of his impending death was awkward to discuss with a throng of strangers: "To express one's feeling as the end draws near is too intimate a task."⁴²⁹ Indeed, Holmes had little interest in dwelling glumly on death at all, nor its attendant tropes of forlornness and self-pity.

What he desired to speak about, in his final public address, was life. And for Holmes—even as a 90-year-old—what made life meaningful was struggle, the very thing that had made life meaningful for him as a young man. "The riders in a race do not stop short when they reach the goal," he said, "For to live is to function. That is all there is in living."⁴³⁰ Holmes concluded his radio broadcast with one last bid for civic pedagogy for the citizens of his beloved United States whose regime of constitutional democracy required, in his view, an unflinching ethos of manly spiritedness. He announced over the air to his listeners:

And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:
"Death plucks my ears and says, Live—I am coming."⁴³¹

⁴²⁸ HOLMES, *Radio Address*, in THE ESSENTIAL HOLMES, *supra* note 1, at 20.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 21.

⁴³¹ *Id.*