

# Criminal Attempts and the Clear and Present Danger Theory of the First Amendment

Edward J. Bloustein

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Edward J. Bloustein, *Criminal Attempts and the Clear and Present Danger Theory of the First Amendment*, 74 Cornell L. Rev. 1118 (1989)  
Available at: <http://scholarship.law.cornell.edu/clr/vol74/iss6/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# CRIMINAL ATTEMPTS AND THE "CLEAR AND PRESENT DANGER" THEORY OF THE FIRST AMENDMENT

Edward J. Bloustein†

## I

### INTRODUCTION

Eight months after he wrote the unanimous opinions for the Supreme Court of the United States in the affirmances of sedition convictions in *Schenck v. United States*,<sup>1</sup> *Debs v. United States*,<sup>2</sup> and *Frohwerk v. United States*,<sup>3</sup> Justice Holmes dissented from the Court's affirmance of another sedition conviction in *Abrams v. United States*.<sup>4</sup> Although he denied it,<sup>5</sup> there is reason to believe that, in the interim, Justice Holmes had changed his mind about the protection afforded speech under the first amendment to the Constitution.<sup>6</sup> Professor Rabban, among others, has shown convincingly what

---

† President and Professor of Law and Philosophy, Rutgers, The State University of New Jersey. B.A., 1948, New York University; B. Phil., 1948, Oxford University; Ph.D., 1954, J.D.M., 1959, Cornell University.

<sup>1</sup> 249 U.S. 47 (1919).

<sup>2</sup> 249 U.S. 211 (1919).

<sup>3</sup> 249 U.S. 204 (1919). The statute in the three cases was formally denominated the Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917), but it comprised numerous sections, like those involved in these three cases, which had an anti-sedition, rather than an anti-espionage, flavor.

<sup>4</sup> 250 U.S. 616 (1919).

<sup>5</sup> *Id.* at 627.

<sup>6</sup> "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. See Rabban, *The Emergence of First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1305-11 (1983) [hereinafter Rabban, *Emergence*]; Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 516, 584-86 (1981) [hereinafter Rabban, *Forgotten Years*]. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 65 (1970) (Professor Emerson states that after *Abrams* "[t]he clear and present danger test, while accepted in theory [by the majority], was not applied [by them] in practice . . ." This must mean that, prior to *Abrams*, Holmes and Brandeis had also accepted the clear and present danger test in theory, despite not having applied it.); S. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 183 (1956); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 843 (2d ed. 1988) (Professor Tribe says that, in *Abrams*, "[Holmes's] doctrinal approach was to infuse more immediacy into the *Schenck* formulation of the 'clear and present danger' test," and intimates that, by insisting that *Schenck* was rightly decided, Holmes was being disingenuous.). Bloustein, *The First Amendment 'Bad Tendency' of Speech Doctrine* 16-19 (unpublished manuscript on file at Cornell Law Review) [hereinafter Bloustein, *Bad Tendency*]; Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283, 295-98 (1988) [hereinafter Bloustein, *Pragmatist Bent*].

caused Holmes to change his mind.<sup>7</sup> This Article examines the role Holmes's concept of the common law of criminal attempts played in the change and what its significance is for understanding the meaning of the "clear and present danger" rule.

I do not intend to assess the validity of Holmes's analysis of common law criminal attempts,<sup>8</sup> nor to appraise his moral and political fitness as a liberal in the aftermath of *Abrams*.<sup>9</sup> These are important questions, but I seek the answer to a different one. I want to see what light Holmes's common law convictions cast on the meaning of the "clear and present danger" rule as he began to expound it more fully and more thoughtfully in *Abrams* than he had in *Schenck*.<sup>10</sup>

The statement of my purpose in writing this Article requires one further point of clarification. Professor Rabban, contrasting Holmes's use of the "clear and present danger" rule in *Schenck*<sup>11</sup> with his use of it in *Abrams*, correctly characterizes the latter as a "Constitutional Divide."<sup>12</sup> He and other revisionist critics of Justice Holmes have demonstrated that changing political circumstances and the scorn his friends expressed about his role in *Schenck* and its progeny caused (what the revisionist critics take to be) a radical break with his prior convictions on fundamental legal and jurisprudential issues.<sup>13</sup>

I agree that the libertarian creed and analytic structure embod-

<sup>7</sup> See Rabban, *Emergence*, *supra* note 6, at 1305-17 (providing an extended bibliography on the issue). While I agree with the Holmes revisionists that his autocratic frame of mind and his Darwinian leanings contributed to the result in *Schenck*, the more weighty explanation of the decision he and his brethren on the Court reached in that case, and of the "clear and present danger" language, was the aftermath of wartime patriotism and the "bad tendency" tradition of first amendment adjudication that predominated up to that time. See Bloustein, *Bad Tendency*, *supra* note 6, at 12-15. Rabban and others have argued tellingly about whether Holmes ever truly emerged as a civil libertarian. See Rabban, *Emergence*, *supra*, at 1305-20. See also Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 36 STAN. L. REV. 1349, 1388, 1406 (1963). Cf. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 at 25, 49-50, 220-21, 282 (1957); 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, 25 (1971). I have examined elsewhere one of the doctrinal grounds—in contradistinction to causal explanations—of the change; namely, the influence of pragmatism and positivism. See Bloustein, *Pragmatist Bent*, *supra* note 6.

<sup>8</sup> See *infra* note 20. Cf. Rabban, *Emergence*, *supra* note 6, at 1265-74; F. KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY (1984); J. HURST, JUSTICE HOLMES ON LEGAL HISTORY 99-101 (1964); H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984).

<sup>9</sup> See *supra* note 7.

<sup>10</sup> Professor Rabban seems to believe that Holmes's views of the common law help to explain *Schenck* but not *Abrams*. See Rabban, *Emergence*, *supra* note 6, at 1265-75.

<sup>11</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>12</sup> Rabban, *Emergence*, *supra* note 6, at 1305.

<sup>13</sup> See *id.* at 1311-17 (reviewing this evidence in detail). See also authorities cited *supra* note 6. Many of Holmes's critics believe that his adoption of a more liberal position on first amendment issues in *Abrams* was short-lived.

ied in *Abrams* constituted a considerable shift in Holmes's opinion, and that he was impelled, among other reasons, by the criticism of his friends and the pressure of events, to abandon his prior position. Rather than focus on what *caused* Holmes to change his mind, this Article explores *the nature* of the change. Holmes's critics suggest that the change in his viewpoint represented a radical transformation of his thinking.<sup>14</sup> I believe that he modified his views in *Abrams* by extending ideas and theories he had previously espoused in *Schenck*, in earlier cases, and in his treatise on *The Common Law*.<sup>15</sup> My interest is in discovering the significance of his earlier views for his later ones, drawing on the causes of the metamorphosis when they are helpful.

## II

### HOLMES'S THEORY OF CRIMINAL ATTEMPTS

The belief that the first use of the "clear and present danger" rule in the United States Supreme Court immediately after World War I opened a new era of judicial and scholarly treatment of first amendment speech issues is mistaken.<sup>16</sup> In fact, a considerable body of case law, state and federal, and a considerable scholarly literature addressed free speech issues even before the "clear and present danger rule" was laid down in the Supreme Court. I do not intend to examine the entire background of court decisions and scholarship—a task Professor Rabban has commendably fulfilled<sup>17</sup>—but rather to describe a single facet of it, Holmes's theory of criminal attempts.

In June 1922, Zechariah Chafee, a friend of Holmes, wrote him a letter inquiring about the origin of the "clear and present danger" rule in *Schenck*.<sup>18</sup> Holmes responded with a letter that attributed the test to having "[thought] hard on [the] matter of attempts in my Common Law and a Mass. case—later in the Swift case (U.S.). . . ."<sup>19</sup> This snippet of correspondence about the "matter of attempts" pro-

<sup>14</sup> See, e.g., Rabban, *Emergence*, *supra* note 6, at 1305-11.

<sup>15</sup> O.W. HOLMES, *THE COMMON LAW* (1881). For a discussion of how the *Abrams* transformation may also be traced to the impact of the philosophies of Positivism and Pragmatism on Holmes's early development, see Bloustein, *Pragmatist Bent*, *supra* note 6, at 293-302.

<sup>16</sup> Cf. Bloustein, *Bad Tendency*, *supra* note 6, at 3-5; Rabban, *Emergence*, *supra* note 6, at 1205-13; Rabban, *Forgotten Years*, *supra* note 6, at 559-79.

<sup>17</sup> See Rabban, *Emergence*, *supra* note 6; Rabban, *Forgotten Years*, *supra* note 6. See also Bloustein, *Bad Tendency*, *supra* note 6, at 8-17 (discussion of one strand of the pre-*Schenck* law).

<sup>18</sup> Letter from Zechariah Chafee, Jr. to Oliver Wendell Holmes, Jr. (June 9, 1922) quoted in Rabban, *Emergence*, *supra* note 6, at 1265.

<sup>19</sup> Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Rabban, *Emergence*, *supra* note 6, at 1265-66 & n.366.

vides significant clues to the meaning of the "clear and present danger" rule as it was announced in *Schenck* and transformed in *Abrams*.

Holmes first set out his theory of criminal attempts in *The Common Law*, published between his leaving law school and his appointment to the Massachusetts Supreme Judicial Court. It rested on two basic beliefs about the criminal law. First, "[f]or the most part, the purpose of the criminal law is only to induce external conformity to rule." Criminal law "only deals with conduct," not the moral character of the actor. "Intent to commit a crime is [therefore] not itself criminal;" we punish "overt act[s]," not wrongdoing or wrongful intentions.<sup>20</sup>

The second principle underlying Holmes's theory of attempts was that "[t]he test of foresight" necessary to establish the intent to commit a crime "is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen." This objective test meant that "there are many cases in which the criminal could not have known that he was breaking the law." Holmes's justification of the rule on attempts was that, "to admit [ignorance as an] excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."<sup>21</sup>

On this foundation, Holmes delineated two classes of criminal attempts. The first consisted of acts that, "supposing [they had] produced [their] natural and probable effect[s], . . . would have amounted to . . . substantive crime[s]."<sup>22</sup> The second comprised acts "which could not have effected the crime unless followed by other acts on the part of the wrong-doer."<sup>23</sup> Intent to commit the crime, he said, was not a requisite in the first category; it was, however, in the second category.<sup>24</sup> Holmes also noted that, within the second category, "[t]he law does not punish every act which is done with the intent to bring about a crime." The law only punishes

---

<sup>20</sup> O.W. HOLMES, *supra* note 15, at 49, 65. As Professor Rabban has pointed out, *see* Rabban, *Emergence*, *supra* note 6, at 1271 n.401, the so-called "objective" theory of criminal culpability, and Holmes's theory of criminal attempts, which is founded on the objective theory, have been abandoned by current criminal law theorists. *See, e.g.*, MODEL PENAL CODE § 5.01(1) (1985). For the most recent treatment of attempts, *see* Ashworth, *The Role of Resulting Harm Under the Code*, and in the *Common Law 20* (Paper delivered at the 25th Anniversary of the Model Penal Code, Rutgers-Camden Law School). Although this Article seeks *greater understanding* of the meaning of the "clear and present danger" test by looking to its antecedents in Holmes's thinking, this Article will *not* consider the theoretical integrity of those antecedents.

<sup>21</sup> O.W. HOLMES, *supra* note 15, at 48, 54.

<sup>22</sup> *Id.* at 66.

<sup>23</sup> *Id.* at 66-67.

<sup>24</sup> *Id.*

these acts where “[p]ublic policy, that is to say, legislative considerations [involving] . . . the nearness of the danger, the greatness of the harm, and the degree of apprehension felt” so dictate.<sup>25</sup>

Holmes had recognized that the second category of attempts did not proceed along the lines of his general theory of punishment. In this category, no harm was “foreseen as likely to follow the [first] act”<sup>26</sup> because a second or third act was necessary before any harm could result. “[E]xternal conformity to [the] rule [of criminal law],” therefore, was not threatened.<sup>27</sup> The first act was nevertheless punishable because “intent [in such a] case renders the otherwise innocent act harmful, because it raises a probability that it will be followed by such other acts and events as will all together result in harm.”<sup>28</sup> Even so, in these cases, Holmes allowed a “public policy” exception that turned on, among other things, “the degree of probability that the crime will be accomplished.”<sup>29</sup>

Holmes relied on English precedents and an American text in setting forth his *Common Law* principles of attempts.<sup>30</sup> After he ascended, first, to the Massachusetts Supreme Judicial Court, and then the Supreme Court of the United States, he had the good fortune to be able to add his own judicial authority to that which he had previously relied upon. It was to cases of these courts, in which he had written the opinions, that he alluded in the letter to Chafee.<sup>31</sup>

The letter mentions “a Mass. case”; actually, there were two of them. In *Commonwealth v. Kennedy*,<sup>32</sup> the defendant had been convicted of attempted murder for having placed “a quantity of deadly poison, known as ‘Rough on Rats’. . . [on] the under side of the crossbar of [the intended victim’s] ‘mustache cup.’ ”<sup>33</sup> On appeal, for the purpose of testing the strength of the strongest available defense, Holmes assumed that the dose of poison the defendant had used would not have killed his intended victim.<sup>34</sup> In other words, he understood the defendant to be arguing that, despite his wrongful intention to poison another, the “natural and probable effects” of

<sup>25</sup> *Id.* at 68.

<sup>26</sup> *Id.* at 67.

<sup>27</sup> See *supra* note 20 and accompanying text.

<sup>28</sup> O.W. HOLMES, *supra* note 15, at 67-68.

<sup>29</sup> *Id.* at 69.

<sup>30</sup> *Id.* at 66, 147. Holmes cited *Regina v. Dilworth*, 2 Moo. & Rob. 531 (1843); and *Regina v. Jones*, 9 C. & P. 258 (1840), in the criminal law, and T. COOLEY, *THE LAW OF TORTS* 164 (1st ed. 1879). See also PERKINS ON CRIMINAL LAW 658-59 (1957), and W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 386-87 (1984).

<sup>31</sup> See Letter to Chafee, *supra* note 19.

<sup>32</sup> 170 Mass. 18, 48 N.E. 770 (1897).

<sup>33</sup> *Id.* at 20, 48 N.E. at 770.

<sup>34</sup> *Id.* at 22, 48 N.E. at 771.

his action would not have been the victim's death, and, therefore, an attempt could not be made out.

Writing for the Court, Holmes sustained the conviction. He first reaffirmed his earlier view that "the aim of the law is not to punish sins, but is to prevent certain external results. . . ." <sup>35</sup> It followed from this that, where the crime has not been consummated, "the act done must come pretty near to accomplishing that result before the law will notice it [as a criminal attempt]." <sup>36</sup> In determining that the defendant had come within sufficient "proximity" of accomplishing the crime of murder, Holmes said, still echoing his *Common Law* view:

Any unlawful application of poison is an evil which threatens death . . . and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. <sup>37</sup>

Four years later, in *Commonwealth v. Peaslee*, <sup>38</sup> Holmes was presented with another opportunity to apply his *Common Law* theory of attempts. The defendant "had constructed and arranged combustibles in [a] building in such a way that they were ready to be lighted, and if lighted would have set fire to the building and its contents." <sup>39</sup> After leaving the building, he sought to pay someone to ignite the combustibles and was refused. He then turned to go back to the building to do it himself, but he changed his mind on the way, and the arson never took place. <sup>40</sup> The Court overturned the defendant's conviction for attempted arson on what we would now regard as an esoteric point of pleading. <sup>41</sup> Holmes, relying on the *Kennedy* case, among others, nevertheless found that substantive guilt had been made out on the evidence presented at trial:

That an overt act, although coupled with an intent to commit the crime commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus poenitentiae* in the need of a further

---

<sup>35</sup> *Id.* at 20, 48 N.E. at 770.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 22, 48 N.E. at 771.

<sup>38</sup> 177 Mass. 267, 59 N.E. 55 (1901).

<sup>39</sup> *Id.* at 271, 59 N.E. at 55-56.

<sup>40</sup> *Id.*, 59 N.E. at 56.

<sup>41</sup> *Id.* at 274, 59 N.E. at 57.

exertion of the will to complete the crime.<sup>42</sup>

Holmes's third pre-*Schenck* criminal attempt case was *Swift and Co. v. United States*<sup>43</sup> decided during his tenure as Justice on the Supreme Court of the United States. (It was cited by Holmes in *Abrams*,<sup>44</sup> but—and I shall discuss the significance of this below—not in *Schenck*.) The defendants had been charged with an attempted “monopoly and restraint of trade” under the Sherman Antitrust Act<sup>45</sup> for having undertaken several acts of price-fixing, none of which alone constituted a restraint of trade.<sup>46</sup> The issue was whether the defendants' individual acts, “if entered into with the intent to monopolize,” were unlawful.<sup>47</sup>

Holmes observed, in terms similar to those he used in *The Common Law* and identical to those in *Schenck*,<sup>48</sup> but without attributing them, that attempts always involved “question[s] of proximity and degree.”<sup>49</sup> Even more significantly with respect to characterizing the distinctive category of attempts involving speech, relying on his earlier *Peaslee* case, and again echoing his analysis in *The Common Law*, he said:

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.<sup>50</sup>

To sum up Holmes's views on this subject as expressed in his treatise and the cases he had decided prior to *Schenck* and *Abrams*: sometimes an action carries the promise of harmful consequences without any further action by the original actor or anyone else. Shooting a gun into a crowd or setting a house afire in a crowded slum are obvious examples. Other acts, however, portend harm only if the original actor or someone else were to undertake another related act. Loading a gun or assembling the combustibles for a fire are two such acts. The proof of the likelihood of harm that justifies

<sup>42</sup> *Id.* at 272, 59 N.E. at 56.

<sup>43</sup> 196 U.S. 375 (1905).

<sup>44</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919).

<sup>45</sup> 15 U.S.C. §§ 1-7, ch. 647, 26 Stat. 209 (1890).

<sup>46</sup> *Swift and Co.*, 196 U.S. at 402.

<sup>47</sup> *Id.*

<sup>48</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>49</sup> *Swift and Co.*, 196 U.S. at 402; see O.W. HOLMES, *supra* note 15, at 68.

<sup>50</sup> *Swift and Co.*, 196 U.S. at 396 (citation omitted).

holding a man liable in the first category is found in "common experience," what any "prudent man" would know, and is independent of whether the actor foresaw or intended the harm. Liability in the second category also turns on the probability of harm, but because an intervening act—firing the gun or lighting the fire—is necessary to cause the harm, the actual intention to accomplish the result must be shown to establish the criminal attempt.

But, now, what about the proof of such intention? Where no intervening act is necessary to accomplish the harm, a fiction is indulged, and the actor "is presumed to intend the natural consequences of his own acts," even if he did not really intend them.<sup>51</sup> What this means is that, in order to enforce the policy of conformity to general external standards of conduct, the law treats the person who is unaware of what might normally be expected from his acts as if he had expected them. We disguise for ourselves the somewhat harsh principle that innocence and ignorance are no defense to liability by indulging in the presumption of bad intentions, even in their absence.

No such presumption or fiction is indulged by Holmes regarding those attempts in which an intervening act, or intervening acts, are necessary to effectuate the threatened harm. Quite to the contrary. Here, Holmes says that "actual intent is clearly necessary," not to "show that the act was wicked, but to show that it was likely to be followed by hurtful consequences."<sup>52</sup> Intent, in such a case, "raises a probability that [the suspect act] will be followed by such other acts and events as will all together result in harm."<sup>53</sup> In the one case, harm is foretold in the act itself, whether it is intended or not. In the other, harm is only probable where the suspect act is undertaken with the intention that it produce harm and in anticipation of the intervening acts that would bring it about.

### III

#### CRIMINAL ATTEMPTS IN *SCHENCK*, *DEBS*, AND *FROHWERK*

##### A. *Goldman*, Precursor to *Schenck*

The significance of the doctrine of criminal attempts for the *Schenck* case,<sup>54</sup> and for the "clear and present danger" theory more generally, had been anticipated in the Supreme Court a year earlier in *Goldman v. United States*.<sup>55</sup> Emma Goldman and Alexander Berk-

<sup>51</sup> O.W. HOLMES, *supra* note 15, at 147.

<sup>52</sup> *Id.* at 66, 68.

<sup>53</sup> *Id.* at 67-68.

<sup>54</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>55</sup> 245 U.S. 474 (1918). *See also* *Kramer v. United States*, 245 U.S. 478 (1918) (same); *Ruthenberg v. United States*, 245 U.S. 480 (1918) (upholding conviction of so-

man were prominent Socialists who regularly condemned the United States's involvement in the First World War in public speeches and writings. They were tried and convicted of conspiring to violate the 1917 Selective Service Draft Law<sup>56</sup> by inducing other listeners, who were under a duty to register for the draft, "to disobey the law by failing to register."<sup>57</sup>

The Supreme Court's opinion, which unanimously sustained the defendants' convictions, dealt solely with the sufficiency of the evidence. The defendants had argued that "there was no evidence that they advised people to disobey the law."<sup>58</sup> Nor was there evidence, they argued, that anyone had refused to submit to the draft as a result of hearing them speak.<sup>59</sup> Chief Justice White, writing for the Court, deigned to respond to these defense claims in only the most general terms. He upheld the conviction, saying that "the proposition that there was no evidence whatever of guilt to go to the jury is absolutely devoid of merit."<sup>60</sup>

Without his having said so, I assume that this magisterial denial of the defendants' claim that no proof established a conspiracy to obstruct the draft rested on the same reasoning about the crime of conspiracy as Holmes had used about criminal attempts in *The Common Law*, and as the Court was soon to avow in free speech cases in *Schenck*. The unanimous *Goldman* Court must have believed that resistance to the draft was the "natural and probable"<sup>61</sup> consequence of Goldman's and Berkman's anti-war speeches. Therefore, the very content of their speech provided a sufficient basis for the jury to have concluded that the defendants intended to obstruct the draft.

Another aspect of *Goldman* was even more significant to the course of first amendment law a year later in *Schenck*. This concerned the defendants' claim that no proof showed that anyone resisted the draft because of their speeches and writings. Here, in a holding that Justice Holmes was to cite in *Schenck* the following year, Justice White relied on

---

cialists for failure to register on theory of accomplice liability). The origins of the "bad tendency" of speech doctrine are in *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) and three other cases decided on this basis before *Schenck*. See *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918); *Fox v. Washington*, 236 U.S. 273 (1915); *Patterson v. Colorado*, 205 U.S. 454 (1907); Bloustein, *Bad Tendency*, *supra* note 6, at 9-11.

<sup>56</sup> Pub. L. No. 65-12, 40 Stat. 76 (1917).

<sup>57</sup> Brief for Plaintiffs-in-Error at 19, *Goldman v. United States*, 245 U.S. 474 (1918) (No. 702).

<sup>58</sup> *Id.* at 19-20.

<sup>59</sup> *Id.*

<sup>60</sup> *Goldman*, 245 U.S. at 477.

<sup>61</sup> See O.W. HOLMES, *supra* note 15, at 69.

the settled doctrine that an unlawful conspiracy . . . to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantively a crime punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end.<sup>62</sup>

This analysis parallels Holmes's theory of criminal attempts.<sup>63</sup>

#### B. The First Use of the "Clear and Present Danger" Formula

*Schenck v. United States*<sup>64</sup> arose under a sedition statute, rather than under the selective draft law, involved a mailed circular, rather than speeches, and rested on first amendment, as well as statutory, grounds. It was, nevertheless, remarkably similar to *Goldman* in terms of proof of intent to cause harm and proof of harm resulting from speech. Schenck and his colleagues had circulated through the mail a lengthy diatribe filled with anti-draft and anti-war rhetoric. Holmes, writing for a unanimous Court to affirm Schenck's conviction, admitted, however, that "in form at least [the circular] confined itself to [recommending] peaceful measures [of opposition to the draft] such as a petition for the repeal of the [draft] act."<sup>65</sup> Moreover, even though evidence showed that the circular had been mailed to persons subject to the draft, as in *Goldman*, no evidence proved that anyone failed to register as a result.

Thus, in *Schenck*, as in *Goldman*, except for relatively vague and equivocal inferences drawn from their anti-war tirades, there was no direct evidence that the defendants advocated, intended, or caused illegal acts. But, as in *Goldman*—indeed, in reliance on that case—and consistent with the views he expressed in *The Common Law*, Holmes declared that

[t]he statute . . . punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.<sup>66</sup>

With the style of the alchemist, Holmes here distilled diverse ideas into a single sentence, and enveloped them in an enigmatic inference. First, he emphasized the relatively simple point of

---

<sup>62</sup> *Goldman*, 245 U.S. at 477.

<sup>63</sup> "If an act is done of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime, the criminal law, while it may properly enough moderate the severity of punishment if the act has not that effect in the particular case, can hardly abstain altogether from punishing it . . ." O.W. HOLMES, *supra* note 15, at 65-66.

<sup>64</sup> 249 U.S. 47 (1919).

<sup>65</sup> *Id.* at 51.

<sup>66</sup> *Id.* at 52 (citing *Goldman*, 245 U.S. at 477).

*Goldman*, which was that a conspiracy can be proven even though it fails to meet its objective. He was also saying, as he had in *The Common Law*, that there is no need to prove that criminal consequences were intended if the "tendency" of the act undertaken was criminal.<sup>67</sup>

The high-flown language he indulged in disguises a tautology posing as a statement of fundamental legal principle. "If a two dimensional figure has four sides of equal length, it's a square." If the "natural and probable" consequence, or "tendency," of an act is criminal, the actor is guilty either of the substantive crime, if it takes place, or of an attempt, if it does not. This is simply another version of the definition of a criminal attempt that Holmes set forth in *The Common Law*.<sup>68</sup>

Now to some Holmesian mystification. How can "an act" (speaking or writing in opposition to the draft) be "the same" as its "tendency" (obstruction of the draft)? And how can these both be "the same" as the actor's "intent" (wanting to obstruct the draft)? Only if you regard the "tendency" or consequence of a speech act as inherent in the act, a natural and ineluctable part of it, would there be no difficulty in describing it by describing its "tendency." ("He wrote an article obstructing the draft.") And if "a man is presumed to intend the natural consequences of his acts"—the presumption Holmes identified as "a fiction" but adopted in *The Common Law*<sup>69</sup>—his intention can also readily become identified with its "natural and probable" consequences. ("He wrote the article to obstruct the draft.") In these terms, describing the circular in the *Schenck* case as "one which obstructs the draft" says it all; you thereby describe the act, its consequence or "tendency," and its motive, in the same terms and at the same time.

In sum, the somewhat impenetrable conclusion from *Schenck* was a variant of Holmes's *Common Law* theory of attempts and mirrored that of *Goldman*. It translates as follows: speech (circulating an anti-war circular to draft registrants) with a "natural and probable consequence" or "tendency" that is unlawful (draft registrants resisting the draft) will be presumed by operation of law to have been intended to accomplish the legal wrong (wanting to obstruct the draft), and the actor will be liable even if it is not fulfilled (even if the draft is not thereby obstructed), and even if he never really intended it to be.

Holmes recognized that the *Goldman* decision laid this purely

<sup>67</sup> See Bloustein, *Bad Tendency*, *supra* note 6, at 15-17.

<sup>68</sup> See O.W. HOLMES, *supra* note 15, at 65-66; see also *supra* text accompanying notes 22-24.

<sup>69</sup> See *id.* at 66 n.2.

evidentiary argument to rest. He went beyond it in *Schenck* because, he said, "free speech [had not been] referred to specially" in *Goldman*, and he "thought fit to add a few words" on that subject. Those words were: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>70</sup> He then proceeded to set forth the celebrated formula of first amendment adjudication, which provides that Congress may only limit speech where there is a "clear and present danger" that the spoken words "will bring about the substantive evils that Congress has a right to prevent."<sup>71</sup>

There is a striking similarity, which Holmes himself noted in his letter to Chafee,<sup>72</sup> between the "clear and present danger" formulation of the constitutional rule and one element of Holmes's doctrine of common law criminal attempts. In *The Common Law*, he wrote that establishing the attempt depends upon "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."<sup>73</sup> He used very similar language in *Commonwealth v. Peaslee*,<sup>74</sup> and in *Swift and Co. v. United States*, where he cited *Peaslee*.<sup>75</sup>

I note, however, that in *The Common Law* and the Massachusetts Supreme Judicial Court and United States Supreme Court cases, the "nearness of the danger," "proximity," is a requirement of liability in only one of the two categories of attempts he delineated, that requiring "further acts."<sup>76</sup> It is *not* required in those attempts "that [set] in motion natural forces that would bring about [the end] in the expected course of events," without "further acts."<sup>77</sup>

### C. "Further Acts": 'Incitement' versus 'Advocacy'

A judge's reticence in relying on the authority of his own legal treatise in deciding a case is understandable and not unusual. However, because the language of *Schenck* was so strikingly similar to that in his earlier criminal attempt opinions, and because he identified

---

<sup>70</sup> *Schenck*, 249 U.S. at 52. The very able briefs in *Debs v. United States*, 249 U.S. 211 (1919), which were before the Court at the time, may well have caused Holmes to go beyond *Goldman* to the first amendment issue. See Rabban, *Emergence*, *supra* note 6, at 1248-52 (providing a detailed analysis of these briefs).

<sup>71</sup> *Schenck*, 249 U.S. at 52.

<sup>72</sup> See *supra* note 19 and accompanying text.

<sup>73</sup> O.W. HOLMES, *supra* note 15, at 68.

<sup>74</sup> 177 Mass. 267, 268, 59 N.E. 55, 56 (1901).

<sup>75</sup> 196 U.S. 375, 396, 402 (1905).

<sup>76</sup> O.W. HOLMES, *supra* note 15, at 67-68; see *supra* text accompanying notes 22-25. See also *Peaslee*, 177 Mass. at 272, 59 N.E. at 56 ("The intent to complete [the act] renders the crime so probable that the act will be [punishable] although there is still . . . the need of a further exertion of the will to complete the crime."); and *Swift and Co.*, 196 U.S. at 396 ("Where acts . . . require further acts in addition to the mere forces of nature to bring [the] result to pass, an intent to bring it to pass is necessary . . .").

<sup>77</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919).

these cases and *The Common Law* in his letter to Chafee as providing the origin of the "clear and present danger" doctrine in *Schenck*, it is puzzling that Holmes failed to cite either *Peaslee* or *Swift and Co.* Holmes's citation of *Swift and Co.*—which in turn cited *Peaslee*—in *Abrams* compounded the puzzle. Moreover, his having "borrowed" for use in *Schenck*, without attribution and without direct quotation, a key phrase from *Swift and Co.* exacerbates the confusion.<sup>78</sup>

The reason for the suppression of these references in *Schenck*, and their presence in *Abrams*, is obviously not conclusively discernible because solving the riddle involves unadulterated speculation about the state of Holmes's thought processes as he wrote each opinion. It appears, however, that Holmes was drawn in two opposing directions as he considered the *Schenck* case. As a result, his opinion was a conceptual jumble that we can hope only to unravel and not to resolve.

Holmes was a patrician, for whom admiration of the "'non-conformist conscience' was at most a matter of intellectual taste . . . not embrac[ing] sympathy for the 'agitator' and habitual dissident."<sup>79</sup> He was considering the prosecution of leaders of the Socialist party who had actively opposed a popular war in wartime. And the decision was to be handed down in the aftermath of the war, while patriotic fervor still ran high,<sup>80</sup> and at a time when socialism had become a specter that haunted the popular mind. These personal feelings and political circumstances undoubtedly predisposed Holmes to sustain the guilty verdict in *Schenck*.<sup>81</sup>

The precedential force of the *Goldman* case favored the same result, as did the weight of the tradition of deciding free speech issues where the mere "bad tendency" of offending speech, however remote the consequences, was considered a sufficient constitutional basis for its limitation.<sup>82</sup> This combination of strong feeling and a respectable intellectual rationale must have had an overwhelming effect.

Countervailing influences were also at work, however. Holmes

<sup>78</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("It [referring to 'clear and present danger'] is a question of proximity and degree.").

<sup>79</sup> See S. KONEFSKY, *supra* note 6, at 183.

<sup>80</sup> See Ragan, *supra* note 7, at 34 n.40. Ragan quotes a letter of John M. Maguire, who had served in the War Emergency Division of the Department of Justice, to Professor Chafee during this era. The opponents of the war, he said, "drove the superpatriots nearly crazy. There was absolute danger of mob law in not a few communities." He then added: "[W]hile you may condemn these convictions [of *Schenck*, *Frohwerk*, and *Debs*] it is a fact that they preserved at least the outward form of law and prevented considerable criticism of the United States as a nation governed by mobs." *Id.* See also Bloustein, *Bad Tendency*, *supra* note 6, at 22-23.

<sup>81</sup> Bloustein, *Bad Tendency*, *supra* note 6, at 19.

<sup>82</sup> *Id.* at 14-17; see also Rabban, *Emergence*, *supra* note 6, at 1275-78.

had recently dissented from the affirmance of a conviction in *Toledo Newspaper Co. v. United States*,<sup>83</sup> because he believed that the challenged newspaper articles had not come near enough to obstructing court proceedings to contravene the purpose of the federal contempt of court statute.<sup>84</sup> There were also able briefs in *Debs*, one of the companion cases to *Schenck*, which advanced for the first time a first amendment defense against the 1917 sedition statute under which *Schenck*, as well as *Debs*, had been prosecuted. These briefs also "raise[d] first amendment challenges to the 'bad tendency' test, [thereby attacking] the heart of the traditional judicial approach to free speech issues."<sup>85</sup>

A final factor which might have given Holmes pause about affirming the conviction in *Schenck* arose from his review of *Goldman*. It paralleled his own criminal attempt theory. Such reflection, therefore, may well have triggered his *Common Law* theory of criminal attempts and the *Kennedy*, *Peaslee*, and *Swift and Co.* cases which his letter to his friend Chafee reveals that he was considering at the time. This background of theory and precedent must have led him to contemplate the distinction between attempts that required proof of actual intent and those that did not.

And therein may have been the cause of his dilemma and discomfort: if he were to apply the doctrine of criminal attempts to speech under the protection of the first amendment—something he had never before contemplated—he might be required to apply a different concept of "intent" than he had applied in the "bad tendency" tradition, which had previously served him in speech cases.<sup>86</sup> There the "tendency" was presumed to inhere in the very words spoken, and the speaker was presumed as a matter of law to intend that "tendency" or "natural and probable" consequence. As we have seen, Holmes had posited a similar relationship between "natural and probable" consequences and presumed intent as a matter of law in the case of attempts where "no further acts" were required in the normal course of things to consummate a substantive wrong.<sup>87</sup>

But, in many circumstances, rather than stimulating a listener directly to action, speech invokes a "further act" of thought or reflection.<sup>88</sup> This, among other things, distinguishes teaching and advocacy from incitement, a distinction that had already been made in

83 247 U.S. 402 (1918).

84 *Id.* at 423 (Holmes, J., dissenting).

85 Rabban, *Emergence*, *supra* note 6, at 1250 (providing a detailed analysis of the briefs).

86 Bloustein, *Bad Tendency*, *supra* note 6, at 25.

87 See *supra* text accompanying note 51.

88 See Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972)

the literature<sup>89</sup> and adopted by Judge Learned Hand in the *Masses Espionage Act* case.<sup>90</sup> The latter case was known to Justice Holmes at the time of *Schenck*,<sup>91</sup> and had been cited in the defendants' brief in the case.<sup>92</sup> The distinction between attempts where further acts are required and those where no further acts are required parallels the distinction between words of advocacy, which invite a "further act," and those of incitement, which do not. This parallel may well have troubled Holmes as he considered *Schenck*.<sup>93</sup> He had somehow to find a way to reconcile his temperamental inclination to affirm the *Schenck* conviction with his dawning recognition that attempts involving speech raise concerns about the concept of "further acts" necessary to establish the substantive crime, and about the proof of "intent." These issues were new to Holmes.

#### D. "Further Acts" in *Schenck*

Had no "further acts" been required in the ordinary course of things to bring about the substantive crime in *Schenck*, intent might have been presumed as a matter of law, as was the case in the law of attempts and in the "bad tendency" tradition.<sup>94</sup> But it would have been difficult for Holmes to assimilate *Schenck* to such classic attempt cases. The case was simply not like that in which a gun was shot off thoughtlessly in a crowded place, for instance. Nor was it like one in which someone set his own home on fire in a heavily populated area. These are cases in which the illegal consequence required "no further act," and could be anticipated with a high degree of certainty.

*Schenck* must have seemed to him more like *Peaslee* and *Swift and Co.*, the cases which we know came to his mind as he wrote the opinion in *Schenck*.<sup>95</sup> There, it will be recalled, the illegal consequence was to be anticipated only if a series of intervening events or "further acts" occurred, and actual intent had to be proved in order to

---

[hereinafter Scanlon, *A Theory*]; cf. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 531-32 (1979) [hereinafter Scanlon, *Categories*].

<sup>89</sup> See Rabban, *Forgotten Years*, *supra* note 6, at 559-79 (examining pre-war free speech and the legal scholarship surrounding the first amendment).

<sup>90</sup> See *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.) ("to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which . . . is a safeguard of free government."), *rev'd*, 246 F. 24 (2d Cir. 1917).

<sup>91</sup> See Rabban, *Emergence*, *supra* note 6, at 1278-83.

<sup>92</sup> Brief for Appellant at 7, *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>93</sup> See Bloustein, *Bad Tendency*, *supra* note 6, at 23; Rabban, *Emergence*, *supra* note 6, at 1276-77.

<sup>94</sup> See O.W. HOLMES, *supra* note 15, at 66; see also Bloustein, *Bad Tendency*, *supra* note 6, at 26.

<sup>95</sup> See *supra* text accompanying note 19.

establish the probability of harm.<sup>96</sup> As with these earlier cases, obstruction of the Selective Service Act could not have taken place in *Schenck* without a series of "further acts" beyond circulation of the anti-draft leaflet to draft registrants. At the very least, the draft registrants must have received the leaflets in the mail, read them, and been persuaded by them to refuse to obey their draft notices.

This being the case, and in the light of his theory of attempts, Holmes must have found it difficult to indulge the fiction of intent. But since there was no evidence that the leaflet in the *Schenck* case had actually obstructed the draft—had there been, the substantive crime would have been charged, of course—bona fide intent to obstruct it would have had to be established to sustain the conviction. This was the teaching of *The Common Law*, and that embodied in the *Kennedy*, *Peaslee*, and *Swift and Co.* opinions.<sup>97</sup>

In the circumstances, Holmes fudged. He never exposed his "natural and probable"—as opposed to "further acts"—analysis of attempts. Nor did he make clear whether he was applying intent as fiction, or as fact. He may even have indulged in obfuscation: first, by omitting reference to his earlier attempt cases, which would have accented the notion of "further acts" and the corresponding requirement of actual intent; next, in relying upon what he—mistakenly, I believe—said was a concession by the defense on the issue of actual intent.<sup>98</sup> Let's look at the evidence in the case.

<sup>96</sup> See *supra* text accompanying notes 22-25.

<sup>97</sup> See O.W. HOLMES, *supra* note 15, at 67-68.

<sup>98</sup> See *Schenck v. United States*, 249 U.S. 47, 51 (1919). I am puzzled about where Justice Holmes finds the basis for this concession. True, the defendants' brief on appeal did say that "[f]or the purposes of this argument, and for such purposes only, the defendants assume that the character of the leaflet or circular offered in evidence herein is such that it may present a question for the jury whether an agreement to circulate the same among men engaged in the military forces . . . would constitute a conspiracy to wilfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty under the provisions of the Act of June 15th, 1917." Brief for Appellant at 18, *Schenck v. United States*, 249 U.S. 47 (1919), reprinted in 18 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 989, 1006 (1975) (emphasis added). But, as I read this concession, especially the enposited word, it only relates to the argument that follows it. That argument was that "there is absolutely no further proof [beyond the fact that 'she wrote the minutes' of a meeting which authorized the leaflet] of any kind to connect the said defendant Elizabeth Baer with the alleged conspiracy." *Id.* at 18. A similar argument is then made for the defendant *Schenck*. *Id.* at 22-25.

In other words, the concession as to the intention of the circular seems to have been made solely to argue that, even if the circular could be read to have an illegal purpose, no evidence connected the defendants to the conspiracy to accomplish that purpose. The brief describes the circular or leaflet as "honest criticism," *id.* at 8, and then urges that "[t]he worst that could be charged against the circular was that it said 'A conscript is little better than a convict,'" words attributed to one of the opponents of the Espionage Act in the United States Senate. *Id.* at 15. Moreover, the defendants suggested that the

E. Intent as Fiction or Fact in *Schenck*

Beyond strident attacks on the draft as unconstitutional, and inflammatory exhortations to "Assert Your Rights," the closest the leaflet in *Schenck* came to urging, advising, or advocating obstruction of the draft was the statement "Do not submit to intimidation."<sup>99</sup> In observing that the suspect circular to draft registrants was "confined . . . to peaceful measures such as a petition for the repeal of the act,"<sup>100</sup> Holmes at least must have considered the possibility that what the defendants intended by their circular might have been lawful. Their intention might have been *not* to cause the registrants to refuse to be drafted, but *rather* to have them, in Holmes's words, undertake "peaceful measures . . . [to] petition"<sup>101</sup> for the end of the draft. Indeed, it might have been argued that a lawful protest against the draft by those subject to it could exert a powerful and quite legitimate form of political influence, perhaps one even stronger than a conscientious refusal to serve.

In these circumstances, Holmes had to have asked himself whether the contents of the circular were such that a jury could have decided "beyond a reasonable doubt" that the defendants intended a criminal obstruction of the draft.<sup>102</sup> Yet on this difficult issue of intent Holmes only said, "[o]f course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect [the circular] could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."<sup>103</sup> Was this a finding of actual, if circumstantial,

---

fair test of freedom of speech was "whether an expression is made with sincere purpose to communicate honest opinion or belief." *Id.* at 14.

Unless appellants made a concession during oral argument regarding the intent of the circular (and I have found no evidence that one was made), Holmes read a concession that was intended solely for the purposes of arguing that there was no evidence connecting the defendants to a conspiracy to accomplish the illegal purpose as conceding that the circular was intended to accomplish an illegal purpose.

<sup>99</sup> *Schenck*, 249 U.S. at 51.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Though the charge to the jury was somewhat one-sided in its presentation of the evidence, it was clear and fair on the issue of intent. "The Question for you to determine is whether the defendants, in the exercise of their right of free speech, were using that right in violation of . . . the Espionage Act by having the purpose in mind when they sent these circulars our other than the proper purpose of merely causing people to use their influence with Congressmen to obtain the repeal of the act, and whether that other purpose was the purpose of causing . . . [obstruction of] recruiting and enlistment of men into the service of the United States. You will take the circular and give it due consideration. Examine it carefully and determine, under all the circumstances in the case, what, beyond a reasonable doubt, in your mind was the purpose and object in sending out that circular." LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, at 66.

<sup>103</sup> *Schenck*, 249 U.S. at 51.

evidence of intent? Or was it what subsequently he was to characterize subsequently, in *Abrams*, as the "vague" use of intent<sup>104</sup> and which he had earlier characterized as a fiction in *The Common Law*?<sup>105</sup> Holmes was exceedingly clear in his treatise and his prior opinions<sup>106</sup> that there were two types of attempts and two senses of "intent."<sup>107</sup> He also described very clearly the requirement of proof of actual intent in attempts requiring "further acts" to consummate the crime.<sup>108</sup> He was to demonstrate the same sensitivity to these conceptual nuances eight months later in *Abrams*.<sup>109</sup> Is it not reasonable

<sup>104</sup> See *Abrams v. United States*, 250 U.S. 616, 626-27 (1919) ("[knowing] facts from which common experience showed that the [illegal] consequences would follow"). Rabban seems to take all sides on this issue. In one place, Rabban indicates that Holmes relied on circumstantial evidence to make out intent. See Rabban, *Emergence*, *supra* note 6, at 1261 ("Holmes in *Schenck* inferred intent from the probable consequences and surrounding circumstances of speech."). In another, see *id.* at 1306, he refers to intent implied in law, that is, intent as a fiction. ("Holmes . . . had used [the] ordinary and vague conceptions of intent [as meaning "no more than knowledge at the time of the act that the consequences said to be intended will ensue"] . . . to justify his deference to the jury determinations of guilt in *Schenck*, *Frohwerk*, and *Debs.*"). Rabban also expresses the view that "[i]n *The Common Law*, Holmes asserted that intent should be evaluated by the tendency of acts, including utterances, to harm; [and that] in *Schenck* . . . [he] judged the intent requirement of the Espionage Act by the tendency of words rather than through an effort to uncover the defendants' actual states of mind." *Id.* at 1276. The references to *The Common Law* that Rabban offers are to theories of intent as a legal fiction; the quotation he offers regarding *Schenck* establishes the intent of speech as an inference from its effect, a form of circumstantial evidence.

<sup>105</sup> O.W. HOLMES, *supra* note 15, at 66 n.2. Rabban says that Holmes gave "a new definition" in the form of a "strict construction" of intent in *Abrams*, thereby rejecting the doctrine of "indirect intent." Rabban, *Emergence*, *supra* note 6, at 1306. This is a misreading of *The Common Law* and the cases that Holmes had decided on the issue of criminal attempts. What Rabban calls "indirect" and "strict" intent, corresponds to Holmes's distinction between the fiction of presumed intent, and actual intent. The former is applicable where no "further act" is required to make out an attempt, whereas the latter is applicable where a "further act" is required. See O.W. HOLMES, *supra*, at 65-66. Holmes never abandoned the distinction. Although he had difficulty in deciding which rule to apply in *Schenck*, he had no difficulty deciding which to apply in *Abrams*. See *infra* text accompanying notes 146-54.

<sup>106</sup> See *Swift and Co. v. United States*, 196 U.S. 375, 397 (1905); *Commonwealth v. Peaslee*, 177 Mass. 267, 271, 59 N.E. 55, 56 (1901); *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21, 48 N.E. 770 (1897).

<sup>107</sup> See also O.W. HOLMES, *supra* note 15, 65-66.

<sup>108</sup> *Id.* at 66-67 ("There is another class [of attempts, those requiring some "further act"] in which actual intent is clearly necessary"). See also *Swift and Co.*, 196 U.S. at 396 ("Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen"); *Kennedy*, 170 Mass. at 18, 48 N.E. at 771 ("But, in view of the nature of the crime [one in which a 'further act' of the intended victim to drink the poison the defendant had set out for him] and the ordinary course of events, we are of opinion that enough is alleged when the defendant's intent is shown").

<sup>109</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919) (citing *Swift and Co.*, 196 U.S. at 396) ("An actual intent in the sense that I have explained is necessary to constitute an

to suppose that he failed to make the distinction in *Schenck*, failed even to allude to his prior attempt cases, because it would have weakened the grounds for his affirmance?

Because he was not sure that there was sufficient evidence to make out actual intent, what Holmes did instead, I believe, is what most of us do when faced with a decision we want to make, but are unsure of: he seems to have indulged in ambiguity, muddied the waters and tried to have it both ways, sometimes seemingly deciding the case as if actual intent were required, and sometimes not.

Holmes's conclusion that the circular could not "be expected to have [an effect] upon persons subject to the draft except to influence them to obstruct the carrying of it out,"<sup>110</sup> might be assessing circumstantial evidence of actual intent to illegally obstruct the draft. The very next sentence supports this characterization. Holmes says, "[t]he defendants do not deny that the jury might find against them on this point."<sup>111</sup> Clearly, Holmes was applying a theory of actual intent.

But, in relying on the *Goldman* case to describe "the act (speaking or circulating a paper,) its tendency and the intent with which it is done [as being] the same," he identified the intent of the act from its "tendency."<sup>112</sup> This bespeaks intent as a legal fiction; the defendants intending the "natural and probable" consequences of their speech, whether actually intended or not.

Holmes attempted a similar conceptual straddle between two meanings of "intent" when he came to discuss how "proximate" the consequence of obstruction of the draft was in the case. On the one hand, under his theory of attempts, proximity is only an issue where "further acts" are required to accomplish the crime. But in such a case, actual, *not* presumed, intent would have been at issue in the case. On the other hand, however, the examples he provided of "clear and present dangers" in *Schenck* do not require "further acts." This suggests that Holmes might have felt that intent as a fiction would have sufficed in the case.

"[S]hout[ing] fire in a theatre" resembles shooting a gun aimlessly into a crowd, which does not require a showing of actual intent to make out the crime of attempted murder, while preparing combustibles to be lit, as in *Peaslee*, requires proof of actual intent to convict of attempted arson. The panic which ensues upon the shout of "fire" in a crowded theatre is not an *action*, it is a *reaction*. Panic is

---

attempt, where a further act of the same individual is required to complete the substantive crime . . .").

<sup>110</sup> *Schenck v. United States*, 249 U.S. 47, 51 (1919).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 52.

not a conscious decision, not meditated, not "a further act," but rather "the common working of natural causes," something people suffer, or experience, rather than undertake to do. Therefore, under Holmes's theory of attempts, it would not require a showing of actual intent.<sup>113</sup>

The same conclusion follows from his citation of the *Gompers* case as an illustration of speech presenting a "clear and present danger."<sup>114</sup> The defendant labor union leaders had been found guilty of contempt in the case for defying an injunction against their "continuing a boycott, or from [their] publishing any statement that there was or had been a boycott against Buck's Stove & Range Company."<sup>115</sup> The contempt citation was founded on, among other things, the circulation of copies of the union magazine, *The American Federationist*, in which "Buck's Stove & Range Company [appeared] on the 'Unfair' and 'We don't patronize' lists."<sup>116</sup>

In response to the union leaders' contention that "the court could not abridge the liberty of speech or freedom of the press," the Supreme Court declared that "the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued."<sup>117</sup> The Court reasoned that

[i]n the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words "Unfair," "We don't patronize," or similar expressions, a force not inhering in the words themselves . . . . Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the use of any other force whereby property is unlawfully damaged.<sup>118</sup>

Holmes characterized the case as one in which the "most stringent protection of free speech . . . does not even protect a man from an injunction against uttering words that may have the effect of force."<sup>119</sup> He then announced the "proximity" or the "clear and present danger" rule, and concluded by stating, "[i]t is a question of proximity and degree,"<sup>120</sup> the exact language of *Swift and Co.*, which, as I have noted, he did not cite.

113 See O.W. HOLMES, *supra* note 15, at 66-67.

114 *Schenck*, 249 U.S. at 52 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 439 (1911)).

115 *Gompers*, 221 U.S. at 419.

116 *Id.* at 420.

117 *Id.* at 436-37.

118 *Id.* at 439; *cf.* *Vegeahn v. Guntner*, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting) (referring to another Massachusetts case in which "[t]he context showed that the words as there used [on a banner] meant threats of personal violence and intimidation by causing fear of it.").

119 *Schenck v. United States*, 249 U.S. 47, 52 (1919).

120 *Id.*

The fact is, however, that *Gompers* was *not* in the least like *Swift and Co.* First, the substantive crime of contempt was made out; it was *not* an attempt case. In *Gompers*, the *very use* of the words, irrespective of wrongful intent, *was* the harm, and consummated the illegality. Second, the words used were words that *did* something, rather than merely *said* something.<sup>121</sup> They were “verbal acts,” constituting a “force whereby property [was] unlawfully damaged.”<sup>122</sup>

*Swift and Co.*, to the contrary, *was* an attempt case. “Further acts” were required to establish the crime of restraint of trade. It was a matter of “proximity and degree” whether the defendants’ acts were a direct enough cause of that harm to hold them liable, and, absent the occurrence of the harm, proof of the actual intention to cause it was necessary to make out the attempt.<sup>123</sup>

Thus, Holmes’s use of *Gompers* in *Schenck* carries the same implication as his use of the “shouting fire in a theatre” analogy. They both demonstrate that, in laying down the “clear and present danger” rule in *Schenck*, he may still have been uncertain whether the intention to do harm was necessary to justify a constitutional limitation of speech that required “further acts” to accomplish a wrong. He was torn between presuming intent, as with the “bad tendency” tradition and attempts where a substantive crime was the “natural and probable consequence” of an act, and requiring actual intent, as with attempts where “further acts” were anticipated to accomplish the harm.

Holmes’s aversion to the inflammatory role of political radicals like Frohwerk in wartime had come into conflict with the intellectual pull of his theory of attempts and with his dawning recognition of the importance of the role of expression in a democratic polity. Because the radicals’ anti-war rhetoric would not have constituted the crime without “further acts,” his theory of attempts required him to rely on their actual intent to obstruct the war effort. But the evidence of such intent was weak to non-existent. As a result, in *Schenck*, and, the following week, in *Frohwerk*<sup>124</sup> and *Debs*,<sup>125</sup> he ac-

<sup>121</sup> See Bloustein, *Pragmatist Bent*, *supra* note 6, at 299.

<sup>122</sup> *Gompers*, 221 U.S. at 439.

<sup>123</sup> *Swift and Co. v. United States*, 196 U.S. 375, 396, 401-02 (1905).

<sup>124</sup> *Frohwerk v. United States*, 249 U.S. 204, 205 (1919). The defendant in *Frohwerk*, editor of the German language newspaper *Missouri Staats Zeitung*, had been convicted, like *Schenck*, of a conspiracy to violate the Espionage Act. The only evidence against him was that he had written a series of articles which scathingly attacked the war against Germany and the political leadership which led the United States into it. Holmes concluded that “it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.” *Id.* at 209. The metaphor was thrown back at Holmes when he dissented from *Gillow v. New York*, 268 U.S. 652, 669 (1921), where the majority opinion observed that “a single revolu-

quiesced in guilty verdicts founded on the barest evidence of actual intent, evidence so minimal as to border on a legal presumption of intent.

#### IV THE *ABRAMS* MATURE "CLEAR AND PRESENT DANGER" RULE

The watershed *Abrams* case<sup>126</sup> was decided eight months later. The defendants were avowed anarchists and revolutionaries, political supporters of the Russian revolution, but of no renown. They pamphleteered—in some cases outside war factories—in an attempt to curtail American aid to the counter-revolution then in progress in Russia. Denouncing the American aid as a "betrayal" of the revolution and of the workers' "interests," they called for a general strike.<sup>127</sup> They were found guilty after a jury trial on the ground that they had conspired to distribute leaflets which advocated "curtailment of production of things and products . . . necessary and essential to the prosecution of the war [against Imperial Germany]."<sup>128</sup> Their convictions were sustained by the Supreme Court, but, for the first time in a first amendment sedition case, Holmes and Brandeis dissented.

##### A. The Majority Opinion

The Court dealt summarily with the defendants' first amendment argument, saying it had been "sufficiently discussed and . . . definitely negated [sic]" in *Schenck*.<sup>129</sup> The majority then considered what it took to be the most important issue of the case, intent. The defendants claimed that their convictions must fail because the applicable statute required proof that they intended curtailment of production of war goods *in the war against Germany*. They insisted that the proof only showed that their intent was *to aid the fledgling*

---

tionary spark may kindle a fire . . ." It is difficult to believe that the subsequent use of the metaphor was not intended to embarrass Holmes in the dissent.

<sup>125</sup> *Debs v. United States*, 249 U.S. 211, 212 (1919). Debs had been convicted of having "attempted to obstruct the recruiting and enlistment service of the United States. . . ." *Id.* at 212. The primary evidence at trial was a single speech in which he had attacked the war and in which he had extolled socialism and the work of a variety of socialist opponents of the war who had been jailed. Holmes concluded that the jury was justified "in finding that one purpose of the speech . . . was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.* at 214-15.

<sup>126</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>127</sup> *Id.* at 616.

<sup>128</sup> *Id.* at 617.

<sup>129</sup> *Id.* at 619.

*Soviet Government* against a counter-revolution in which the United States was providing assistance.

In sustaining the conviction, the Court invoked presumed or fictional intent.<sup>130</sup> To this effect, the majority said, “[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.” A general strike would have “[defeated] . . . the war program [against Germany]” and, whether this was their “primary” intention or not, the defendants must be liable for that consequence no less than for those they actually intended.<sup>131</sup>

## B. The Dissenting Opinion

Holmes’s dissent was curious, both in its treatment of the constitutional issue and the issue of intent. Responding, it would seem, to criticism of his authorship of the constitutional rule which sustained the convictions in *Schenck*, *Debs*, and *Frohwerk* against first amendment attack, he announced defensively that “questions of law alone were before [the] Court” in those cases and that he had “never . . . seen any reason to doubt” that those questions “were rightly decided.”<sup>132</sup> However, he then applied the *Schenck* rule to urge reversal of the conviction in *Abrams*, without ever distinguishing it factually or procedurally from *Schenck*. There is no legally defensible ground on which to distinguish the two cases.<sup>133</sup>

<sup>130</sup> The doctrine of presumed intent holds people morally responsible and criminally liable for the foreseeable outcome of their conduct just as if it were intended by them, even in cases where they did not intend it. See *supra* text accompanying note 51.

<sup>131</sup> *Abrams*, 250 U.S. at 621.

<sup>132</sup> *Id.* at 627.

<sup>133</sup> The Procedural Setting of *Abrams*: *Abrams* had been convicted under an amendment to the Seditious Act making it a crime to “advocate curtailment of production,” see *Abrams*, 250 U.S. at 617, while the *Schenck* conviction had been under a provision of that Act before it was amended, which prohibited “[obstruction of] the recruiting and enlistment service of the United States.” See *Schenck v. United States*, 249 U.S. 47, 48-49 (1919). But in *Abrams*, neither Holmes nor the majority suggested that the difference between a statute which prohibited “advocacy” directly and one which prohibited it only if it affected “obstruction” justified a different result under the “clear and present danger rule.” Such a distinction was thereafter made in the *Gitlow* case. See *Gitlow v. New York*, 268 U.S. 652 (1925). The majority held in *Gitlow* that a “clear and present danger” need not be proved where the statute expressly prohibited “advocacy” of specified character—as in both *Abrams* and *Gitlow*—rather than prohibiting a substantive danger which advocacy might accomplish, like that in *Schenck*. See *id.* at 671. Holmes’s silence on this issue in his *Gitlow* dissent, however, must be taken to mean that he thought the distinction between the two types of statutes was insignificant insofar as the “clear and present danger” rule was concerned; in any event, however, even had he accepted it, he would have been more rather than less ready to sustain the conviction in *Abrams*.

The Evidence: Holmes pointedly noted in *Schenck* that “copies [of the offending circular] were proved to have been sent through the mails to drafted men.” See *Schenck*, 249 U.S. at 50. In *Frohwerk*, however, he sustained the conviction even though it “[did] not appear that there was any special effort to [have the offending newspaper] reach men

Whether because of reticence, obfuscation, embarrassment, or confusion, Holmes's handling of the question of intent was likewise less than satisfactory. The absence of proof of the requisite intent under the statute was one ground on which Abrams urged reversal,<sup>134</sup> and Holmes agreed. In sustaining this position, he alluded to a "vague" sense of "intent," and distinguished it from a more "exact" sense, "actual intent," which he believed should apply in the case.<sup>135</sup> But he failed to identify the cases in which the "vague" sense had applied; and, indeed, he never said whether or how his use of "intent" in the earlier sedition cases was different from the way either he or the majority applied it in *Abrams*.<sup>136</sup>

### C. Holmes's Changes of Mind

Rabban, Justice Holmes's most perceptive critic, sees Holmes changing his mind on three questions in the *Abrams* opinion. The first change is that he adopted a "new definition" of "intent."<sup>137</sup> The second is that he offered a restatement of the "clear and present danger" test which "infused . . . new elements [into the test] that afforded greater protection for speech."<sup>138</sup> Third, Rabban asserts,

---

who were subject to the draft," see *Frohwerk v. United States*, 249 U.S. 204, 208 (1919). Moreover, in *Abrams* itself, without making a point of it, he virtually conceded that "workers in . . . ammunition factories" had access to the leaflets calling for a general strike. See *Abrams*, 250 U.S. at 626.

Another possible factual ground for a distinction between the two cases is that the primary defendant in *Schenck* was the general secretary of the Socialist Party, a prominent political figure, see *Schenck*, 249 U.S. at 49, while Abrams and his colleagues were "poor and puny anonymities." *Abrams*, 250 U.S. at 629. But Holmes expressly discounted this factual difference as a basis for limiting Abrams's criminal liability, stating that, "if published for the purposes [of curtailment of production of things necessary to the prosecution of the war, the condemned leaflet] might be punishable." *Id.* at 628. He relied on the defendants' "anonymous" status solely to argue for "the most nominal punishment." *Id.* at 629. Cf. Rabban, *Emergence*, *supra* note 6, at 1311-12.

<sup>134</sup> See *Abrams*, 250 U.S. at 626-27. Since he reached this result on the meaning of "intent" under the statute, he need not have reached the question of the constitutionality of the statute. But he did nonetheless.

<sup>135</sup> *Id.*

<sup>136</sup> Rabban, *Emergence*, *supra* note 6, at 1306 (citing *Abrams*, 250 U.S. at 626-27), says that Holmes had used the "ordinary and vague conceptions of intent, which he had already analyzed in *The Common Law* and applied in his earlier decisions on the general law of attempts, to justify his deference to the jury determinations of guilt in *Schenck*, *Frohwerk*, and *Debs*." There is no reference, however, to the earlier sedition cases in the cited pages of *Abrams*, except the general reference to their having been "rightly decided." Moreover, the "earlier decisions" on the general law of attempts—*Kennedy*, *Peaslee*, and *Swift and Co.*—to which Rabban alludes, involved the "strict" sense of intent, not the "vague" sense, see *supra* notes 32-53 and accompanying text; indeed, as I have indicated, Holmes cited *Swift and Co.* in *Abrams* for the proposition that "actual intent" is required. See *Abrams*, 250 U.S. at 628.

<sup>137</sup> Rabban, *Emergence*, *supra* note 6, at 1306.

<sup>138</sup> *Id.* at 1308.

he manifested a "readjustment in his personal ideology."<sup>139</sup> I agree with the latter two elements of Rabban's analysis, but disagree with the first.

There are surely "new elements," characterizations, and descriptive terms for the criteria of the "clear and present danger test" in *Abrams*. Thus, "clear and immediate" was substituted for the earlier "clear and present," and the terms "forthwith," "immediate," and "imminent" were frequently interspersed in the opinion. As one would expect in an opinion urging reversal of a conviction, all such changes tended to limit the conditions under which the state could constitutionally regulate speech beyond the *Schenck* definition of the test. But none of the changes is startlingly new or significant. Nor, in light of the similarity of the facts in the cases, does any of them provide a justification for Holmes to sustain *Schenck's* conviction, while dissenting from *Abrams's*.

The second point of conceptual difference between Holmes's views in the *Schenck* and *Abrams* cases that Rabban notes is that Holmes awakened sharply in *Abrams* to the value of dissent in a democracy, something to which he had never felt compelled to bear witness to before. The contrast with the prior seven cases in which he had written opinions involving freedom of expression, barely alluding to its political significance, is conspicuous.<sup>140</sup> Actually, prior to *Abrams*, in a letter to a colleague commenting on a case in which he joined an opinion sustaining a law requiring compulsory vaccinations, he had gone so far in underestimating the worth of freedom of expression as to say that "[f]ree speech stands no differently than freedom from vaccination."<sup>141</sup>

In this light, it was a startling break with his past to declare in *Abrams* that

the theory of our constitution . . . [is] that the ultimate good desired is better reached by [the] free trade in ideas [than by sweeping away all opposition]—that the best test of truth is the power of thought to get itself accepted . . . in the market, and that truth is the only ground upon which [peoples'] wishes safely can be carried out.<sup>142</sup>

---

<sup>139</sup> *Id.* at 1310.

<sup>140</sup> See *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918); *Fox v. Washington*, 236 U.S. 273, 277 (1915); *Patterson v. Colorado*, 205 U.S. 454 (1907); *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1896).

<sup>141</sup> Letter from Oliver Wendell Holmes, Jr. to Learned Hand (June 14, 1918) (quoted in Rabban, *Emergence*, *supra* note 6, at 1278-79, citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1909)).

<sup>142</sup> *Abrams*, 250 U.S. at 630.

This should not be mistaken for mere rhetorical flourish. Nor should it be discounted as a mere glowing avowal of a "new ideology," embodying the political merits of free speech. (Rabban undertakes both these forms of subtle disparagement.)<sup>143</sup> Rather, this change is fundamental to Holmes's recognition that the "bad tendency" doctrine on which he had previously relied in first amendment litigation was fundamentally mistaken. By justifying limitations on speech whenever they bore some reasonable relationship, however remote, to legitimate exercises of state power, the "bad tendency" doctrine afforded speech no more constitutional protection than any other form of behavior. In effect, it thereby made the first amendment superfluous, transforming its protection to that afforded by the due process clause.<sup>144</sup> In these terms, Holmes's recognition in *Abrams* of the singular role that free speech plays in a democracy was a substantial part of the metamorphosis of his thinking.

#### D. "Further Acts," "Intent" and the "Clear and Present Danger" Doctrine

The most significant feature of the evolution of Holmes's first amendment analysis in *Abrams* concerned the concepts of "further acts" and "intent." Holmes had never before expressly applied his criminal attempts theory to first amendment issues. As discussed above, he only did so uncertainly in *Schenck*, and its use there was veiled.<sup>145</sup> He gave every reason to believe that, at best, he was ambivalent about its application, and that, in any event, he had not fully developed its application to free speech.

Rabban is mistaken, however, in believing that the change in *Abrams* involved a "new definition" of "intent."<sup>146</sup> The transition in Holmes's view in *Abrams* was more subtle, though more pivotal. He brought to bear a new characterization of speech acts, which, in turn, invoked a different concept of "intent," and a new sense of the value of speech than he had worked with in *Schenck*.

Holmes's theory of criminal attempts involved both presumed intent (the fiction of intent), and actual intent.<sup>147</sup> In *Schenck*, although his analysis was marred by obscurity, equivocation and—perhaps—obfuscation, the express terms of the exception to first amendment protection Holmes had carved out corresponded to *only the first* of the two prongs of his *Common Law* theory of criminal at-

<sup>143</sup> Rabban, *Emergence*, *supra* note 6, at 1310-11.

<sup>144</sup> See Bloustein, *Bad Tendency*, *supra* note 6, at 28-32, 38-39.

<sup>145</sup> See *supra* notes 54-93 and accompanying text.

<sup>146</sup> See Rabban, *Emergence*, *supra* note 6, at 1306.

<sup>147</sup> See *supra* text accompanying note 51.

tempts; in *Abrams* it corresponded to *both*. The most significant aspect of the evolution of Holmes's thinking in the eight months between *Schenck* and *Abrams* is that he characterized the speech act in *Abrams* as requiring a "further act" in order for the substantive crime to take place.<sup>148</sup> From this characterization it followed that actual intent had to be proved to sustain an attempt conviction. In *Schenck*, on the other hand, there was no characterization of the speech. Some of what Holmes said seemed to suggest reliance on the presumption of intent, while other language suggested actual intent had been shown.<sup>149</sup>

Compare the *Schenck* version of the rule ("words [which] . . . create a clear and present danger [of] . . . substantive evils"),<sup>150</sup> with that of *Abrams* ("speech that produces *or is intended to produce* a clear and imminent danger [of] substantive evils"). His earlier statement turns on speech that "creates" a danger; his later one turns on speech that "*produces or is intended to produce*" a danger.<sup>151</sup>

Other formulations of the *Abrams* rule vary somewhat, but they each underscore the same expansion of the conceptual scope of the "clear and present danger" doctrine—namely, that the doctrine applies, not only to words that portend danger that is "natural and probable," but also to words intended to bring about such danger.<sup>152</sup> Thus, at another point in his opinion, Holmes speaks of the expression of beliefs that introduce a "present danger of immediate evil *or an intent to bring it about.*"<sup>153</sup> And at another point, he says *Abrams's* "surreptitious publishing of a silly leaflet [did not] . . . present any immediate danger . . . [to] the success of the government arms . . . . Publishing [it] *for the very purpose of* obstruct[ion] however, might indicate a greater danger and at any rate would have the quality of an attempt."<sup>154</sup>

#### CONCLUSION

Notwithstanding his denial that he had changed his view,<sup>155</sup> and despite his continued use of much the same "clear and present danger" formulation he had earlier used in *Schenck*, Holmes's dissent in

<sup>148</sup> *Abrams*, 250 U.S. at 628.

<sup>149</sup> See *supra* text accompanying notes 100-25.

<sup>150</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>151</sup> *Abrams*, 250 U.S. at 627 (emphasis added).

<sup>152</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[T]he necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent . . . ."), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444, 449, 452 (1969).

<sup>153</sup> *Abrams*, 250 U.S. at 628 (emphasis added).

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> *Id.*

*Abrams* was a subtle revision of his first amendment theory. He adapted it to the theory of criminal attempts he had developed in his early treatise, *The Common Law*.<sup>156</sup>

The significance of this revision is three-fold. First, it helps us to understand Holmes's equivocal opinion sustaining the convictions in *Schenck* and its progeny, and also helps us to understand his dissent from *Abrams*. The evidence of specific intent to commit the obstructions charged in the four cases consisted of little more than tenuous inferences derived from the defendants' anti-war rhetoric. There was no proof in *Schenck*, *Frohwerk* or *Debs* that the draft actually had been obstructed, and there was no evidence in *Abrams* that the war against Germany was obstructed. Significantly, Holmes omitted from the pre-*Abrams* opinions any reference to the distinction between the two concepts of "intent" that he had identified in his *Common Law* analysis of attempts. He did, however, distinguish these two concepts of intent in the *Abrams* case.<sup>157</sup> Why the difference?

The question has added significance in light of his having lifted, in *Schenck*, a key phrase from his opinion in *Swift and Co.*, without quoting or citing it.<sup>158</sup> In *Abrams*, he then cited and relied upon *Swift and Co.* for the distinction between the two kinds of attempts he had earlier identified in his treatise.<sup>159</sup> His letter to Chafee explaining the origins of the "clear and present danger" test further compounded the conundrum by identifying *Swift and Co.* and the Massachusetts *Peaslee* case, in which he had also written opinions that relied on the same two senses of "intent."<sup>160</sup>

The only explanation I can offer for this pattern of omission and obfuscation is that Holmes wished to avoid embarrassment. Given his personal and political inclination to sustain convictions against political radicals for unpatriotic acts in wartime,<sup>161</sup> and given the paucity of evidence that the pre-*Abrams* defendants had intended their speech to obstruct the draft, Holmes found it difficult to allude, even indirectly (by means of a reference to *Swift and Co.*) to his theory of criminal attempts. This would have raised the issue of in-

<sup>156</sup> See *supra* note 15.

<sup>157</sup> *Abrams*, 250 U.S. at 626-27. It is true that there was a statutory issue of "intent" in the *Abrams* case which was not present in the others. Nonetheless, had Holmes desired, he had ample occasion in the pre-*Abrams* cases to discuss these two concepts of intent during his discussion of presumed intent.

<sup>158</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Swift and Co. v. United States*, 196 U.S. 375, 396 (1905). See *supra* notes 77-78 and accompanying text.

<sup>159</sup> *Abrams*, 250 U.S. at 628; *Swift and Co.*, 196 U.S. at 396. See *supra* notes 77-78 and accompanying text.

<sup>160</sup> See *supra* text accompanying note 19.

<sup>161</sup> See S. KONEFSKY, *supra* note 6, at 183; see also Rabban, *Emergence*, *supra* note 6, at 1280.

tent too pointedly. Instead, in *Schenck*, for instance, Holmes left unclear whether he was relying on a defense concession of intent, or on the doctrine of "bad tendency," in which intent was implied as a fiction from the character of the words spoken.<sup>162</sup>

Thus, in *Schenck*, as a result of indulging his antipathy toward radical political activity in wartime, Holmes obscured the logic of the distinction between the two kinds of attempts. But by the time of *Abrams*, his predisposition in this regard had cooled, and he relied squarely on *Swift and Co.*, inveighed against the "[vague use of] the word 'intent' . . . in ordinary legal discussion,"<sup>163</sup> and voted to reverse the conviction.

The conceptual adjustment he made in *Abrams* helps one explain, as well as one can, how Holmes could conceivably have voted to sustain the conviction in *Schenck* and, under virtually the same set of facts, to have dissented in *Abrams*. It also represents the abandonment of the "bad tendency" theory which Holmes had previously applied to first amendment cases.<sup>164</sup> In Professor Chafee's words, that theory justified limitations of speech on the basis of "some tendency, however remote, to bring about acts in violation of law."<sup>165</sup> It explains Holmes's rather cavalier attitude toward proof of actual intent to cause unlawful harm, found in the earliest sedition cases. It is embodied, I believe, in a cryptic observation in the *Schenck* opinion: "If the act, . . . its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."<sup>166</sup> Although the opinion avoids all reference to his *Common Law* concept of attempts, its identification of "intent" with the "tendency" of the speech act corresponded to that branch of his early theory where an attempt was made out as long as a crime was the "natural and probable" consequence of a

---

<sup>162</sup> The same reliance on vague inferences of specific intent and allusions to the "bad tendency" test are found in cases dating from the week after *Schenck*, where Holmes wrote unanimous opinions. In *Debs*, the Court sustained an inference of specific intent from the defendant's expression of sympathy for colleagues imprisoned for obstructing the draft, from his adherence to a plank of a political party platform, and from "the natural tendency and reasonably probable effect" of the language he used. *Debs v. United States*, 249 U.S. 211, 216 (1919). In *Frohwerk*, "[o]wing to unfortunate differences no bill of exceptions [was before the Court]," but taking the case "on the record as it is . . . [Holmes found it] impossible to say that [a jury] might not have . . . found that the circulation of [the defendant's newspaper article] was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." *Frohwerk v. United States*, 249 U.S. 204, 206, 209 (1919).

<sup>163</sup> *Abrams*, 250 U.S. at 626-27.

<sup>164</sup> See Rabban, *Emergence*, *supra* note 6, at 1305.

<sup>165</sup> See Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 948 (1919).

<sup>166</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919). The language of *Debs* exhibits the same orientation: intent was to be inferred from the "natural tendency and reasonably probable effect" of the *Debs* speech. *Debs*, 249 U.S. at 216.

defendant's act, independent of actual intent to cause the harm.<sup>167</sup>

But in *Abrams* the tendency of the words alone was no longer sufficient. He treated the speech acts in that case as corresponding to those *Common Law* attempts in which "further acts" are anticipated to establish the crime, and in which actual intent is required to make out the attempt. Especially in light of his belated recognition of the unique relevance of free speech to a democracy, this development shows that he had begun to differentiate the special characteristics of speech acts, as opposed to other behavior subject to regulation by the state, when considered as criminal attempts; he thereby firmly repudiated the "bad tendency" theory.<sup>168</sup>

Third, and most important, Holmes's overt accommodation in *Abrams* of his first amendment theory to his doctrine of criminal attempts helps to explain what types of speech Holmes thought subject to constitutional limitation under the "clear and present danger" test. To be sure, he never provided more than catch phrases and illustrations of what he had in mind, and I rely heavily on suggestive overtones of his stingy treatment of the issue. But, viewed in the context of evidence of his pragmatist philosophic orientation,<sup>169</sup> and of his reliance on the *Swift and Co.* requirement of actual intent, his dissent in *Abrams* leads me to believe that he may have been groping for a way to differentiate, in constitutional terms, words that *do* things from words that *say* things.<sup>170</sup>

The *Schenck* opinion is inconsistent and obscure in a number of respects. But it plainly analogizes mailing a circular which attacked the draft to "shouting fire in a theatre," or—describing the situation of the *Gompers* labor boycott case—"uttering words that may have all the effect of force."<sup>171</sup> These are illustrations in which what is said either directly causes a wrong—causing people to panic, with no "further act" of thought intervening—or what is said itself violates an injunctive order, without a "further [intervening] act."

In *Abrams*, Holmes considered the circular akin, not to a shout or the violation by the publication of a newsletter of a court order, requiring no "further acts" to accomplish the wrong, but to the price fixing undertaken by one of the *Swift and Co.* defendants, which could only succeed if followed by "further acts" of price fixing by co-defendants. Thus, on the one hand, in *Schenck*, Holmes treated an anti-war circular as if it might have constituted the proximate

<sup>167</sup> See *Schenck*, 249 U.S. at 52; O.W. HOLMES, *supra* note 15, at 65-70 (discussing attempts in criminal law).

<sup>168</sup> See Bloustein, *Bad Tendency*, *supra* note 6, at 2 n.5.

<sup>169</sup> See generally Bloustein, *Pragmatist Bent*, *supra* note 6.

<sup>170</sup> *Id.* at 16-20.

<sup>171</sup> *Schenck*, 249 U.S. at 52.

cause of panic, or like an act of contempt of court, *without* any "further [intervening] act." On the other hand, he dealt with the anti-war circular in *Abrams* as if it could only constitute an unlawful obstruction of the war effort if a "further act" ensued, only if someone read and understood it and acted on that understanding.<sup>172</sup> Because of this difference in his characterization of the mailing of the anti-war circular in the two cases, as either requiring a "further act" or not, to accomplish a wrong, he was able, consistent with his theory of attempts, to deal with intent differently in the two cases.<sup>173</sup>

Beyond whether Holmes presented a consistent theory of criminal attempts in *Schenck* and *Abrams*, and whether the two cases were rightly decided, there is a question of what Holmes's change of mind in the interim tells us about his conception of the constitutional limitations on speech. He was coming to see that some speech requires a further intervening act to accomplish its purpose, and some does not. The speech that can cause criminal wrongs without further acts (*e.g.*, the examples Holmes gave in *Schenck*) presents a "clear and present danger" and is constitutionally subject to limitation, whether the wrong is intended or not. The speech that does require further acts to constitute the wrong—the reference to *Swift and Co.* in *Abrams*—is only constitutionally subject to limitation if the wrong is intended.

This is hardly a finished doctrine; it leaves many questions unanswered, not the least of which is whether someone who intends to accomplish grave mischief by what he says is guilty of an attempt, even if there is no "clear and present danger" that he will accomplish his wrongful purpose.<sup>174</sup> Nonetheless, examining Holmes's

---

<sup>172</sup> See Scanlon, *A Theory*, *supra* note 88, at 213. Holmes sets forth John Stuart Mill's principle of free expression as involving "harmful consequences of acts performed as a result of acts of . . . expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe . . . these acts to be worth performing." Cf. Scanlon, *Categories*, *supra* note 88, at 531.

<sup>173</sup> This may explain why Holmes could say in *Abrams*, without feeling hypocritical, that he had not "seen any reason to doubt that the questions of law that alone were before this Court in [the pre-*Abrams* sedition cases] were rightly decided." *Abrams v. United States*, 250 U.S. 616, 627 (1919). He may have understood that it was not the legal theory that "went wrong" in those cases, but his characterization of the facts to which the theory applied.

<sup>174</sup> Holmes said in *Abrams* that

nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt.

250 U.S. at 628. Did he really mean to say that, no matter how unlikely the danger of harm, the mere intention to cause it by expressing one or another opinion would be a

"clear and present danger" formula from the perspective of his theory of criminal attempts—looking at the *Abrams* case as a conceptual outgrowth of the *Schenck* case, and both as deriving from *The Common Law*—suggests the critical variation in first amendment theory I mentioned earlier: the constitutionally sanctioned limitation on words which *do* something versus that applicable to words which *say* something. (It is also, by the way, a distinction I find implicit in Judge Hand's differentiation in *Masses* between words of "incitement" and words of "advocacy.")<sup>175</sup>

Some words do things, some convey meanings. "I do thee wed," said by someone legally authorized to conduct marriage ceremonies, "you son of a bitch," said in an angry tone, like the examples used by Holmes in *Schenck*, are uses of language that have consequences without "further [intervening] acts." Distributing copies of a circular to factory workers calling for a general strike, or teaching a course which includes discussion of *The Communist Manifesto* and the class struggle as a prelude to revolution, are uses of

---

crime? This might have been consistent with his theory of criminal attempts, but would it have been consistent with the reasons for the constitutional protection of speech that he provided in *Abrams*?

[W]e 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. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."

*Id.* at 630.

<sup>175</sup> *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F.2d (2d Cir. 1917). This may be why Holmes wrote to Hand that he did not see the difference between Hand's view and his own. Letter from Oliver Wendell Holmes, Jr. to Learned Hand (April 3, 1919), *cited in* Rabban, *Emergence*, *supra* note 6, at 1282. It also relates to his concluding remarks in *Abrams*: "Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here. . . ." *Abrams*, 250 U.S. at 631. Did Holmes mean to suggest that "incitement," words "which have the effect of force" (language that he used in *Schenck* to characterize the speech in *Gompers*, which the Court itself characterized as "verbal acts," *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 437 (1911)) were subject to limitation because they were outside the scope of the first amendment? Was this distinction also what he had in mind in his *Gitlow* dissent? See *Gitlow v. United States*, 268 U.S. 652, 673 (1925) ("The only difference between the expression of an opinion and an incitement in the narrower sense [of being different from a theory] is the speaker's enthusiasm for the result. Eloquence may set fire to reason."). For recent judicial treatment of the distinction, see *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) ("conduct designed not to communicate but to coerce merits . . . less consideration under the First Amendment"), and *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.").

language that only have effect if “[intervening] further acts” take place; they are uses of language that convey understanding and can be acted upon or not, depending upon the inclination of the listener. I believe that this distinction is one of the most important Holmes contributed to our understanding of the first amendment, and that it had its origin in the distinction between two kinds of attempts in *The Common Law*.

Thus, while Holmes’s revisionist critics tend to see his opinion in *Abrams* as a radical break with his prior thinking,<sup>176</sup> I see it as an outgrowth of his early philosophic orientation and the views on criminal attempts that he had expressed in *The Common Law*. These influences were clearly at work in the *Schenck* case, but his earlier adherence to the “bad tendency” theory of first amendment adjudication, and his disdain for political radicalism and the patriotic fervor of the immediate post-war period led him to subdue his true conceptional lights. In *Abrams*, stung by the criticism of his role in the *Schenck* line of cases, and imbued with a new awareness of the dangers that repression of speech poses to a democracy, the strength of the long-standing pragmatist tendency of his thought, and the concept of criminal attempts he had developed in *The Common Law*, finally came into their own as elements of his first amendment theory.

---

<sup>176</sup> See *supra* notes 6-8 and accompanying text.