

# Censorship Moments

Reading Texts in the History of Censorship and  
Freedom of Expression

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## ‘Every Idea is an Incitement’: Holmes and Lenin

Sue Curry Jansen

Holmes: *Persecution for the expression of opinions seems to me perfectly logical. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.*<sup>1</sup>

Lenin: *[In] capitalist usage, freedom of the press means freedom of the rich to bribe the press, freedom to use their wealth to shape and fabricate so-called public opinion. In this respect, too, the defenders of ‘pure democracy’ prove to be defenders of an utterly foul and venal system that gives the rich control over the mass media. They prove to be deceivers of the people, who, with the aid of plausible, fine-sounding, but thoroughly false phrases, divert them from the concrete historical task of liberating the press from capitalist enslavement.*<sup>2</sup>

The year 1919 has been described as a year that ‘changed the world.’<sup>3</sup> The Treaty of Versailles redrew the map of Europe and imposed war reparations against Germany, creating conditions that would lead to World War II. Russia, which had withdrawn from the Allied effort after the Bolshevik Revolution, was an anomaly; perceived as a potentially dangerous outlier in 1919, its vision of worldwide proletarian revolution disturbed the peace of many a capitalist. Across the Atlantic, anarchists sent a series of letter bombs to American public officials, including one addressed to Supreme Court Justice Oliver Wendell Holmes Jr. that was intercepted by the postal service and another that damaged the home

of Attorney General Mitchell Palmer. With the support of Congress, Palmer responded with a series of violent raids, arrests and deportations of anarchists and leftists in 1919 and 1920, a period that was dubbed 'The Red Scare'. It would later become known as America's 'First Red Scare': its sequel, the virulent 'red-baiting' of the early Cold War era, produced an even more chilling blight on the life of the mind.

In terms of censorship, the two 1919 texts reproduced above, from Justice Holmes's dissenting opinion in *Abrams v. US* and Russian revolutionary leader Vladimir Ilyich Lenin's Speech at the Opening Session of the First Congress of the Communist International, have been retrospectively elevated to iconic representations of competing visions of the role markets play in the circulation of ideas. From a twenty-first-century vantage point, they seem to capture in starkly reductive terms the East-West/communist-capitalist ideological visions that defined most of the twentieth century.

Torn from history and reduced to propaganda, Holmes's statement is now misinterpreted by many as a defence of capitalist free markets and of markets as the chief arbiters of truth as well as, by extension, trustworthy censors of bad ideas. Conversely, Lenin's speech frames capitalist marketplaces of ideas as rigged: controlled and censored by the rich, who use the mass media to deceive the people and manipulate public opinion to advance their own ends. The task of 'liberating the press from capitalist enslavement' therefore requires censoring capitalist censors.

For sixty years, endless variations on this oppositional – either/or – rendering of freedom and censorship supported powerful master narratives within each sphere of influence which, except for a brief strategic respite during World War II, proscribed any breaching of borders. From 1961 to 1989, the Berlin Wall cemented the divide. The fall of the Wall signalled the beginning of the end for the Soviet Union as well as the unmooring of these seminal documents from their respective orthodoxies.

Restoring these texts to their historical contexts permits us to recover some of their lost resonance as well as to interpret them more lucidly through the lens of the present. It also exposes some revealing conundrums. Many current champions of Holmes's market metaphor are, for example, unaware that he actually deployed it in defence of the free expression of self-proclaimed Russian revolutionaries and did so against the prevailing opinions of the American public, the Congress, the Justice Department and the majority of the Supreme Court. Holmes's contemporary critics claimed the dissent

contradicted his earlier decisions and ran counter to the entire tradition of First Amendment case law as it had developed up to that time. In short, Holmes' opinion failed the test of the marketplace of ideas in his own time although it acquired salience much later.

Lenin's argument is also fraught with complexity. We now know too well the tragic historical consequences of his censorial logic. Yet, Lenin's solution to the problem of the liberal press – censoring the censors – draws on an enduring flaw in Enlightenment-based defences of free expression: their Achilles' heel, the absence of any reliable universal principle securing liberalism's enfranchisement of free expression. Every liberal defence of free expression contains what journalist Walter Lippmann called 'a weasel clause' which limits its range.<sup>4</sup> Holmes himself, despite his expansive support for allowing expression of 'opinions we loathe and believe fraught with death', drew the line at views that 'so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country' (277). But even this narrowly conceived weasel clause has proven remarkably elastic under the US national security state.

Bringing these two censorship moments together, instead of cloistering them in opposition, will not yield the Holy Grail of a universal principle for securing free expression, but it will demonstrate why the problem of censorship is so intractable.

Justice Oliver Wendell Holmes Jr. (1841–1935) has been widely mythologized in America: the favourite son of an internationally famous author of patrician lineage, he was a thrice-wounded Civil War veteran who possessed exceptional eloquence of both pen and voice. He was the subject of a bestselling semi-fictional biography shortly after his death, *Yankee from Olympus*, as well as a hit Broadway play and film, *Magnificent Yankee*. The first full biography, which revealed some of his less laudable beliefs and behaviour, did not appear until 1989.<sup>5</sup> By then popular interest in Holmes had waned and the patina of the myth was too well burnished for it to be tarnished. Today, Holmes is most often remembered for his 1919 Abrams dissent, which provides the philosophical foundation for modern interpretations of the First Amendment.

In 1919, the First Amendment of the US Constitution, which prohibits Congress from abridging freedom of speech and the press, was little more than fine-sounding phrases. Emergency wartime measures, including the Espionage Act of 1917 and its 1918 amendment, the Sedition Act, had in fact abridged both freedoms. The Sedition Act, for example, made it a crime for anyone to 'utter,

print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, the Constitution of the United States, or military or naval force of the United States, or the flag ...'.<sup>6</sup> The Act carried a penalty of up to twenty years in prison and/or a fine of \$10,000.

In a 7–2 decision, the majority of the Supreme Court upheld the convictions of Jacob Abrams and four other defendants, all Russian émigrés who had been charged with four counts of conspiracy under the Espionage and Sedition Acts and sentenced to twenty years in prison. Few Americans today, including the highly educated, are aware of the events that incited the émigrés' actions: the Polar Bear Expedition, the US's ill-conceived 1918–1919 invasion and occupation of Northern Russia and Siberia in attempts to aid anti-Bolshevik forces and secure US ordnance intended for those forces. Cold War-induced historical amnesia effectively erased this fact from collective memory.

Abrams and the other émigrés had printed and thrown two leaflets from a window of a building in New York City. The first denounced sending US troops to Russia, claiming that 'German militarism combined with Allied capitalism to crush the Russian Revolution' and the 'common enemy' of all capitalists, the working class; it was signed 'The Rebels'. The Russians added a note to the leaflet claiming that calling them pro-German was absurd, avowing: 'We have more reasons for denouncing German militarism than the coward of the White House.' The second leaflet, written in Yiddish, denounced the war and American intervention in the Russian Revolution; it used what Holmes describes as 'abusive language', referring to the Allies as 'hypocrites', and urged Russian émigrés and 'friends of Russia in America' not to participate in producing weapons 'to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom'.<sup>7</sup>

Holmes dismissed the first two conspiracy counts as unfounded and the third because the prosecution did not prove intent on the part of the defendants. He focused on the fourth count, arguing that the defendants' objective was 'not to impede the United States in the war that it was carrying on' with Germany but rather 'from the beginning to the end that the only object of the paper [the second leaflet] was to help Russia and stop American intervention there against the popular government' (275). Holmes contended that 'the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them'; and he concluded the defendants were 'deprived of their rights under the Constitution of the United States' (277).

The Abrams dissent marked a radical departure in Holmes's approach to free expression. Before Abrams, the 78-year-old jurist voted to protect speech in only three of the eleven cases that came before the Supreme Court; after Abrams, he voted fourteen times in its favour and only twice to deny. Historians contend that the young progressives he socialized with in his old age played a role in transforming Holmes's judicial philosophy. Progressives certainly contributed to mythologizing Holmes and the importance of the Abrams dissent, which became 'a rally[ing] point for resistance to the Red Scare'.<sup>8</sup>

Although the phrase 'marketplace of ideas' is indelibly linked to Holmes today, he never actually used it: Justice Douglas invoked it in 1953 as did Justice Brennan in 1965. Since then, thousands of lower court cases and commentaries have used the metaphor and linked it to the Abrams dissent. Legal scholars generally trace its genesis to Socrates, John Milton, Adam Smith, John Stuart Mill and more immediately to the influence of Holmes's friends and associates, including Harold Laski, Learned Hand, Zechariah Chafee, Louis Brandeis and the editors of *The New Republic* magazine.<sup>9</sup>

In embracing and literalizing Holmes's metaphor, free market fundamentalists ignore Holmes's actual judicial record: he supported government regulation of business and the rights of labour to organize, strike and to sponsor boycotts. Moreover, in illustrating the meaning of his metaphor, Holmes repeatedly used political, not economic, examples. However, a subtle shift in meaning occurred when the metaphor evolved from Holmes's 'free trade in ideas', which implied dialectics – testing the logic and value of propositions in arguments – to a 'marketplace of ideas', which denotes a physical space dedicated to commercial exchanges.<sup>10</sup> Commerce was not involved in the Abrams case; however, it has been involved in many, possibly most, post-1953 First Amendment cases.

Writing in 1928, Holmes's fellow pragmatist, philosopher John Dewey, interpreted Holmes's trade metaphor as referring to a forum in which 'intelligence would prevail' – similar to contemporary social theorist Jürgen Habermas's concept of the ideal speech situation.<sup>11</sup> There is a substantial body of legal scholarship persuasively challenging literal interpretations of the market metaphor; legal research also demonstrates that even if the metaphor is taken literally, commercial markets for ideas are so radically different today that they no longer meet Holmes's standard of 'free'.<sup>12</sup> That is, media markets now are dominated by vast global conglomerates that have reach and penetration that far exceed anything Holmes or Lenin could have envisioned in 1919.

If this is not enough to convince free market fundamentalists that Holmes was not of their tribe, in *Gitlow v. US* in 1925 the Justice went so far as to assent to the possibility that ‘free trade in ideas’ might lead to the triumph of Bolshevism:

If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they [Bolsheviks] should be given their chance and have their way. (323)

Despite red-baiting by his enemies, Holmes was no Bolshevik sympathizer. Aristocratic by disposition, conviction and heritage, he thought socialism was a flawed ideology that would lead to mediocrity. It is, however, reasonable to assume that the historic Holmes’s concept of free expression drew more inspiration from Socrates’ dialogic misadventures in the Athenian marketplace than from any concern for Mr. Rockefeller’s accounting ledgers.

If Holmes was mythologized, Lenin (1870–1924) was elevated to the role of a secular saint after his death: officially venerated as both theoretician and revolutionary hero in the Soviet Union, he was also long romanticized by the Western left. Disabled by a series of strokes, Lenin died just three years after the end of the Russian Civil War, succeeded by Stalin’s totalitarian regime. Lenin’s early death engendered much utopian speculation about what might have been.

A voracious reader and prolific writer (his collected works run to forty-five volumes), once in office Lenin proved remarkably flexible in revising his theories as situations demanded. To deal with the scarcity of food, for example, he restored some levels of free enterprise among peasants, which, ironically, led his leftist critics to charge that he was actually ‘an agent of Wall Street bankers’. Lenin’s strategic realism along with his final ‘Testament’, in which he critiqued his own past errors and recommended removing Stalin as General Secretary of the Party, fuelled the Lenin myth.<sup>13</sup>

However, Lenin’s affirmation of terror as a revolutionary strategy as well as his centralized leadership model – whereby the proletariat ruled in name only through its proxy, the Central Committee of the Communist Party, which, in turn, was subject to the iron discipline of the supreme leader – created the structural conditions that would secure Stalin’s brutal regime.<sup>14</sup> That is, Lenin was directly responsible for the conditions that made possible the developments that he regretted in his final days.

The same must be said of his approach to censorship. In his youth, Lenin loved languages and literature and only developed an interest in revolutionary

ideas in his late teens after his older brother was executed by tsarist forces. Although Lenin began university studies with a strong academic record, he was expelled after only a few months for participation in proscribed student political groups and was forbidden to matriculate in any Russian university in the future. His petitions for release from the educational ban were repeatedly denied, but he undertook a rigorous programme of self-study, and he was allowed to take examinations as an external student in jurisprudence and was awarded a degree with honours from St Petersburg University. He then briefly practised as a lawyer before his political activities led to imprisonment, exile to Siberia and then forced emigration.

The son of educators, Lenin believed in the transformative power of ideas: so much so that he contended that revolutionary re-education could produce a 'New Man'. In that respect, he was actually more of a Hegelian than a Marxist, emphasizing politics over economics and consciousness over class position. He promoted universal literacy, public schools and free public libraries. In his 1901 article, 'Where to Begin', Lenin ascribed a crucial role to the press in developing revolutionary consciousness, famously arguing: 'The newspaper is not only a collective propagandist and a collective agitator, it is also a collective organizer.'<sup>14</sup> That is, the material conditions required to organize, produce and distribute a newspaper – especially an outlawed newspaper like *Iskra*, produced abroad and smuggled into Russia – creates a network that can be used to develop disciplined revolutionary activity.

In his own incarnation as a journalist in exile, Lenin published extensively in obscure revolutionary papers and from 1900 to 1903 served as one of the editors of *Iskra*, the first Marxist newspaper with a national circulation in Russia. During the period of liberalization beginning in 1905, Bolshevik papers were allowed to publish in Russia. Lenin published hundreds of articles in *Pravda*, which became the most important Bolshevik newspaper.

Censorship was a given in tsarist Russia; as a journalist, Lenin faced many struggles with censors. In his pre-revolutionary writings, he did not advocate censorship. After the October 1917 revolution, however, he immediately imposed censorship as 'a temporary measure'. The Decree on the Press declared, 'the bourgeois press is one of the mightiest weapons of the bourgeoisie' that cannot be allowed to undermine the revolution. In large cities, Commissars for the Press shut down hostile publications and acted as censors in printing houses. By mid-1918, the Party tightened its control to suppress 'counterrevolutionary agitation', shutting down most of the remaining Socialist Revolutionary and Menshevik newspapers (234 newspapers, of which 142 were socialist).<sup>15</sup> By the end of the

year, all non-Bolshevik papers were suppressed. Several agencies, including one headed by Lenin's wife, Nadezhda Krupskaya, supervised publishing, literacy education, development of schools, libraries, reading rooms and the banning of 'obsolete literature' from public libraries.

With the end of the civil war, new literary organizations and some private publishing houses appeared. Under Lenin's New Economic Policy (1922), censorship was formally instituted to more effectively supervise the emerging literary scene; and The Main Administration for Literary and Publishing Affairs, commonly known as Glavlit, was established. Its mission was to prevent the publication and distribution of works that (1) contained anti-Soviet propaganda; (2) revealed military secrets; (3) incited public opinion with false information; (4) aroused nationalistic or religious extremism; or (5) contained pornography. During almost seventy years of operation, Glavlit even censored some of Lenin's own writings when they failed to conform to current orthodoxies.<sup>16</sup> Glavlit continued to operate until August 1990 when Mikhail Gorbachev's Press Law abolished official censorship.

In *Gitlow v. US*, Holmes maintained that 'Every idea is an incitement' (323). Those who care passionately about ideas, as both Holmes and Lenin did, worry most about the seductions of oppositional ideas; and when they have the power to silence them, they are sorely tempted to do so. Holmes worried about Bolshevism, but in *Abrams* he resisted the temptation to censor. *Abrams's* activities did not rise to the high standard he set for suppression.

If we grant some legitimacy to Bolshevism after the October Revolution, Lenin's 'temporary' 1917 censorship may have met Holmes's standard, given that Russia was involved in both World War I and a civil war at the time. If so, however, Lenin's subsequent 1918 suppression of all competing newspapers and imposition of permanent censorship grossly violated Holmes's limited franchise.

If we take Holmes at his word – that his belief in free speech was stronger than his will to preserve capitalism – then we must concede that he set an even higher standard of tolerance for himself than for the country. Unlike Lenin, who suffered the consequences of his own incitements, Holmes was never called upon to face the consequences of his fine-sounding idea, the idea that free speech might topple capitalism.