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Book Review: Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech. by Richard Polenberg.

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FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH. By Richard Polenberg.[1] New York, N.Y.: Viking Press. 1987. Pp. ix, 431. $24.95.

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Great cases may, as Holmes observed, make bad law, but in the hands of a talented scholar they often become superb legal history. Examples include Stanley Kutler's study of the *Charles River Bridge* case,[3] Don Fehrenbacher's exhaustive treatment of *Dred Scott*,[4] Charles Rosenberg's inquiry into the trial of Charles Guiteau,[5] John Noonan's *The Antelope*,[6] and A.W.B. Simpson's *Cannibalism and the Common Law*.[7] To this distinguished list should be added Richard Polenberg's splendid new book on the World War I sedition case, *Abrams v. United States*. The sooner this volume appears in paperback, the sooner will courses in American legal history be enriched.

Professor Polenberg's title comes, of course, from Holmes's celebrated dissenting opinion in that case, an opinion which, as constitutional scholars know, gave a new, libertarian twist to his own "clear and present danger" test and remains one of the towering monuments in our constitutional literature:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. 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

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3. S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

4. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

5. C. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE (1968).

6. J. NOONAN, THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977).

7. A. SIMPSON, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984).

> carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check 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." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.[8]

The occasion for this eloquence was the Court's review in October 1919 of the convictions a year earlier in New York City of three Russian anarchists—Abrams, Mollie Steimer, and Hyman Lachowsky—and one socialist, Samuel Lipman, for violating the Sedition Act of 1918 which made it a crime, among other things, to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States's forms of government or to "willfully urge, incite, or advocate any curtailment of production in this country of any thing or things . . . necessary or essential to the prosecution of the war . . . with intent by such curtailment to cripple or hinder the United States in the prosecution of the war." The four avid supporters of the Bolshevik Revolution had printed and distributed leaflets in English and Yiddish that condemned United States military intervention into the civil war raging in Russia and called on American workers to protest this policy. The Yiddish leaflet, but not the English one, urged a general strike. Although their defense attorney argued that they intended to criticize the invasion of the Soviet Union, not to disrupt the war effort against Germany, and that the first amendment barred their prosecution, the trial judge and the jury rejected these contentions. After deliberating for little more than an hour, the jury returned a guilty verdict. Judge Henry DeLamar Clayton, Jr., a former congressman from Alabama best known for his sponsorship of antitrust legislation, imposed the maximum sentence on Abrams, Lipman, and Lachowsky of twenty years in prison and fines of $1,000. In an act of chivalry, he sentenced Steimer to fifteen years and a fine of $500.

Only about a third of Polenberg's gripping book, based largely on an extraordinary range of sources in thirty-six libraries, examines how the American legal system dealt with Abrams and his confederates from trial to final appeal in the Supreme Court. Even in

8. Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

this well-trod area, Polenberg offers fresh information and new insights such as the pre-trial strategy of government prosecutors and defense attorney Harry Weinberger; the government's mistranslation of the Yiddish broadside that worked to the defendants' disadvantage; and the transformation of Justice Holmes's thinking on freedom of speech under the influence of friends and critics. The author has a deft grasp of criminal procedure, relevant constitutional history, and jurisprudential issues. But the richness of this work derives, finally, not from its explication of legal issues, however excellent, but from Polenberg's ability to place *Abrams* in its full social, cultural, and political context and in so doing to enlighten us about a vast range of other important matters:

—the social and intellectual world of American anarchists immediately before, during, and after World War I.

—the apparatus of government surveillance and repression of radicals in 1917-20, which included, among others, the Bomb Squad of the New York City Police Department, Military Intelligence, the state investigating committee headed by Clayton Riley Lusk, and the General Intelligence Division of the Federal Bureau of Investigation.

—the harrowing conditions inside local and federal penal institutions such as the New York City Workhouse on Blackwell's Island, the federal penitentiary in Atlanta, and the Missouri state prison in Jefferson City.

—the nightmarish existence of anarchists, deported from the United States to the Soviet Union and then driven into further exile by their new Bolshevik tormentors.

Along the way, Polenberg offers memorable vignettes of the leading actors in this historic legal drama. In his dissent, Holmes never referred to Abrams, Steimer, Lachowsky, and Lipman by name. He called them "poor and puny anonymities," who professed a "creed of ignorance and immaturity." Polenberg rescues the defendants from historical obscurity with a series of affectionate portraits about the book binders (Abrams and Lachowsky), the furrier (Lipman), and the ladies shirtwaist maker (Steimer), who risked imprisonment and exile for their political beliefs and in so doing helped to change our Constitution.

In addition to probing the lives and ideas of the defendants, Polenberg offers vivid accounts of the motives and behavior of others, including Weinberger, indefatigable in his efforts to secure justice for people trapped in the web of wartime hysteria; Henry DeLamar Clayton, a hanging judge if ever there was one, whose southern gentility could not disguise his loathing for the defendants

and his partisan conduct of the trial; Frederick Howe, the decent, reform-minded Commissioner of Immigration, who strove to make the once-wretched conditions at Ellis Island habitable; Kate Richards O'Hare, the striking "Red Kate" of the Socialist Party, who agitated against the war and battled for prison reform; Woodrow Wilson, pathetically seeking in his final days in office to rectify by means of clemency some of the human suffering inflicted by his Department of Justice, but finally dissuaded from that course by the disingenuous arguments of his mean-spirited attorneys general, Thomas Gregory and A. Mitchell Palmer.

The radical defendants, not Holmes and Brandeis, are the central figures in this book, but Polenberg's treatment of the two Justices who dissented in *Abrams* reminds us once again why they remain such imposing figures in our constitutional history. Until *Abrams*, neither Holmes nor Brandeis could be regarded as a staunch libertarian on the question of freedom of speech. Holmes, in fact, had authored three opinions before the war (*Patterson v. Colorado; Moyer v. Peabody*, and *Fox v. Washington*) that displayed gross insensitivity to this right, and his famous "clear and present danger" standard, first formulated in the Espionage Act case of *Schenck v. United States*,[9] had been invoked to justify the conviction of the general secretary of the Socialist Party. With Brandeis joining him, Holmes had used the same test to affirm the convictions of other war-time dissenters, most notably Eugene Debs and Jacob Frohwerk.

Between *Schenck* and *Abrams*, however, Holmes experienced a genuine conversion when his opinion came under sharp criticism from people he respected (Learned Hand, Harold Laski, Ernst Freund, and Frederick Pollock) and as he read several other works (James Ford Rhodes's *History of the Civil War* and F.S. Marvin's *The Century of Hope*) that dramatized for him the enormous intellectual costs resulting from the suppression of political opinions during war. It is not going too far to suggest that in Holmes's dissent in *Abrams* we have one of the few examples in our history of the force of enlightened opinion actually working to transform constitutional doctrine. Although he still refused to accept Hand's very liberal "direct incitement" test, Holmes boldly recast "the clear and present danger" standard in *Abrams* to the point where it finally protected speech rather than justified its suppression.

Building on Holmes's foundation in *Abrams*, Brandeis developed an even more libertarian position by 1920 when in his dissenting opinion in *Gilbert v. Minnesota* he argued that the "clear and

9. 249 U.S. 47 (1919).

present danger" standard should not only control jury verdicts in free speech cases but also limit legislative discretion.[10] Holmes refused to travel that road, informed Brandeis that he had gone "too far," and joined Justice McKenna's opinion upholding Gilbert's conviction under the Minnesota criminal anarchy statute.[11] When the Warren Court finally drove a constitutional stake through the heart of these remaining sedition laws in the late 1960s, it did so by invoking the Holmes of *Abrams* and the Brandeis of *Gilbert*.

In a case as rich with social and intellectual significance as this one, there were bound to be a few striking ironies. Polenberg captures these, too. Supporters of the defendants, many of them anarchists and socialists, cashed in Liberty Bonds to raise their bail. Punished for defending the Bolshevik Revolution in America, they were later banished from the Soviet Union for counterrevolutionary activities. Vicious though they sometimes were, even Henry Clayton and J. Edgar Hoover showed a greater respect for civil liberties than Felix Dzerzhinsky and the Cheka.

THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC. By Ralph Lerner.[1] Ithaca, N.Y.: Cornell University Press. 1987. Pp. xv, 238. $24.95.

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In this collection of seven essays, Professor Ralph Lerner shows himself to be a discerning student of early American political thought and practice. Rich and subtle in understanding and graceful in expression, these essays must be read with care if their merits are to be fully appreciated. All of them will receive some notice here, but most of my attention will be given to "The Supreme Court as Republican Schoolmaster," both because its subject is closest to the concerns of this journal and because it raises the most questions in my mind.

Professor Lerner begins with an effort at "Recovering the Revolution" from "modern historians," among whom J.G.A. Pocock, Bernard Bailyn, and, above all, Gordon S. Wood figure

10. 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).
11. *Id.* at 334 (Holmes, J., concurring).

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