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### Aphorisms, Enthymemes, and Oliver Wendell Holmes, Jr. on the First Amendment

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## Aphorisms, Enthymemes, and Oliver Wendell Holmes, Jr. on the First Amendment

*By relying on Oliver Wendell Holmes's decisions as a Supreme Court Justice, I argue that aphorisms employ enthymematic reasoning and that enthymemes are best conveyed through aphorisms. Such an argument requires that I classify Holmes's decisions as aphorisms and show how Holmes explicitly rejects formal, legal rhetoric. These two moves are most clear in his First Amendment decisions, and it is these decisions that demonstrate how Holmes rethinks, broadly, the relationship between rhetoric and law. Holmes's position on the First Amendment, informed by the relationship between aphorisms and enthymemes, helps show how style is constitutive of reason.*

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Yale University awarded Oliver Wendell Holmes, Jr. an honorary degree in 1886.<sup>1</sup> In a speech to the graduating class that year, Holmes bestowed this advice: "I never heard anyone profess indifference to a boat race. Why would you row a boat race? Why endure long months of pain in preparation for a fierce half-hour that will leave you all but dead? Does anyone ask the question? . . . Is life less than a boat race?" (qtd. in Lerner 33).<sup>2</sup> Retrospectively, such a speech is characteristic of Holmes's decisions while a member of the US Supreme Court in two ways. First, it represents his commitment to a kind of muscular, competitive pragmatism (Menand). A philosophical belief in striving for an end without certainty of the meaning or value of that end underpins Holmes's reading of the First Amendment and his method of judicial decision-making (Alschuler). Second, it represents his style as a writer and orator. The use of metaphor points the reader toward a particular perspective. The speech is not a logical demonstration. Holmes eschews evidence for rhetorical questions, and the speech does not

demand compliance from its audience. Instead, Holmes is terse and allusive. Holmes's importance in the canon of American jurists rests on the combination of his judicial philosophy and his rhetorical style, both embodied in his Yale speech.

Richard Posner observes that Holmes is best understood as a "writer-philosopher" whose "distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work" (xvi). Posner does not go so far as to explain the constituent components of that literary skill. I argue that the two key features of Holmes's literary skill are his use of aphorisms and enthymemes. By reading some of Holmes's decisions as a judge, I will show how an aphoristic style can be understood as a form of enthymematic reasoning. It is the combination of this kind of style with this form of reasoning that allows Holmes to perform and articulate his version of pragmatism. In addition, the relationship between an aphoristic style and enthymematic reasoning allows Holmes to conceptualize law as a kind of perpetually unfinished task that requires careful attention to language.

A long tradition of thinking about the relationship between law and rhetoric reminds "all of us that law can never escape the intricacies and imprecisions, as well as the promise and power, of language itself" (Sarat and Kearns 1). From Gerald Wetlauffer's perspective, law is the profession of rhetoric. Stanley Fish sees the legal process as an endless competition between competing rhetorics. And James Boyd White argues that legal work is similar to poetry and literature in its reliance on language and thus is a special form of rhetoric. Such perspectives privilege the importance of language for law instead of, to use two prominent examples, justice or power. Furthermore, these kinds of arguments can arouse anxiety by highlighting the ways in which legal proceedings can be manipulated by skillful practitioners of rhetoric. The fear is that rhetoric might obscure justice. Holmes belongs to the same tradition that informs Wetlauffer's, Fish's, and White's perspectives. Both his philosophy and literary style implicitly recommend the importance of rhetoric over and above some abstract notion of justice. Therefore, Holmes's decisions can be used to qualify, in specific ways, the relationship between rhetoric and law *and* to offer philosophical justification for considering the language of law before questions of justice. This can be accomplished by viewing Holmes as a writer who uses an aphoristic style and enthymematic reasoning.

Aphorism has no clear, agreed-upon definition. It does have many synonyms: Saying, maxim, adage, proverb, and epigram are just a few. An aphorism is notably distinct, however, from a maxim, which Kant defined as a subjective principle that an individual uses in making a decision. James Geary provides one definition—an aphorism is brief, definitive, personal, philosophical, and must

have a twist (1–5). One thing is certain: An aphorism must be terse. Beyond brevity, however, there are few other defining characteristics that unite the disparate set of literary examples labeled as aphorisms. Gary Saul Morson offers perhaps the best explication of the aphorism by comparing it to the dictum: “Dicta are certain [and] literally indubitable. Any attempt to refute them necessarily confirms them; to doubt them is to prove them” (“Aphoristic Style” 257). In contrast, aphorisms are mysterious in that they “all share a sense that what is most valuable to grasp lies beyond our reach” (260). An aphorism is “posed” while a dictum is “complete and contains no obscurity” (261). I extend Morson’s distinction between dicta and aphorisms by showing how an aphorism can “pose” an argument without being “complete” or overly certain—it does this by employing enthymematic reasoning instead of syllogistic demonstration. Holmes teaches us to see the power of aphorisms as argumentative technique.

As with aphorism, enthymeme suffers from some degree of ambiguity. Beginning with Aristotle, who claimed that it was the “substance of rhetorical persuasion,” enthymemes have always constituted a central preoccupation of rhetorical theory (1345a). However, according to Thomas Conley, the meaning of the term *enthymeme* is unclear, and the history of its use is best described as “tangled” (168). From Aristotle’s perspective, which informs the “dominant” understanding according to Conley, an enthymeme is a deductive argument with premises that are probabilities not certainties—at times those premises are left out or implied. In other words, an enthymeme is an incomplete syllogism. But this definition strikes many as too narrow (see Green; Jasinski). Jeffrey Walker suggests a more sophistic view of the enthymeme as “a stylistically striking, kairotically opportunistic, argumentative turn that not only presents a claim but also foregrounds an inferential, attitudinal complex” (63). According to this perspective, the interaction between audience and rhetor is highlighted, and the process of identification between the two requires the intersection of argument, style, and emotion. In working within this understanding of the enthymeme, I will show how aphorisms act as one of the stylistic devices for creating audience identification. If style matters to enthymematic reasoning, then the aphorism presents a unique opportunity for analyzing how the style of a particular genre of writing can advance a reasoned argument.

### **Aphorism as Argument, Holmes as Poet-Philosopher-Jurist**

In much of Holmes’s work, he avoids long, technical arguments that interpret the case at hand in the light of historical precedent and legal vocabulary. Instead, his opinions are short, instructive, and designed to have an impact on a wide range of audiences. Metaphors like “free trade in ideas” are designed to

capture the underlying assumptions of a case by association with other concepts. Because law, as Holmes claimed, is nothing more than what judges are willing to do, the language of the law determines judicial action.

One of the defining features of an aphorism is its length. Sometimes an aphorism can stand as just one line. Holmes's opinions are certainly not that short, but they are notably terse. Morson, however, argues that length does not determine what belongs to the category of aphorism. Instead, he "examines short forms from the perspective of genres as carriers of worldviews" ("The Aphorism" 411). From such a perspective, "*War and Peace* is the longest aphorism in the world" (412). One of the key features of the worldview carried by the aphorism is that it expresses "a view of experience" (411). Holmes, of course, thought that the life of law was experience. Given this reliance on experience, "interpretation of an aphorism deepens its mystery" (413). This is what distinguishes an aphorism from a riddle, for which there is a final solution. To highlight the mysterious nature of the aphorism is to suggest that the task of interpretation does not end. It is also to suggest that experience cannot be complete but always points us to further questions, uncertainties, perspectives, and possibilities.

Morson develops the worldview carried by the aphorism further by comparing it to the dictum. The two are opposites because the dictum "tells us that things are *not* so complex as people have thought" and "tends to *totality*," does not "tolerate exceptions," aspires to "absolute *clarity*," presents "truths as *axiomatic*," "proclaim[s] knowledge and demand[s] power," and is "certain" (416–18). Given these attributes, dicta "often cultivate the language and forms of mathematical or logical proof. . . . [T]hey present themselves as scientific truth" (419). In contrast, aphorisms "share a sense that what is most valuable to grasp lies beyond our reach" (421). Most importantly, aphorisms mark a "beginning" not an end (422). They are "momentary probes" that "show and gesture" without ever being finished. From the perspective of Morson's distinction, there is much at stake in viewing legal rhetoric as either dicta or aphorisms—Holmes obviously preferred that his decisions be read as aphorisms and not dicta.

According to *The Common Law*, experience is the central concern in legal decision-making: "The life of the law has not been logic; it has been experience" (Lerner 51). Such a statement was designed to reject the notion of a science of law founded on irrefutable general principles deduced logically. It is just such a science of law that would employ syllogistic reasoning to derive its principles, but experience, in Holmes's view, cannot be reduced to general propositions to be used in syllogistic demonstrations. General propositions may be important, but that importance is limited: "All the pleasure in life is in general ideas. But all the use of life is in specific solutions—which cannot be reached through generalities any more than a picture can be painted by knowing some of the rules of method" (qtd. in Baker

172–73). Holmes used this idea in his famous dissent in *Lochner v New York* (1905): “General propositions do not decide concrete cases” (Lerner 149).

This belief in experience grounds a conventional approach to the law: “The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient” (qtd. in Menand 344). In this case, “convenient” points to the social and conventional norms of a culture embodied in the collective experiences of those that participate in that culture. In the process of adjudication, “Experience is the test by which it is decided whether the degree of danger attending given conduct under known circumstances is sufficient to throw risk upon the person pursuing it” (Lerner 65). Whose experience is he referring to? It is the experience of the fictional, average person. Over the course of his career, Holmes developed a collective or social conception of experience as opposed to a psychological or individual conception. This social conception of experience is most clearly embodied in Holmes’s use of the “reasonable man” standard in liability cases: “The question of what a prudent man would do under given circumstances is . . . equivalent to the question of what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances” (Lerner 70). Holmes wrote that the law does not hold a person liable unless “he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did” (68). The “average man,” the “prudent man,” and the “reasonable man” are all, of course, fictions. They are fictions that Holmes used as an external test for legal claims. As a test, these fictions are products of the historical moment, social circumstances, and cultural assumptions guiding the senses of average, reasonable, and prudent.

This emphasis on common experience and reasonableness was tempered by Holmes’s devotion to the passion and power of individual beliefs derived from full participation in life. Recalling his experience in the Civil War, he claims that we “are born to act” and that the “stern experience of . . . youth” left the “feeling” that “through life” the “root of joy is to put all one’s powers toward some great end” (Lerner 27). In pursuing such ends, however, one must realize that every person believes firmly in a variety of different ends as those most worth pursuing. It is not a question of deducing the “right” end. Rejecting certitude, Holmes argues that “[I]f life is painting a picture, not doing a sum” and that the results are that “twenty men of genius looking out the same window” paint “twenty canvases, each unlike all the others” (26). We derive our own ends and paint our own picture, but the one thing that ties us all together is our fervent pursuit of those ends: “Nothing could be more enchanting than to see a man nearly killing himself for an end which derives its worth simply from his having affirmed it.” Holmes called this kind of commitment “nonsensical and sublime” (qtd. in Novick 216).

These two commitments, to collective experience and to individual power, are the grounds for Holmes's reading of the First Amendment *and* for the literary style perfected in his decisions as a Supreme Court Justice. *Abrams v U.S.* (1919) is perhaps the best-known case tried under the Espionage Act, an attempt to outlaw speech against US involvement in World War I. Jacob Abrams and several other Russian immigrants threw leaflets from the roof of a loft in New York City's garment district. These leaflets argued for the curtailment of war production. Abrams was tried under the Espionage Act, convicted, and sentenced to twenty years in prison for the "intent [to] cripple or hinder the United States in the prosecution of war" (Lerner 305). By majority opinion the Court upheld the conviction, with Holmes and Louis Brandeis dissenting.

Holmes's dissent makes his commitment to power, experience, and the "reasonable man" all immediately apparent:

[W]hen men have realized that time has upset so 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. 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. (Lerner 312)

The most striking implication of this argument is that a specific epistemology grounds the "theory of our Constitution." Philosophers of all kinds would be alarmed to know that this epistemology does not generate certain, irrefutable, general knowledge claims. Instead, the test of truth is not whether a proposition can be shown to follow logically from some other, more general proposition, but whether a proposition is persuasive, whether the majority accepts it in the course of open competition with other propositions.

This decision is also illustrative of what I consider Holmes's aphoristic style. Morson's claim that the genre of the aphorism carries a worldview is clearly on display (411). The first aspect of this worldview is that truth is not something that

can be revealed (412). The epistemology that Holmes refers to here nicely elaborates that position by suggesting that truth is an outcome of agreement. Moreover, aphorisms are available for multiple interpretations and each interpretive step tends to lead to another. Again, the focus here is on the reception of a claim, and, according to this line of thinking, Holmes's decision carries the worldview of the aphorism in two ways: First, he suggests that any act of public communication is open to endless interpretation. It is in the interpretation of such acts of communication that truth is made. We defend the right to free speech because we are open to the possibilities of multiple interpretations—we believe the world is made up of competing aphorisms not competing dicta. Second, Holmes's decision itself leads into a tangle of varying interpretations of the metaphor "free trade in ideas." We have spent nearly a century trying to determine the meaning of such a metaphor and the extent to which we are committed to it as a descriptor of free speech. Perhaps most importantly from Morson's perspective, that task of interpretation has deepened the mystery of the role of free speech in democratic societies and the intent of Holmes's proclamation (see Peters).

From Holmes's perspective, the First Amendment is a command to protect the ongoing practice of rhetoric for the long-term benefit of the community because of rhetoric's capacity to gesture at what might be possible. We must allow all speech to be heard because without such allowances we miss the opportunity to test our truth claims and be persuaded by new claims. Without these kinds of possibilities, the experiment of life cannot be run and the mystery of life cannot be celebrated. The only danger lies in certain claims leading directly to violence or the end of the experiment. That is why Holmes reserves the right for the government to "check" free speech if such speech presents a "clear and present danger" (Lerner 292–97).

The notion of "clear and present danger" is comparable to the "reasonable man" standard in that it is meant to craft an external test, open to negotiation and revision, subject to circumstance and context, by which to judge whether one's speech has jeopardized the experiment. In *Schenck v U.S.* (1919), another important First Amendment case, the defendants were Socialist Party officials who distributed leaflets to men drafted to serve in the First World War. These officials were also charged under the Espionage Act for urging men to refuse to serve. In this case Holmes wrote the opinion for the majority, upholding the convictions on the following grounds:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends on the circumstances in which it is done. . . . The most stringent protection

of free speech would not protect a man in falsely shouting fire in a crowded theater and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has a right to prevent. (Lerner 296–97)

In the light of his experience in the Civil War, Holmes was committed equally to the competition between claims to truth as he was to the well-being of the larger community. It was the government that made free trade in ideas possible. Any speech that incites the kind of violence that would threaten to destroy the free trade in ideas must be curtailed because we lose the capacity to test that claim's truthfulness.

Again, this is an example of an aphorism. Unlike the dictum (which seeks absolute clarity and certainty and eschews metaphor), Holmes crafted a decision that inevitably leads to endless debate over what belongs to the same category as yelling "fire" in a crowded theater. The metaphor here drives the cultivation of interpretations and acknowledges that we might not always be certain that we know what belongs to this category. Thus this aphorism marks a beginning in free-speech decisions because it gestures beyond itself to the living, mysterious, unfinished debates that will come regarding the limits of our free speech. Obviously we are not finished with the metaphor of the crowded theater or this decision.

This "clear and present danger" standard was tested in *Gitlow v New York* (1925). Benjamin Gitlow was arrested and convicted under the Criminal Anarchy Act of 1902 for writing a socialist pamphlet called "The Left Wing Manifesto." As a Socialist Party leader, Gitlow argued for a proletarian revolution and a communist reconstruction of society. In light of a sweeping wave of antiradicalism in New York State, any provocation toward "anarchy" was made illegal. The Supreme Court upheld Gitlow's conviction under this law, with Holmes and Louis Brandeis dissenting. The majority opinion even used Holmes's "clear and present danger" standard to uphold the conviction, but Holmes objected:

It is said that this manifesto is more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.

Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way. (Lerner 324–25)

In this case Holmes did not think that Gitlow's ideas were particularly persuasive, and if they were, they would have gained agreement enough to establish the goals that they sought. Again, this decision carries the worldview of the aphorism in that it gestures, alludes, and "shows something else" about democratic life—namely, the sense in which eloquence/rhetoric can be an incitement (Morson, "The Aphorism" 428).

Each of these three First Amendment decisions, as well as Holmes's broader proclamations about the relationship between law and experience or general propositions, are kinds of aphorisms, according to Morson's criteria, in two important ways. First, as carriers of a worldview, or a philosophy of democracy, Holmes's decisions celebrate uncertainty and the inevitability of endless chains of interpretation. Thus these decisions lack the perspicuity of a logical demonstration and instead have found a life as fragments of American public culture that continue to circulate beyond the particularities of the decisions rendered in each case. Holmes, as is clear in these decisions, cultivated the mysteries of democratic life. In other words he did not use the law to extirpate uncertainty, flexibility, and contingency but to justify the importance of those values for democracy. Such a position is best carried stylistically by an aphorism. In Morson's words, "If life were a riddle, everything could be solved. But it is not. It is a mystery. This is the sense of the aphorism" ("The Aphorism" 415). Holmes may have been inclined to add that this is also the sense of democratic life. Second, these decisions mark a beginning in debates over the role and limits of free speech in democratic life. They are unfinished fragments, and Holmes was aware of this—the law is, from Holmes's perspective, perhaps one long unfinished fragment. But what elevates the style of a great decision is its capacity to gesture beyond the particularities of a case without employing broad generalizations. This is why Holmes's decisions are so stylistically memorable—the metaphors they employ gesture beyond the case at hand to larger, more pressing paradoxes that continue to mark American political affairs.

Holmes's position on the First Amendment, therefore, suggests strongly that democratic life carries the worldview of the aphorism. In other words, democracies themselves are unfinished, momentary probes that merely show and gesture without making final proclamations. Democracy is always a beginning, not an

end, and the law is designed to ensure that we do not reach an end. This is why the First Amendment is such a valuable and important part of the Constitution. The metaphoric manner in which Holmes interprets the First Amendment, with reference to the “free trade in ideas,” obviously suggests that there is something more to the Amendment than is explicitly stated. Thus his decisions mimic that style in that they avail themselves, through the use of metaphor, to interpretation and do not seek to end or close off conversation. He believed that this was what legal rhetoric did anyway, whether it aspired to the closed and finished status of the dictum or not. The only difference was that Holmes employed a rhetoric that mirrored that philosophical commitment. An aphorism encourages further reflection, interpretation, and wordplay, just the things needed for the ongoing success of a democracy. Dicta see rhetoric as a mechanism for conveying truth. Holmes did not believe in any kind of final truth. Therefore, his use of aphorisms demonstrates a philosophical commitment to understanding law as a competition between different rhetorics, not as a search for justice. His job as a judge was to keep the public competition between rhetorics as open as possible. To do so, he used a style of argument that was suggestive, allusive, and terse, not final or complete. But law is more than just style; it is also a form of reasoning, and Holmes’s style is deeply indicative of the kind of reasoning he thought best—enthymematic reasoning.

### Reading Holmes’s Aphorisms as Enthymemes

When Richard Posner calls Holmes a “writer-philosopher,” he does so to argue that “Holmes was a great judge *because* he was a great literary artist” (xvii). Posner understands rhetorical skill from an “aesthetic perspective” and as “an instrument” with the capacity for the “persuasion, edification, mystification, entertainment, or whatnot of its audience” (xviii). But the aesthetics of Holmes’s decisions cannot be divorced from the reasoning employed in those decisions. To understand how the reasoning behind Holmes’s decisions became persuasive requires a distinction between logical/deductive reasoning and enthymematic reasoning. Holmes consistently criticized what he called “the fallacy . . . of logical form” and the view that law “can be worked out like mathematics from some general axioms of conduct.” Therefore, he argued that

[t]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. (Lerner 80)

Holmes's literary skill was a product of his ability to get at this "inarticulate and unconscious judgment" to make the key questions of a case clear. The kind of reasoning that Holmes refers to here is clearly aligned with what Aristotle called the enthymeme (1355a–1356b).

The term *enthymeme* literally means "held in the mind," and enthymemes always have at least one claim that the members of a community believe or hold in common. So clear is the agreement on a shared claim that it might not even be stated explicitly in an argument. The persuasive power of the enthymeme, therefore, is produced by its ability to play on the commonly held assumptions of its audience. By leaving those assumptions unstated, an enthymeme bases its reasoning on "the inarticulate and unconscious judgment" of an audience. In contrast, the syllogism, although it may be thought of as similar in structure, explicitly states each of its premises (major and minor) and tries to derive truths about which we can be certain. While the enthymeme acknowledges that our "unconscious judgments" may change over time and are subject to circumstance, context, and occasion, the syllogism assumes that it uses premises that are universally, transhistorically, and aculturally true. In both "The Path of the Law" and *The Common Law*, Holmes insists that "experience" is more important in jurisprudence than "logic." It is experience that points to the common assumptions of an audience and allows one to investigate the "unconscious judgments" on which legal reasoning rests.

One place to begin to see how Holmes used these "unconscious judgments" is to consider *Lochner v New York* (1905). A report by the New York Bureau of Statistics of Labor discovered that the baking industry exposed workers to serious health risks from long hours and unsafe working conditions. In response to these findings, New York passed a statute designed to improve conditions and limit the number of hours bakers could work to ten hours a day or sixty hours a week. The owner of a bakery in Utica, New York, was convicted of a misdemeanor under the statute when it was discovered that he had allowed one of his employees to work more than sixty hours in one week. He claimed that the statute was unconstitutional because it interfered with the Fourteenth Amendment's "liberty of contract" clause. The court invalidated the statute, finding in favor of the owner of the bakery, but Holmes dissented.

Holmes's dissent is only two paragraphs long, and it can clearly be read as an aphorism. He does not haggle over legal terms or waste much time with case precedent. The opening sentence states: "This case is decided upon an economic theory which a large part of the country does not entertain" (Lerner 148). The justices that struck down the law were arguing from an implied assumption that the "reasonable man" did not share. But even if Holmes had

“agreed with that theory,” his agreement would “have nothing to do with the right of a majority to embody their opinions in the law.” Moreover,

[a] constitution is not intended to embody particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (Lerner 149)

Holmes was articulating the idea that a judge’s underlying assumptions are the reason for the decisions reached. But the test for these assumptions should be what a “reasonable man might think” (149). A judge must be restrained from using his or her own assumptions when deciding a case, and must defer to the more common assumptions of the larger culture.

In the opinion’s most terse and eloquent statement, Holmes argues that the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*” (Lerner 149). *Social Statics* was published in 1851, and it was Spencer’s position that there was something “natural” about laissez faire economics. Holmes’s contention was that it was just an economic theory with no greater claim to authority than any other. This sentence is also an example of synecdoche. Holmes understands a belief in the “natural” authority of an economic theory in terms of one particular book. This synecdoche reveals the underlying assumption behind the opposing enthymeme, and by disputing that principle assumption, Holmes is able to refute the entire argument with great clarity, precision, and force. Eventually, the original decision was overruled, and Holmes’s dissent proved persuasive. Changing economic theories had made assumptions about laissez faire economics suspect.

One of the basic characteristics of enthymematic reasoning is that it emphasizes the dialogic relation between writer and audience by requiring that the writer include some aspect of the audience’s thinking into the invention process. Holmes is consistently trying to do just this in his construction of the “reasonable man.” Through a reading of Isocrates and Anaximenes, Jeffrey Walker suggests that an enthymeme should also be understood as “a concise, emphatic statement of an emotionally charged opposition, one that serves not only to draw conclusions but also to foreground a stance or attitude toward the subject under discussion and to motivate the audience to strongly identify with that stance” (51). Holmes is certainly concise, and, more importantly, he

brings to the foreground the attitudes that are central to the opposing sides in the case—this is just what he does with the Herbert Spencer reference. Moreover, Walker links the enthymeme to “passional thought, kairotic inventiveness, and style” (50). These links demonstrate that the enthymeme is more than just an incomplete syllogism. Holmes consistently argued that legal reason requires more than logic, and the “more” that he pointed to included passions, values, timing, and style.

According to Walker’s reading, enthymemes are characterized by their “concise, emphatic quality” (53). Such a quality is reminiscent of the characteristics of the aphorism. What is different, however, is that the enthymeme seeks to move the audience someplace (unlike the aphorism that points someplace beyond it but does not explicitly take the audience there). Enthymemes “seize the *kairos* of the moment to move the audience to a decisive recognition” (53). In order to cause this recognition and establish a sense of identification in the audience, the enthymeme exploits a “range of stylistic schemes” (54). Walker does not mention the aphorism as a stylistic device for this purpose, but, as I contend below, it should be included.

In the case of Holmes’s First Amendment decisions, one can also see the use of stylistic devices, the relationship between the decisions and the *kairos* of the moment, the concise and emphatic quality, and the importance of passional thought. Holmes’s reading of the First Amendment is designed to move the audience to an emotional commitment to an underlying, metaphoric value embedded in that law. It is an emotional commitment to rhetoric that Holmes seeks from his audience, an acceptance of the inevitability of conflict and the public airing of doctrines that one hates (see Peters). By re-animating these commitments, Holmes hopes to move beyond the original emotional directive behind the laws banning speech against US involvement in the First World War. A different value scheme is foregrounded in the argument in order to deliver a reasonable objection to the value scheme that instigated the passage of, for example, the Espionage Act. But Holmes sees the law as competition between value-schemes and passions anyway. This is the lesson of the speeches he made, like the one to the graduating class at Yale. Propositional logic, as applied to legal issues, is really just one kind of enthymematic reasoning masquerading as something that it is not. Holmes uses enthymemes because they foreground values, passions, and the underlying assumptions of the moment, and these are the constitutive factors of jurisprudence.

The Abrams, Schenck, and Gitlow cases are clearly examples of enthymematic reasoning. Although Walker’s position on the enthymeme is explicitly sophistic, it does not necessarily contradict a more general, Aristotelian view. According to William Grimaldi’s view of Aristotle’s *Rhetoric*, the power of the

enthymeme “resides in its ability to sum up the implications and scope of an argument in fairly precise, condensed, and reasoned inference” (87). And Aristotle himself says that “enthymemes should be condensed as much as possible” (18a). Clearly the Abrams, Schenck, and Gitlow decisions all strive for the precision and brevity that Aristotle claims is essential to this form of reasoning. Enthymemes must be condensed arguments because they rely on the audience’s ability to quickly and effectively engage and understand the central claims being advanced. This rapid insight is often achieved through the use of metaphor (Grimaldi 88). Each of the central ideas in Abrams, Schenck, and Gitlow is articulated through a metaphor.

Two additional criteria can qualify an argument as an enthymeme (when working in the Aristotelian tradition): First, enthymemes must use probable premises or premises that reflect values; second, they must use at least two declarative sentences, one of which is stated as the reason for the other (see Gage). Using these two additional criteria, we can clearly see Holmes’s three First Amendment decisions as forms of enthymemes. In Abrams, Holmes begins by citing the manner in which “men come to believe” that “free trade in ideas” leads to the “ultimate good desired.” This statement tries to articulate and reflect the values of his audience. Moreover, the conclusion that we “should be eternally vigilant against attempts to check the expression of opinions that we loathe” is reached because of the two preceding declarative sentences: “the best test of truth” followed by “all life is an experiment.” Again in Schenck, Holmes begins by articulating the values of his audience: “in many places and in ordinary times . . .” He follows that with two declarative sentences that serve as justification for the conclusion: First, “the character of every act depends on the circumstances in which it is done”; second, “the most stringent protection of free speech would not prevent a man in falsely shouting fire.” In both of these cases, the premises include a striking metaphor to create an immediate link with the audience, as Aristotle suggests.

In the Gitlow case the two declarative statements that lead to the conclusion are even more starkly clear: “[E]very idea is an incitement” and “eloquence may set fire to reason” serve as justification for the conclusion that the ideas under consideration should have their chance to fight for their acceptance. These premises obviously do not seek the status of universally true generalizations, as syllogistic logic requires, but instead circulate comfortably at the level of probability. What makes them effective, however, is their capacity to resonate with particular audiences—and those premises continue to resonate with us; Holmes’s enduring influence is evidence of this fact.

### **The Relationship between Aphorisms and Enthymemes**

Obviously, aphorisms lend themselves to enthymematic reasoning. They are incomplete, concise, emphatic, value-laden. They actively seek to construct a sense of identification between author/orator and audience. They point to a way, gesture, and probe, all the while admitting that the final answer might not be known. Read in this manner, aphorisms are reasonable arguments, but they are reasonable arguments that assume reason is an unfinished project and that arguments never quite put an end to ongoing conversation. Instead, aphorisms encourage interpretation and audience interaction—it is for these reasons that they resemble enthymemes. We can have poetic responses to aphorisms, but those poetic responses can also be reasonable. To read an aphorism as an enthymeme is only one-half of the task. We can also turn the similarities between the two back around, to ask what reading an enthymeme as an aphorism can teach us about reason. To do so would be to realize that the enthymeme is trying to reach something that is beyond our grasp. The mystery that Morson suggests is carried by the worldview of the aphorism helps demonstrate the purpose of reasoning in the first place—to capture some ineffable part of human experience. Propositional logic seeks to kill the ineffable, mysterious, or extra so that it can be analyzed and brought under the control of human intelligence. But to do so would be to kill all that is wonderful in experience, and to destroy the original impulse behind the invention of reason—Holmes was certainly aware of this. Reading enthymemes as aphorisms ensures that we see reason as a project that does not seek an end but a future of possibilities and change. From the perspective of the aphoristic worldview, reason points us in a direction. It gestures, shows the way, and probes the unknown, but it never gets all the way there. What we learn from Holmes is that legal reasoning is an incomplete project that tries to capture the life of experience.

More to the point, reading enthymemes as aphorisms allows us to rethink the relationship between style and argument. This is exactly what Walker and others have in mind. In this case Holmes's style carries his worldview and mimics his philosophy. His literary skill is not used merely to convey the truth he is after, but as an argumentative device itself designed to foreground values and emotions that are always already part of the legal process but that too often are cast aside as illogical. Stylistic devices, like aphorisms, carry worldviews, exude philosophical commitments, and foreground beliefs and assumptions. In other words, they are kinds of arguments anyway.

In this article I have shown how enthymemes and aphorisms share a worldview. Such a position leads to the conclusion that style is constitutive of reason and reason constitutive of style. In our consideration of the stylistic devices used

in enthymemes, perhaps we should begin looking beyond schemes and tropes to the genre within which the enthymeme fits. In this case seeing enthymemes as devices used in the genre of the aphorism helps to develop the relationship between style and argument and extend our understanding of practical reasoning. And understanding genres as carriers of argument can reinforce this relationship. Such a position is consistent with more modern theories of persuasion and argument. From Holmes we learn that the practice of rhetoric is vital for democratic life and that the theory of our Constitution allows for the “free trade in ideas” in which only what proves persuasive will succeed. Persuasion in such circumstances requires reason and style—one is not enough without the other.

### Notes

<sup>1</sup>I thank *RR* reviewer John Gage for his thoughtful, extensive, and rigorous review of this manuscript.

<sup>2</sup>In what follows I rely extensively on Max Lerner’s excellent collection of Holmes’s writings, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*. All references to quotations from Holmes’s decisions and essays are taken from this anthology.

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