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Clear and Present Dangers: The Importance of Ideas and the Bowels in the Cosmos

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CLEAR AND PRESENT DANGERS: THE IMPORTANCE OF IDEAS AND THE BOWELS IN THE COSMOS

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> I wonder if cosmically an idea is any more important than the bowels.
>
> Yours ever,
> O.W.H.[1]

Wednesday, June 19, 1918—an otherwise unremarkable day in history—was the morning of a chance meeting between Justice Oliver Wendell Holmes, Jr., in the prime of his formidable judicial career, and a little-known district judge nearly half his age named Learned Hand.[2] By coincidence, the two judges shared a train ride from New York City to Boston. They had a spirited argument about when the majority can silence the speech of a minority. Perhaps they were attracted to each other because they disagreed so agreeably, each recognizing in the other a mind with which to be reckoned. During that conversation their acquaintanceship began to develop into an intellectual friendship that would last the rest of their lives.

Even though he had been a judge only nine years to Holmes's thirty-five, Hand had an advantage because he had written a district court opinion on the constitutional issue[3]—no such case had yet presented itself to the High Court for decision—and writing, of course, is the most rigorous form of thinking. Hand was emboldened by the rapport of their shared train compartment to pursue Holmes further in letters. Going back

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1. Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Aug. 21, 1919), in Mark DeWolfe Howe, ed., 2 *Holmes-Pollock Letters* 22 (Belknap Press, 1961).

2. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719, 732 (1975).

3. *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

and forth several times, each elaborating on his argument with the smell of the lamp, Holmes tried to understand their differences and Hand tried to persuade him that their differences mattered greatly. Hand's persistence coincided with a back channel campaign of several of Holmes's salon friends who urged on him a more progressive attitude toward dissident speech. It was a brave challenge to beard the lion of the law, but they succeeded. Their arguments were magnified through Holmes's intense intellect, and focused on a then-undeveloped area of constitutional law. Holmes became a judicial champion of the rights of conscience. Modern constitutionalists continue to teach his opinions as part of the canon.

Historians and biographers have carefully chronicled how Holmes came to be persuaded to wrap his great mind around the First Amendment and how his thinking and insights eventually became part of the warp and woof of modern free speech doctrine.[4] But let us suppose an alternative sequence of events.

Suppose that chance meeting did not take place. Suppose Holmes was not feeling up to traveling that morning and simply decided to postpone his trip until the next day. After all, he was 77 years old and, though he enjoyed reasonably good health, he did suffer from intestinal problems from a Civil War bout with dysentery. How would constitutional law be different if Hand had taken the Wednesday train and Holmes had taken the Thursday train, each to ride alone with his thoughts, never the two minds to meet?

Without that affirming conversation on the train and the validation of the follow-up correspondence, Hand might have been too timid to take on Holmes in an ego-to-ego fight over something so important. Holmes was his hero, after all. Hand was plagued by deep self-doubts all his life, even after he achieved great stature as a jurist. Furthermore, Hand had been reversed rather unceremoniously by his immediate superiors on the Second Circuit[5] in the very case he was urging on the Justice, and his opinion had gone largely ignored.

Without the worshipful influence of his judicial protégé, Holmes might have been sufficiently cocksure to resist the entreaties of his academic friends. He had a rather low opinion of

4. See generally Gerald Gunther, *Learned Hand: The Man and the Judge* 151-70 (Knopf, 1994); G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 412-54 (Oxford U. Press, 1993).

5. *Masses Pub. Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

legal scholarship. He had long taken a crabbed view of claims of self-expression, both on the Supreme Court of Massachusetts[6] and on the Supreme Court of the United States.[7] His preliminary views on the First Amendment might have been preserved intact and whole, like an ant in amber, fossilized for all time. We might imagine what the evolutionary record of the First Amendment might read like without Holmes's personal transformation and, in turn, without the transformative influence he wrought on the Supreme Court. Consider some possibilities.

Holmes's greatest First Amendment opinion would be *Schenck v. United States*.[8] Generations of professors and students still would parse the quotation, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," emphasizing the telling adverb "falsely."[9] But Holmes and a unanimous Court sided with the government to affirm the defendants' convictions for mailing leaflets which asserted that conscription violated the Constitution. The speech was not protected because it created "a clear and present danger" of hindering the government's war effort, something "Congress has a right to prevent."[10]

Holmes's untransformed approach is further illustrated in two actual cases applying his clear and present danger test. In *Debs v. United States*[11] he wrote to affirm the conviction of Eugene Debs, a prominent Socialist, for allegedly encouraging others to obstruct military recruiting. In *Frohwerk v. United States*[12] he wrote again to affirm the conviction of a newspaper publisher for articles urging resistance to the draft. If this were still the law decades later, the government could have sent George McGovern to prison for his opposition to the Vietnam War.[13]

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6. *McAuliffe v. Mayor of City of New Bedford*, 29 N.E. 517, 517 (1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

7. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.").

8. 249 U.S. 47 (1919).

9. Id. at 52.

10. Id.

11. 249 U.S. 211 (1919).

12. 249 U.S. 204 (1919).

13. Harry Kalven, Jr., *Professor Ernst Freund and* Debs v. United States, 40 U. Chi. L. Rev. 235, 237 (1973).

Holmes would not have written his great dissent in *Abrams v. United States*.[14] We would thus lack the "marketplace of ideas" metaphor. One of the basic tenets of free speech theory would be missing: the fundamental principle that the government cannot suppress ideas because "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[15] Instead, we might have the Holmesian quotation "free speech stands no differently than freedom from vaccination."[16]

Likewise, Holmes would not have written his classic dissent in *Gitlow v. New York*[17] and he would not have joined Justice Brandeis's signal concurring opinion in *Whitney v. California*,[18] thus maintaining the momentum of the clear and present danger test on the side of the government against dissidents. Consequently, a lot of the strongest First Amendment ideas we take for granted simply would be lost. Perhaps someone else would have come up with it, but it would not have come from Holmes.

Looking at the two leading Cold War decisions—*Dennis*[19] and *Yates*[20]—we can conclude that Chief Justice Vinson's opinion in *Dennis* is more in harmony with the pre-transformation Holmes while Justice Harlan's opinion in *Yates* relies on the post-transformation Holmes who never came into being. Thus, advocacy of the abstract doctrine of the forcible overthrow of the government would be no more protected than actually inciting a violent revolution. If Communists have no First Amendment protection from government suppression and prosecution, then Congress could have its way with them and with every other organization deemed to be a threat to the good order.

The original clear and present danger test would have been satisfied on the uncomfortable facts in *Brandenburg v. Ohio*.[21] So the underlying conviction would have been affirmed and there would have been no occasion for the majority to expand the language of the test to make it more protective of free

14. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).
15. Id. at 630.
16. Letter from Oliver Wendell Holmes, Jr., to Learned Hand, reprinted in Gunther, 27 Stan. L. Rev. at 757 (cited in note 2). See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
17. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
18. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
19. *Dennis v. United States*, 341 U.S. 494 (1951).
20. *Yates v. United States*, 354 U.S. 298 (1957).
21. 395 U.S. 444 (1969).

speech. *Whitney v. California*[22] would still be on the books. States could disband Ku Klux Klan rallies and punish the mere advocacy of Klan doctrine under syndicalism statutes. State officials later would not resist the temptation to exercise that same power over other dissident minority groups, in the defense of Southern apartheid. Racial protests, disturbances, and riots might have triggered an era of American pogroms subject only to the kind of governmental self-restraint exhibited during the Palmer Raids.

The Vietnam protest cases would have been decided under a different dynamic, one far more favorable to the government. The Holmes of the *Schenck* opinion would have had an easy time sending Hess—and others of his ilk—to prison for yelling to the mob "We'll take the fucking street later!"[23] He would not have seen that statement as "counsel for present moderation" any more than falsely shouting fire was an invitation to go outside for a smoke.[24]

"Fighting words" are "a retail version of the kind of speech that, if engaged in on the wholesale level," amounts to a clear and present danger.[25] *R.A.V. v. City of St. Paul*[26] would thus have been decided differently. Burning a cross in the yard of the only African-American family in the neighborhood creates clear and present dangers of a breach of the peace and violation of civil rights. And it is only a small step from upholding that ordinance to upholding more and more expansive speech codes that would criminalize all harms of offending another person based on race, color, creed, gender, or sexual orientation.

The greater-power-includes-the-lesser power syllogism in *Schenck*—that if Congress can punish obstruction of the draft then it can punish speech that may obstruct the draft—might have significantly influenced the doctrine of commercial speech. Justice Rehnquist could have cited Holmes for his 1986 dictum that the greater power to ban casino gambling includes the lesser power to ban advertising.[27] If this proposition held, then the commercial speech doctrine would have been circumscribed to

22. 274 U.S. 357 (1927).
23. *Hess v. Indiana*, 414 U.S. 105, 107 (1973).
24. Id. at 108; id. at 109-12 (Rehnquist, J., dissenting).
25. John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 1111 (5th ed. 1995).
26. 505 U.S. 377 (1992).
27. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

protect only advertisements for constitutionally-protected interests such as birth control and abortion.[28] Thus, the shadow of Holmes-untransformed would be cast into the millennium of the Internet to endorse government regulation by enforced ignorance in the marketplace of goods and services.

Justice Holmes's personal legacy and reputation would have been substantially lessened if he had not been inspired to enlist in the defense of freedom to dissent. More important, the United States would be a politically poorer country, after four generations of the government quelling the people into political imbecility. Offering an answer to Holmes's rhetorical question, therefore, we can speculate that it was very important to our world of ideas that the grand old man's bowels allowed him to ride the train that Wednesday morning.

28. See, e.g., *Carey v. Population Servs. Intl.*, 431 U.S. 678 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975).