

TOUCHED WITH FIRE

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Gordon A. Christenson

Last month, an international criminal court found three media executives guilty of inciting mass murder. The United Nations had set up the court in Tanzania to hear cases brought from the Rwanda genocide. The three journalists had used their local radio station and a bimonthly newspaper to turn Rwanda's Hutu majority against the governing Tutsi, igniting the massacre of hundreds of thousands at churches, schools, hospitals and roadblocks. Two journalists were given life sentences, the third imprisonment for twenty-seven years. The decision quoted a witness: "What [they] did was almost to pour petrol, to spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country."

The Rwanda case is unique. The genocide was not committed by organized military units with leaders under government orders, but by roving bands that killed at the bidding of newspapers and radio stations. Free press experts warn that the decision chills journalism and imperils freedom of expression. Others disagree. "This [media incitement] was truly outrageous and unprecedented," says an American commentator. "These defendants were not just inciting hatred. They specifically urged the murder of particular individuals, and then celebrated the murders after they were committed. It has nothing to do with press freedom as anyone in the world understands that concept." But around the world freedom of expression is not understood in the same way.

In the United States, we presume that the greatest enemies of free speech are governments. The reasons were spelled out best in dissents by Justice Oliver Wendell Holmes, Jr., though it took a half-century before the Warren Court fully extended protection to the most offensive speech. And in other parts of the world, even in Canada and Germany, offensive hate speech is prohibited. You are probably familiar with the events which led to this difference, for they began on a farm north of Cincinnati, where you could spot a Confederate flag on a barn, as you drove by on I 71. One evening in 1968, twelve white supremacists gathered there. They were members of a revived Ku Klux Klan, heirs of the old Knights of the Golden Circle of Civil War vintage. A local TV station from Cincinnati showed up and broadcast the events for the nightly news. Hooded Klan leaders were attempting to incite a national uprising to restore white supremacy. In several provocative speeches the leaders called for "revenge" against blacks and Jews. "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race," said a Klan member in full regalia, "it's possible that there might have to be some revenge taken." "Personally," added another speaker, "I believe the nigger should be returned to Africa, the Jew returned to Israel." Members displayed weapons in front of a burning cross.

The State of Ohio brought charges under the State's Criminal Syndicalism statute, which prohibited advocating the duty or necessity of crime, violence or terrorism to accomplish reform. The law was similar to those in other States, passed early in the 20th century after anarchists and anarchists and Communists began advocating the violent overthrow of democratic government. Cincinnati defense lawyer Allan Brown argued the case, *Brandenburg v. Ohio*, when it reached the U.S. Supreme Court. He persuaded the justices that the previous cases upholding these kinds of laws were wrongly decided, and the Court struck down the Ohio law. In doing so, it announced the most protective free speech doctrine ever articulated by any court in the world. Under the First Amendment said the Court, a State can't forbid anyone from advocating the use of force or law violation even when hate is involved unless that advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Under that principle, for example, the anti-Semitic hate march in Skokie, Illinois, where survivors of the Holocaust lived, couldn't be banned. Is there some special reason why we have to tolerate loathsome expressions of hate when other democracies do not?

For centuries, even in tolerant societies, governments have punished dissidents for advocating lawlessness or sedition. In 1807 Aaron Burr was tried for "constructive treason" for advocating a break-up of the United States, though acquitted. President Adams prosecuted many for sedition, as did his political enemy Thomas Jefferson before the Sedition Act was repealed in 1806. Some of the most notorious episodes of sedition took place during the Civil War. Some of these began with General Ambrose Everett Burnside. After the disaster under his command at the battle of Fredericksburg mid-December in 1862, Burnside was removed and sent, in disgrace, to run the Department of the Ohio, a military district with headquarters in Cincinnati. His jurisdiction covered the States of Ohio, Kentucky, Indiana and Illinois. The war was not going well for Lincoln, and the elections of '62 brought in a hostile Congress. A former pro-slavery Congressman from Dayton, Ohio, by the name of Clement Vallandigham, was the prince of dissidents and a bitter Lincoln-hater. His mouth formed a perpetual sneer. He was flippant, reckless, shallow, unctuously appealing to the war-weary mind. "The war for the Union is in your hands," he said to his audiences, "a most bloody and costly failure. There is mourning in every home. Make an armistice. Call a constitutional convention. The Union will re-establish itself."

Vallandigham ran for governor in Ohio in 1863 and campaigned on his antiwar harangues. "The dead, the dead, the numerous dead. Think of Fredericksburg! Let us make peace." General Burnside was not amused, even more disturbed than Lincoln, he was, and issued General Order No. 38. "The habit of declaring sympathies for the enemy will not be allowed," the order said. Vallandigham and other dissidents responded by calling mass-meetings against the war. They wrote letters to soldiers telling them they could stop the war by deserting and coming home. Intolerables, as they were known, also cheered the agitator Frank Howard when he summoned audiences "to rise against the vulgar and brutal despotism that ground them down." He was arrested, then released on *habeas corpus*, which unleashed another frenzy of free speech by wily agitators, as Lincoln called the most vocal and clever dissidents. They in turn were arrested by order of Secretary of War Stanton and sent to "places where they would never hear the dogs

bark." Nobody kept records of these arrests, and all were illegal. They were condemned without court or cause, since there was no other way, it was said.

After President Lincoln reviewed one sentence of execution imposed by court martial for desertion, he spoke of his dilemma: "Must I shoot a simple-minded soldier boy who deserts while I must not touch a hair of the wily agitator who induced him to desert?" No, said the crowd! Pardon the soldier-boy and throw Frank Howard into Fort Lafayette! But civil court juries would not convict the agitators. "There are always some of them," said Lincoln, "more anxious to hang the panel than to hang the traitor." Inflammatory speeches reached their climax in an oration from our self-claimed tribune of the people, Clement Vallandigham. "I have the most supreme contempt for General Order No. 38," he bellowed to a crowd. "I have the most contempt for King Lincoln." Rise up, united, and hurl the tyrant from his throne. "He does not wish to end the war. He will continue it as long as there are any contractors or officers to enrich. "

Early next morning, May 5, 1863, soldiers from the 115th Ohio Volunteer Infantry called on Mr. Vallandigham, before breakfast at his home in Dayton, and arrested him in his nightshirt. He was tried by a military commission in Cincinnati the next day on charges of "treasonable utterances." Riots broke out in Dayton. Fires consumed an entire city block. Troops from Columbus and Cincinnati arrived and martial law was declared. Vallandigham was convicted of aiding the Confederates in violation of General Order No. 38 and sentenced to perpetual imprisonment. Off to prison he went -- scoundrel, hero, martyr, traitor, subject of scores of impassioned headlines in the papers, North and South. *Habeas corpus* denied. It was the greatest *cause celebre* of the war. The prisoner enjoyed unimagined publicity for his campaign for governor. And Lincoln wandered the White House halls in the middle of the night wondering what he should do. Making war on martyrs is a sorry business, but if he released Vallandigham, he would only encourage more sedition. Leave him in jail, however, and his words would speak eloquently, more than at liberty where his lies might be exposed. What if he won the Ohio election, thought Lincoln. Did he want a governor in jail?

Then out from his gloom, came a spark of inspiration. Lincoln chuckled, sat down and wrote out an order to release Vallandigham from prison; and then banished him to the Confederacy. Soldiers escorted the politician to General Bragg in Tennessee under a flag of truce, while Vallandigham raged! The South didn't want him either, and Jefferson Davis sent him to Nassau on a blockade-runner. General Burnside felt vindicated and promptly made his move on another hated object of disloyalty -- the seditious *Chicago Times* -- and shut it down. Twenty thousand people marched in protest and telegraphed Lincoln to stop this sort of thing; and Lincoln obliged, rapping Burnside on the knuckles again. And to make his point, Lincoln ordered a general release of wily agitators from jail. In October, Clement Vallandigham, now in exile in Canada, was overwhelmingly defeated for the Ohio governorship by John Brough from Marietta. In June, Vallandigham sneaked back into Ohio. Throughout the summer he plotted with Confederates and tried speaking out. But Lincoln and the North prudently ignored him; and the public lost interest in his rants once he resumed the practice of law.

Twenty years after mustering out of his Civil War regiment, Oliver Wendell Holmes, Jr., was invited to give a Memorial Day address at Keene, New Hampshire, to commemorate his fallen comrades. Captain Holmes had been wounded for the third and last time during the battle of Fredericksburg and the experience changed him profoundly. Holmes was now a justice on the Massachusetts Supreme Judicial Court. He must have borne survivors' guilt, for in his address he remarked that "the generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing."

Roosevelt appointed Holmes to the United States Supreme Court in 1902, when the justice was in his early sixties. Years later, in 1918, the country was in another war, and the venerable seventy-seven year-old with a droopy white mustache was at the height of his powers. That June after dashing off his last opinion of the term, Holmes caught a train for New York. There he switched for Boston heading up to his Massachusetts summer home in Beverly Farms to the north. He looked forward to relief from Washington's heat, humidity and politics. At Beverly Farms each summer he read his books, reviewed petitions, corresponded widely with old friends such as Lord Frederick Pollock at Oxford and younger new ones such as Harold Laski and Felix Frankfurter. This year out of New York, as Holmes settled in his seat, Learned Hand, a well-regarded federal judge of the United States District of New York, got aboard. He, too, was traveling to his summer home, but in Cornish, New Hampshire. Perchance spotting Holmes, he took a seat beside the Justice. As the train moved through the countryside up the East Coast toward Boston, the two friends had an unusually sharp exchange, a first brief confrontation over protection of free speech by the courts during wartime.

The Great War was not yet over. For the first time since Adams and Jefferson used the Sedition Act of 1798 against each other in the courts, the national government was bringing charges under a new Espionage Act of 1917. These were against radicals who were subverting the war effort through their pamphlets, speeches and agitation. During the Civil War, as we just saw, there had been military court convictions of civilians for treasonous utterances and sedition. But Congress had passed no new espionage law until 1917, no new sedition law until 1918, both after the United States entered the war in Europe. And over 2,000 charges now would be brought in the federal courts. During their train ride, Holmes remarked to Hand in his jaunty, lucid manner that the country's political majority had the constitutional right to prevail in these prosecutions. Just as in other areas when liberties must be limited for the public good in circumstances of danger, he said, so also during wartime any speech tending to obstruct the war could be punished under duly enacted law. He then went further. Every person has a natural right to kill another person whose opinion is diametrically opposed to his own. So the majority made up of such persons have the right to prevail in these cases. This startled Hand. It was necessary for the courts to curb the passions of this dominant majority, he shot back, most especially when a few antiwar protestors were the most likely to be silenced by a wartime herd instinct.

We know about this conversation because Judge Hand, later brooding in New Hampshire on his inept response, wrote Holmes a more forceful restatement of his position. This in turn brought a letter in retort, then more letters. These are all preserved in the Holmes Papers in the Library of Congress. The disagreement between these two jurists was all the more remarkable, considering that both were philosophical skeptics who rejected absolutes on eternal truths. Holmes had taken from the Civil War the lesson that certitude leads to violence. He was suspicious of righteous causes. He regarded them as attempts to compel one group of human beings to conform to some other group's idea of the good, a kind of despotism, he wrote to friend. Yet, at bottom, all people were capable of fighting for what they believed and nothing could save them from a resort to violence when push came to shove. What prevents conflicts from reaching violence is democracy, he thought. If judges gave respect to legislation worked out politically instead of imposing their own policies, it would go a long way to tamp down violent popular reactions. Both Holmes and Hand doubted whether court-imposed limits on popular legislation could be effective over the long run or even legitimate. Forty-six year old Hand had been a federal trial judge for nine years. He revered Holmes and held him in the highest esteem and closest friendship. But there was one thing he had done that Justice Holmes had not. A year earlier Hand had heard and decided one of the first cases brought under the new Espionage Act.

The case involved a revolutionary journal named the *Masses*, which had begun serious publication in 1912 when a Marxist, Max Eastman, became its chief editor. It was an attractive magazine in bright-colored covers. Its oversized pages were full of bold drawings, cutting social satire, political criticism and intellectual commentary. The anarchic editorial board promised a "revolutionary and not a reform magazine. . . frank, arrogant, impertinent, searching for true causes; a magazine, directed against rigidity and dogma wherever it is found." The art editors included iconoclastic painters Robert Henri, George Bellows and Stuart Davis. Among its writers were the radical romantic John Reed, Louis Untermeyer, Sherwood Anderson and Carl Sandburg. It had hoped to reach the masses but found instead a spare audience of mere intellectuals. Eastman, Reed and Young opposed the war and wrote editorials against militarism, the draft and the conspiracy of business interests for profiteering.

One part of the new Espionage Act prohibited use of the mails to distribute newspapers or journals with material tending to obstruct the war effort. The Postmaster General threatened to stop delivering the *Masses* and close it down. The editors promptly petitioned Judge Hand in New York for an injunction. Hand granted it. The government's charge specified four cartoons, three articles and a poem as violations. The drawing, "Conscription," showed nude men labeled "Youth" and "Labor" chained to a cannon and a nude woman labeled "Democracy" crucified on its carriage. A cartoon, "Congress and Big Business," showed a group of businessmen looking at a document labeled "War Plans" while ignoring Congress, which was standing sadly aside, asking, "Excuse me, gentlemen, where do I come in?" Big Business replies, "Run along now! We got through with you when you declared war for us." The articles praised the sacrifice of draft resisters and conscientious objectors.

Public opinion of the day was quite hostile to this kind of dissent because most thought it undermined the war effort. Prevailing legal analyses supported punishing speech, as well, if the effect of the objectionable words would lead to giving aid and comfort to the enemy. This view was quite well established; it would nip in the bud any dissent tending to interfere with the war. Against this background, Judge Hand's decision to grant the injunction was original and daring, though it seems right to us now. The government wrongly focused on the imagined consequences of the magazine's offensive content, he wrote, and not on the words themselves. Now, this is a hard distinction for a public at war to make. But in Hand's view, if freedom of speech means anything, it must fall to the courts to protect dissidents from wartime hysteria by a hard line in order to preserve public deliberation on war policy. The Court of Appeals would have none of that and promptly reversed Hand. Holmes had not yet faced this question as a justice.

What exactly was this disagreement with Holmes all about? Wasn't the First Amendment clear enough? "Congress shall make no law . . . abridging the freedom of speech?" Well, no. Counseling or conspiring to murder is speech. False advertising and fraudulent offers are, too. All these are prohibited by law without violating the First Amendment. So why couldn't speech that agitates against the war effort or opposes the draft and government war policies also be suppressed, being even more harmful? Why does a person have a natural right to kill someone who passionately disagrees with his own opinion, as Holmes had asserted on the train? Since Holmes couldn't have meant this literally, thought Hand, the crux of their dispute had to be over intolerance for opinions we despise. In his first letter, then, Hand wrote about tolerance: "Opinions are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own." In other words, because our own opinions sometimes can be wrong, we should tolerate opposite opinions by others.

Then, sardonically, Hand took after Holmes' natural right to kill argument. "You say that I strike at the sacred right to kill the other fellow when he disagrees. The horrible possibility silenced me when you said it. Now, I say, 'not at all, kill him for the love of Christ and in the name of God, but always realize that he may be the saint and you the devil. Go your way with a strong right arm and a swift shining sword, in full consciousness that what some smart chap like Laski may write a book and prove is all nonsense... Tolerance is the twin of Incredulity, but there is no inconsistency in cutting off the heads of as many as you please; that is a natural right. Only, and here we may differ, I do say that you may not cut off heads, because the victims insist upon saying things which look against Provisional Hypothesis Number Twenty-Six..."

Holmes showed this letter to Harold Laski, his brilliant young socialist friend from London, who happened to be visiting him at Beverly Farms when it arrived. Laski might have found merit in Hand's views, for in a few days' time, after he had returned to Harvard where he was teaching, Laski wrote a letter to Holmes. He recalled that tolerance of ideas had gone through three stages: first, when the idea itself is criminal, and therefore meets persecution, like the early Christians in Rome; second, when the idea

itself was not criminal but inexpedient and persecuted on that ground, like the Catholics under Elizabeth; and third when the idea is regarded as having sufficient strength or weakness to be permitted to survive on its own. Hand's view surely falls in the third category, Laski wrote, though most governments would silence inexpedient ideas of the second type if they could. Stupid or wrongheaded notions don't have enough chance of survival to go through the trouble of penalizing the ideas themselves. However, there is one case, Laski continued, where a "man in black" thinks "toleration nonsense and is to slay all who think differently. If he and [Judge] Hand were the two last men in the world how could Hand secure the survival of toleration except by killing him?" There was something after all in Carlyle's ultimate question, "Can I kill thee or can'st thou kill me?" But, wrote Laski, "There is an alternative hypothesis that toleration was a dodge invented by the physically weak to secure survival."

Holmes wrote Laski back before answering Hand. "Dear Laski," he began, "I don't see where your quarrel with Hand is. It rather should be with me either... My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power--you will do what you believe efficient to bring about what you want--by legislation or otherwise. In most matters of belief we are not cocksure--we don't care very much--and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like."

Holmes now turned to crafting a response to Hand. Generally, he agreed with Hand's argument, but with one crucial disagreement. Free speech was like any other liberty, he insisted, just as he had told Laski. It "stands no differently than freedom from vaccination," a freedom that could be readily overridden by the majority, as the Supreme Court had made clear thirteen years earlier when public health and safety required it to be compulsory. There might be a rare case when the majority might care enough to squelch dissent, Holmes wrote further, "but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act." Holmes wasn't budging.

A few months later, the Supreme Court began in earnest to review prosecutions for antiwar agitation under the Espionage Act. This is not the place for me to trace how ideas from these friends' letters technically found their way into Holmes' opinions and, after fifty years of slow development, finally were imbedded in the *Brandenburg* opinion. More fascinating for us now is to observe how Holmes fused these ideas into literary forms that opened the judicial imagination. In particular, two images appear in the language of his opinions to help him wrestle with tolerating offensive ideas. The first is a metaphor. A spark from a dangerous idea might ignite and cause a conflagration. The second is his natural right fiction. Everyone has a natural right to kill someone whose intolerant opinion is diametrically opposed to his own.

The first case the Court took up was *United States v. Schenck*. Holmes wrote the opinion. It upheld a conviction for pamphlets with messages tending to obstruct the war. In ordinary times, he said, there might have been a right to distribute inflammatory pamphlets, but this depended upon the circumstances. "The most stringent protection of

free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. Then: Speech may be punished when "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 the Congress has a right to prevent." In wartime, Congress has an urgent security interest in preventing obstruction of the draft or war effort. Since Schenck's pamphlets had the intent and likelihood to some degree to interfere, he could be punished. In his next opinion Holmes again used the fire metaphor to punish speech. Maybe in times of peace the same words are not inflammatory, but in war, "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame." A spark from ideas in an anarchist cell might light the tinder that fires mass revolution. Why wait for the conflagration before punishing the provocation? Kill off the revolutionary before he kills you, was the bottom line.

Where did Holmes get these fire metaphors? His biographers point out that he loved to chase after fire engines going to fires in Boston. He liked writing about railroad insurance cases, where a spark from an engine ignites a fire along the tracks, and criminal attempts, where a would-be-arsonist lights a match near a haystack, then blows it out when he sees someone looking. Holmes also enjoyed theater. There had been a recent case about a false shout of fire in a movie theater that set off a stampede where many perished. Fire metaphors appear in many similar cases, as in the petrol spread by media messages in Rwanda that ignited into genocide. The earliest use I have found is in Francis Bacon's essay *On Sedition*. "[T]he surest way to prevent seditious (if the times do bear it) is to take away the matter of them. For if there be fuel prepared, it is hard to tell, when the spark shall come, that shall set it on fire. The matter of seditious is of two kinds: much poverty, and much discontentment. . . ." Bacon noted "that some witty and sharp speeches, which have fallen from princes, have given fire to seditious." So he counseled prudent princes to "beware what they say." And the best way to stop seditious is for princes to have some great person of military valor well reputed near to repress the seditious in their beginnings.

Holmes fit this assignment to a tee, for he carried his Civil War valor and honor entirely into the judge's duties. He used the symbol of fire in conjunction with the "clear and present danger" test to fulfill this duty. His first three espionage opinions, concluding with the Debs case, were all routine criminal cases for Holmes. In writing them he gave much more importance to protecting the state from the fires of sedition than to protecting political agitators from government persecution.

Judge Learned Hand was beside himself as he read these three opinions. He thought Holmes had missed his point entirely and by the fire metaphor made it easy for a jury to kill off all dissident speech opposing the war. More letters followed. Laski wrote, too, and *The New Republic* posted a scathing editorial on the Debs opinion, which Holmes took the time to draft an answer he never sent. Then, in the next case, Holmes seemed to change. He appeared to be seriously considering why courts should protect dissent in wartime. This time instead of writing the majority opinion upholding conviction, in *Abrams v. United States*, he wrote his most famous dissent joined by Justice Louis Brandeis. *Abrams* was a Bolshevik who distributed leaflets protesting the

American Expeditionary force in Russia during the war with Germany and agitated for a general strike. He was convicted for obstructing the war effort. It seems to me, as I now review the global dimensions of free speech, that Holmes' dissent found an ingenious way to tame his dramatic natural rights fiction about killing off those with different beliefs. He accomplished this by a literary device. If people didn't fight for their ideas, as they did their businesses, Holmes believed, they were weak and those ideas, like tepid enterprises, deserve to die! So, borrowing a phrase from market economics and business, he wrote, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." Our Constitution is an experiment, as all life is an experiment. We must be "eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death," unless they are immediately threatening to the country's survival.

But Holmes was no civil libertarian. He had a cruelly harsh and savage view of life. Having survived both his fallen comrades and his wounds in the Civil War, he was fatefully pessimistic about human nature. He took Hobbes' view that only the state has enough power to guard civilization from the harshness of private life, from never ending blood feuds and vengeance. This was the main reason Holmes gladly paid his taxes, he said. And he romanticized war, too, writing Lord Pollack in Oxford to support his condemnation of "armchair pacifists". "[U]ntil the world has gotten farther along," Holmes said, "war not only is not absurd but is inevitable and rational."

A few years later, in the 1920's, left wing socialists were convicted for publishing and circulating a Manifesto advocating the violent overthrow of organized government, and the Supreme Court upheld that conviction. It was now Justice Sanford who took up Holmes' original fire metaphor in his majority opinion: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." Holmes dissented. Now on the other side he drew perhaps from Emerson's phrase about the "central fires that ignite the mind," and answered with a new fire metaphor: "Every idea is an incitement," he wrote. "Eloquence may set fire to reason. But whatever may be the 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."

Holmes' view here is inescapably Darwinian. It holds out as common good the survival of the fittest speaker or most effective voice that power or money can produce. It works almost exactly as the ancient Greeks had viewed speech as freedom. In their Agora the rhetorical skills of Greek orators had to survive the test of who might be shouted down, drowned out, scorned or shunned when their words were weak or without reason or conviction. Great orators such as Pericles commanded the most respect and gained power from their words spoken in the public forum. Other speakers were ignored unless their words drew blood, as Lincoln came to understand. Today, government voices and mega-media messages may crowd others out, getting there first, spinning, titillating, dominating, while cyber-speech flows globally with blogs and hits and filters --

a kind of virtual war of ideas. Radical Islamist websites recruit young zealots for a global *jihad*. Outsider political candidates buck the old bosses with multi-media websites. You have to fight and struggle to be heard in these arenas. As Holmes saw it finally, speech is the metaphor, the fire of every idea an incitement, the marketplace of ideas a vicarious battleground where valor and courage create a flourishing society. This language of dissent and inspiration ultimately did prevail for us and entered our common discourse, becoming the dominant free speech idiom in our time. But does it have global reach? It might.

Late in life Holmes told Albert Einstein "that after the Civil War the world never seemed quite right again." And Holmes, the old Stoic, broke down in tears while trying to read a poem he liked, about the Civil War and what had been lost of a highly cultivated, homogeneous world -- idealistic, artistic and socially committed, a war that all this learning and brilliance had been powerless to prevent. In his own isolation in old age, only Emerson had not faded. "The only firebrand of my youth that burns to me as brightly as ever," Holmes wrote Pollack in 1930 just before leaving the Court at age 90, "is Emerson."

By the early 1990's French philosophers such as Jean Baudrillard and other postmodernists were heaping scorn on America's fierce protection of freedom of expression. Pretext for cultural dominance, they sneered. A community must say no and protect itself from such obscene and penetrating voices. And soon enough came new voices from many people of Islam supporting the Ayatollah's *fatwa* to kill Salman Rushdie wherever he may be found for publishing *Satanic Verses*. A scholar of Islamic free speech justifies this sacred order to kill because the novel is a "flagrant violation of the right to freedom of expression." He cites for authority the Universal Declaration of Human Rights, which, it seems, puts limits on the freedom of speech and opinion. This freedom is "not to be exercised at the expense of the rights of others," he said, echoing John Stewart Mill. "Nor should Islam be made the target of sacrilege in the name of freedom of expression. . . . *Satanic Verses* ignores these principles of morality, civilized conduct and respect for the sensibilities of over one billion Muslims." And this was just the beginning.

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In the late summer of 2001, suddenly through the sky aircraft full of people and petrol plunged into the towers and Pentagon, exploding. Hyperterror flew with the hijackers from hidden cells of nihilism aimed directly at those icons of American power, incinerating 3,000 human beings. What ideas could have scorched human hearts with flames of such murderous intolerance? Harold Laski had told Holmes that tolerance might be considered weakness. When our first response came, it was not tolerant. In kind it came straight from that natural right to kill off an ultimate intolerance that Holmes mentioned to Hand on that train ride in June. And when a full offensive later burst into the core of Babylon with more strikes of fire and words, how could we not also

remember those other words. "[I]n our youth," said Holmes, "our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing.
