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FREEDOM FOR THE THOUGHT THAT WE HATE

"Not free thought for those who agree with us but freedom for the thought that we hate".

Judge Oliver Wendell Holmes (1929).

By

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More than one of the societal "advances" to which we now point with pride was a "thought hated" by many Americans when it was first expressed; hated with such frenzied, maniacal hate that its proponents were branded traitors and public enemies. Here are a few examples from the law reports.

Workmen's compensation, said the highest court in the State of New York in 1911, is based on economic and sociologic arguments which "subvert the fundamental idea of property". If these be countenanced, "there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words; the legislature will next say to the man of wealth 'you have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the State' ". Minimum wages for women, said the United States Supreme Court in 1923, "ignores the necessities of the employer, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty." Membership in a labor union is not the personal and private affair of the employee, said the United States Supreme Court in 1915. "The employer must be left at liberty to decide for himself whether such membership by his employee is consistent with the satisfactory performance of the duties of the employment. The employee has no inherent right to join the union and still remain in the employ of one who is unwilling to employ a union man." Child labor, said the United States Supreme Court in 1918, is "a matter purely local in its character. If Congress can thus regulate matters entrusted to local authority, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

The Holmes approach to these dire predictions of destruction of our government and enervation of our constitution to a mere waste of words, was always the same: "If the belief, whether right or wrong, may be held by a reasonable man,

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the courts must safeguard his right to entertain that belief. The wisdom of the belief is not my concern." In 1915, the New York court considered "practical experience as well as theory", found that "with the change in industrial conditions, an opinion has gradually developed" in favor of workmen's compensation and gave it judicial approval. In 1937, the United States Supreme Court found that it had departed "from the true application of the principles governing the regulation by the State of the relation of employer and employee" in condemning minimum wage legislation. "The exploitation of a class of workers who are in an unequal position with respect to bargaining power casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met." In 1941, the United States Supreme Court upheld the *Fair Labor Standards Act* and found that its earlier refusal to enforce child labor legislation "was a departure from the principles which have prevailed in the interpretation of the Commerce Clause before and since." In 1949, the United States Supreme Court found that an employee had the right to obtain and hold jobs free of discrimination against him because of union or non-union membership.

Neither politically, economically nor sociologically does the United States of today bear the slightest resemblance to the republic of the founding fathers. Drastic changes were made in every branch of our law as we advanced from the horse and buggy to the airplane, from a population of three millions to our present one hundred and fifty millions. Not one of today's governmental restrictions on our private lives and property would have been upheld by the Supreme Court of 1800. They had hard sledding even with our own. That even our form of government has strayed far from its origins is well-known. Individual rights and property must always yield to the "general welfare". This has ever been an elastic term; it encompasses all governmental activities thought by the majority to be "interwoven with the well-being of the Nation." It would support a communistic form of government *if* the majority wished it and could show that it was in furtherance of the public welfare. In fact, we have had our own particular brand of "communism" for almost a decade. Employees are now, in a few states, entitled to sick benefits from the state, even if their illness is unrelated to their employment. All drivers of automobiles pay, through insurance premiums—which are compulsory in some instances—for the negligent or reckless driving of others. In New York, low rent housing for persons of low income is a constitutionally declared function of government; all property owners pay for adequate housing for others. Passengers on New York City's subway system are carried at a loss to the city. The deficit is met by real property taxes which thereby causes all property owners to pay for the transportation of others. Even housewives now join commercial employers in paying for the old age benefits to which employees are entitled. Profit-sharing between management and labor is now accepted industrial procedure. These planks we have extracted from the "communistic propaganda" to which we have been exposed for more than one hundred years. In 1829, the Working Men's Party advocated that "great wealth be taken away from its possessors on the same

principle that a sword or a pistol may be wrested from a robber." Its members were called "ring-streaked and speckled rabble" by one of New York's leading newspapers, which added that they "deserved nothing better than to die like ravenous wild beasts, hunted down without pity." In 1840, Horace Greeley hired Karl Marx as foreign correspondent for the New York Tribune. In 1886 a dynamite-filled bomb exploded during a labor riot at Haymarket Square, Chicago, while four anarchists who were later hanged for the explosion shouted: "You have nothing more to do with the law. Throttle it, kill it, stab it, do everything you can to wound it." In 1919, an anti-Red hysteria swept this country, with its concomitant Congressional investigations of Communistic propaganda and in the seizure of hundreds of "radicals" in coast-to-coast raids, 249 "undesirables" were deported to Russia. Legally elected Socialist legislators were barred from Congress and the New York state legislature. No distinction was made between socialism and communism. The prevailing opinion was "Socialism is Bolshevism with a shave." From these thoughts that we hated when first expounded, came the concepts we now accept as if the founding fathers had handed them to us. Were our form of government and our Constitution not so flexible, not so readily adaptable to change, we should long since have had a "classless" society—the present Nirvana of the communists—or something equally obnoxious.

Our guardian angel throughout our history has been the freedom of expression we have granted to "the thought that we hate". The wisdom of this procedure is just as apparent in the realm of politics as in the field of economics. The newcomer in politics, as in economics, may bring with him one idea we shall wish to adopt. That he may also bring with him many ideas we do not wish to use does not detract from the value to us of an open market for all ideas, political and economic. Except during our sporadic witch-hunting days, we have maintained an open mind and an eager eye not only for the man who may be making the better mousetrap but for the one who may be able to solve our never-ending societal problems. The better mousetrap is more readily recognized and more rapidly accepted than its societal counterpart. The maker of the mousetrap need convince only a small segment of our industrial community of the merit of his idea. The sociological or political innovator must convince a majority of our entire population that his idea will solve a current societal problem. Therefore decades may pass before his innovation is adopted. But he has always had the same free market and opportunity for salesmanship as the inventor of economic goods and devices. *That* fact cuts the ground from under those who argue that force of arms or other violent means are necessary to effectuate political or sociological changes in this country. They would be necessary for rapid changes, but not for the gradual changes Americans prefer. They want their changes in small doses, with the opportunity to assimilate one mouthful before asked to swallow another. The slower, persuasive method of change carries enough of the old concepts and ideas into the new era to insure continuity between the old and the new. The new idea, therefore, frequently seems merely the normal offshoot of the old, although it may be a

radical departure from the old ideas as they were before "freedom for the thought that we hate" started to work on them.

The evolution of the Fourteenth Amendment's negro equality provisions illustrates the point. The Amendment was adopted in 1868. It prohibited unequal treatment of persons declared in the *Dred Scott* decision of 1857 to be incapable of recognition as "people", because they came of slave stock. With the force of an atomic bomb, it shattered the opinion then "fixed and universal in the civilized portion of the white race" and "an axiom in morals as well as politics" that neither they nor their descendants could ever be considered "people". The Amendment, if taken at its face, would be "mere brute force" said the United States Supreme Court, as it proceeded to cushion the impact. In 1879, the court restricted the Amendment to official state action. Private individuals and "subordinate" state officials, it declared, may still discriminate against negroes. The Amendment does not prohibit non-official inequality, such as lynching or the trial of a negro for murder before a jury from which subordinates have excluded all negroes. "Individual invasion of individual rights is not the subject-matter of the amendment", the Court repeated in 1883, when it held unconstitutional a congressional act entitling a negro to recover monetary damages for discrimination against him by proprietors of public inns, theatres, and conveyances. There is no "public interest" in such treatment; that is a "matter purely of private concern", it said. Gradually the difference between "individual" and "state" action was narrowed. In 1917, city ordinances prohibiting negroes from living in a white residence area were held to be state action interfering with a white man's right to sell or lease his property to whomever he wished, including negroes. But the "general or common law" prohibition and restrictive covenants against such sales to negroes were still deemed private affairs concerning only the individuals affected. So were refusals of state political parties to permit negroes to vote in their primaries. In 1939, the exclusion of negroes from grand and petit juries was held to be a violation of the Amendment, irrespective of the method of exclusion used or the official status of the excluder. In 1941, the Court ruled that negroes willing to pay the established rates were entitled to first-class railroad accommodations, even while the train was passing through Jim Crow states; whether the discrimination was by "individual" or "state" action was not considered. In 1944, the Court determined that "primary elections are conducted by the party under state statutory authority", found that refusal of the state political parties to permit negroes to participate in their primaries was a violation of the Amendment. In 1948, while adhering to its prior determination that restrictive covenants against the sale of real property to negroes was a private affair, the Court held that the use of state courts to enforce such covenants was akin to state action and a violation of the Amendment. Not until 1950—eighty-two years after the adoption of the Amendment—was its prohibition of unequal treatment fully recognized by the United States Supreme Court. State colleges and universities, said the Court, must offer the same educational facilities to negroes as to whites. Giving the same courses in a separate school for negroes is not enough. They are entitled to sit in the same classrooms, use the same library,

eat at the same cafeteria, have the same "opportunity to secure acceptance by their fellow students on their own merits." The intangibles distinguishing one school from another—reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige—must be available to negroes on the same terms as to the whites." Railroads must remove their "curtains, partitions and signs" by which they attempt to segregate negroes and whites in their dining cars. There may be no racial classification of passengers holding identical railroad tickets, the Supreme Court ruled.

All our political and economic concepts have undergone similar gradual changes and are still undergoing them today. Always the cry is heard that the founding fathers would have objected to what we are about to do. When rent control first came before the United States Supreme Court for enforcement in 1921, three of its members declared that the Constitution thereby became "an archaeological relic." They soliloquized: "If such exercise of government be legal, what exercise of government is illegal? If the public interest may be concerned with the control of any form of property, it can be concerned with the control of all forms of property. If the public interest can extend a lease, it can compel a lease; the difference is only in degree and boldness." To such warnings that the commies were on our trail, Justice Holmes again replied: "We have no concern with whether rent control is wise or will effect the result desired. It is enough that we are not warranted in saying that it is futile, or has no reasonable relation to the relief sought."

When the "thought that we hate" includes a call to immediate change, to force of arms or other violence to effectuate such change, entirely different principles are involved. Here the innovator goes beyond the market place of ideas, is dissatisfied with the platform we make available to him and seeks not the substitution of a new idea for an old but force in place of our legislative and judicial processes. In the United States, the use of force to accomplish a result is a governmental power which no individual may arrogate to himself, even to suppress "subversive elements." The government may use force only when peaceful persuasion is ineffective; individuals may never use force except in self-defense. The utterance of "the thought that we hate" is protected by that prohibition against the use of force; without such restraint on individual conduct, the utterer would frequently be in personal danger of audience assault. Advocacy of a doctrine that "organized government should be overthrown by force or violence" has long been a felony in New York. This is not one of the new ideas we are waiting to hear but only an attempt to persuade law-abiding citizens to break the law. It is comparable to an harangue of gangsters by their gang leader on the merits of burglary, arson, murder. These are *not* thoughts that we hate; they are *acts* which are criminal because they prevent the orderly presentation, absorption, and adoption of ideas for better community living. These ideas we want to hear about, even if they are presently hateful to us. But there must not be linked with their presentation an attempt to persuade us to become criminals and destroy the governmental processes which alone enable us to live out our lives in comparable peace and safety.