

Why Can't You Shout "Fire!" in the Virtual Public Square?

Almost 10 years ago the free-speech champion Trevor Timm, with the Electronic Frontier Foundation at the time and now with the Free of the Press Foundation, implored readers "to stop using the 'fire in a crowded theater' quote" to justify limits on free expression. Many people apparently need a reminder.

Timm wrote, "[Supreme Court Justice Oliver Wendell] Holmes [Jr.'s]' quote has become a crutch for every censor in America, yet the quote is wildly misunderstood." To dispel the misunderstanding, Timm told the story behind the quotation.

The Court opinion containing the quote is from *Schenck v. United States* (1919), a notorious anti-free-speech case in which Charles Schenck and Elizabeth Baer had been convicted and sentenced to six months in prison during World War I under the federal Espionage Act for mailing 15,000 pamphlets urging soon-to-be-drafted men "not [to] submit to intimidation" and to "Assert your rights." The pamphlet did not advocate violent resistance but stated that the draft violated the 13th Amendment, which bans slavery.

The Court ruled *unanimously* against the defendants on the grounds that distributing the material was a "clear and present danger" during wartime. Holmes noted that the pamphlet would have been constitutionally protected in peacetime, but in 1917 the rules were different. To emphasize the point, Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

Schenck stood as a precedent until 1969, when it was overturned in *Brandenburg v. Ohio*. Nevertheless, Holmes's trope is wheeled out today against almost anyone who expresses concern about the limitations on the free exchange of ideas on social networks, especially when the controversy concerns criticism of any aspect of "wokeism," for example, the ideologies underpinning "anti-racism" and "trans-genderism." If someone publicly expresses uneasiness at people being suspended from or kicked off social-media platforms for innocuous posts that come nowhere near threatening or inciting violence, the other side will likely quote Holmes to justify the punishment.

It should be too obvious to have to point out that Holmes's dictum is irrelevant to such episodes. Before we get to that, however, let's put on this on the record: although they may be under great government pressure to crack down on certain real or alleged misinformation and disinformation, the social-media platforms are private companies with the right to set their terms of use. But that does *not* mean having a low bar for expulsion is a good policy. Social networking, to the extent it is to have political value, ought to be an

open forum. Kicking people off even for lying about election results or (justifiably) criticizing rules about permissible pronouns is not only obnoxious; it also makes a mockery of what the platforms themselves say they aspire to be.

With that out of the way, we can move on to the main course. None of the targets to which Holmes's trope is aimed bears any resemblance to the literal case of falsely shouting fire in a theater. We can break this down into two parts.

The first concerns the unreasonable shouting of *anything*, even "Chocolate!" in a theater, crowded or not. If I buy a ticket to a concert, play, or movie, I have at least an implicit contract with the theater owner that I will not disrupt the show (without a darn good reason) and spoil it for the other patrons. If that contractual term were not assumed, the owner would be defrauding all the customers. Would you buy a ticket to a show knowing that anyone in the audience was permitted to make noise?

Just as I cannot eat in a restaurant and refuse to pay by claiming that I never explicitly agreed to pay for the meal, so I cannot make a ruckus in a theater on grounds that I never agreed not to do so. We can go further and point out, as Murray Rothbard did, that even the theater owner may not unreasonably disrupt the show without violating the contract with his customers: If he does, "He has thus welshed on this contractual obligation, in violation of the property rights of his patrons."

Rothbard's point is that freedom of speech is not some free-floating right. To make sense it must be rooted in property rights. No one has a right to make a speech in your living room without an invitation. The corollary, he points out, is that so-called public, that is, government-controlled, land presents insoluble conflicts. When demonstrators want to block a busy street during rush hour, whose rights should prevail: theirs or the drivers'.

As I say, this goes for any shouting. But let's move on to the issue of content. Falsely shouting fire adds potential injury or death to the insult because the patrons do not have the luxury of checking out the shouter's claim. Maybe it's a false alarm, but waiting to find out could cost them their lives. Obviously, if the shouter knows the place is on fire, he's done his fellow patrons a favor.

How does this relate to social media? Nothing anyone can say on Twitter can compare to the potentially deadly disruption that would occur with a false shouting of fire in a theater. Even if Donald Trump tweets a million times a day — falsely — that his landslide reelection in 2020 was stolen from him, the mechanism for harm just is not present. No one reading Trump's tweets, as obnoxious as they would be, would *have* to rush out of wherever he is merely to save his life and possibly endanger others as he does so. It's simply ridiculous to compare the two situations.

A tweet might offend people — if they choose to take offense — or it might hurt someone's

feelings. But let's get real: that bears no resemblance to endangerment. But what if someone else reads the tweet and then feels motivated to commit violence? That person is an aggressor who is fully responsible for his actions. He must not be permitted to plead that the tweet *caused* or incited him to commit violence. He is an agent.

Rigid controls on social media cannot be justified on "clear and present danger" grounds. In other words, it's impossible to shout "Fire!" on social media, and we are justified in criticizing platform owners who insist on punishing their guests for what they say. It's easy enough to avoid your fellow guests whom you find obnoxious.

So let's finally put Holmes's trope to rest. It has no power to justify restrictions on expression that does not directly and immediately endanger others.