

# Shouting Fire on a Crowded Internet

by Julian Warner

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*Also take no heed unto all words that are spoken; lest thou hear thy servant curse thee:*

*For oftentimes also thine own heart knoweth that thou thyself likewise hast cursed others.*

*Ecclesiastes 7: 21-22*

A common view in liberal cultures, widely diffused in popular consciousness, is that freedom of expression is an absolute or undivided good. This view is associated with the First Amendment to the United States Constitution, that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

We do not need fully to assent to Mark Twain's cynical, although still persuasive, interpretation of how this has been understood in practice – "It is by the fortune of God that, in this country, we have three benefits: freedom of speech, freedom of thought, and the wisdom never to use either" – to recognize that a view of freedom of expression as an unqualified good robs the concept of any discriminatory power. The clause contains no principle that can discriminate between acceptable and unacceptable speech. Allowing hate speech, for instance, might reinforce relations of power and the dominance of the major-

ity, rather than promoting individual liberty. Other jurisdictions have not had to formulate issues in terms of First Amendment rights but have faced comparable issues. Classic philosophical discussions and United States judicial decisions have placed qualifications on freedom of expression by time, place and intention or likely effects of utterance. These qualifications were formulated in relation to oral and written, particularly published written, communication. A crucial current issue is how these qualifications are to be understood in relation to electronic communication, where time and place of utterance can be difficult to delimit.

## On Liberty

In the United Kingdom, there has been no written constitution or amendments to generate debate, and government has been less committed to freedom of information and expression than in the United States (consider Crown copyright, for instance). The British philosopher John Stuart Mill in *On Liberty* (1859), regarded as a seminal defense of liberty of conduct and expression, proposed restrictions on freedom of expression:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply

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circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

The main criterion for restricting freedom of expression is the proximity of the utterance to its receivers and potential unwanted effects, with public circulation distinguished from direct addressing. The material form of the utterance, whether written or spoken – placard or oral delivery – is, not crucial. In modern analytical terms, we could distinguish the immediacy and directness of the relation between addresser and addressee. The notion of proximity and of the intentions and likely effects of an utterance, can be seen to underlie the conviction and hanging of Derek Bentley (subsequently pardoned) in Britain in 1952-1953 for shouting, *Let him have it, Chris*, to his accomplice who shot a policeman.

### Shouting Fire in a Crowded Theater

A classic Supreme Court decision by Oliver Wendell Holmes in 1919 has close analogies with Mill's position in *On Liberty*. Documents urging resistance to conscription had been sent through the mail directly (and, it seems, largely exclusively) to men called and accepted for military service. The crucial issue was the intended effect of the document to obstruct the draft.

But it is said, suppose that that was the tendency of this circular,

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## A further crucial current issue...is that freedom of expression is emerging as an individual level right, not necessarily mediated by publishing and editorial procedures.

it is protected by the First Amendment to the Constitution. ... 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 upon 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 theater and causing a 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 Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

His opinion is considered responsible for the diffusion of the phrase, shouting fire in a crowded theater (an enshrined misquotation). The test of "clear and present danger" is comparable to Mill's "positive instigation to some mischievous act." The material form of the utter-

ance is again not crucial, with an oral situation – shouting fire in a theater – used to generalize from the particular delivery of written documents through the mail. Analytically, and again partly implicitly, the directedness of the relation between addresser and addressee is significant. Considerations of the truth-value of the utterance – *falsely* shouting – have been introduced. Holmes is likely to be in debted to Mill, given his attempt to adapt European intellectual traditions to the United States context, and traces of his Civil War experience can also be discerned.

The idea of freedom of expression as an undivided good has not, then, been held in classic philosophical and legal sources, once these are read attentively, despite its diffusion in public consciousness. Qualifications placed on freedom of expression relate to time, place and intention of utterance and its degree of proximity to its possible effects, with the addition of truth-value in United States considerations. Proximity can, to some extent, be analyzed in terms of the immediacy and directedness of the relation between addresser and addressee. The material form of the utterance is not crucial, but time, place and proximity can be more readily specified and exemplified in relation to direct oral communication. How then are these qualifications to be understood for electronic forms of communication? What does shouting fire in a crowded Internet mean?

### Electronic Communication

I shall not answer, nor even attempt to answer, the questions I have raised,

but will indicate the considerations which may have to be addressed in working toward an understanding and possible resolution of issues. Consciousness is lagging behind reality. Issues are likely to be addressed in near future history, through judicial disputes and legislation, possibly influenced by modes of thought reminiscent of the practical reasoning valued by Holmes.

With regard to time and place of utterance, a distinction can be made between the territory of production and the territory of reception (recalling that all jurisdiction is, *prima facie*, territorial). For oral and written communication, restrictions on expression have been set by the territory of production with import controls exerted by the territories of reception. Yet a recent libel case was allowed to proceed in Australia against the United States-based magazine *Barron's*, in view of the number of Australian Internet subscribers and the reputation in Australia of the individual claiming libel. The directedness of the relation between addresser and addressee arose with regard to oral and written communication and can be expected to reemerge with electronic communication. Should a directed e-mailing be differentiated from a Web page? A further crucial current issue, again appearing in practical developments before it has been theoretically understood, is that freedom of expression is emerging as an individual level right, not necessarily mediated by publishing and editorial procedures. How fully are the responsibilities and liabilities associated with public utterances understood by individual producers? If there is a wish to retain restrictions on freedom of expression, how can they be enforced?

### Conclusion

The choice is between a historically and theoretically informed discussion of issues connected with freedom of expression and a less informed reinvention. For the moment, the active tolerance and reflection on one's own conduct, advocated by *Ecclesiastes*, might be the best resource.