

A Ruling Against a Man Arrested for a COVID-19 Joke Highlights the Influence of a Pernicious Analogy

A black and white portrait of a man with dark hair, a full beard, and round glasses. He is wearing a dark, textured sweater over a collared shirt. The background is light blue with faint, repeating text in a serif font, including words like 'HEALTH', 'POLITICS', 'ECONOMY', 'SCIENCE', 'TECHNOLOGY', and 'WORLD NEWS'.

That was a reference to *Schenck v. United States*, a 1919 case in which the U.S. Supreme Court unanimously upheld the Espionage Act convictions of two socialists who had distributed anti-draft leaflets during World War I. Writing for the Court, Justice Oliver Wendell Holmes Jr. said, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.”



Written by [Jacob Sullum](#) on August 30, 2023

In the 1969 case *Brandenburg v. Ohio*, the Court modified the “clear and present danger” test it had applied in *Schenck* — a point that Joseph somehow overlooked. Under *Brandenburg*, even advocacy of criminal conduct is constitutionally protected unless it is “directed” at inciting “imminent lawless action” and “likely” to do so — an exception to the First Amendment that plainly did not cover Bailey’s joke.

Although *Schenck* is no longer good law, Holmes’ passing comment about shouting fire lives on in judicial decisions and in popular discourse. After last year’s racist mass shooting in Buffalo, for example, New York Gov. Kathy Hochul invoked the analogy as a justification for censoring online “hate speech,” which she erroneously claimed is not protected by the First Amendment.

Even Justice Samuel Alito has cited “shouting fire in a crowded theater” as a well-established exception to the First Amendment. Yet Holmes’ description of that scenario, which had nothing to do with the facts of the case, did not establish any such principle.

Alito presumably had in mind a situation like the sort covered by Louisiana’s “terrorizing” statute, which among other things makes it a crime to intentionally cause “evacuation of a building” by falsely reporting “a circumstance dangerous to human life.” But as Hochul and like-minded advocates of speech restrictions see it, the analogy extends much further.

“Anyone who says ‘you can’t shout fire! in a crowded theater’ is showing that they don’t know much about the principles of free speech,” Greg Lukianoff, president of the Foundation for Individual Rights and Expression, observed in 2021. “This old canard, a favorite reference of censorship apologists, needs to be retired.”

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