

*Solid Research
& Argument*

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Roger and Ann Worthington Essay

Name: Aimee Ford

UTeid: aef643

Email: aimeefordy@hotmail.com

Class: Freshman

Freshman Prize

To: FCC Chairman

From: Aimee Ford

Subject: Journalistic Irresponsibility Proposal

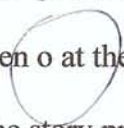
You have asked me to write either an opinion on how to implement your new policy or to give a reason why such a policy should not be executed. Seeing as I am faced with the weighty responsibility of analyzing the First Amendment, I must invoke more than my own uninformed opinion. Through a compilation of court cases and principles developed through stare decisis, my ultimate judgment will carry the added import of the Supreme Court and the Constitution.

Where do you fall?

Earlier, as I questioned the ability of the FCC to trounce on constitutional freedoms, you quelled my concerns by telling me, "The first amendment doesn't protect a person from shouting 'fire' in a crowded theater. This is the same thing." At first, my concerns about infringement on the First Amendment subsided. However, on closer inspection, I realized that in order for me to determine the validity of punishing news networks for false speech, I must verify that shouting "fire" in a crowded theatre really is "the same thing" (to use your words) as reporting false information in the news. After all, if the two forms of speech do not prove similar, then I must find a different category of unprotected speech in which falsified news might fit before I can deduce that any policy restricting news media is constitutional.

In *Schenck v. United States*, the original court case where the popular saying was first coined, Justice Holmes develops the clear and present danger test: "... 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" (Schenck). Although this case still carries judicial weight, it has become archaic via the creation of the imminent lawless action test. The new test, first used in the Supreme Court's *Brandenburg v. Ohio* opinion, adds only one criterion to the clear and present danger test. Now, speech can only be prohibited if it is "directed at inciting or producing imminent lawless action" *and* it is "likely to incite or produce such action" (Brandenburg). This slight tweak emphasizes that speech must not only incite some sort of violence (criteria for the clear and present danger test), but must also intend to incite that violence in the near future. Now I must decide whether newscasters give false information with the intent of inciting violence *and* whether such violence is even likely to come to fruition in the near future.

In order for the newscaster's speech to fall under imminent lawless action, one must prove that the said newscaster intended for his/her speech to incite a violation of law. Unfortunately, determining intent falls into a judicial grey area, as no one can definitively decide the true motives of either news network. Due to this uncertainty, newscasters cannot simply be assumed to be releasing false information with a malevolent intent. After all, news reporters are often  at the scene of a newsworthy story before they are able to obtain all of the facts. As the story progresses, the reporter checks his/her facts with multiple sources, corrects any incorrect statements, and continues to relay information to the public as quickly as possible. In such a fast-paced system, mistakes are unavoidable and it simply cannot be assumed that those mistakes are intentional.

Secondly, shouting fire in a crowded theatre clearly produces a chaotic response: people running for the exits as a means of self-preservation. While the two news sources (one relating false information about firearm laws and one misrepresenting the man's guilt) produced a similarly chaotic end result, that result lacked justification. In other words, the individuals in the theatre have reason to believe that they will die if they do not escape, invoking a survival sense. This is not the case for the man who shot and killed two police officers simply because he believed that his guns would be confiscated. He was not protecting his life and to a reasonable observer, his actions were irrational regardless of the radio station's mistakes. Similarly, the chaos that ensued after the news program falsely stated that the murderer was not guilty was a violent and irrational reaction to any reasonable observer.

Finally, the newscasters and networks in the specified scenarios clearly did not advocate specific illegal activities. By telling the public that President Smith ordered confiscation of all firearms, the conservative network did not explicitly call all civilians to shoot police officers. Likewise, the liberal news station did not tell people to take to the streets and cause property damage. Releasing the false and/or misleading information, the news networks both lost a considerable amount of legitimacy, however, neither network's actions fall under the imminent lawless action clause and are still protected under the First Amendment.

Clearly, shouting "fire" is not the only type of unprotected speech. If either news fallacy falls under another category of unprotected speech, then, Chairman, I cannot dispute your implementation of a new policy. Exploring the other types of unprotected

speech, only a few apply to the cases in front of us: defamation, fighting words, and incitement to crime.

Conservative radio station said that the President intended to outlaw firearms on inauguration day. With the information provided, it is unknown whether or not the President really did intend to outlaw firearms so it cannot be affirmed that the radio station even released false information, intentionally or unintentionally. Let's just assume this statement could be proven false, then the President would be in a situation where his reputation had been harmed by a lie told about him. Does this constitute defamation? Unfortunately for the president, he falls under the category of a public figure. This means that he must not only prove that his reputation was depreciated by the false statement, but also that the statement was made with "actual malice" (New), according to the principles set in *New York Times v. Sullivan*. Proving a malevolent intent on the part of the radio station leads into hairy territory, as it is nearly impossible to prove that the station purposefully told a lie. In the other case, the liberal news program used a poor choice of words that led to a false statement about a man convicted of murder. While it is true that the man's guilt in the murders was misstated, he was not personally harmed by the statement and therefore, his situation also falls short of defamation.

In *Chaplinsky v. New Hampshire*, fighting words are described as words that "inflict injury or tend to incite an immediate breach of the peace" (Chaplinsky). Somewhat similar to shouting "fire," fighting words produce a chaotic and unlawful response. However, referring to fighting words as an argument to suppress certain types of speech has become uncommon. The rarity of such an argument may come

from an increasing use of the reasonable observer. For example, would a reasonable bystander blame the conservative radio station for the death of two cops or would they blame the man who shot those two policemen? In addition, neither the radio station nor the news program issued words that compare to the severity of fighting words. In *Chaplinsky v. New Hampshire*, Chaplinsky had called a city marshal a "God-damned racketeer" and a "damned fascist" (Chaplinsky). The severity of Chaplinsky's words, which have now set the precedent for other fighting words, surpasses that of both the radio station and the news program, without even considering the very large possibility that neither news network intentionally stated a rabble-rousing fallacy.

Lastly, the same principles I used to decide that the news networks did not shout "fire" in a crowded theatre can be applied to determine that they also did not issue speech with the purpose of inciting crime.

After seeking guidance from brain power far greater than my own and referring to some of the most fundamental court cases in the United States, I have come to the conclusion that neither the liberal news program nor the conservative radio station can be used as sparks to ignite a suffocating flame upon other news media. Although both the radio station and the news program broadcasted incorrect information, neither network resorted to unprotected speech. Imposing a policy would infringe on the First Amendment rights of the networks and therefore, harm the public by suppressing news media, a crucial and often underappreciated lifeline in modern society. Quite simply, we cannot "punish [news networks] for saying the theatre's on 'fire'" for one reason: they never said it was.

*Word Count: 1437

Works Cited

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