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## SEARCHING FOR THE FALSE SHOUT OF "FIRE"

L.A. Powe, Jr.\*

"*Schenck*—and perhaps even Holmes himself—are best remembered for the example of the man 'falsely shouting fire' in a crowded theater."<sup>1</sup> So wrote Harry Kalven even as he repeated one of the two popular misstatements<sup>2</sup> of what Holmes actually wrote: "falsely shouting fire in a theatre and causing a panic."<sup>3</sup> With Kalven, everyone who studies the First Amendment is confronted and confounded by the false shout of fire. Where did Holmes come up with this image?

Ernst Freund, writing in *The New Republic* after Holmes affirmed Eugene Debs' conviction,<sup>4</sup> found that the Court had ap-

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\* Anne Green Regents Chair, The University of Texas. I would like to thank Marlyn Robinson of the Tarlton Law Library and Cori Crider, University of Texas, class of '03 for their excellent research help, and Al Alshuler, Robert Post, and David Rabban (who dissents from my conclusions) for their helpful comments. And a special thank you to Lawrence Friedman who orally shared with me his discovery that "clear and present danger" had been used almost a year prior to *Schenck* in an Espionage Act case involving a Lutheran minister. See note 61.

1. Harry Kalven, Jr., *A Worthy Tradition* 133 (Harper & Row, 1988) citing *Schenck v. United States*, 249 U.S. 47 (1919).

2. How Kalven (and his editors, son Jamie and Owen Fiss) could have made that mistake is unclear, but others have, too. Thus Fred Friendly rebuked President George H.W. Bush for omitting falsely and for authority he quoted the sentence from *Schenck*, yet he added "crowded" (while omitting the "a" between causing and panic). Friendly concluded his letter with "It's a common mistake, Mr. President—most law professors get it wrong, too." *N.Y. Times*, section 4, p. 22 (January 17, 1989). At least Friendly, like Kalven, was too sophisticated to make that more common error, that he corrected in President Bush, of concluding that there is no duty (indeed there is a prohibition) to shout fire when the theater is actually burning. In addition to President Bush, lots of people—although contra Friendly, (apparently) not law professors—make that mistake: Austin American-Statesman A8 (January 29, 2002) (editorial) joining such notables as Senator Jesse Helms, 136 Cong. Rec. No. 73 (June 11, 1990), Charleton Heston "*This Week*" ABC (May 2, 1999), Christopher Hitchens, *Outrage: Displaced & Misplaced*, *The Nation* 9 (Dec. 13, 1999), Newton Minow, *The Communications Act*, 61 *Vital Speeches* 389, 392 n.13 (1995), and William F. Buckley, Jr., *The National Review* 91 (May 1, 1995) and 86 (Oct. 10, 1994). Heston has the excuse that the First is not his amendment, and Minow that he spends all his time watching television so that he can proclaim how bad it is, but presumably some of the others should have known better.

3. 249 U.S. at 52.

4. *Debs v. United States*, 249 U.S. 211 (1919).

plied “notoriously loose common law doctrines” to send Debs to jail for what Freund aptly noted was agitating against the war.<sup>5</sup> Indeed Freund could not conceive of how Debs could have hoped to interfere with the military, given all the practical obstacles in the way:

Yet Justice Holmes would make us believe that the relation of the speech to obstruction is like that of the shout of Fire! in a crowded theatre to the resulting panic! Surely implied provocation in connection with political offenses is an unsafe doctrine if it has to be made plausible by a parallel so manifestly inapposite.<sup>6</sup>

Kalven added his amen; the example was both “trivial and misleading.”<sup>7</sup>

The reason Holmes came up with such a bad analogy to Schenck’s actions<sup>8</sup> is that he did not see *Schenck* primarily as a First Amendment case. To the extent that Holmes did think about the First Amendment, it was solely to conclude that it did not give an absolute immunity to speech even if it did mean something more than no prior restraints.<sup>9</sup> The full sentence— “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”<sup>10</sup>—is the rejection of complete protection for all speech.

Holmes and *Schenck-Debs* have prompted a lot of scholarship. For decades, Zechariah Chafee offered the conventional wisdom that Holmes was laying groundwork while waiting for the right case<sup>11</sup>—*Abrams*<sup>12</sup>—later in the year. Gerald Gunther destroyed Chafee’s soothing apologetics when he detailed Learned Hand’s lobbying of Holmes on the issue.<sup>13</sup> That proved Holmes was “quite insensitive”<sup>14</sup> to speech claims and that he

5. Ernst Freund, *The Debs Case and Freedom of Speech*, *The New Republic* 13 (May 3, 1919) reprinted in Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. Chicago L. Rev. 235, 239-42 (1973).

6. *Id.* at 241.

7. Kalven, *A Worthy Tradition* at 133 (cited in note 1).

8. The analogy is truly good for rejecting absolutism.

9. *Schenck*, 249 U.S. at 51-52. Holmes thereby questioned his earlier contrary conclusion in *Patterson v. Colorado*, 205 U.S. 454 (1908).

10. *Schenck*, 249 U.S. at 52.

11. Zechariah Chafee, Jr., *Freedom of Speech* 88-93, 120, 155-59 (Harcourt, Brace and Howe, 1920); *Free Speech in the United States* 81-82, 136-38 (Harvard U. Press, 2nd ed. 1941).

12. *Abrams v. United States*, 250 U.S. 616 (1919).

13. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 720 (1975).

14. *Id.*

had no grasp of speech issues.<sup>15</sup> More recently and very persuasively, David Rabban<sup>16</sup> has painstakingly laid out the relationship between Holmes' prior thinking on the common law of attempts—commencing in *The Common Law*<sup>17</sup>—and his opinions in *Schenck, Debs*, and *Frohwerk*.<sup>18</sup> As he demonstrates, *Schenck* was a rather routine criminal case for Holmes. Government can punish actual obstruction of the draft; so government can punish an attempted obstruction. The distinction between an attempt by conduct and an attempt by speech was, for Holmes, a distinction without a difference.

The law of attempts provide one answer to the origins of the example of falsely shouting fire and causing a panic. But there is a different, virtually unasked, "where" question. Where did Holmes get his hypothetical about the false shout? After all, it doesn't jump out as the first or best (or even second best) illustration of the legal proposition that the First Amendment does not offer absolute protection for all speech. Was the example taken from a case he had read? Or a news report? Or was it just created like a lawyer's hypothetical? The question has not been answered. If Holmes' voluminous published papers provided the answer, then one of his many biographers would have written it up already (although perhaps the answer is still in his papers which until the last twenty years his authorized biographers kept from other scholars<sup>19</sup>).

Of all the scholars who have been drawn to Holmes, only Rabban has even speculated on the actual origins of the false shout of fire. Rabban notes, as Holmes himself did, the Justice's consistency from *The Common Law* onward throughout Holmes' career. Rabban's fire case is *Commonwealth v. Peaslee*,<sup>20</sup> wherein the defendant had solicited an employee to burn down his home for insurance reasons by lighting combusti-

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15. Thus Hand wrote to Ernst Freund on May 7, 1919 that "I have so far been unable to make [Holmes] see that he and we have real differences." Letter from Hand to Freund, reprinted in Douglas Ginzburg, *Afterword to Ernst Freund and the First Amendment Tradition*, 40 U. Chi. L. Rev. 243, 244 (1973).

16. David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge U. Press, 1997). Just as Rabban takes Chafee apart for myth-making in the wake of Schenck-Debs-Abrams, Mark A. Graber, *Transforming Free Speech* (U. California Press, 1993), continues the demonstration that Chafee remained an advocate rather than a scholar in his writing on free speech in the aftermath of Roosevelt's successful constitutional revolution.

17. Oliver Wendell Holmes, *The Common Law* 65-76 (Little, Brown, 1881).

18. *Frohwerk v. United States*, 249 U.S. 204 (1919).

19. Albert W. Alschuler, *Law Without Values* 32 (U. Chicago Press, 2001).

20. 59 N.E. 55 (1901).

bles already set in place by the defendant himself; the employee went to the police instead of lighting the candle.<sup>21</sup> *Peaslee* uses the language of the “degree of proximity” necessary to constitute an attempt “may vary with the circumstances.”<sup>22</sup> This, in turn, was almost immediately relied upon by Holmes in writing the *Swift* antitrust opinion for the Supreme Court,<sup>23</sup> and Rabban is wholly persuasive in noting the influence of this reasoning on *Schenck* itself.<sup>24</sup>

Rabban speculates that “Holmes may well have been thinking of the solicitation to light a fire in *Peaslee* when he wrote in *Schenck* that the First Amendment would not protect ‘falsely shouting fire in a theatre.’”<sup>25</sup> With full respect to a long-time friend and colleague, that is a stretch. A man solicits an employee to burn down his home for insurance purposes. First drop out the employee. Next make the house a theater. Then place people in it. Get rid of the fire (and therefore the insurance rationale). Have a false shout instead.<sup>26</sup> Bishop Occum created his razor for reasoning like this.

In searching for a better and more economical answer, I have found two major incidents in the decade prior to *Schenck* of an actual false shout of fire causing a real panic. Both received national publicity because both involved lots of deaths; indeed in numbers dwarfing those associated with violent labor disputes. One was probably negligence (or unintentionally false), while the other seems a calculated attempt to harm people. Either might have served as the basis for Holmes’ famous statement (although only one involved a theater).

That theater was the Morgan Opera House, in Canonsburg, Pennsylvania, a town of about 6000 just south (and a bit west) of Pittsburgh. On Saturday night, August 26, 1911 someone shouted “fire” while the opera house was showing a movie. According to the *New York Times* report a film “flared up”<sup>27</sup> and

21. *Id.* at 35-56.

22. *Id.* at 56.

23. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

24. See Rabban, *Forgotten Years* at 291-93 (cited in note 16).

25. *Id.* at 298.

26. And also make it a successful prosecution rather than the reversal of *Peaslee*’s conviction.

27. The Washington Post report said it was the “blowing out of a fuse,” *26 are Killed in Panic at Theater*, Wash. Post 1 (Aug. 27, 1911), while the L.A. Times asserted there had been a brief fire but that the operator of the “moving picture machine” had “heroically fought down the flames and extinguished them” in place. August 27, 1911 at 1, 2.

someone, possibly a drunken coal miner (it being payday), shouted fire, mistakenly believing that the theater itself was burning. The eight hundred in attendance<sup>28</sup> headed for the only escape, through a center isle and then down a flight of narrow stairs. The first people going down stumbled and were thereafter trampled. With the theater emptied, some in the crowd complained that there were still people inside who might need help. That triggered a "mad scramble" up the stairs again over the dead and dying.<sup>29</sup> Twenty-six people were killed, about half under the age of sixteen, and another fifty seriously injured from the panic.

Almost three times as many died sixteen months later in the Italian Hall Disaster in Calumet, Michigan, a turn of the century boomtown.<sup>30</sup> Local copper miners had been on strike since summer. On Christmas Eve, about seven hundred strikers and their families, mostly Finns, but also including Croatians, Slovenians and Italians, were celebrating in their second floor meeting hall. Someone, apparently from the outside, stuck his head through the door and yelled "fire."<sup>31</sup> The cry was repeated inside in several languages,<sup>32</sup> and there was a stampede down a narrow stairway to the doors which opened inward and then a crush. When the panic subsided, seventy-three people were dead, virtually all from suffocation because they were at the bottom of the human pile near the door. Fifty-eight of them were between the ages of two and sixteen. The Calumet Theater became the temporary morgue.<sup>33</sup>

There had been no fire. The person who caused the deaths could not be identified,<sup>34</sup> although there were claims, lasting as long as the survivors lived, that company men had been seen

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28. The theater had a capacity of 1000 and had recently passed a fire inspection. *26 Die, 50 Hurt in Theatre Rush*, N.Y. Times 1 (Aug. 27, 1911).

29. *Id.*

30. It was both wealthier and larger than Detroit.

31. *Washington Post* 1 (Dec. 25, 1913).

32. *Fund for Victims of Calumet Panic; Death Total is 72*, Chicago Tribune 1, 2 (Dec. 26, 1913).

33. The rest of the facts come from two helpful websites: <[www.genealogia.fi/emi/emi3d31e.htm](http://www.genealogia.fi/emi/emi3d31e.htm)> and <[www.angelfire.com/mi2/1913](http://www.angelfire.com/mi2/1913)>.

34. The N.Y. Times reported that "[e]very policeman and detective in this region is searching to-night for the man who gave the false alarm of fire and if he is caught he probably will be lynched." *X-Mas Tree Panic Costs 80 Lives*, N.Y. Times 1, 2 (Dec. 25, 1913). A follow-up story the next day noted that the "relentless" search had yet to turn up anything and that the president of the Western Federation of Miners had called on President Woodrow Wilson "demanding" a federal investigation. *Wants U.S. Inquiry in Calumet Horror*, 1 N.Y. Times 1 (Dec. 26, 1913).

around the Italian Hall and were responsible. The strike lasted through the winter and then was broken.

It is useful to compare the deaths in Canonsburg but especially Calumet with those that occurred in the major labor disputes of the era. Intermittent warfare during the massive Pullman Strike of 1894 saw thirteen people killed and another fifty-three seriously wounded.<sup>35</sup> The pitched gun battle between strikers and Pinkerton's during the Homestead Strike at Carnegie Steel in 1892 killed nine strikers and seven Pinkerton's, with a further sixty more injured by gunfire.<sup>36</sup> The 1890s and later years produced numerous clashes where one or two were killed. The death toll at the Italian Hall simply dwarfs that of other labor disputes—and over three-fourths of those killed were children. It was a singular event.

The principal objection to either the Canonsburg or the Italian Hall Disaster being the source of Holmes' famous quotation is the well-known fact that Holmes claimed to stay as ignorant as possible of current events. One need but sample Holmes' voluminous correspondence to note their absence.<sup>37</sup> Like his judicial opinions, his private writings eschew discussions of facts, for, as he explained to Louis Brandeis, "I hate facts."<sup>38</sup> He maintained, in Felix Frankfurter's words, a "worldly innocence" concerning the "evanescent events of the day"<sup>39</sup> while proudly proclaiming that he did not read newspapers.<sup>40</sup>

Yet Holmes' protestations were something of bravado. He did read newspapers, and his letters prove it.<sup>41</sup> Liva Baker observed that Holmes "knew down to the final dot over the final 'i' what they [newspapers] said about his opinions."<sup>42</sup> Francis Biddle, too, notes an exception to the self-imposed news blackout. "[H]e liked odd rarities when they pointed to an idea."<sup>43</sup> Might it be possible that he learned of one or both of the actual instances of a false shout of fire causing a panic? Could not

35. Jeremy Brecher, *Strike!* 106 (South End Press, 1997).

36. *Id.* at 74-76.

37. Sanford Levinson, *Fan Letters*, 75 *Tex. L. Rev.* 1471 (1997) (reviewing *Holmes and Frankfurter: Their Correspondence 1912-34* (U. Press of New England, 1996)).

38. Letter from Holmes to Sir Frederick Pollock, May 26, 1919, quoted in *id.* at 1484.

39. Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* 55 (2nd ed. 1961).

40. Liva Baker, *Justice from Beacon Hill* 388 (Harper Collins, 1991).

41. See e.g., Letter from Holmes to Sir Frederick Pollock, May 28, 1914 in Mark DeWolfe Howe, ed., 1 *Holmes-Pollack Letters* 215, 216 (Oxford U. Press, 1941) ("It is very hot here but the papers say hotter at other places on the Atlantic Coast. . . .")

42. Baker, *The Justice from Beacon Hill* at 388 (cited in note 40).

43. Francis Biddle, *Mr. Justice Holmes* 87-88 (Charles Scribner's Sons, 1942).

death tolls, the likes of which were never otherwise seen in the most violent labor disputes, be an "odd rarity"?

There are two reasons why this might come within Biddle's exception to the news blackout. First, Holmes knew fires. Second, he knew theaters.<sup>44</sup>

Holmes seemed to love fires.<sup>45</sup> He liked to watch them. He liked their literary imagery.<sup>46</sup> In *The Common Law* he illustrated "attempts" with a would-be arsonist who lit a match near a haystack and then blew it out when he realized he was being observed.<sup>47</sup> After reading Freund's *New Republic* article, Holmes drafted a letter to the magazine's editor, Herbert Croly, asserting that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, from matters of degree."<sup>48</sup> Then to Harold Laski, he wrote that the letter had not been sent "as some themes may become burning."<sup>49</sup> Similarly he explained to Learned Hand that judges should speak publicly only through their opinions and not "meddle with burning themes."<sup>50</sup>

Charles Henry Butler, Holmes' friend and Eye Street neighbor,<sup>51</sup> reports walking home from the Capitol with Holmes when the justice grabbed his arm upon hearing a fire engine: "I always go to fires, don't you?"<sup>52</sup> And they were off, soon dog-trotting down Capitol Hill and up Maryland Avenue, as Holmes further observed that in Boston "we always *run* to fires."<sup>53</sup> Their efforts were rewarded by what Holmes described as "an awfully jolly good fire."<sup>54</sup> Holmes then told Butler:

that whenever there was a fire in any direction he would be glad to go to it with me even if he had to be routed out of bed. In fact it would not have surprised me had he left the Bench

44. Hence he knew a panic for a narrow exit could occur even without having a crowd in the theater.

45. Well, not all fires. The Holmes' summer house at Mattapoisett burned down in 1888.

46. See Baker, *The Justice from Beacon Hill* at 523 (cited in note 40).

47. Holmes, *The Common Law* at 67 (cited in note 17).

48. Quoted in Rabban, *Forgotten Years* at 297 (cited in note 16).

49. Holmes to Laski, May 13, 1919, quoted in *id.*

50. Baker, *Justice from Beacon Hill* at 449 (cited in note 40).

51. And the Court's Reporter from 1902-16.

52. Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* 178 (G.P. Putnam's Sons, 1942).

53. *Id.*

54. *Id.* at 179.

to witness a fire while the Court was in session. He also told me that Mrs. Holmes was equally fond of such spectacles.<sup>55</sup>

A man who is so excited by fires might allow evidence of an intentional false alarm into his consciousness.

In his years on the Massachusetts court, Holmes was a regular at the theater on Friday nights in Boston.<sup>56</sup> Right after his appointment to the Court, Holmes and his wife “often” accompanied the Roosevelts to the theater,<sup>57</sup> and, when Holmes visited London, theater parties were on the agenda.<sup>58</sup> During periods when the Court was not hearing arguments he would occasionally go to New York and the theater.<sup>59</sup> And, of course, he sometimes went to the Gayety Burlesque (for vaudeville, not striptease).<sup>60</sup>

My conclusion is that with his love of fires and frequenting of theaters, it is easy to see how Holmes could have combined the two in his famous example, especially if, somehow, an actual instance of a false shout of fire had come to his attention. Only Rabban has offered an alternative and I believe my explanation(s) beat his, until something better comes along,<sup>61</sup> so I would point first to the Italian Hall Disaster and then to the Canonsburg tragedy as the likely sources of Holmes’ famous statement.

55. *Id.*

56. Baker, *The Justice from Beacon Hill* at 283 (cited in note 40).

57. Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 259-60 (Little, Brown and Co., 1989).

58. Baker, *The Justice from Beacon Hill* at 423 (cited in note 40). The trips ended in 1914.

59. Novick, *Honorable Justice* at 275 (cited in note 57).

60. *Id.* at 310-11; Robert K. Headley, *Motion Picture Exhibition in Washington*, D.C. 267 (1999).

61. Robert Post’s future Holmes Devise volume would be a candidate. Perhaps Post will also uncover the origins and transmission of “clear and present danger”—for despite what we think we know, it wasn’t *Schenck*. In the summer of 1918, Benjamin W. Shaw, defending (unsuccessfully until appeal) an Espionage Act case, uttered the following during his closing argument to the jury: “Under all the facts and circumstances disclosed by the evidence in this case, how can it be said that he wilfully [sic] said and did the things alleged? How can the words used under the circumstances detailed in the evidence have the tendency to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent?” John Fontana, 12 *American State Trials* 897, 932 (John D. Lawson, ed., F.H. Thomas Law Book Co., 1920).