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“SHOUTING ‘FIRE’ IN A THEATER”: THE LIFE AND TIMES OF CONSTITUTIONAL LAW’S MOST ENDURING ANALOGY

Carlton F.W. Larson*

ABSTRACT

In 1919, Justice Oliver Wendell Holmes introduced the specter of a man falsely shouting “fire” in a theater into First Amendment law. Nearly one hundred years later, this remains the most enduring analogy in constitutional law. It has been relied on in hundreds of constitutional cases, and it has permeated popular discourse on the scope of individual rights.

This Article examines both the origins and the later life of Holmes’s theater analogy. Part I is a detective story, seeking to solve the mystery of how Holmes came up with this particular example. This story takes us to the forgotten world of the late nineteenth and early twentieth centuries, where false shouts of “fire” in theaters were a pervasive problem that killed hundreds of people both in the United States and Great Britain. The person who shouted “fire” in a crowded theater was a recognizable stock villain of popular culture, condemned in newspapers, magazines, and books from coast to coast. The analogy, lifted by Holmes from a federal prosecutor in Cleveland, was rooted in this larger world of popular culture, which would have understood the analogy as shorthand for stupid, harmful speech. Recovering this forgotten world also answers another question: Why do lawyers and non-lawyers alike refer to “shouting ‘fire’ in a crowded theater” rather than “falsely shouting ‘fire’ in a theater and causing a panic,” which is what Holmes actually wrote? Along the way, we will encounter a real detective and even a mustachioed villain.

Part II is based on an empirical study of the 278 subsequent judicial opinions that employ the theater analogy. Among other findings, this Article shows that the Supreme Court has rarely employed the analogy in majority opinions, but it has flourished in concurring and dissenting opinions. In lower courts, use of the analogy is increasing. Opinions that invoke the analogy, not surprisingly, typically reject free speech claims, but opinions that paraphrase Holmes are, counter-intuitively, more receptive to free speech claims than opinions that quote Holmes precisely.

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This Article concludes by noting that the theater analogy has largely lost its capacity to frighten in the visceral way that Holmes's audience would have understood it. Although it persists in constitutional law, it has become rarified and largely abstract, perhaps contributing in some small way to the general libertarian trend of modern First Amendment law.

INTRODUCTION

When I introduce the subject of free speech to my law students, I ask them to provide examples of speech that is obviously unprotected by the First Amendment. Inevitably, one of the first answers is "shouting 'fire' in a crowded theater." I follow up by asking, "Suppose there is a fire in the theater. Could you shout 'fire' then?" and the student usually answers, "Yes."¹

I then tell the students that this image comes from Justice Oliver Wendell Holmes's opinion in the 1919 case of *Schenck v. United States*,² in which the Court unanimously upheld a conviction under the Espionage Act for distributing flyers opposed to the draft.³ Writing for the Court, Justice Holmes argued, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁴

My students nonetheless instinctively paraphrase Holmes's words as "shouting 'fire' in a crowded theater." They are not alone. A Google search reveals over 200,000 hits for "shouting fire in a crowded theater" but only 53,000 hits for the Holmes version.⁵ Just one year after *Schenck*, United States Attorney General Mitchell Palmer, in congressional testimony, claimed, "A man may say what he will, as has often been

¹ A New Jersey appellate judge recently asked: "Is there something wrong about yelling 'fire' in a crowded theater if there is a fire?" *In re Estate of Thomas*, No. A-4320-02T2, 2004 WL 943629, at *38 (N.J. Super. Ct. App. Div. May 3, 2004) (Fisher, J., dissenting). It is possible, that even if there is a fire, shouting "fire" might not be the best way of dealing with it. *See, e.g.*, Walter Lippmann, *Today and Tomorrow: The Washingtonian Principle*, L.A. TIMES, Oct. 19, 1940, at A4 ("[E]ven if someone thinks there is a fire, it is his duty to keep cool and collected and to remember that in human affairs a panic is far worse than a fire. For a fire can be put out. But a panic is an almost certain disaster.").

² 249 U.S. 47 (1919).

³ *Id.* at 48–49.

⁴ *Id.* at 52.

⁵ Even writers who purport to quote Holmes directly often get it wrong. *See, e.g.*, CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 28 (2007) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater, and causing a panic," [Holmes] wrote."); Charles G. Brown, *Murder by the Book: Is the Publisher Responsible?*, WALL ST. J., Mar. 6, 1996, at A21 ("As Justice Oliver Wendell Holmes pointed out, 'You can't shout "fire" in a crowded theater.'"). Legal scholar Fred Friendly, correcting President George H. W. Bush's removal of "falsely," nonetheless incorrectly added "crowded." Fred W. Friendly, Letter to the Editor, *Falsely Shouting Fire*, N.Y. TIMES, Sept. 17, 1989, at E22.

said; but if he cries ‘fire’ in a crowded theater, with the intent to injure the people there assembled, certainly his right of free speech does not protect him against the punishment that is his just desert [sic].”⁶ Two years after *Schenck*, an article in a legal periodical claimed, “A man has no right to shout ‘fire’ in a crowded theatre, to use a familiar illustration.”⁷ Even the United States Supreme Court has referred to shouting “‘fire’ in a crowded theater.”⁸

On a conceptual level, however, the Holmes version and the paraphrase differ in three significant ways. First, Holmes includes the critical element of falsity, which the paraphrase omits. A person shouting “fire” in response to a real fire (or shouting “fire” as part of his or her lines on-stage) presents very different issues than a person deliberately making a false statement. Second, the paraphrase requires the theater to be crowded. But why does the theater need to be crowded for the speech to be unprotected? A false shout of “fire” that disrupts a performance causes harm to the theater owner and poses risks to the attendees even if only four people are in the audience. Third, Holmes refers to “causing a panic,” thus suggesting a requirement of actual harm, whereas the paraphrase does not.⁹ Thus, falsely shouting “fire” in an entirely empty theater might not give rise to legal liability.

Holmes’s theater analogy is a perfect retort to the frivolous argument that all speech, regardless of context or consequences, is immunized from governmental regulation. But, in the context of *Schenck*, it was entirely beside the point. A false shout of “fire” in a theater is a false statement of fact; the flyers in *Schenck* made statements of political opinion.¹⁰ The audience in a theater is captive to a speaker in a way that the readers of the flyers in *Schenck* were not. The panic in the theater is immediate and not easily countered by more speech; the flyers in *Schenck* created no similar risk of imminent harm.¹¹

The inaptness of the analogy was noted almost immediately. Writing a few months after *Schenck* was decided, Professor Ernst Freund of the University of Chicago Law School found the analogy “manifestly inappropriate” in the context of “implied provocation in connection with political offenses.”¹² Professor Zechariah Chafee of Harvard Law School argued that a much closer analogy to *Schenck* was a “man who gets up in a theater between the acts and informs the audience honestly but perhaps

⁶ *Sedition: Hearing on S. 3317, H.R. 10650 and 12041 Before the H. Comm. on the Judiciary*, 66th Cong. 35 (1920) (statement of Mitchell Palmer, Att’y Gen. of the United States).

⁷ Elwood S. Jones, *Free Speech and Laws in Derogation Thereof*, 93 CENT. L.J. 348, 349 (1921).

⁸ *Thomas v. Collins*, 323 U.S. 516, 536 (1945) (“We have here nothing comparable to the case where use of the word ‘fire’ in a crowded theater creates a clear and present danger . . .”).

⁹ Curiously, Holmes’s own formulation of the “clear and present danger” test in *Schenck* does not require actual harm, only a significant risk of harm. 249 U.S. at 52.

¹⁰ *See id.* at 52–53.

¹¹ *See id.*

¹² Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13, 14.

mistakenly that the fire exits are too few or locked.”¹³ Such perplexing cases “cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection.”¹⁴ H. L. Mencken argued in 1926 that the theater example was unique because “there is no opportunity for persons who know that there is no fire to state the fact calmly, and prove it.”¹⁵ One of Freund’s successors at the University of Chicago, Professor Harry Kalven, would later describe the analogy as “trivial and misleading,” noting that because it “is so wholly apolitical, it lacks the requisite complexity for dealing with any serious speech problem likely to confront the legal system.”¹⁶

Professor Vincent Blasi of Columbia Law School has defended the theater analogy as resting on “falsity, absence of a general idea, and audience vulnerability.”¹⁷ As such, it is primarily about “excluding certain verbal activities from the ambit of First Amendment concern,” rather than supporting the proposition that any speech can be limited if the resulting harms are great enough.¹⁸ This interpretation sensibly domesticates the analogy within modern First Amendment doctrine, but it fits uneasily with *Schenck* itself, where one could hardly argue that the anti-war pamphlets lacked a general idea or rested on an obvious falsity. Moreover, as Holmes argued in *Schenck*:

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.¹⁹

At least in *Schenck*, Holmes seemed to suggest that all speech was subject to the clear and present danger test.²⁰

Despite all of its limitations, the theater analogy is the most enduring analogy in the constitutional canon.²¹ As shorthand for why rights are not unlimited, it can

¹³ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 944 (1919).

¹⁴ *Id.*

¹⁵ H. L. Mencken, *On Liberty*, CHI. DAILY TRIB., Mar. 21, 1926, at H1.

¹⁶ HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 133–34 (Jamie Kalven ed., 1988).

¹⁷ Vincent Blasi, *Shouting “Fire!” in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 565 (2011).

¹⁸ *Id.* at 567.

¹⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (emphasis added).

²⁰ *See id.*

²¹ “Shouting ‘fire’ in a theater” is best described as an analogy, not a metaphor. Unlike later cases where the Court would describe radical speech as a spark (a true metaphor), the theater analogy typifies the analogical reasoning style of the common law. Although it is not strictly a comparison of one thing to another, its use of the hypothetical case to make an argument

hardly be beaten. It has been relied on in hundreds of constitutional cases and has permeated popular discourse on the scope of individual rights.²² A 1963 *Wall Street Journal* editorial referred to the “classic case” that “free speech does not include the right to shout ‘Fire!’ in a crowded theater.”²³ The analogy appears regularly in the speeches of political leaders.²⁴ Even comic writers have played with the analogy, from Tom Stoppard’s *Rosencrantz and Guildenstern are Dead*,²⁵ to a parody of social science research:

A sample of forty-seven movie theaters across the country was selected for the experiment. The sample was divided into a “test” group and three “control” groups. In the test group, a graduate student in the audience shouted “fire” at a randomly chosen point in the performance, and the results were observed and tabulated. In control group 1, patrons viewed the film under normal circumstances. In control group 2, an assistant shouted “fire,” and then the theater was actually set ablaze. In control group 3, the theater was torched without any warning cry. Observers assigned the resultant behavior of the crowd a value on the Wassenberg-Schevitsky Panic Scale.²⁶

The humorist Russell Baker complained, “Lawyers aren’t much for metaphorical speech either. Their favorite rhetorical device is simile. ‘Like shouting “Fire!” in a

is analogical. On the use of fire metaphors in free speech cases, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 186–98 (1992); ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* 52–60 (2008); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 *GEO. L.J.* 181, 182 (2004).

²² See *infra* Part II.

²³ *Rights Without Responsibility*, WALL ST. J., Oct. 1, 1963, at 14.

²⁴ See, e.g., Gerald R. Ford, *Crime in America*, in A RECORD OF PRESS CONFERENCE STATEMENTS MADE BY SENATOR EVERETT MCKINLEY DIRKSEN AND REPRESENTATIVE GERALD R. FORD FOR THE REPUBLICAN LEADERSHIP OF THE CONGRESS, S. DOC. NO. 90-61, at 11 (1st Sess. 1967) (“No one has a right to shout ‘Fire!’ in a theatre.”); H.R. REP. NO. 82-2510, at 47 (2d Sess. 1952) (testimony of Thomas J. Fitzgerald) (“I think it was Justice Oliver Wendell Holmes who made the famous statement that freedom of speech does not entitle a person to shout ‘fire’ in a crowded theater.”); Michael Cooper, *Debate on Role Played by Anti-Abortion Talk*, N.Y. TIMES, Jan. 15, 1995, at 16 (quoting the President of Planned Parenthood who said, “This is tantamount to shouting, ‘Fire!’ in a crowded theater. We have a crowded theater; just look at the spate of murders at clinics in the last few years.”).

²⁵ TOM STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* 60 (1967) (“Ros: Fire! / Guil jumps up / Guil: Where? / Ros: It’s all right—I’m demonstrating the misuse of free speech. To prove that it exists.”).

²⁶ TOM WELLER, *Shouting “Fire” in a Crowded Theater: Experimental Evidence*, in *CULTURE MADE STUPID* 17 (1987); see also Dave Barry, *Need a Yacht? Don’t Waste Your Money; Exercise Your Rights*, CHIC. TRIB., Nov. 10, 1985, at H10 (“[Y]ou can’t shout ‘FIRE!’ in a crowded theater. Even if there IS a fire, you can’t shout it. A union worker has to shout it.”).

crowded theater’—that’s about as close to poetry as lawyer talk ever comes. And that’s an antique from the early part of the century.”²⁷

This Article explores two neglected aspects of the shouting “fire” in a theater analogy. First, it looks backward from 1919 to the source of Justice Holmes’s analogy. Was this simply a clever hypothetical tossed off by a brilliant jurist known for his aphorisms? Or does the analogy draw on something deeper? After surveying previous attempts to answer this question, this Article argues that the analogy is rooted in a world in which false shouts of “fire” in theaters were a perennial problem, resulting in the highly publicized deaths of hundreds of people. As a result, the person who falsely shouted “fire” in a crowded theater was a recognizable stock villain of the late nineteenth century. Holmes’s analogy was thus far from hypothetical—it described one of the most frightening forms of speech that could be imagined, the archetype of stupid, harmful speech. Recovering this lost world also answers another question: Why do lawyers and non-lawyers alike routinely refer to “shouting ‘fire’ in a crowded theater,” rather than the more precise version offered by Justice Holmes? They do so because they are drawing on a linguistic convention that long predated Holmes and which has survived long after *Schenck*.

Second, this Article looks forward from 1919 to examine the life of the analogy in judicial opinions, focusing initially on United States Supreme Court opinions and then turning to a quantitative analysis of the 278 judicial opinions that invoke the analogy in free speech cases. When the Supreme Court returned to the analogy in the 1940s, it used the conventional paraphrase, not the more precise version formulated by Justice Holmes.²⁸ Although the Court has not relied on the analogy extensively in majority opinions, individual Justices have frequently invoked it in separate opinions.²⁹ The analogy, far from fading into obsolescence, has displayed increasing vitality in recent years. In lower courts, opinions that invoke the analogy, not surprisingly, typically reject free speech claims, but opinions that employ the paraphrase are, counter-intuitively, more receptive to free speech claims than opinions that quote Holmes precisely.³⁰ Similarly, appellate court opinions that invoke the analogy are more receptive to free speech claims than trial court opinions that invoke the analogy.³¹

This Article concludes by observing that the theater analogy is no longer frightening in the visceral manner that Holmes’s audience would have understood it. The central analogy of First Amendment law has become an abstract debating point, stripped of immediate relevance or any sense of serious danger. As such, it provides little resistance to the general libertarian valence of modern First Amendment doctrine.

²⁷ Russell Baker, *Like Lead to the Romans*, N.Y. TIMES, May 29, 1993, at 19.

²⁸ See *infra* Part II.A.

²⁹ See *infra* Part II.A.

³⁰ See *infra* Part II.B.

³¹ See *infra* Part II.B.

I. THE ORIGINS OF THE ANALOGY

It was argued in 1983 that the “specter of a man shouting in a theater has . . . preoccupied first amendment scholarship,”³² but, until recently, there has been little interest in the source of Holmes’s theater analogy.³³ In his influential 1997 book, *Free Speech in its Forgotten Years*, Professor David Rabban of the University of Texas School of Law made the offhand suggestion that Holmes may have drawn the analogy from an earlier case in which a man had solicited his employee to burn down a building in an attempt to secure insurance money.³⁴

Five years later, Rabban’s Texas colleague, Lucas Powe, published *Searching for the False Shout of ‘Fire,’* the first, and, to date, only article directly addressing the origins of the theater analogy.³⁵ Powe was unimpressed by Rabban’s insurance argument:

With full respect to a long-time friend and colleague, that is a stretch. A man solicits an employee to burn down his house 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. Bishop Occum created his razor for reasoning like this.³⁶

Powe instead argued that Holmes’s most likely sources for the analogy were two notorious incidents in the decade prior to *Schenck* in which false shouts of “fire” had created harmful and deadly panics.³⁷ The first occurred in Canonsburg, Pennsylvania, in 1911, when someone falsely shouted “fire” in an opera house that was showing a movie.³⁸ Twenty-six people were killed, and fifty people were seriously injured in the ensuing panic.³⁹ The second occurred in Calumet, Michigan, in 1913, where striking copper miners and their families were celebrating Christmas Eve on the second floor of a meeting hall.⁴⁰ An unknown person yelled “fire,” and the resulting panic killed seventy-three people, most of them children.⁴¹

³² Steven Shiffrin, Book Review, *Government Speech and the Falsification of Consent*, 96 HARV. L. REV. 1745, 1745 (1983).

³³ See THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 231–33 (Ronald K. L. Collins ed., 2010).

³⁴ DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 297–98 (1997).

³⁵ L. A. Powe, Jr., *Searching for the False Shout of “Fire,”* 19 CONST. COMMENT. 345 (2002).

³⁶ *Id.* at 348.

³⁷ *Id.*

³⁸ *Id.* at 348–49.

³⁹ *Id.* at 349.

⁴⁰ *Id.*

⁴¹ *Id.*

Although there was no direct evidence that Holmes was aware of these incidents, Powe argued that Holmes had a particular interest in both theaters and fires and, therefore, likely drew on these examples when writing the *Schenck* opinion.⁴² Powe felt this explanation beat Rabban's argument, at least "until something better comes along."⁴³

Although Powe was unaware of it, there already was something better. Powe had plausibly assumed that Justice Holmes had invented the theater analogy in *Schenck*, but this assumption was incorrect. The analogy was first used in the 1918 Cleveland trial of socialist Eugene Debs for violations of the Espionage Act.⁴⁴ The prosecuting United States Attorney, Edwin Wertz, argued to the jury that "a man in a crowded auditorium, or any theatre, who yells 'fire' and there is no fire, and a panic ensues and someone is trampled to death, may be rightfully indicted and charged with murder."⁴⁵ Wertz's use of this analogy had been largely forgotten by constitutional historians, but it was noted in a 1919 book about Eugene Debs⁴⁶ and discussed in a 1987 article in the *Indiana Magazine of History*.⁴⁷

The connection to *Schenck* is clear. Debs appealed his conviction to the Supreme Court, where it was affirmed in a unanimous opinion by Justice Holmes, one week after *Schenck*.⁴⁸ Although legal historian Melvin Urofsky has argued that there is no direct evidence that Holmes was aware of Wertz's closing argument,⁴⁹ the circumstantial evidence is compelling. The much more probable case is set forth by Professor Thomas Healy of Seton Hall University School of Law in his 2013 book, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*.⁵⁰ Healy argues that Holmes adapted this analogy from the record of the *Debs* case into the final form it took in *Schenck*.⁵¹

The Holmes version is far tighter and more rhetorically effective than the meandering example offered by Wertz, as the parallels below indicate:

⁴² *Id.* at 351–52.

⁴³ *Id.* at 352.

⁴⁴ ERNEST FREEBERG, *DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT* 102 (2008).

⁴⁵ THOMAS HEALY, *THE GREAT DISSIDENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 91 (2013).

⁴⁶ DAVID KARSNER, *DEBS: HIS AUTHORIZED LIFE AND LETTERS* 45 (1919).

⁴⁷ David L. Sterling, *In Defense of Debs: The Lawyers and the Espionage Act Case*, 83 *IND. MAG. OF HIST.* 17, 32–34 (1987).

⁴⁸ *See Debs v. United States*, 249 U.S. 211, 216–17 (1919).

⁴⁹ Melvin I. Urofsky, *The Trial of Eugene V. Debs, 1918*, in *JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO* 97, 118 n.50 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

⁵⁰ HEALY, *supra* note 45, at 91.

⁵¹ *Id.* at 97, 268–69 n.95.

<i>Holmes</i>	<i>Wertz</i>
“falsely”	“and there is no fire”
“a theater”	“crowded auditorium, or any theatre”
“and causing a panic”	“and a panic ensues and someone is trampled to death.”

Holmes’s analogy used twenty-three words; Wertz’s analogy used thirty-five.⁵²

Nonetheless, Edwin Wertz merits at least a footnote in the annals of constitutional history. Holmes might have used the theater analogy in any event, but it is Wertz who first used it in a First Amendment case.⁵³ Of all the sources upon which Holmes might have drawn when writing *Schenck*, Wertz’s closing argument in the *Debs* case is by far the most plausible.

But this of course raises a further question: How did Wertz come up with the theater analogy? Was there anything in his life or background that made him particularly drawn to this example? Although reasonably well-known in Ohio during his lifetime, he did not leave a significant historical legacy. Wertz was born in 1875 in Wayne County, Ohio, and graduated from Ohio State with degrees in philosophy and law.⁵⁴ In 1900, he was admitted to the Ohio bar and, in 1903, was elected as a Democrat to the Ohio state legislature.⁵⁵ He served two terms, supporting highway legislation, education reform, prison reform, and the regulation of railroads and mines.⁵⁶ From 1915 to 1923, he was the United States Attorney for the Northern District of Ohio, where he was responsible for the prosecution of Eugene Debs.⁵⁷ A 1943 obituary described him as a “rough-and-tumble lawyer of the old school.”⁵⁸

As a life-long resident of the greater Cleveland area, Wertz was in closer geographical proximity to the false shouts identified by Lucas Powe than was Justice Holmes.⁵⁹ Canonsburg, Pennsylvania, is only 128 miles from Wertz’s residence in Wooster, Ohio,⁶⁰ and thus a likely candidate for familiarity. Similarly, the Calumet

⁵² Compare *Schenck v. United States*, 249 U.S. 47, 52 (1918), with HEALY, *supra* note 45, at 91.

⁵³ See Urofsky, *supra* note 49, at 109–10.

⁵⁴ *Biography of Edwin S. Wertz*, N. CENT. OHIO BIOGRAPHIES, <http://www.onlinebiographies.info/oh/nco/wertz-es.htm> [<http://perma.cc/4SRF-D88D>] [hereinafter *Biography of Wertz*].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Lawyer Who Prosecuted Eugene Debs Is Dead; Loved Impromptu Debate at Bar Conventions*, 5 AM. L. & LAWYERS 6 (Nov. 16, 1943).

⁵⁹ See *Biography of Wertz*, *supra* note 54.

⁶⁰ Driving Directions From Canonsburg, PA, to Wooster, OH, GOOGLEMAPS, <http://www.google.com/maps> [<http://perma.cc/YB2N-LB68>].

disaster, although not especially close to Cleveland, was still in a neighboring state and closer to Wertz than it was to Holmes. Moreover, as a legislator who had taken an interest in improving the lives of miners, Wertz may well have found the story of Calumet both fascinating and horrifying.

Calumet is located on the remote Keweenaw Peninsula, which juts out from Michigan's Upper Peninsula into Lake Superior.⁶¹ The region is known as Copper Country, after the enormous copper mines that once dominated the local economy.⁶² In July 1913, the copper miners, led by the Western Federation of Miners (WFM), went on strike.⁶³ The mine managers refused to negotiate, and the strike dragged on for months.⁶⁴

By December, the Women's Auxiliary of the WFM had become concerned about the children of the striking miners, whose parents might not be able to afford Christmas presents.⁶⁵ The Auxiliary organized a Christmas Eve party for the children on the second floor of Calumet's Italian Hall.⁶⁶ The party proved enormously popular, and approximately seven hundred people crowded into the Hall's event space to listen to Christmas carols.⁶⁷ The children had begun processing to the stage to receive their donated presents when someone burst into the room and shouted, "Fire!"⁶⁸ Witnesses later testified that the man was wearing the button of the "Citizens' Alliance," a front group for mine management.⁶⁹

There was no fire, but people had reason to be frightened.⁷⁰ The earlier incarnation of Italian Hall had burned down in a fire in 1907.⁷¹ The new Hall was built with modern safety features designed to minimize harm in the event of a fire.⁷² There were multiple staircases to the second floor, a fire escape that led directly outside, and exit doors that swung outward.⁷³ But most people in the Hall were unaware of the other exits, and a large swarm of people rushed to the staircase that led to the entrance on the street.⁷⁴ It appears that someone tripped on the stairs, which caused others to trip

⁶¹ STEVE LEHTO, *DEATH'S DOOR: THE TRUTH BEHIND THE ITALIAN HALL DISASTER AND THE STRIKE OF 1913*, at 1 (2d ed. 2013).

⁶² *Id.* at 13.

⁶³ *Id.* at 33.

⁶⁴ *Id.* at 52–55.

⁶⁵ *Id.* at 167–68.

⁶⁶ *Id.* at 168–69.

⁶⁷ *Id.* at 169–70.

⁶⁸ *Id.* at 170–71.

⁶⁹ *Id.* at 152, 170–71.

⁷⁰ *Id.* at 1.

⁷¹ *Id.* at 168.

⁷² *Id.* at 169.

⁷³ GARY KAUNONEN & AARON GOINGS, *COMMUNITY IN CONFLICT: A WORKING-CLASS HISTORY OF THE 1913–14 MICHIGAN COPPER STRIKE AND THE ITALIAN HALL TRAGEDY* 167–69 (2013); LEHTO, *supra* note 61, at 169.

⁷⁴ LEHTO, *supra* note 61, at 9–10.

in turn, and eventually people began piling up on top of each other.⁷⁵ By the time the incident was over, seventy-three people were dead, sixty-two of them children of the striking miners.⁷⁶

The overwhelming evidence suggests that someone entered Italian Hall and deliberately shouted “fire.”⁷⁷ It is likely that the person who did this was hostile to the union and sought to disrupt the Christmas Eve festivities, even if he did not anticipate the horrific death toll that his false shout would create.⁷⁸ In terms of fatalities, this is one of the worst acts of reckless homicide in the country’s history, and it remains one of the country’s most significant unsolved crimes.⁷⁹ Although Italian Hall was not strictly a theater, it did involve an audience and a stage. It is not implausible that Edwin Wertz, and possibly Justice Holmes as well, had this incident in mind when referring to a “man falsely shouting ‘fire’ in a theater.” Constitutional law’s greatest hypothetical villain may well be a real person with a real name. Is it possible, over one hundred years later, to find out who he was? There are some tantalizing hints.

In his book *Death’s Door*, Michigan attorney Stephen Lehto argues that the most likely suspect was a management-hired strike-breaker named Edward Manley.⁸⁰ Curiously, Manley was pulled from the pile of people on the Italian Hall staircase, a very strange place for a strike-breaker to be.⁸¹ Although Manley claimed that he had run into the Hall from the street to provide assistance, Lehto argues that this story is implausible.⁸² It is more likely, Lehto claims, that Manley had entered the Hall, shouted “fire,” and then was caught in the ensuing stampede.⁸³

Historians Gary Kaunonen and Aaron Goings reject Lehto’s Manley thesis, arguing that the shouter almost certainly escaped from the building and would not have been trapped in the pile of bodies in the stairwell.⁸⁴ They discuss two other suspects who had been identified in 1914.⁸⁵ The first was tracked by a private detective hired by the Calumet & Hecla mine.⁸⁶ Several eyewitnesses reported that the shouter had a mustache.⁸⁷ The detective located a Calumet barber, who claimed that a man came into his shop on the night of the incident, acted nervously, and requested that the barber shave off his mustache.⁸⁸ The detective then tracked down a man named

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 178.

⁷⁷ *Id.* at 325–38; *see also* KAUNONEN & GOINGS, *supra* note 73, at 219.

⁷⁸ LEHTO, *supra* note 61, at 395–97; *see also* KAUNONEN & GOINGS, *supra* note 73, at 171.

⁷⁹ *See* KAUNONEN & GOINGS, *supra* note 73, at 219.

⁸⁰ LEHTO, *supra* note 61, at 174–77.

⁸¹ *Id.* at 175.

⁸² *Id.* at 176.

⁸³ *Id.* at 174–75.

⁸⁴ KAUNONEN & GOINGS, *supra* note 73, at 203.

⁸⁵ *Id.* at 218.

⁸⁶ *Id.* at 205.

⁸⁷ *Id.* at 183, 201.

⁸⁸ *Id.* at 211–12.

Messner; this man had left Calumet early in the morning on Christmas Day, and, when he returned several weeks later, he no longer had a mustache.⁸⁹ Although this would seem to be highly incriminating circumstantial evidence, Messner was not a good physical match for the shouter.⁹⁰ The shouter's height (and the height of the man in the barber shop) was described as around 5'7", whereas Messner's height was nearly 6'.⁹¹ At this point, the detective seems to have given up the search for the shouter.⁹² The second suspect was identified by the local union of the WFM.⁹³ "George" was seemingly a union organizer but was actually a spy for management.⁹⁴ By April 1914, the union had concluded that George, who had fled to Minnesota, was the man who had shouted "fire" at Italian Hall.⁹⁵ His last name may have been Bartoski or Sartoskila.⁹⁶

These are all plausible candidates for the man who shouted "fire" in Italian Hall, but there is regrettably no conclusive proof with respect to any of them, and it is unlikely, at this date, that new evidence will emerge.⁹⁷ Nonetheless, a decent argument can be made that the widely publicized false shout at Calumet may have been in Wertz's and Holmes's minds when they employed the theater analogy.

Further research, however, suggests that one should not overemphasize the Calumet disaster. Although Calumet was unique because of its horrific death toll, the cause of those deaths was not. False shouts of "fire" leading to deadly panics in theaters were not uncommon in the late nineteenth and early twentieth centuries.⁹⁸ They would have been familiar to any person who attended the theater or who read the newspapers. In 1876, someone in the gallery of a Cincinnati opera house falsely shouted "fire."⁹⁹ The theater was packed with 2,500 people, mostly women and

⁸⁹ *Id.* at 213.

⁹⁰ *Id.* at 215; LEHTO, *supra* note 61, at 389–90.

⁹¹ KAUNONEN & GOINGS, *supra* note 73, at 210, 212, 215.

⁹² *Id.* at 216. Steve Lehto finds the entire account of the private detective fanciful and argues that the detective was incompetent. LEHTO, *supra* note 61, at 385–91.

⁹³ LEHTO, *supra* note 61, at 391.

⁹⁴ KAUNONEN & GOINGS, *supra* note 73, at 217.

⁹⁵ *Id.* at 217–18.

⁹⁶ *Id.* at 218.

⁹⁷ The Italian Hall disaster, including the false shout, would be immortalized later, somewhat inaccurately, in Woody Guthrie's ballad "1913 Massacre." WOODY GUTHRIE, *1913 Massacre* (Woody Guthrie Publications, Inc. 1961), https://www.woodyguthrie.org/Lyrics/Nineteen_Thirteen_Massacre.htm [<http://perma.cc/6336-CQAF>]. Steve Lehto notes that many residents of Calumet viewed the song as "insulting." LEHTO, *supra* note 61, at 354. The disaster continues to generate bitter debate among scholars. For example, Steve Lehto finds the work of Gary Kaunonen and Aaron Goings to be "unfounded," "unscholarly," and full of "mistakes and misstatements." *Id.* at 381, 383. Kaunonen and Goings find Lehto's work to be marred by a "combination of guesswork and embellished writing" and "loose playing with sources and poor documentation." KAUNONEN & GOINGS, *supra* note 73, at 201–02.

⁹⁸ *See, e.g., infra* notes 99–111 and accompanying text.

⁹⁹ *A Fatal Panic: The Awful Calamity at Cincinnati*, CHL DAILY TRIB., Feb. 8, 1876, at 3.

children.¹⁰⁰ In the resulting panic, eight people were trampled to death, another died of fright, and many others were seriously injured.¹⁰¹ In 1889, a false shout of “fire” at a Johnstown, Pennsylvania, opera house led to the deaths of at least ten people and injuries to fifty more.¹⁰² In 1895, at the Front Street Theater in Baltimore (the site of the 1864 Republican National Convention), a patron erroneously shouted “fire” after seeing a gas jet being lit.¹⁰³ In the ensuing panic, twenty-four people were trampled to death, and twelve more were seriously injured.¹⁰⁴ In 1901, a boy falsely shouted “fire” during a theatrical performance at a building in Chicago.¹⁰⁵ The shout led to a panic that killed five people and injured fifty others.¹⁰⁶ A month earlier, a performance in the same building had been interrupted by a false shout of “fire,” resulting in eighteen injuries.¹⁰⁷ Police suspected that the same boy, who allegedly had “a mania for this kind of work,” was responsible for both incidents.¹⁰⁸ On Easter Eve 1906, a boy entered St. Ludmilla’s Roman Catholic Church in Chicago and falsely shouted “fire.”¹⁰⁹ The resulting panic killed three young girls and an adult woman and injured numerous others.¹¹⁰ In 1909, boys in the balcony of a Cleveland theater falsely shouted “fire,” creating a panic that injured six people, three seriously.¹¹¹ Edwin Wertz (who might have been in the audience) could easily have had this incident in mind when he employed the theater analogy ten years later at the Cleveland trial of Eugene Debs.

There were also failed attempts to cause panics.¹¹² In 1905, five men interrupted a Yiddish performance at Chicago’s Academy of Music by shouting “fire” from different places in the audience and rushing for the exits.¹¹³ Policemen intervened quickly, averted a panic, and arrested the shouters.¹¹⁴ The incident could have been

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Many Trampled to Death: A False Alarm of Fire Causes a Terrible Panic in a Johnstown Theater*, MILWAUKEE DAILY J., Dec. 11, 1889, at 1.

¹⁰³ *24 Deaths in a Panic*, WASH. POST, Dec. 31, 1895, at 12.

¹⁰⁴ *Id.*

¹⁰⁵ *Five Dead in Theater Panic*, CHI. DAILY TRIB., Jan. 13, 1901, at 1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Panic in a Church; 3 Dead; 24 Injured*, CHI. DAILY TRIB., Apr. 15, 1906, at 1.

¹¹⁰ *Id.*; *Boy’s Prank Causes Panic: Cry of Fire in Chicago Church Stampedes Easter Crowd and Four Are Crushed to Death*, S.F. CHRON., Apr. 15, 1906, at 24.

¹¹¹ *Six Injured in Theater Panic*, L.A. TIMES, Mar. 20, 1909, at 12.

¹¹² *See, e.g., infra* notes 113–15 and accompanying text.

¹¹³ *Panic in Theater Started by Plot*, CHI. DAILY TRIB., June 9, 1905, at 5.

¹¹⁴ *Id.* The *Chicago Daily Tribune* noted that attendants of the theater assert a rivalry exists among the Yiddish players resembling that which caused riots and murder in the early days of the New York stage. The performances in local Yiddish playhouses frequently have been interrupted by adherents of the rival stars and the police called in to suppress trouble.

Id.

much worse, considering the audience was likely primed for fear of fire—approximately six hundred people had been killed in a notorious Chicago theater fire in 1903.¹¹⁵

Other false shouts of “fire” in a theater caused panics but did not result in fatalities.¹¹⁶ These incidents, widely reported across the nation, occurred in San Francisco in 1875,¹¹⁷ in New York City in 1877,¹¹⁸ 1881,¹¹⁹ 1883,¹²⁰ 1884,¹²¹ 1888,¹²² and 1907;¹²³ in Memphis in 1880;¹²⁴ in Chicago in 1883¹²⁵ and 1884,¹²⁶ in St. Louis in 1887¹²⁷ and 1896,¹²⁸ in Cincinnati in 1887,¹²⁹ in Pottsville, New York, in 1888,¹³⁰ in Boston in 1895,¹³¹ in Niles, Michigan, in 1897;¹³² in Newark in 1901;¹³³ in Pittsburgh in 1911;¹³⁴ in Wheeling, West Virginia, in 1911,¹³⁵ in St. Paul, Minnesota, in 1914,¹³⁶ and in

¹¹⁵ *All but Four Claimed: Two More of the Iroquois Theater Dead are Identified*, CHI. DAILY TRIB., Jan. 5, 1904, at 3.

¹¹⁶ See, e.g., *infra* notes 117–39 and accompanying text.

¹¹⁷ *Panic in a Theater*, MILWAUKEE DAILY SENTINEL, Mar. 31, 1875, at 5.

¹¹⁸ *Panic in a Theater: What a Cry of Fire Did at Niblo’s Garden*, ST. LOUIS GLOBE-DEMOCRAT, Nov. 2, 1877, at 2.

¹¹⁹ *A Fearful Panic Last Night in a Crowded Bowery Theatre: Some Fool, Hearing the Hissing of Escaping Steam, Cries “Fire!”*, CHI. DAILY TRIB., Nov. 25, 1881, at 5.

¹²⁰ *Panic in a Theater: Caused by the Lights Going Out and a Cry of Fire*, MILWAUKEE DAILY J., Oct. 18, 1883, at 1.

¹²¹ *A Cry of Fire in a Crowded Theatre*, N.Y. TIMES, Sept. 25, 1884, at 4.

¹²² *A Panic in a Theater*, ROCKY MOUNTAIN NEWS, Dec. 2, 1888, at 1.

¹²³ *Panic in Theatre at Cry of Fire: Bad Brooklyn Boy Started It for Revenge When Ejected from the Gotham*, N.Y. TIMES, June 9, 1907, at 2.

¹²⁴ *An Exciting Scene: A Panic in Leubrie’s Theater Caused by a False Alarm of Fire*, DAILY ARK. GAZETTE, Jan. 4, 1880, at 1.

¹²⁵ *A Panic in a Theater*, MILWAUKEE SENTINEL, Dec. 13, 1883, at 5.

¹²⁶ *A Theatre Panic: A False Cry of Fire Terrorizes the Audience at the Academy of Music*, CHI. DAILY TRIB., Oct. 20, 1884, at 1.

¹²⁷ *Panic in a Theater: A False Cry of Fire Quickly Empties the People’s Theater*, ST. LOUIS GLOBE-DEMOCRAT, Mar. 28, 1887, at 7.

¹²⁸ *False Fire Alarm Causes a Panic: Reckless Spectator in a St. Louis Theater Empties the House in Quick Order*, CHI. DAILY TRIB., Oct. 8, 1896, at 1.

¹²⁹ *Almost a Theatre Horror: Somebody Cries “Fire” in a Cincinnati Play-House and a Panic Ensues*, CHI. DAILY TRIB., Oct. 2, 1887, at 11.

¹³⁰ *Somebody Shouted “Fire”:* *A Panic Created in a Pottsville Theater by a Causeless Alarm*, WASH. POST, Dec. 27, 1888, at 1.

¹³¹ *Items of General News*, ME. FARMER, May 23, 1895, at 8.

¹³² *Panic in a Theater: During a Real Fight on the Stage at Niles, Mich., a Cry of Fire is Raised—Many People Injured*, MILWAUKEE SENTINEL, Sept. 12, 1897, at 1.

¹³³ *Panic in a Theatre*, N.Y. TIMES, Oct. 25, 1901, at 1.

¹³⁴ *Crushed in Theatre Panic: Children Trampled When Some One Shouted False Alarm of Fire*, N.Y. TIMES, Nov. 21, 1911, at 1.

¹³⁵ *Child Averts a Panic: Girl Piano Player Calms Audience After False Fire Alarm*, N.Y. TIMES, Dec. 31, 1911, at 1.

¹³⁶ *Boy’s Cry Starts a Panic*, S.F. CHRON., May 6, 1914, at 21.

Annapolis, Maryland, in 1919.¹³⁷ There was also an 1881 incident at a church in Bradford, Pennsylvania,¹³⁸ and a 1904 incident at a church in New Haven, Connecticut.¹³⁹

One especially intriguing incident occurred in 1912, about ten blocks from Justice Holmes’s house in Washington, D.C.¹⁴⁰ A motion picture screening at a theater was disrupted by a false cry of “fire,” resulting in the audience making “frantic efforts to get to the street.”¹⁴¹ Although no one was seriously injured, several women and children were knocked down.¹⁴² The theater’s manager told the *Washington Post*, “I would like to find the man who spread the alarm. I would teach him not to repeat his act.”¹⁴³

False shouts of “fire” were equally problematic in the United Kingdom. In 1878, a British publication surveyed recent theater panics, all of which had been triggered by false shouts of “fire.”¹⁴⁴ It noted an 1840s incident at the Victoria Theatre in London that led to several deaths and many serious injuries, an 1856 incident at a religious service at the Surrey Music Hall that resulted in many casualties, an 1870 incident in Liverpool that resulted in at least a dozen deaths, and an 1878 incident in Liverpool in which thirty-seven people were crushed to death.¹⁴⁵ The incidents kept occurring.¹⁴⁶ In 1884, a recently fired employee falsely shouted “fire” in the Star Theater in Glasgow, creating a panic that resulted in sixteen deaths and twelve serious injuries.¹⁴⁷ In 1887, someone falsely shouted “fire” at a London theater during a performance by the Hebrew Dramatic Club.¹⁴⁸ A “terrible panic” ensued, and it “was found that twelve women and five youths had been trampled to death in the rush to escape, and many others injured.”¹⁴⁹

The image of a “man falsely shouting ‘fire’ in a theater and causing a panic” was thus not simply a clever hypothetical invented on the spot to spice up a judicial opinion or a closing argument. False shouts of “fire” were a pervasive problem that plagued theaters throughout the United States and the United Kingdom, resulting in hundreds of deaths and injuries. Although the comparison is not exact, false shouts

¹³⁷ *Start Scare in Theater*, WASH. POST, Mar. 13, 1919, at 3.

¹³⁸ *Methodist Episcopal*, W. CHRISTIAN ADVOC., Oct. 12, 1881, at 325.

¹³⁹ *Four Hurt in Church Panic*, N.Y. TIMES, Mar. 28, 1904, at 2.

¹⁴⁰ Holmes’s house was at 1720 I Street, NW. LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOMES* 372 (1991).

¹⁴¹ *Fire Cry Scares Audience*, WASH. POST, Feb. 12, 1912, at 10.

¹⁴² *Id.*

¹⁴³ *Id.* The theater was located at 608 9th Street, NW. WASH. POST, Dec. 12, 1909, at T3 (advertisement for the Virginia Theater).

¹⁴⁴ *Panic and Panics*, ALL THE YEAR ROUND, Nov. 30, 1878, at 512.

¹⁴⁵ *Id.* at 513–15.

¹⁴⁶ See, e.g., *infra* notes 147–49 and accompanying text.

¹⁴⁷ *Around the World*, S.F. CHRON., Nov. 2, 1884, at 8.

¹⁴⁸ *A Fiendish Joke: The Cry of Fire in a London Theater Causes Panic and Terrible Scenes*, DAILY INTER OCEAN, Jan. 19, 1887, at 1.

¹⁴⁹ *Id.*

of “fire” in theaters were a problem similar to that of school shootings in our own day. Justice Holmes, an Anglophile who loved the theater, was almost certainly aware of the scope of the problem, and Edwin Wertz likely was as well.

Indeed, so widespread was the problem of false shouts of “fire” in the theater that the false shouter, typically described as a “fool” or an “idiot,” had become a recognized stock villain of late nineteenth and early twentieth century popular discourse.¹⁵⁰

The earliest parallel I have found is from 1723.¹⁵¹ Daniel Defoe argued:

If it is Criminal to cry Fire in the City, when there is no Fire, because of the Hurry and Fright it puts the Neighbourhood into; if it be Criminal in the Camp for a Centinel upon Duty to fire his Musket when he is not Attacked, or sees no Enemy; what do these Men deserve, who give a false Alarm to a whole Nation, and for every Fever, or Sickly Season, which may happen Abroad, cry Fire?¹⁵²

Defoe’s nineteenth-century biographer, William Minto, seems to have drawn on this image, arguing:

It is possible, however, that [the royal judges] deemed the mere titles of [Defoe’s] pamphlets offences in themselves, disturbing cries raised while the people were not yet clear of the forest of anarchy, and still subject to dangerous panics—offences of the same nature as if a man should shout fire in sport in a crowded theatre.¹⁵³

By 1873, the problem of false shouts of “fire” in theaters was widely recognized.¹⁵⁴ The New York literary magazine *Appleton’s Journal* wrote:

There is a fellow who should be made to run the gantlet [sic] of the press. He should be scathed in Maine, trolloped in Massachusetts, denounced in Connecticut, whipped in New York, pilloried in Philadelphia, and made to undergo everywhere else whatever punishment the ingenuity of man can devise. This fellow is of several *aliases*, but he is known to everybody as the

¹⁵⁰ See, e.g., *infra* notes 151–59 and accompanying text.

¹⁵¹ Daniel Defoe, *On the Pleasure of Writing Dismal Stories, Exciting Surprise and Horror*, in 3 WILLIAM LEE, DANIEL DEFOE: HIS LIFE, AND RECENTLY DISCOVERED WRITINGS 209 (London, 1869) (1723).

¹⁵² *Id.*

¹⁵³ WILLIAM MINTO, DANIEL DEFOE 107 (1879).

¹⁵⁴ See APPLETON’S J., Mar. 22, 1873, at 410.

man who suddenly shouts “Fire!” in theatres and other crowded places, to the consternation of the audience. He did it last Sunday night, says the *Arcadian*, at the Academy of Music, during a sermon by Mr. Talmage, and of course there was the usual terrible panic. He has appeared twice at Niblo’s during the performance of “Leo and Lotos.” He is pretty sure to be present on every occasion when the assembly is large, the difficulty of exit great, and the people in a condition to be easily alarmed. We earnestly hope he will be caught in the act ere long, and suffer summary justice at the nearest lamp-post.¹⁵⁵

A newspaper noted in 1884 that “the fellow who attempts to create a cholera-scare is a brother to the idiot who shouts ‘Fire!’ in a crowded theatre.”¹⁵⁶ That same year, a medical journal argued that the “fool or knave [who] cries ‘Fire’ in a public assembly” was worse than a murderer and that “[h]anging is too good for such a criminal.”¹⁵⁷ Another medical journal in 1888 referred to someone yelling “in about the same voice that the escaped idiot yells ‘Fire!’ at the theatre.”¹⁵⁸ An 1889 column assumed the shouter was widely recognizable:

A man with a big appreciation for humor (probably first cousin to the fellow who shouts “Fire!” in a crowded theatre) took down the calendar in a large commercial office and hung up in its place one which was two years old. Important papers were dated from this old calendar and the result was a loss of \$30,000.¹⁵⁹

Falsely shouting “fire” in a theater soon made its way into the plot devices of fiction. In an 1882 short story, “Fire! Fire!,” a man decides to take revenge on the manager of a theater by falsely shouting “fire” during a performance.¹⁶⁰ The ensuing panic results in the death of a small child.¹⁶¹ When the shouter returns home, he discovers that the victim is his own daughter, who had begged to be taken to the theater that morning.¹⁶² It is not entirely improbable that Justice Holmes himself may have read this story, as it was published in Boston by George M. Baker, in a series that

¹⁵⁵ *Id.*

¹⁵⁶ Edgar L. Wakeman, Editorial, *THE CURRENT*, Aug. 2, 1884, at 66 (quoting the *Chicago Evening Mail*).

¹⁵⁷ *Panics in Public Assemblies*, 51 *MED. & SURGICAL REP.* 666 (1884).

¹⁵⁸ *How to Deal with Croup*, *SANITARY ERA*, Jan. 15, 1888, at 147.

¹⁵⁹ *The Trade Lounger, Roundabouts*, *AM. STATIONER*, Mar. 7, 1889, at 584.

¹⁶⁰ Meriem, *Fire! Fire!*, in 12 *READING CLUB & HANDY SPEAKER* 80–83 (George M. Baker ed., 1882).

¹⁶¹ *Id.* at 82–83.

¹⁶² *Id.*

included works by Justice Holmes's father, Oliver Wendell Holmes, Sr.¹⁶³ An 1884 parody claimed that the Republican National Convention had been disrupted when "some one [sic] in the gallery yelled fire, and every one in the building made a rush for the doors Hundreds of spectators were injured, and one Hayes delegate was killed."¹⁶⁴ In a 1911 school textbook, students were instructed to "[w]rite a story in accordance with one of the suggestions given below Some one [sic] shouts 'Fire!' in a theater packed to the doors. The manager tries to reassure the audience, but a panic seems imminent."¹⁶⁵

The false shout of "fire" in a theater was an equally well-known problem in England. The humor magazine *Punch* offered this "Advice to Playgoers" in 1881:

When the footlights flare above the glasses, or there is the slightest smell of burning paper or linen, stand up in the body of the house and shout "Fire!" as loudly as possible. Having created a panic, and being directed to outlets that are not altogether familiar to you—some of them labelled "Exit to be used in case of fire"—insist upon going out by the entrance or entrances you always come in at, and insist upon going out in the most disorderly manner. Knock over as many seats as you can find unfixed, upset people who are smaller and weaker than yourself, and do not hesitate for a moment to trample on them if they are foolish enough to lie on the floor.¹⁶⁶

A year later, a short story appeared in which police fabricate a charge against three Oxford undergraduates, alleging that they had

rushed into the room where an entertainment was being given, and shouted "Fire" at the top of [their] voices, and continued to shout "Fire" until there was a complete panic, which caused several ladies to be crushed almost to death, and the whole of the audience struggled out of the place in a state of alarm and demanded their money back.¹⁶⁷

¹⁶³ Oliver Wendell Holmes, *The Ballad of the Oysterman*, in 3 READING CLUB & HANDY SPEAKER 45–46 (George M. Baker ed., 1876).

¹⁶⁴ *By Cheap Cab Special to Life*, LIFE, June 12, 1884, at 333.

¹⁶⁵ CHARLES MAURICE STEBBINS, A PROGRESSIVE COURSE IN ENGLISH FOR SECONDARY SCHOOLS 269 (1911); see also HOLMAN DAY, BLOW THE MAN DOWN: A ROMANCE OF THE COAST 254 (1916) ("Like the fool who shouts 'Fire' in a throng, this brainless individual revived all the fears of the frenzied passengers.").

¹⁶⁶ *Advice to Playgoers*, PUNCH, Apr. 9, 1881, at 158.

¹⁶⁷ William Frederick Traill, *The Unjust Proctor*, in TALES OF MODERN OXFORD 44, 51 (1882).

Another British magazine queried, “Which is the safest theatre? timid people may ask, and, according to the managers, every theatre is as safe as the rest—only more so. But when the inevitable idiot jumps up and shouts ‘Fire!’ and the other idiots begin rushing the wrong way, where are you?”¹⁶⁸ A British naval historian noted, “Some miserable idiot in a theatre cries ‘Fire!’ and the whole house becomes a body of lunatics, men trampling women under foot, and tearing each other to pieces to escape from a safe building.”¹⁶⁹

The false shouter in the theater was an obvious analogy for persons who started financial panics.¹⁷⁰ An 1893 article complaining about the “intemperate talk of the silver inflationists” warned:

The man who yells “fire” in a crowded hall may be an extremely insignificant person, yet he is likely to cause a great deal of fright and perhaps destruction. If it turns out that there was no fire, that it was a false alarm, the injury inflicted is the same, and what shall be said of the miscreant or idiot who originated the scare?¹⁷¹

A 1905 letter in the *American Economist* argued, “Free-Traders advocating a revision [of the tariff] are like the schoolboy who for fun cries ‘Fire’ from the lobby of a theatre, not realizing until it is too late that he will be trampled on in the panic which his thoughtlessness creates.”¹⁷² As Congressman George Gorman of Illinois asserted in 1913:

The man who cries panic when there is no panic occupies the same relative position in, and performs the same relative service to, society as the man who did not know the gun was loaded or who rocks the boat, or the man who cries fire in a crowded play-house when, in fact, there is no fire.¹⁷³

A 1916 article, warning against financial pessimism, claimed, “He who shouts ‘fire’ in a theatre may create a panic when there is no danger. The wise and courageous man will keep the band playing, the people calm and try to put the fire out.”¹⁷⁴

¹⁶⁸ *The Only Jones*, JUDY, OR THE LONDON SERIO-COMIC J., Nov. 9, 1887, at 220.

¹⁶⁹ WALTER JEFFERY, *A CENTURY OF OUR SEA STORY* 193 (1900).

¹⁷⁰ See, e.g., *infra* notes 171–74 and accompanying text.

¹⁷¹ *Minority Rule Imperiling Great Interests*, SHOE & LEATHER REP., Aug. 17, 1893, at 373.

¹⁷² William Barbour, Letter to the Editor, *A Tariff Bill Would Be Disastrous*, AM. ECON., Mar. 17, 1905, at 128.

¹⁷³ 51 CONG. REC. app. 54 (1914) (statement of Rep. Gorman).

¹⁷⁴ Theo. H. Price, *An Unnecessary Prophecy of Pessimism*, COM. & FIN., Jan. 12, 1916, at 39.

Moral reformers put a new twist on the theater shouter in 1912 by imagining the culprit as a female.¹⁷⁵ In a stern warning against unsuitable juvenile literature, the *Bulletin of the New Hampshire Public Libraries* asked, “Would you have your young people associate with a girl who would deliberately try to maim a companion by running into her while coasting; or a girl who would yell fire in a theatre to stampede the audience . . . ?”¹⁷⁶

The stupidity of the shouter was a recurrent theme.¹⁷⁷ A 1902 letter to *Harper’s* magazine asked:

Did he ever attend a theatre or hall full of people, and have a fire-apparatus drive past the door, and some man fool in the house shout “fire,” and immediately the audience make one rush for the door? No; the horse is not alone in being part maniac and part idiot.¹⁷⁸

Another writer complained, “In a crowded theater the fool, who cries ‘fire’ can raise more commotion in a minute than a hundred actors on the stage can subdue.”¹⁷⁹ Still another warned of the “kind of a lunatic who cries ‘fire!’ in a crowded auditorium when he smells a little smoke.”¹⁸⁰ An actress explained that “among the necessary acquirements for the actress is an unshakable self-control She must not scream when the perennial gallery-idiot yells, ‘Fire!’”¹⁸¹ An architect warned about the condition of a Minneapolis theater, noting, “Its top gallery is such that any time a fool cries fire, a most horrible disaster may be expected, aside from the ever present danger of conflagration.”¹⁸² The *Los Angeles Times* opined in 1907, under the headline “Lost Opportunity”:

It is a pity that the man who yelled “fire” at the Orpheum Monday night is not known. He ought to be advertised throughout the city and exhibited as the brainless wonder. If he and the men who started the panic in the balcony could have been put in the ring at Naud Junction last night and beaten up, there would have been some satisfaction in going to a prize fight.¹⁸³

¹⁷⁵ *The Indictment Against Harmful Juveniles*, BULL. OF THE N.H. PUB. LIBR., Dec. 1912, at 136–37.

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *infra* notes 178–81 and accompanying text.

¹⁷⁸ Walter R. Swank, *A Defence of the Horse*, HARPER’S WKLY., Aug. 30, 1902, at 1197.

¹⁷⁹ *The Faddist of Fads*, AM. SCH. BD. J., June 1901, at 9.

¹⁸⁰ *Stray Shots from Solomon*, CAN. SHOE & LEATHER J., Jan. 1901, at 517.

¹⁸¹ Clara Morris, *How the Actor Saves the Play*, SCRAP BOOK, Aug. 1908, at 263.

¹⁸² Robert Craik McLean, *A Warning in Regard to Minneapolis Chief Play House*, 15 W. ARCHITECT 25, 27 (1910).

¹⁸³ *Lost Opportunity*, L.A. TIMES, Oct. 16, 1907, at II4.

Other Americans pointed to audience training as the solution to needless panics.¹⁸⁴ A 1914 letter to the trade magazine *Motion Picture* argued:

In view of the many casualties in Motion Picture theaters, due to the panic caused by some fiend shouting, “Fire!” would it not be a good idea to continually show the following on the screen in large letters: IF SOME FIEND SHOUTS “FIRE” PLEASE DO NOT START A PANIC, KEEP COOL; EACH PANIC MEANS DEATH! or words to that effect, and thereby we could possibly teach the public to disregard the demon call to their own destruction. The idea would be install a disregard for the cry of fire similar to the effect now shown by our school-children when the fire-alarm is sounded in their schoolrooms; they simply get up and get out in an orderly fashion.¹⁸⁵

Another writer pointed out that “[t]he ‘natural’ and human thing to do when someone cries ‘fire’ in a crowded theatre is for the whole audience to rise and rush. And unless they have learned previously through a certain intellectual discipline to restrain their natural impulses they will destroy themselves.”¹⁸⁶

Municipalities responded with provisions criminalizing false shouts of “fire.”¹⁸⁷ As early as 1823, the city of Cincinnati enacted “An Ordinance to Prevent False Alarms of Fire.”¹⁸⁸ The 1917 Indianapolis Municipal Code made it a crime to “[c]ry out a false alarm of ‘fire’ in any church, public hall, theater, moving picture showroom, or any other building of a similar or different character, while the same is occupied by a public assemblage.”¹⁸⁹ A 1913 commentator noted, “The cry of ‘fire’ in a public assembly creates a panic. No word in the American language is more menacing, more stirring, more alarming to human consciousness. For a person to shout ‘fire’ in a crowd, when there is no fire, is a misdemeanor severely punishable by law.”¹⁹⁰

The theater shouter also appeared in legal proceedings.¹⁹¹ In 1894 a Missouri appellate court rhetorically asked:

¹⁸⁴ See MASS. PLOUGHMAN, Mar. 26, 1904, at 4.

¹⁸⁵ B. Von Suskil, Letter, *Keep Cool: Each Panic Means Death*, MOTION PICTURE MAG., Feb. 1914, at 168; see also MASS. PLOUGHMAN, *supra* note 184, at 4 (“A man in a Salem audience the other day has apparently established an antidote for the fellow who yells ‘fire.’ Slapping a neighbor’s face may not be altogether dignified, but it evidently has value in changing the current of your neighbor’s thoughts at the moment when he is about to precipitate a panic.”).

¹⁸⁶ NORMAN ANGELL, THE POLITICAL CONDITIONS OF ALLIED SUCCESS 307 (1918).

¹⁸⁷ See *infra* notes 188–89.

¹⁸⁸ Cincinnati, Ohio, Ordinance to Prevent False Alarms of Fire (Sept. 10, 1823).

¹⁸⁹ INDIANAPOLIS, IND., MUNICIPAL CODE § 702(8) (1917).

¹⁹⁰ M. C. Huggett, *Fire Prevention and the Individual*, 2 GRAND RAPIDS PROGRESS 203, 204 (1913).

¹⁹¹ See *Ephland v. Mo. Pac. Ry. Co.*, 57 Mo. App. 147, 165 (1894).

If the servant in charge and control of a crowded theater, in the presence and hearing of an audience, negligently, falsely and loudly cries, “fire, run for your lives,” would not the proprietor be liable for the damage resulting from the conduct consequent upon the terror which this might excite, whether he addressed his fellow servants or the audience?¹⁹²

In a 1915 labor arbitration, Warren S. Stone, the prominent head of a railroad workers’ union, argued:

Gentlemen, there will always be three jobs waiting for the fool killer: one is the fool who rocks the boat; one is the fool who cries “fire” in a crowded theatre; and greatest of all, is the fool who turns a switch light red in the face of a fast passenger train.¹⁹³

Curiously, Stone was from Cleveland, Ohio, where Edwin Wertz practiced law and where Eugene Debs would be prosecuted three years later.¹⁹⁴

There were even early attempts to link the theater shouter to the problem of radical speech.¹⁹⁵ In 1908, the *Wall Street Journal*, anticipating the Supreme Court’s subsequent fascination with fire metaphors, opined:

But if there should be a political conflagration it will come from a sensational, exaggerated, passionate, anarchical use of words. Many a great forest fire has been started by the carelessness of campers. A theatre panic has had its origins in some fool shouting “fire.” Chicago was destroyed by a cow kicking over a lamp. Revolution might be inaugurated by some coward using words addressed to the evil passions of the mob.¹⁹⁶

¹⁹² *Id.* Holmes, who was “deeply interested” in the “liability of an employer for the negligence of his employees,” may have been aware of this case. HEALY, *supra* note 45, at 269.

¹⁹³ *Closing Argument of Warren S. Stone on Behalf of the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen*, in 9 PROCEEDINGS: ARBITRATION BETWEEN THE WESTERN RAILROADS AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN UNDER THE ACT APPROVED JULY 15, 1913, BY AGREEMENT DATED AUGUST 3, 1914, at 7776 (1915).

¹⁹⁴ *Engel v. Pottsville Div. No. 90, Bhd. of Locomotive Eng’rs*, 46 Pa. C. 171, 172 (1917).

¹⁹⁵ *See The Use of Language*, WALL ST. J., Aug. 15, 1908, at 1.

¹⁹⁶ *Id.* Similar language persisted after *Schenck*. *See, e.g., The American Workman vs. The Bolshevik*, THE BULLETIN, July 1919, at 3 (“The man who throws a bomb these days, who denounces our mode of government, who waves the red flag instead of the Stars and Stripes, who tries to stir up class hatred, who prods capital on one hand and labor on the other, who says to each that they have nothing in common, who urges both to take advantage of the readjustment period and ‘grab while the grabbing is good,’ such a man is full brother to a fool

By the time Justice Holmes turned his pen to the *Schenck* opinion in 1919, the theater shouter had become a well-established villain of popular culture. Far from spinning a creative hypothetical, Holmes drew on one of the tritest examples imaginable. The person who falsely shouted “fire” in a theater was widely condemned for his stupid, dangerous speech. For Holmes’s readers, the analogy may well have functioned as simple shorthand for all stupid, harmful speech.

This survey of popular culture also answers the question of how Holmes’s theater became crowded. It is not from misquoting;¹⁹⁷ the theater was always crowded. By 1919, “shouting ‘fire’ in a crowded theater” was, if not exactly a cliché, at least a well-worn formulation that permeated public discourse across a wide variety of subjects. Edwin Wertz, in the *Debs* trial, followed conventional semantics by referring to a “crowded auditorium, or any theatre.”¹⁹⁸ Although Justice Holmes removed the crowd from the *Schenck* opinion, he was not able to remove it from popular consciousness and standard linguistic convention. The phrase “shouting ‘fire’ in a crowded theater” long predated *Schenck* and continued to be used long after *Schenck* was decided.¹⁹⁹ This persistence may have something to do with its metrical qualities; “shouting ‘fire’ in a crowded theater” has a natural rhythm that “falsely shouting ‘fire’ in a theater and causing a panic” lacks.²⁰⁰

One of the first courts to employ the analogy after *Schenck* understood exactly what was at stake. In 1922, the Oregon Supreme Court held:

who rocks the boat, the knave who yells ‘fire’ in a theatre, the slabsided ‘maverick’ that piles the herd up at the bottom of a pit. American labor will be the first to single that man out and demand that he be expelled from the country.”)

¹⁹⁷ See, e.g., William Safire, *On Language: Dominoes’ Return*, N.Y. TIMES (Mar. 5, 1995), <http://www.nytimes.com/1995/03/05/magazine/on-language-dominoes-return.html> (condemning “shouting fire in a crowded theater” as a misquote of Holmes); Elio Gaspari, Letter to the Editor, *To Shout Fire in a Crowded Theater*, N.Y. TIMES, Mar. 20, 1979, at A18 (condemning the omission of “falsely” and stating “[i]t is fortunate that the First Amendment protects those who omit key words from judicial aphorisms, causing panic in crowded constitutional questions.”).

¹⁹⁸ See HEALY, *supra* note 45.

¹⁹⁹ *Schenck* appears to have made little difference in popular usages of the phrase. See, e.g., IRENE CASTLE, *MY HUSBAND* 51 (1919) (“Paris was like a crowded theatre in which someone had shouted ‘fire.’ People seemed to have lost all judgment and sense of balance.”); H. C. WITWER, *A SMILE A MINUTE* 276 (1919) (“Alongside of the boob which buys a second-hand auto, Joe, the idiotic simp which rocks the boat, the pinhead that yells ‘Fire!’ in the theatre, and the hick that thinks they’s a fortune in bettin’ on the races, is shrewd, wise guys.”); *Community Co-operation Needed to Solve After-War Problems*, AM. LUMBERMAN, Aug. 16, 1919, at 47 (“The person who in times of scarcity and high prices buys beyond his needs, who predicts further advances at the same time that he adds to the demand that will bring such advances about, is like him who in a crowded room shouts, ‘Fire!’ and produces a panic.”); *A “Sailor’s Snug Harbor” for Retired Admirals!*, HERALD OF GOSPEL LIBERTY, Sept. 17, 1925, at 910 (“For many of Admiral Fiske’s utterances are too much like such occupations as investigating gasoline tanks with lighted matches, yelling ‘Fire!’ in crowded theaters, and rocking boats filled with women and children.”).

²⁰⁰ I am indebted to Aaron Caplan for this point.

No man can enter a crowded theater, falsely shout fire, and thus cause a panic resulting in the crushing, maiming, and killing of enfeebled men, helpless women, and innocent children, and then justify his conduct by brazenly proclaiming that he did no more than to exercise his constitutional right of free speech.²⁰¹

The hypothetical was unmistakably real and so were the dead men, women, and children.

II. THE ANALOGY IN THE COURTS

Once Justice Holmes introduced the theater analogy into the *United States Reports*, it took on a life of its own. As a pithy explanation of the limits of constitutional rights, it was irresistibly attractive to judges, even if they didn't always quote it precisely. This Part examines the judicial treatment of the analogy, first in the United States Supreme Court and then in American courts more generally.

A. In the Supreme Court

The theater analogy lay dormant at the Supreme Court for over twenty years until Justice Felix Frankfurter invoked it in his 1941 dissenting opinion in *Bridges v. California*.²⁰² Frankfurter wrote, "One cannot yell 'Fire' in a crowded theater."²⁰³ Although Frankfurter revered Justice Holmes, this paraphrase typified the casual judicial treatment of *Schenck*; the critical element of falsity had disappeared, as had the resulting panic, and the theater had been made crowded. Four years later, in *Thomas v. Collins*,²⁰⁴ a majority of the Court, citing to *Schenck*, employed the paraphrase for the first time: "We have here nothing comparable to the case where use of the word 'fire' in a crowded theater creates a clear and present danger which the State may undertake to avoid or against which it may protect."²⁰⁵ With this decision, the Court brought the more traditional and colloquial form of the theater analogy into legal respectability.

In fairness to Justice Frankfurter and the Court, it is worth noting that even Justice Holmes didn't always use his own analogy precisely.²⁰⁶ A few weeks after the opinion in *Schenck* was announced, Holmes referred to it in a letter:

²⁰¹ State v. Laundry, 204 P. 958, 965 (Or. 1922).

²⁰² 314 U.S. 252, 296 (1941) (Frankfurter, J., dissenting).

²⁰³ *Id.*

²⁰⁴ 323 U.S. 516 (1945).

²⁰⁵ *Id.* at 536.

²⁰⁶ See Letter from Oliver Wendell Holmes to Alice Stopford Green, Mar. 26, 1919, <http://ids.lib.harvard.edu/ids/view/43005715> [<http://perma.cc/HJ3R-XJZL>] [hereinafter *Letter from Holmes*]; see also HEALY, *supra* note 45, at 110 (discussing similar letters from Holmes to other correspondents).

Of course there was a lot of talk about free speech, in favor of which I should go as far as anyone, but, as I said, the powers of the Constitution certainly never supposed that the provision for it gave a man immunity for counselling a murder or falsely crying fire in a theatre.²⁰⁷

In this paraphrase, “crying” has replaced “shouting,” and “causing a panic” has disappeared entirely.

In subsequent cases, the analogy played only a minimal role in Supreme Court majority and plurality opinions. Other than the paraphrase in *Thomas*, the theater analogy has been quoted directly in only two majority opinions²⁰⁸ and two plurality opinions.²⁰⁹ It went unmentioned in *United States v. Alvarez*,²¹⁰ addressing the constitutionality of criminalizing false statements about receiving the Medal of Honor.²¹¹ The Ninth Circuit had discussed the theater analogy extensively, since it was the classic example of a false statement of fact unprotected by the First Amendment.²¹² But none of the Justices thought it merited discussion.²¹³

The analogy has nonetheless flourished in separate opinions, mostly dissents.²¹⁴ For example, Justice Stephen Breyer invoked the analogy to justify restrictions on sales of video games in his dissent in *Brown v. Entertainment Merchants*.²¹⁵ In his dissent in *New York Times Co. v. United States*,²¹⁶ Chief Justice Warren Burger used the analogy, albeit with the opposite of Holmesian concision: “Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout ‘fire’ in a crowded theater if there was no fire.”²¹⁷

Justice William O. Douglas discussed the analogy more than any other Justice, perhaps because it presented such a challenge to his generally absolutist view of the

²⁰⁷ *Letter from Holmes, supra* note 206.

²⁰⁸ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Cox v. Louisiana*, 379 U.S. 559, 563 (1965).

²⁰⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) (plurality opinion) (Stevens, J.); *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949) (plurality opinion) (Reed, J.).

²¹⁰ 132 S. Ct. 2537 (2012).

²¹¹ *See id.*

²¹² *United States v. Alvarez*, 617 F.3d 1198, 1214 (9th Cir. 2010).

²¹³ *See Alvarez*, 132 S. Ct. 2537.

²¹⁴ *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 399 (1992) (White, J., concurring); *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting); *Smith v. United States*, 431 U.S. 291, 318 n.16 (1977) (Stevens, J., dissenting); *Kunz v. New York*, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting).

²¹⁵ 131 S. Ct. 2729, 2763 (2011) (Breyer, J., dissenting).

²¹⁶ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

²¹⁷ *Id.* at 749 (Burger, C.J., dissenting).

First Amendment. In his dissenting opinion in *Beauharnais v. Illinois*,²¹⁸ Douglas conceded “that even without the element of conspiracy there might be times and occasions when the legislative or executive branch might call a halt to inflammatory talk, such as the shouting of ‘fire’ in a school or theatre.”²¹⁹ Such restrictions were permissible if the perils of speech were “clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.”²²⁰ In his concurring opinion in *Brandenburg v. Ohio*,²²¹ he argued, “The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action.”²²² Similarly, in his dissenting opinion in *Miller v. California*,²²³ Douglas argued, “Whenever speech and conduct are brigaded—as they are when one shouts ‘Fire’ in a crowded theater—speech can be outlawed.”²²⁴ Finally, in his dissenting opinion in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*,²²⁵ he wrote, “There comes a time, of course, when speech and action are so closely brigaded that they are really one. Falsely shouting ‘fire’ in a theater, the example given by Mr. Justice Holmes . . . is one example.”²²⁶

Taken literally, Douglas’s arguments in *Brandenburg*, *Miller*, and *Pittsburgh Press* are almost nonsensical. A person who shouts “fire” in a theater is engaging in pure speech, not conduct; indeed, the pure speech aspect is what makes the analogy so powerful. And even if the shout was viewed as combining speech and conduct, it would still be subject to the *O’Brien* test and not simply analyzed as a form of conduct.²²⁷ What Douglas is suggesting with the unusual term “brigaded,” more likely, is what he more explicitly stated in *Beauharnais*: that the shout triggers immediate consequences (conduct by others) that cannot be countered by more speech.²²⁸ It is thus distinctly different from most other forms of speech.

Curiously, the most extensive discussion of the theater analogy in a Supreme Court majority opinion occurred in a Takings Clause case. In *Nollan v. California Coastal Commission*,²²⁹ the Court invalidated a condition that a homeowner grant a public easement in exchange for permission to remodel a house.²³⁰ Justice Scalia’s opinion for the Court argued:

²¹⁸ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

²¹⁹ *Id.* at 284–87 (Douglas, J., dissenting).

²²⁰ *Id.* at 284–85 (Douglas, J., dissenting).

²²¹ 395 U.S. 444 (1969).

²²² *Id.* at 456 (Douglas, J., concurring).

²²³ 413 U.S. 15 (1973).

²²⁴ *Id.* at 42 n.6 (Douglas, J., dissenting).

²²⁵ 413 U.S. 376 (1973).

²²⁶ *Id.* at 398 (Douglas, J., dissenting).

²²⁷ See *United States v. O’Brien*, 391 U.S. 367 (1968).

²²⁸ See 343 U.S. 250, 255–56 (1952).

²²⁹ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

²³⁰ *Id.* at 837.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State’s police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.²³¹

The analogy is a bit strained, and it is not entirely clear precisely why Justice Scalia thinks his hypothesized California theater law would violate the First Amendment. It is not explicitly based on content or viewpoint; instead, it simply allows one to purchase an exemption from an otherwise applicable law. If strict scrutiny is the governing standard (and it is not clear that it is), one could argue that the State’s willingness to sell exemptions so cheaply undermines the claim that the law serves a compelling state interest. But if the exemption were priced higher, say \$5 million, that argument would lose most of its force. The strongest argument against the hypothesized statute is probably not a First Amendment argument but a more generic constitutional argument against allowing individuals to purchase exemptions from regulations of any sort.²³² Even then, there’s still a problem of remedy—should a court merely strike the exemption or invalidate the entire statute? Suffice it to say with *Nollan*, Justice Scalia has managed to make an unruly analogy even more complicated.

B. In Courts in General

Although of limited use at the Supreme Court, the theater analogy has flourished in the lower courts.²³³ Few of these decisions extensively analyze the analogy, but most employ it in an analytically plausible manner. To give some greater precision to the analysis, I have assembled a database of published judicial opinions that invoke the theater analogy. Using Westlaw, my research assistants and I searched for all

²³¹ *Id.*

²³² See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 56 (2000) (“The sale of the right to violate a valid and important public safety regulation involves illegitimate governmental action which endangers third parties who were apparently not represented at the bargaining table (theatergoers who will be trampled as a result of the ensuing panic).”).

²³³ See *infra* notes 234, 238–42 and accompanying text.

opinions since *Schenck* involving some variant of “shouting fire,” “crying fire,” or “yelling fire.” The database is limited to cases involving free speech claims, and I also excluded opinions where the court was simply repeating arguments made by counsel or by a lower court in an unpublished opinion. If both a majority opinion and a concurring or dissenting opinion in a particular case invoked the analogy, each opinion was entered separately.

1. Summary Statistics

There are a total of 278 opinions.²³⁴ Seventy-one are from federal appellate courts, fifty-two from federal trial courts, one hundred forty-five from state appellate courts, and ten from state trial courts. The first uses were in 1919 and they continue to the present day. Usage by decade is shown in Table One.

Table One

Decade	Uses of the Analogy	Acceptance Rate of Free Speech Claims
1919	5	0.00%
1920–1929	4	0.00%
1930–1939	2	0.00%
1940–1949	22	27.27%
1950–1959	10	20.00%
1960–1969	31	22.58%
1970–1979	50	28.00%
1980–1989	42	19.05%
1990–1999	38	47.37%
2000–2009	53	32.07%
2010–	21	28.57%

There are fewer uses of the analogy in the earlier decades when there were simply fewer free speech claims being raised. The limited use is also reflected in casebooks. Several casebooks from the 1920s included the analogy,²³⁵ but many prominent casebooks of the 1930s through the 1950s did not.²³⁶ Lawyers who did not learn the

²³⁴ A federal district court used the analogy when issuing a temporary restraining order against *The Progressive*, but no formal opinion was published. Douglas E. Kneeland, *U.S. Judge Bars Use of an Article on the H-Bomb*, N.Y. TIMES, Mar. 10, 1979, at 1.

²³⁵ See, e.g., H. EDGAR BARNES & BYRON A. MILLER, SELECTED CASES IN CONSTITUTIONAL LAW 279 (7th ed. 1924); JAMES PARKER HALL, CASES ON CONSTITUTIONAL LAW 1478 (2d ed. 1926); JOSEPH RAGLAND LONG, CASES ON CONSTITUTIONAL LAW 298 (1926).

²³⁶ See, e.g., WALTER F. DODD, CASES AND MATERIALS ON CONSTITUTIONAL LAW (3d ed. 1941); WALTER F. DODD, CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW

analogy in law school may have been less inclined to argue it in court or to include it in drafts they prepared as law clerks. Since the 1960s, the analogy has been used consistently. If anything, its use is intensifying, with the 2000s showing the most uses and the 2010s well on track to match it. By now, every lawyer and judge probably read *Schenck* as part of his or her legal education, and it comes readily to mind when confronting First Amendment issues.²³⁷

Of the 215 opinions invoking the analogy issued by members of multi-member panels,²³⁸ 148 were majority opinions, 2 were plurality opinions, 19 were concurring opinions, 2 were concurring in part and dissenting in part, and 44 were dissents.

The opinions are approximately evenly split between those that cite and correctly state Holmes’s formulation in *Schenck* and those that do not. One hundred sixty-three of the two hundred seventy-eight opinions (58.63%) cite to *Schenck*. Slightly over one-third of opinions (103 or 37.05%) omit the term “falsely.” A slight majority (142 or 51.08%) refer to the theater as “crowded.” Similarly, a slight majority (146 or 52.52%) omit the phrase “causing a panic.”

2. Acceptance of Free Speech Claims

Not surprisingly, opinions invoking the theater analogy are not especially receptive to free speech claims. Nearly two-thirds of the opinions rejected the asserted free speech claim (184 or 66.19%). Seventy-eight (28.06%) accepted the claim, and seven (2.52%) read a statute narrowly to avoid First Amendment problems. Of the remaining nine opinions, five partially accepted and partially rejected free speech claims,²³⁹ two did not resolve the matter because qualified immunity was found,²⁴⁰ one denied summary judgment because of disputed material facts,²⁴¹ and one was a dissent from a denial of certiorari.²⁴²

The rejection rate is instructive, however, only in comparison to some baseline. If, for example, courts routinely reject 80% of free speech claims, opinions invoking the analogy would, in general, be more favorable to free speech claims than those

(1932); NOEL T. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1937); FRANK R. STRONG, *AMERICAN CONSTITUTIONAL LAW* (1950).

²³⁷ It is also possible that *Schenck* is typically taught in the first days of a First Amendment or Constitutional Law II class when students are alert and class attendance is high.

²³⁸ One case was heard by a three-judge district court. *Nat’l Mar. Union of Am. v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948).

²³⁹ *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Melton v. Young*, 328 F. Supp. 88 (E.D. Tenn. 1971); *United Elec., Radio & Mach. Workers of Am., CIO v. Baldwin*, 67 F. Supp. 235 (D. Conn. 1946); *Newman v. Delahunty*, 681 A.2d 671 (N.J. Sup. Ct. 1994).

²⁴⁰ *Gold v. Miami*, 121 F.3d 1442 (11th Cir. 1997); *Morris v. City of Orlando*, No. 6:10-cv-233-Orl-19GJK, 2010 WL 4646704 (M.D. Fla. Nov. 9, 2010).

²⁴¹ *Sallie v. Lynk*, No. 2:10CV456, 2012 WL 995245 (W.D. Pa. Mar. 23, 2012).

²⁴² *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., dissenting).

that do not. Ideally, one would know the overall success rate of free speech claims. Regrettably, no such comprehensive data appears to have been assembled, but there are some hints. Professor Adam Winkler analyzed free speech cases in federal courts between 1990 and 2003 and found that free speech claims were rejected in only 21% of the cases.²⁴³ This is quite different from the 66.19% for opinions invoking the theater analogy, suggesting (unsurprisingly) that opinions that employ the analogy are more likely to rule against free speech claims than opinions that do not.

As Table One indicates, opinions invoking the analogy have some variability by decade in terms of receptiveness to free speech claims. From 1919 to 1939, no opinion employing the analogy accepted a free speech claim. In the 1980s, however, nearly half (47.37%) of the opinions accepted the free speech claim. By the 2010s, however, the acceptance rate was down to 28.57%, close to historical norms.

Federal and state courts show little variance in their acceptance of free speech claims, with federal court opinions accepting 26.02% of free speech claims and state court opinions accepting 29.68%.

Trial court opinions and appellate court opinions, however, diverge more markedly. Trial court opinions accepted free speech claims in only 15.87% of the cases, compared to 31.63% of the appellate court opinions. This difference narrows somewhat if partial acceptances of free speech claims are included; 20.6% of trial court opinions either fully accept or partially accept free speech claims, and appellate court opinions either fully or partially accept 32.56% of the claims. Nonetheless, appellate opinions that invoke the analogy are generally more friendly to free speech claims than trial court opinions.

To a small but consistent degree, opinions that paraphrase Justice Holmes are more favorable to free speech claims than those that quote him precisely. Opinions that omitted “falsely” accepted 36.89% of free speech claims; opinions that included “falsely” accepted 22.85%. Opinions that added “crowded” accepted 31% of free speech claims; those that did not accepted 25%. Opinions that omitted “causing a panic” accepted 33.56% of free speech claims; opinions that included “causing a panic” accepted 22%.

This variation is counter-intuitive, at least in certain respects. The omission of “falsely” and “causing a panic,” which would leave more speech unprotected by the First Amendment, should lead to a higher rate of rejection of free speech claims. On the other hand, adding “crowded” reduces the amount of unprotected speech, at least slightly, and should lead to a lower rate of rejection.

²⁴³ Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 165 (2009). Ashutosh Bhagwat analyzed cases employing intermediate scrutiny in free speech cases in the United States Courts of Appeals from 1983 to 2005, and he found that free speech claims were rejected in 73% of cases. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 ILL. L. REV. 783, 809. This rate is higher than Winkler’s because Winkler’s also includes strict scrutiny cases.

The causes of this variation are not easy to determine. Although real, the magnitude is still relatively minor. My best guess is that opinions that bother to cite Holmes correctly view the theater analogy as an important part of the analysis. By contrast, opinions that employ the paraphrase may do so in a perfunctory manner, a nod to the obvious limits of free speech, but one that must merely be acknowledged before reaching more difficult issues.

CONCLUSION

The world in which false shouts of “fire” in a theater were a perennial problem has fortunately disappeared, leaving Justice Holmes’s analogy in *Schenck* as its most enduring legacy. The problem persisted, however, at least into the 1930s. In Schenectady, New York, in 1931, a fourteen-year-old falsely shouted “fire” from the balcony of a movie theater, resulting “in a panic which threatened for a time to assume dangerous proportions.”²⁴⁴ In 1933, six children were injured when someone falsely shouted “fire” in a Brooklyn movie theater.²⁴⁵ A year later, a group of Columbia undergraduates entered an Upper Broadway movie theater, falsely shouting “fire.”²⁴⁶ The resulting panic injured twenty people.²⁴⁷ As recently as 1975, fifteen people were injured in Mexico City when someone falsely shouted “fire” and the “audience fled for the exits in panic.”²⁴⁸

In *The Common Law*, Holmes argued for the critical role of experience in shaping the law:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories . . . even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.²⁴⁹

So, too, with the theater analogy, for which Holmes has probably received too much credit. It is not a timeless truth, a legal axiom from which logical propositions can then be deduced, but is itself a product of a specific historical and cultural context.

²⁴⁴ *Youth’s Shout of Fire Starts Theater Panic*, SCHENECTADY GAZETTE, Mar. 9, 1931, at 2.

²⁴⁵ *Shouts ‘Fire’ in Theater; 6 Hurt in Rush to Exit*, CHI. DAILY TRIB., June 19, 1933, at 8.

²⁴⁶ *New York Students Shout “Fire” in Theatre*, LEWISTON DAILY SUN, Jan. 9, 1934, at 6.

²⁴⁷ *Id.*

²⁴⁸ *Shout of Fire Hurts 15*, MILWAUKEE J., May 26, 1975, at 7.

²⁴⁹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

In *Schenck*, Holmes drew on a rich well of experience and intuition, widely shared with his fellow Americans. These Americans ranged from Edwin Wertz in Cleveland, who first used the analogy in a free speech context, to the mourning parents of Calumet, Michigan, attending the mass burials of their trampled children, to the thousands of theater patrons who needlessly raced for the exits in fear for their lives, and to the millions of other Americans who read terrifying accounts of false shouts of “fire” in newspapers, magazines, and books.

That world is gone, but the theater analogy persists. In its nearly hundred-year life, however, it has become abstract and remote, a cliché devoid of any relevance to contemporary Americans. This in itself may have constitutional significance. Our free speech doctrine has become increasingly libertarian, but our central analogy about the limits of free speech has largely lost its capacity to frighten.²⁵⁰ If we routinely analogized, not to a false shout of “fire” in a theater, but to, say, a mugger shouting, “Your money or your life,” free speech law might have developed differently. Although our trans-ideological and deep rooted commitment to free speech cannot be explained by the presence of one analogy, it is possible that in a handful of cases, an antiquated and un-frightening analogy gives greater play to free speech than the frightening one that Holmes originally employed.

As frequently noted, it is difficult to make predictions, especially about the future. Yet I suspect that one hundred years from now, constitutional law professors will still easily elicit the theater analogy when querying students about the limits of free speech. The scoundrel in the theater has been given a form of immortality. He will always be there, lurking in our collective consciences, waiting, as the curtain rises, for just the right moment to ruin a performance with a false shout of “Fire!”

²⁵⁰ I am indebted to Thomas Healy for this point.