

SHOUTING “FIRE!” Alan M. Dershowitz. *Atlantic Monthly* (January, 1989), pp. 72-74

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1 When the Reverend Jerry Falwell learned that the Supreme Court had reversed his \$200,000 judgment against *Hustler* magazine for the emotional distress that he had suffered from an outrageous parody, his response was typical of those who seek to censor speech: “Just as no person may scream ‘Fire!’ in a crowded theater when there is no fire, and find cover under the First Amendment, likewise, no sleazy merchant like Larry Flynt should be able to use the First Amendment as an excuse for maliciously and dishonestly attacking public figures, as he has so often done.”

2 Justice Oliver Wendell Holmes’s classic example of unprotected speech—falsely shouting “Fire!” in a crowded theater—has been invoked so often, by so many people, in such diverse contexts, that it has become part of our national folk language. It has even appeared—most appropriately—in the theater: in Tom Stoppard’s play *Rosencrantz and Guildenstern Are Dead* a character shouts at the audience, “Fire!” He then quickly explains: “It’s all right—I’m demonstrating the misuse of free speech.” Shouting “Fire!” in the theater may well be the only jurisprudential analogy that has assumed the status of a folk argument. A prominent historian recently characterized it as “the most brilliantly persuasive expression that ever came from Holmes’ pen.” But in spite of its hallowed position in both the jurisprudence of the First Amendment and the arsenal of political discourse, it is and was an inapt analogy, even in the context in which it was originally offered. It has lately become—despite, perhaps even because of, the frequency and promiscuousness of its invocation—little more than a caricature of logical argumentation.

3 The case that gave rise to the “Fire!”-in-a-crowded-theater analogy—*Schenck v. United States*—involved the prosecution of Charles Schenk, who was the general secretary of the Socialist Party in Philadelphia, and Elizabeth Baer, who was its recording secretary. In 1917 a jury found Schenk and Baer guilty of attempting to cause insubordination among soldiers who had been drafted to fight in the First World War. They and other party members had circulated leaflets urging draftees not to “submit to intimidation” by fighting in a war being conducted on behalf of “Wall Street’s chosen few.”

4 Schenk admitted, and the Court found, that the intent of the pamphlets’ “impassioned language” was to “influence” draftees to resist the draft. Interestingly, however, Justice Holmes noted that nothing in the pamphlet suggested that the draftees should use unlawful or violent means to oppose conscription: “In form at least [the pamphlet] confined itself to peaceful measures, such as a petition for the repeal of the act” and an exhortation to exercise “your right to

assert your opposition to the draft.” Many of its most impassioned words were quoted directly from the Constitution.

5 Justice Holmes acknowledged that “in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights.” “But,” he added, “the character of every act depends upon the circumstances in which it is done.” And to illustrate that truism he went on to say, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”

6 Justice Holmes then upheld the convictions in the context of a wartime draft, holding that the pamphlet created “a clear and present danger” of hindering the war effort while our soldiers were fighting for their lives and our liberty.

7 The example of shouting “Fire!” obviously bore little relationship to the facts of the Schenck case. The Schenck pamphlet contained a substantive political message. It urged its draftee readers to think about the message and then—if they so chose—to act on it in a lawful and nonviolent way. The man who shouts “Fire!” in a crowded theater is neither sending a political message nor inviting his listener to think about what he has said and decide what to do in a rational, calculated manner. On the contrary, the message is designed to force action without contemplation. The message “Fire!” is directed not to the mind and the conscience of the listener but, rather, to his adrenaline and his feet. It is a stimulus to immediate action, not thoughtful reflection. It is—as Justice Holmes recognized in his follow-up sentence—the functional equivalent of “uttering words that may have all the effect of force.”

8 Indeed, in that respect the shout of “Fire!” is not even speech, in any meaningful sense of that term. It is a clang sound—the equivalent of setting off a nonverbal alarm. Had Justice Holmes been more honest about his example, he would have said that freedom of speech does not protect a kid who pulls a fire alarm in the absence of a fire. But that obviously would have been irrelevant to the case at hand. The proposition that pulling an alarm is not protected speech certainly leads to the conclusion that shouting the word fire is also not protected. But the core analogy is the nonverbal alarm, and the derivative example is the verbal shout. By cleverly substituting the derivative shout for the core alarm, Holmes made it possible to analogize one set of words to another—as he could not have done if he had begun with the self-evident proposition that setting off an alarm bell is not free speech.

9 The analogy is thus not only inapt but also insulting. Most Americans do not respond to political rhetoric with the same kind of automatic acceptance expected of schoolchildren responding to a fire drill. Not a single recipient of the Schenck pamphlet is known to have changed his mind after reading it. Indeed, one draftee, who appeared as a prosecution witness, was asked whether reading a pamphlet asserting that the draft law was unjust would make him “immediately decide that you must erase that law.” Not surprisingly, he replied, “I do my own thinking.” A theatergoer would probably not respond similarly if asked how he would react to a shout of “Fire!”

10 Another important reason why the analogy is inapt is that Holmes emphasizes the factual falsity of the shout “Fire!” The Schenck pamphlet, however, was not factually false. It contained

political opinions and ideas about the causes of the war and about appropriate and lawful responses to the draft. As the Supreme Court recently reaffirmed (in *Falwell v. Hustler*), “The First Amendment recognizes no such thing as a ‘false’ idea.” Nor does it recognize false opinions about the causes of or cures for war.

11 A closer analogy to the facts of the *Schenck* case might have been provided by a person’s standing outside a theater, offering the patrons a leaflet advising them that in his opinion the theater was structurally unsafe, and urging them not to enter but to complain to the building inspectors. That analogy, however, would not have served Holmes’s argument for punishing *Schenck*. Holmes needed an analogy that would appear relevant to *Schenck*’s political speech but that would invite the conclusion that censorship was appropriate.

12 Unsurprisingly, a war-weary nation—in the throes of a know-nothing hysteria over immigrant anarchists and socialists—welcomed the comparison between what was regarded as a seditious political pamphlet and a malicious shout of “Fire!” Ironically, the “Fire!” analogy is nearly all that survives from the *Schenck* case; the ruling itself is almost certainly not good law. Pamphlets of the kind that resulted in *Schenck*’s imprisonment have been circulated with impunity during subsequent wars.

13 Over the past several years I have assembled a collection of instances—cases, speeches, arguments—in which proponents of censorship have maintained that the expression at issue is “just like” or “equivalent to” falsely shouting “Fire!” in a crowded theater and ought to be banned, “just as” shouting “Fire!” ought to be banned. The analogy is generally invoked, often with self-satisfaction, as an absolute argument-stopper. It does, after all, claim the high authority of the great Justice Oliver Wendell Holmes. I have rarely heard it invoked in a convincing, or even particularly relevant, way. But that, too, can claim lineage from the great Holmes.

14 Not unlike *Falwell*, with his silly comparison between shouting “Fire!” and publishing an offensive parody, courts and commentators have frequently invoked “Fire!” as an analogy to expression that is not an automatic stimulus to panic. A state supreme court held that “Holmes’ aphorism ... applies with equal force to pornography”—in particular to the exhibition of the movie *Carmen Baby* in a drive-in theater in close proximity to highways and homes. Another court analogized “picketing ... in support of a secondary boycott” to shouting “Fire!” because in both instances “speech and conduct are brigaded.” In the famous *Skokie* case one of the judges argued that allowing Nazis to march through a city where a large number of Holocaust survivors live “just might fall into the same category as one’s ‘right’ to cry fire in a crowded theater.”

15 Outside court the analogies become even more badly stretched. A spokesperson for the New Jersey Sports and Exposition Authority complained that newspaper reports to the effect that a large number of football players had contracted cancer after playing in the Meadowlands—a stadium atop a landfill—were the “journalistic equivalent of shouting fire in a crowded theater.” An insect researcher acknowledged that his prediction that a certain amusement park might become roach-infested “may be tantamount to shouting fire in a crowded theater.” The philosopher Sidney Hook, in a letter to the *New York Times* bemoaning a Supreme Court decision that required a plaintiff in a defamation action to prove that the offending statement was actually false, argued that the First

Amendment does not give the press carte blanche to accuse innocent persons “any more than the First Amendment protects the right of someone falsely to shout fire in a crowded theater.”

16 Some close analogies to shouting “Fire!” or setting off an alarm are, of course, available: calling in a false bomb threat; dialing 911 and falsely describing an emergency; making a loud, gunlike sound in the presence of the President; setting off a voice-activated sprinkler system by falsely shouting “Fire!” In one case in which the “Fire!” analogy was directly to the point, a creative defendant tried to get around it. The case involved a man who calmly advised an airline clerk that he was “only here to hijack the plane.” He was charged, in effect, with shouting “Fire!” in a crowded theater, and his rejected defense—as quoted by the court—was as follows: “If we built fireproof theaters and let people know about this, then the shouting of “Fire!” would not cause panic.”

17 Here are some more-distant but still related examples: the recent incident of the police slaying in which some members of an onlooking crowd urged a mentally ill vagrant who had taken an officer’s gun to shoot the officer; the screaming of racial epithets during a tense confrontation; shouting down a speaker and preventing him from continuing his speech.

18 Analogies are, by their nature, matters of degree. Some are closer to the core example than others. But any attempt to analogize political ideas in a pamphlet, ugly parody in a magazine, offensive movies in a theater, controversial newspaper articles, or any of the other expressions and actions catalogued above to the very different act of shouting “Fire!” in a crowded theater is either self-deceptive or self-serving.

19 The government does, of course, have some arguably legitimate bases for suppressing speech which bear no relationship to shouting “Fire!” It may ban the publication of nuclear-weapon codes, of information about troop movements, and of the identity of under-cover agents. It may criminalize extortion threats and conspiratorial agreements. These expressions may lead directly to serious harm, but the mechanisms of causation are very different from that at work when an alarm is sounded. One may also argue—less persuasively, in my view—against protecting certain forms of public obscenity and defamatory statements. Here, too, the mechanisms of causation are very different. None of these exceptions to the First Amendment’s exhortation that the government “shall make no law ... abridging the freedom of speech, or of the press” is anything like falsely shouting “Fire!” in a crowded theater; they all must be justified on other grounds.

20 A comedian once told his audience, during a stand-up routine, about the time he was standing around a fire with a crowd of people and got in trouble for yelling, “Theater, theater!” That, I think, is about as clever and productive a use as anyone has ever made of Holmes’s flawed analogy.