William & Mary Bill of Rights Journal

Volume 6 (1997-1998)
Issue 3

Article 4

May 1998

The Moral Failure of the Clear and Present Danger Test

David R. Dow

THE MORAL FAILURE OF THE CLEAR AND PRESENT DANGER TEST

David R. Dow*

The clear and present danger test has been used for almost a century to determine the speech the government may restrain. This test assumes that at some point speech transforms into an act and at that moment the speech becomes punishable. Under the clear and present danger test, the First Amendment does not protect speech that is an incitement to imminent lawless action.

Professor Dow suggests that the clear and present danger test protects too little speech. He posits that speech should be protected unless the following three conditions are met: (1) the speaker's specific intent in uttering the words was to cause an unlawful injury, (2) the injury in fact occurred as a proximate result of the speech, and (3) the speaker, through his or her speech, overwhelmed the will of the listener. Professor Dow's proposed test is based upon the belief that the listener has a will of his or her own and thus may choose whether to act on the words he or she heard. This test springs from the understanding that the Free Speech Clause recognizes that evil words do not always lead to evil acts. The proposed test would allow the punishment only of the most culpable speakers, those who overwhelm the will of the listener and in essence force the listener to act as the speaker desires.

* * *

> In the practice of the use of language . . . one party calls out the words, the other acts on them.[1]

A nineteen-year-old teenager speeding down a Texas highway south of Houston did not hear the pursuing highway patrolman's siren because the CD player in the stolen truck he was driving was blaring the rap lyrics of Tupac Shakur.[2] Eventually the teenager, a young man named Ronald

---

* Professor of Law, University of Houston Law Center. I have profited by comments on earlier drafts from Peter Linzer, Irene Rosenberg, and Suzanna Sherry. I thank Scott Shieldes for superb research assistance, and Harriet Richman and her staff for the same. This work was supported by a grant from the University of Houston Law Foundation, for which I am grateful.

[1] Ludwig Wittgenstein, Philosophical Investigations ¶ 7, at 5e (G.E.M. Anscombe trans., 3d ed., Basil Blackwell 1968) (1953).

[2] The late Shakur produced so-called gangster rap music. The song the teenager

Howard, noticed the patrolman's flashing lights in his rearview mirror, so he pulled to the side of the road. As Officer Bill Davidson walked up to Howard's window, the teenager pointed his semiautomatic handgun and fired. Trooper Davidson died on the side of the highway. The State of Texas prosecuted Howard for capital murder. At his trial, Howard raised a defense of diminished capacity, arguing, in essence, that the violent Shakur lyrics were in part responsible for causing him to act as he did and that the jury should therefore mitigate his punishment accordingly. The jury sentenced Howard to death.[3]

Howard's defense—his claim that the music made him do it—offends modern notions of free will and responsibility, and the jury sensibly rejected it. At the same time, this defense illuminates the central defect of the clear and present danger test. This test, which is central to interpreting the Free Speech Clause of the First Amendment, rests on the morally unacceptable proposition that words alone can overcome human will. The test ignores the morally salient distinction between speech and action, between saying and doing. Consequently, the same sentiment that moved jurors to reject Howard's mitigation defense should compel constitutional theorists to jettison the clear and present danger test.

1.0. INTRODUCTION

Without the freedom to speak, all our other freedoms are empty promises.[4] In the history of American law, many jurists have recognized that the First Amendment is our most precious freedom,[5] yet few have been willing

---

was listening to was "Crooked Ass Nigga." It includes the following lyrics: "Suddenly I see / some niggas that I don't like. / [Gunfire] / Got 'em." 2PAC, *Crooked Ass Nigga*, *on* 2PACALYPSE NOW (Interscope Records/Atlantic 1991).

[3] *See* Michelle Munn, *The Effects of Free Speech*, 21 AM. J. CRIM. L. 433, 476-79 (1994) (describing the trial of Ronald Howard). In addition to the criminal trial, Officer Davidson's family filed suit in a Texas district court seeking damages from Shakur, Atlantic Records, and Time Warner, Inc., claiming a causal connection between the music and Howard's actions. *See* Mike Quinlan & Jim Persels, *It's Not My Fault, The Devil Made Me Do It: Attempting To Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech*, 18 S. ILL. U. L.J. 417, 418-19 (1994).

[4] *See* Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting) ("I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom.").

[5] *See* Yates v. United States, 354 U.S. 298, 344 (1957) (Black, J., concurring in part and dissenting in part) ("The First Amendment provides the only kind of security system that can preserve a free government . . . ."); *Dennis*, 341 U.S. at 590 (Douglas, J., dissenting) (calling free speech "the glory of our system of government"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.) (remarking that "one may say that

to admit that the jurisprudential core of the current Free Speech Clause doctrine is an embarrassment because it is philosophically untenable.[6] The clear and present danger test (periodically referred to in this Essay as the "CPD test") has been used for three-quarters of a century, in one form or another, to determine which utterances the government legitimately may restrain. This test, however, is inimical to our core values. Although it is thought to be expansive, it in fact protects too little speech. I argue in this Essay that the CPD test ought to be abandoned and replaced with a nearly categorical prohibition against the impairment of speech. The Free Speech Clause should protect all speech unless three conditions are satisfied: (1) the speaker's specific intent in uttering the speech was to cause an unlawful injury, (2) the injury in fact occurred as a proximate result of the speech, and (3) the speaker, through his or her speech, overwhelmed (i.e., controlled) the will of the listener.

This test would permit the punishment of almost no speech whatsoever. It is superior to the CPD test primarily because it adheres to the distinction between speech and action, a distinction embraced by the First Amendment. The Free Speech Clause recognizes that evil words do not lead inexorably to evil acts, yet the clear and present danger test is oblivious to this crucial recognition. The CPD test, therefore, cannot coexist with the modern notions of individual responsibility that underlie our laws and our form of government. The same rationale that permits the CPD test to silence speech permits criminal defendants like Ronald Howard compellingly to attribute their murderous acts to someone else's speech. Its pedigree notwithstanding, the clear and present danger test is terribly flawed.

[the freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom"); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 9 (1996) ("Freedom of speech is one of the most remarkable aspects of American constitutional law.").

[6] *But see* Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court To Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883 (1996). Professor Freedman characterizes current free speech law as follows:

> Current free speech law resembles the Ptolemaic system of astronomy in its last days. Just as that theory grew increasingly incoherent in an attempt to incorporate new empirical observations that were inconsistent with its basic postulates, so is First Amendment doctrine disintegrating as cases reviewing restraints on speech strive to paper over the fact that analyses based on presuppositions as to the value of particular kinds of expression are inconsistent with the premises of the First Amendment itself.

Id. at 885.

2.0. THE CURRENT STATE OF THE CLEAR AND PRESENT DANGER TEST

Justice Holmes invented the clear and present danger test as a tool for determining which speech the government could punish. As originally formulated, it provided that:

> 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.[7]

To illustrate the kind of speech that would constitute a clear and present danger, Holmes created the well-known metaphor of someone's falsely shouting fire in a theatre, thereby causing a panic.[8] Although the theatre metaphor is the best-known illustration of Holmes's point, his opinion actually included a more interesting scenario.

Holmes assumed at the outset of his analysis that there comes a moment when speech becomes an act. At that moment, the act of speaking is punishable. To illustrate this moment, he cited *Gompers v. Bucks Stove & Range Co.*[9] In *Gompers*, a court enjoined the defendant, a labor union, from publishing certain derogatory statements about Bucks Stove & Range Company (including, for example, statements that the company had appeared on the American Federation of Labor's "Unfair" or "We don't patronize" lists).[10] The Supreme Court reversed the criminal contempt convictions,[11] but it also noted that an injunction may at times be warranted to prevent certain speech that, because of the prevailing circumstances, constitutes an act.[12] Justice Lamar, writing for the Court in *Gompers*, reasoned that the power of labor unions may become so vast as to render an individual helpless by forcing that individual either to submit to the will of the union or to seek an equitable remedy.[13] Consequently, when unions speak against an individual (for instance, by declaring that the individual is "unfair"), and the individual has no means of seeking peace but through submission or equita-

---

[7] Schenck v. United States, 249 U.S. 47, 52 (1919).

[8] *See id.*

[9] 221 U.S. 418 (1911).

[10] *See id.* at 436.

[11] *See id.* at 452.

[12] *See id.* at 439; *see also Schenck*, 249 U.S. at 52 (stating that under the authority of *Gompers*, the First Amendment "does not even protect a man from an injunction against uttering words that may have all the effect of force").

[13] *See Gompers*, 221 U.S. at 493.

ble remedy, then the force of the speech may be so great as to constitute a "verbal act."[14]

By relying on *Gompers*, Holmes accepted the proposition that *saying* can be tantamount to *doing*. In *Gompers*, however, the Court seemed to limit this proposition to cases in which speech truly overbears the listener's will. Holmes, however, accepted the proposition without this limitation. From the beginning, therefore, the clear and present danger test contained at its core twin defects: It treated some speech as action, and thereby allowed some actors to attribute the blame for their actions to someone else's speech.

The linguistic formulation of Holmes's test has changed from time to time, but no forthright assault has ever attacked the test's central premise that certain speech can become action. Even Judge Learned Hand, who is viewed as Holmes's partner in the development of the CPD test,[15] assumed when the Second Circuit decided the case of *United States v. Dennis*,[16] that it was obvious that the First Amendment did not protect the leader of a mob who gave the word "go" to a group of individuals already ripe to begin rioting.[17] Hand did not say why this was obvious; he simply assumed that the only difficult question arises when "persuasion and instigation [are] inseparably confused."[18]

Whereas Holmes embedded the idea that speech, at a certain moment, can become an act and thereby be punished as action, Hand attempted to isolate that moment. The transformation from speech to action occurs, in Hand's view, at the moment of "incitement" or "instigation."[19] Justice

---

[14] *See id.*

[15] Professor Gunther's recent magisterial biography of Learned Hand expresses a preference for Hand's version of the test. *See generally* GERALD GUNTHER, LEARNED HAND 156-60 (1994) (recalling Holmes's focus on a causal connection between speech and action). In contrast, Professor Bernard Schwartz has argued that Gunther exaggerated Hand's goodness and understated the virtues of Holmes's approach. *See* Bernard Schwartz, *Holmes versus Hand: Clear and Present Danger of Advocacy of Unlawful Action*, 1994 SUP. CT. REV. 209.

[16] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

[17] *See id.* at 207.

[18] *Id.* at 212. To deal with this problem of the "inseparable" confusion of persuasion and instigation, Hand introduced his own formulation of the clear and present danger test: "In each case," Judge Hand said, we "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* The test bears an obvious relationship to Hand's test in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). On the basis of Hand's formulation, the Second Circuit affirmed the convictions, and on review, the Supreme Court, in a plurality opinion written by Chief Justice Vinson, not only affirmed the Second Circuit's judgment but also adopted Judge Hand's formulation of the legal rule. *See* Dennis v. United States, 341 U.S. 494 (1951).

[19] *See Dennis*, 183 F.2d at 208.

Harlan, however, was not satisfied with this model. Writing in *Yates v. United States*, Harlan tried to cling to the dichotomy between speech and action.[20] In Harlan's view, *Dennis* concerned itself with a conspiracy to advocate *in the present* the future forcible overthrow of the government, rather than a conspiracy to advocate *in the future* the future forcible overthrow of the government.[21] In the former conspiracy, only *action* is suspended, whereas in the latter conspiracy, the *advocacy and the action* are suspended. The essential (and highly subtle) difference for Harlan lay between advocacy to *do* something and advocacy to *believe* in something.[22]

Whatever its merits, Harlan's attempt to establish a subtle difference between advocacy to *do* and advocacy to *believe* was short-lived. In *Brandenburg v. Ohio*,[23] the Court declared an Ohio criminal syndicalism statute unconstitutional, and in so doing established the modern incitement formulation of the clear and present danger test. Under this test, the First Amendment does not protect incitement to imminent lawless action.[24] In the language of the Court's per curiam opinion,

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*[25]

If decisions can have intentions, *Brandenburg*'s were surely good. It is equally clear, however, that *Brandenburg* perpetuated the clear and present danger test's central proposition that some speech can be treated, and thereby punished, as action.[26] This proposition, the core of the CPD test, is

---

[20] *See* 354 U.S. 298 (1957).

[21] *See id.* at 324.

[22] *See id.* at 324-25.

[23] 395 U.S. 444 (1969) (per curiam).

[24] The appellant in *Brandenburg*, the leader of a local Ohio Ku Klux Klan chapter, invited a television reporter to attend a Klan rally. A film of the rally taken by the reporter, which later aired on television, showed hooded figures setting fire to a cross and shouting slogans such as "Save America," "Send the Jews back to Israel," and "Bury the niggers." *Id.* at 446 n.1. The film also depicted a speech in which the appellant stated, "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken." *Id.* at 446.

[25] *Id.* at 447 (emphasis added).

[26] The Court has been unclear as to what exactly constitutes an imminent threat of harm. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam). In *Hess*, the Court reversed a disorderly conduct conviction. The defendant was arrested at a demonstration when he yelled out,

problematic for two reasons. The first reason is historical. The speech that is deemed to be action, and therefore subject to suppression and sanction under this test, is never really dangerous at all; the state simply believes it to be. Justice Douglas put it best in his dissent in *Dennis*:

> Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is.[27]

The second reason is philosophical. The consequence of collapsing the distinction between speech and action is to deny the potency of the human will, yet modern notions of moral and criminal responsibility, including those that underlie the Constitution itself, depend intimately on the power of the human will. The CPD test is at war with these notions. The following section focuses on this second defect.[28]

"We'll take the fucking street later," as the local police were clearing the streets of demonstrators. 414 U.S. at 107. The Court noted, "At best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id.* at 108. Similarly, in *Claiborne Hardware Co.*, the Court reasoned that when a few weeks separated potentially incendiary speeches from the violent reactions of the listeners, the speech did not present an actionable threat. *See* 458 U.S. at 928.

In fact, *Brandenburg* often has been used as a tool of dissent. *See* Kleindienst v. Mandel, 408 U.S. 753, 773 (1972) (Douglas, J., dissenting) (upholding the plenary power of the Attorney General to deny a waiver of a statutory exclusion of an alien—in this case a Belgian journalist and Marxist theoretician—who advocated or published Communist doctrine); *see also* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting) (asserting that the Court's departure from the CPD test is a means of prohibition); Branzburg v. Hayes, 408 U.S. 665, 716-17 (1972) (Douglas, J., dissenting) (stating that political ideologies as well as other forms of more traditional artistic expression are protected by the free speech doctrine); California v. LaRue, 409 U.S. 109, 131 (1972) (Marshall, J., dissenting) ("The only way to stop murders and drug abuse is to punish them directly."); Cole v. Richardson, 405 U.S. 676, 688-89 (1972) (Douglas, J., dissenting) (arguing that advocacy of "overthrow" or "basic fundamental changes in government" is protected by the First Amendment).

[27] Dennis v. United States, 341 U.S. 494, 588 (1951) (Douglas, J., dissenting).

[28] The argument that the test is rooted in unfounded fear of German militarism and Soviet Communism is addressed in David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. (forthcoming 1998).

3.0. THE MORAL FAILURE OF THE CLEAR AND PRESENT DANGER TEST

> We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.[29]

We should start with the words of the text: "Congress shall make no law . . . abridging the freedom of speech . . . ."[30] The clear and present danger test obviously does not adhere to this language. To the contrary, the test assumes that certain speech may be punished because that speech will undermine democracy. It is therefore akin to the argument that holds that the Constitution may be violated when the cost of adhering to it would be destruction of the Constitution itself, for the Constitution is not a suicide pact.[31] This argument is a sham, however. The simple truth of the matter is that there has never in the history of the modern state been a democracy that collapsed due to the presence of too much speech. Indeed, since the Enlightenment, the only states that have systematically suppressed speech have been states that feared democracy, not states where democracy has thrived.[32]

History (and a profound overreaction to Communism) perhaps can *explain* the CPD test, but history cannot justify it. The Free Speech Clause of the First Amendment embodies the intuitive proposition that there is a distinction among thinking something, saying something, and doing something. Although action at times can qualify as speech,[33] and although speech is, in a sense, an action,[34] a strong moral intuition holds that *saying* something is different from *doing* something. The Free Speech Clause embraces this intuition. Saying that someone ought to be shot is different from shooting someone; saying that banks should be robbed and the money redistributed to the poor is different from robbing a bank. Even instructing a soldier to execute an innocent civilian is different from executing the civilian; the shooter cannot escape blame by attributing responsibility for his act to the speaker.

---

[29] Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., dissenting) (quoting Thomas Jefferson).

[30] U.S. CONST. amend. I.

[31] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1962).

[32] I put to the side the controversial question of what constitutes a democracy. *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE 59-60 (1985) (discussing a process-based theory of decision making to arrive at a conception of democracy).

[33] As a doctrinal proposition, this assertion is commonly associated with cases like *United States v. O'Brien*, 391 U.S. 367 (1968) (treating the burning of a draft card as speech).

[34] Muscular contractions produce the noise that is speech.

The plain language of the Free Speech Clause distinguishes between actors and speakers and attributes responsibility for events solely to actors, not to speakers. The CPD test, ignoring the text of the First Amendment, ignores too this moral intuition.

It is far too late in the jurisprudential day to deny that laws can be properly enacted yet still be immoral, or that wars can be properly declared yet still be unjust. Any theory of the Free Speech Clause that restricts the liberty of individuals to insist that certain laws are unethical or that certain wars are unjust is fatally flawed. No theory, however, is capable of treating some speech as action, thereby making it punishable, without flowing ineluctably into this fatal flaw. Put differently, all efforts that have aspired to preserve both the freedom of individuals to criticize as well as the power of the state to punish have failed, and the reasons they have failed are clear. First, they attempt to make use of the elusive distinction between advocacy and incitement, yet this distinction, if it exists at all, is primarily a function of the listener, not the speaker.[35] Moreover, it implicates intractable issues of causation. Second, even if the distinction between advocacy and incitement is tenable, it is nonetheless a distinction between two types of speech. Merely invoking it collapses the basic moral distinction between speech and action, between *saying* something and *doing* it. The following Section elaborates upon these observations.

3.1. *Two Preliminary Caveats*

Before proceeding to the argument, there are two issues that present potential distractions but are not germane to my thesis that the First Amendment protects all communication. First, the modern incitement approach to the regulation of speech is based on specific intent. This means, generally, that in order for speech to be punished, not only must the speech be *likely* to incite or produce lawlessness, but the speech must be *directed* toward inciting or producing lawlessness. Further, it is also true that under the modern approach, any alleged danger presented by certain speech must be *imminent*, rather than merely possible (or even likely). Neither of these qualifications, however, saves the clear and present danger test from the defect discussed below. Despite the use of specific intent, and despite the focus on "incitement," the modern version of the test continues to blur the morally and legally salient distinction between speech and action.

Second, it is important to emphasize that the moral criticism leveled here against the clear and present danger doctrine does not flow in both

[35] Courts attempt to objectify this distinction by asking, for example, whether certain words would incite the reasonable listener. This gambit can succeed, but only at the cost of silencing radical speech and, more importantly, by negating the moral distinction between saying and doing.

directions. Saying that speech is not an action does not imply that, for doctrinal purposes, action cannot be protected by the Free Speech Clause. Consequently, the fact that it is wrong as a normative (and constitutional) matter to treat words as conduct does not by any means cast doubt on the line of cases that hold that certain conduct must be protected as speech.[36] In *Texas v. Johnson*,[37] for example, the Court held unconstitutional a Texas statute that punished the desecration of the American flag, reasoning that the act of burning a flag is protected *as speech*. The State argued a version of the CPD test. The State maintained that although burning a flag may be speech, it is speech that could deeply offend onlookers; therefore, the law against flag desecration actually protected the public from potential breaches of the peace. In rejecting the State's argument, the Court made a point sharp enough to shred the entirety of the CPD test. The Court observed that even though certain breaches of the peace may occur when an individual or group burns a flag, the State has available the apparatus to punish those who in fact breach the peace. The First Amendment protects speech. If people hearing certain speech react lawlessly, the State has the power to punish the people for their lawless actions rather than punish the speaker to whom they are reacting.

The doctrinal strand of the First Amendment that treats certain conduct as protected speech rests on the basic premise that speech is communication, and certain conduct serves primarily, if not exclusively, as a means of communication.[38] This premise is manifestly correct; however, it has no bearing on my thesis that speech—or, more generally, communication—is not action and that the First Amendment protects communication (as distinguished from action) absolutely.[39]

3.2. *Saying and Doing*

"Every idea is an incitement," wrote Holmes.[40] There is nothing worth saying that might not cause some listener to take action, action that may

---

[36] The line of cases begins with *United States v. O'Brien*, 391 U.S. 367 (1968). Commenting on this case, Professor Ely praised the Court for abandoning the speech-conduct distinction. That may be a good idea when the speech or conduct is communicative, but not so good when used to control speech (rather than merely conduct). *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorizing and Balancing First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975).

[37] 491 U.S. 397 (1989).

[38] Well-known examples of such communicative conduct include the gestures of sign language and carrying a sign in a picket line.

[39] I should not be understood as challenging the power of the state to regulate speech through reasonable time, place, or manner restrictions.

[40] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., and Brandeis, J., dissenting).

well be unlawful. A listener who hears a Byron poem may become a radical environmentalist, inspired to assassinate political leaders whom the listener perceives as hostile to the environment, yet Holmes was not exactly correct. Not *every* idea is an incitement, but every idea *might* be, and any idea *can* be. Nevertheless, it is the *act* that the law must punish, rather than the ostensible trigger (or cause) of the act. This is true partly because we can never be sure what actually is the trigger. The more powerful reason this is true, however, is that saying that speech can be coupled with the bad act it assertedly caused, and then punished exactly as is the act, is a conclusion that is at war with the very core of the Free Speech Clause itself. The point was succinctly made by Justice Douglas nearly a generation ago. Concurring in *Brandenburg*, he wrote, "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[41]

The Free Speech Clause is unequivocal and absolute.[42] What best explains this categorical rule—the words "no law"—is a normative intuition held in our culture today and among the Framers centuries ago: Speech is different from action. At the neurobiological level, there may well be no difference between thinking something, saying something, and doing something, but within the ontology of American law, both civil and criminal, the distinction is pivotal.[43]

---

[41] Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (per curiam); *see also* United States v. Caldwell, 408 U.S. 665, 716-17 (1972) (Douglas, J., dissenting) (rejecting the Court's holding that requiring newsmen to appear and testify before state or federal grand juries with respect to confidential sources does not abridge the freedom of speech); Scales v. United States, 367 U.S. 203, 262-75 (1961) (Douglas, J., dissenting) (positing that the First Amendment barred prosecution for being an active member of a Communist organization).

[42] *See* U.S. CONST. amend. I; *see also* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 110 (1982) (characterizing the Free Speech Clause as "crisp and unambiguous"). *But see* Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 3-5 (1986) (concluding that the language of the Free Speech Clause is "indefinite and noncommittal").

[43] *See* FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993). For a discussion of this point in the context of criminal law generally, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW (2d ed. 1986); Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992); Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay of Criminal Justice*, 93 MICH. L. REV. 1915 (1995). For a discussion of the idea in the context of tort law, see Richard W. Wright, *The Efficiency Theory of Causation and Responsibility*, 63 CHI.-KENT L. REV. 553, 578 (1987). For a discussion of the breakdown of this idea, see Craig C. Calhoun, *Social Theory and the Law: Systems Theory, Normative Justice, and Postmodernism*, 83 NW. U. L. REV. 398, 449 (1989). There is a sense in which theorists who argue for greater emphasis on communal responsibility for various phenomena are arguing against the theory of the First Amend-

The language of the First Amendment sharply distinguishes between saying and doing, and it consequently mandates that only overt acts are punishable. In establishing this rule, the Free Speech Clause manages to circumvent some of the most vexing problems in the philosophy of law. Specifically, three factors generally must be present in order to justify punishing an individual. First, the individual must have acted. Second, the action must have caused harm. Third, the individual must be culpable. Each of these criteria presents well-known philosophical difficulties. I do not propose in this Essay to revisit the entire moral terrain presented by these issues. Instead, I briefly will indicate why these issues are so complex and then will show that by distinguishing sharply between saying and doing, the genius of the First Amendment is that it resolves these complicated matters when speech is at issue.

3.2.1. *Action-Inaction*

The first criterion implicates the problematic distinction between action and inaction. When is *not* acting tantamount to acting? What does it even mean to say that someone has "acted?" Charles Fried gave the example of the pedestrian who saw a swimmer drowning, but declined to throw the swimmer a nearby life preserver because it was freshly painted and the pedestrian did not want to soil his clothes.[44] Did the pedestrian act or refrain from acting? Bentham characterized inaction (or what he called omissions) as "negative actions" on the ground that an individual who has declined to act has nonetheless performed an act of will.[45] Like Bentham, George Fletcher argued that the appropriate focus is not on the difference between actions and omissions, but on human agency.[46] Certain failures to act, Fletcher reminds us, are manifestly punishable: for example, failure to pay one's taxes or to register for the draft.[47] It is certainly true as an empirical proposition that Anglo-American criminal law generally distinguishes

---

ment put forth in this Essay. *See, e.g.*, Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); Jurgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38, 42 (1989).

[44] *See* CHARLES FRIED, RIGHT AND WRONG 52 (1978). The related and relevant question for Free Speech Clause jurisprudence is: When is nonspeech tantamount to speech?

[45] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 75-76 (J.H. Burns & H.L.A. Hart eds., Claredon Press 1996). Gilbert Ryle has argued that Bentham errs in characterizing inaction as willful. *See* GILBERT RYLE, THE CONCEPT OF MIND 62 (1949).

[46] *See, e.g.*, George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994).

[47] *See id.* at 1447.

between actions and omissions and tends to punish only the former.[48] It is also true, however, that this general rule is riddled with exceptions and that, in any event, the distinction between an action and an omission is sustained more by history than by logic. Is an action taken by a sleepwalker an "action" for purposes of criminal law? The answer is no, but only because the somnambulist, lacking mens rea, is *deemed* not to have acted[49]—demonstrating yet again the vast incompleteness of the definition of action. Likewise, Hart and Honoré suggest that someone who does not water a plant thereby has "acted" and has caused the plant to die.[50] George Fletcher, pursuing the example, posited a commercial pilot who refused to take the controls and fly the plane:[51] Has not he acted in such a way as to be subject to homicide statutes (even though there is a potent linguistic sense in which his crime really consists of "not acting")?

What is clear is that the distinction between acting and not acting may be tenable as a proposition of physics, but as an indicator of moral and legal culpability it is highly porous. The clear and present danger test, as currently understood, therefore means that the difficulties presented by this issue also are applicable in the context of speech. That is, insofar as inaction is, at least on occasion, tantamount to action, would a refusal to persuade potential rioters not to riot be punishable? Judge Hand assumed that it was clear beyond cavil that the Free Speech Clause does not prohibit the state from punishing a speaker whose words instigated a riot;[52] however, why should a speaker who says "Let's start looting" be liable (whether as a criminal or as a tortfeasor) while a speaker who declines to say "Let's not loot" be held blameless? This is not an easy question in the context of existing First Amendment doctrine.[53] In contrast, under a theory of the Amendment's text that holds, as I propose, that no speech is punishable, the question cannot even arise.

---

[48] *See generally* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993).

[49] *See* Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1828 (1994).

[50] *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 38 (2d ed. 1985).

[51] *See* Fletcher, *supra* note 46, at 1448.

[52] *See* United States v. Dennis, 183 F.2d 201, 207 (2d. Cir. 1950), *aff'd*, 340 U.S. 863 (1950).

[53] It also is not easy in view of the modern trend in many areas of law, from criminal law to tort law, to punish actors who fail or neglect to prevent harm. *See, e.g.*, Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 266-67 (1980) (stating that a duty to rescue is an internal matter beyond the reach of the external constraints of positive law).

3.2.2. *Causation*

The second factor that must be present to justify punishment is causation. Irrespective of the tenability of the distinction between action and inaction, an individual is not morally blameworthy unless her action (or inaction) has caused harm.[54] Causation is a notoriously complicated notion.[55] Judith Jarvis Thomson has recently argued that "no plausible analysis of causality" has yet to be offered.[56] In an earlier book, Thomson grappled with the issue by putting forward the notion of "event-ownership": that is, "For a person *z* to cause an event *E* it is necessary *both* that there be an event *C* that causes *E*, *and* that *C* be in some sense *his*."[57] What Thomson succeeds in doing with this definition, however, is simply to divert attention from the *physical* matter of causation, which sometimes seems clear enough, to the far more difficult normative matter of ownership. Consider, for example, Thomson's trolley problem.[58] An out of control trolley is hurtling down a track toward five men who will be killed if the trolley reaches them. A passerby named Bloggs is standing next to a switch. If he turns it, the trolley will veer off the main track onto a spur, but a single man is standing on the spur, and he will be killed if Bloggs throws the switch. If Bloggs does not act, will he have caused the deaths of the five men on the main trolley? To be sure, there is certainly a sense in which he will have, but in this case not acting would cause five deaths, while acting would cause but one (while saving five).[59] No matter what Bloggs chooses to do or not to do, it will be possible, and indeed plausible, to say he has caused one or more deaths.

Whether an individual can be said to own the event *C* that produces objectional (or unlawful) event *E* apparently does not depend simply on the distinction between acting and not acting. Accordingly, moral philosophers have expended great energies stating the conditions under which an individual can be said to cause certain harm.[60] Suppose, for example, that Bloggs

---

[54] The law of attempts might be said to punish potential harm, and for this very reason is it philosophically problematic. It is ordinarily justified, however, by a pragmatic theory that holds that potentially harmful *conduct* ought to be punished even when the actor fortuitously caused no injury, so as to deter others from engaging in such risky activity.

[55] *See* HART & HONORÉ, *supra* note 50.

[56] JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 234 (1990).

[57] JUDITH JARVIS THOMSON, ACTS AND OTHER EVENTS 149 (1977). The reason that event *C* is required is that causal laws link events rather than persons (though that matter is not pursued here). *See id.*

[58] THOMSON, *supra* note 56, at 176. Thomson actually borrows the problem from Phillipa Foot. *See* PHILLIPA FOOT, VIRTUES AND VICES 21-32 (1978).

[59] *See* THOMSON, *supra* note 56, at 176.

[60] A superb treatment of these issues is found in JOEL FEINBERG, DOING AND DE-

would throw the necessary switch if he were to know that the trolley was approaching. If another person were to see the trolley coming but were to say nothing to Bloggs, would that nonspeech have caused the deaths of the five pedestrians?

In contrast to those like Thomson who have sought to develop an adequate notion of moral causation, other philosophers, including Thomas Nagel, have argued that the question of causation is morally irrelevant. Nagel has argued that the question of whether a certain action caused external harm is typically susceptible to "moral luck"— factors that the individual cannot control.[61] (It was beyond Bloggs's control, for instance, that he happened to be where he was at the moment the trolley approached.) When Holmes and Hand asked whether speech threatened imminent harm, they were asking a question about causation, about the closeness of the nexus between words and deeds—about whether a speaker "owns" a certain admittedly harmful outcome. Law as a whole cannot avoid the morass of causation,[62] but the theory of the First Amendment proposed here makes the issue of causation entirely irrelevant. When all the actor has done is speak, the issue of imminence will never arise.

For example, it is possible that when Tupac Shakur recorded the record that Ronald Howard was listening to in the moments before Howard committed murder, Shakur himself might have been imagining murder. Shakur might have imagined that people who heard his music would become murderous. He might even have been advocating murder. Regardless of whether he was imagining any of these things, however, he did not act; all he did was communicate. If a murder follows a song, then even if we can bridge the impossibly wide causation cavern and say that the song caused the murder—even if we can say that Shakur's lyrics *caused* Howard to act—we still will not have dissolved the distinction between singing and shooting.[63] By

---

SERVING (1970); *see also* John Casey, *Actions and Consequences*, *in* MORALITY AND MORAL REASONING 155 (John Casey ed., 1971) (theorizing that moral principles not justified by their results are inherently flawed); Elliot Sober, *Apportioning Causal Responsibility*, 85 J. PHIL. 308 (1988) (arguing that the relative contribution of a cause and the difference it makes in the effect are separate issues).

[61] *See* THOMAS NAGEL, MORTAL QUESTIONS 24 (1979); BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, at 20 (1981); Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374 (1987).

[62] Some philosophers, however, certainly have argued that causation is irrelevant to the issue of blameworthiness. *See, e.g.*, Daniel C. Dennett, *I Could Not Have Done Otherwise—So What*, 81 J. PHIL. 553, 553 (1984) ("I assert that it simply does not matter at all to moral responsibility whether the agent in question could have done otherwise in the circumstances.").

[63] For examples of civil suits arguing that music caused harm, see generally Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd without opinion*, 958 F.2d 1084 (11th Cir. 1992), *cert. denied*, 506 U.S. 916 (1992) (involving a suit for wrongful death filed by the parents of a boy who committed suicide after repeatedly listening to the

presuming as a fixed axiom that speech is not action, the First Amendment completely circumvents the complex issues of causation.[64] Ronald Howard does not even get to try to establish that Tupac Shakur "caused" him to murder Officer Bill Davidson because what Shakur did was speak. Shakur communicated; Howard acted.

3.2.3. *Responsibility*

There is only one exception to the potent firewall that the First Amendment erects between speech and action. That exception, which lies within the third requirement for punishment, is satisfied when the speaker, through his or her speech, overwhelms the individual listener's will.

The third factor that must be present for punishment to be justified requires that the individual who acted and caused the harm be legally blameworthy. To be sure, legal responsibility and moral responsibility do not always walk hand in hand. The law may deem not legally responsible someone who strikes us as, in fact, being morally responsible. Conversely, the law may deem legally responsible an individual who seems morally blameless.[65] Nevertheless, what law and morality have in common is the requirement of blameworthiness, even though the criteria for satisfying this condition may not overlap in these two domains with perfect precision. My contention here is that when the speaker has, in fact, overborne the will of the listener, then it is appropriate to say that the speaker has acted in a culpable fashion.[66]

Whether a speaker has overwhelmed the will of a listener ordinarily will be a matter of fact. Thus, for example, if a speaker says to a listener that he will pay her a certain sum of money if she murders someone, then (apart from the question of whether a promise of future payment is tantamount to present action) the speaker might well succeed in overcoming the listener's will. Whether the speaker succeeds will depend on a number of factors, including the amount of money offered, the financial condition of the listener, and so forth. If, however, we conclude that the speaker controlled the listener's will to such a degree as to render the speaker liable for punish-

---

music of heavy metal singer Ozzy Osbourne); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (with the same general premise). In each of these cases, the trial and appellate courts correctly found that the First Amendment barred the plaintiffs' claims because the defendants did not engage in culpable incitement of suicide.

[64] As one commentator recently (and correctly) observed, "there is no proof that emotions or sudden external provocations can truly overcome our ability to make moral choices (e.g., not to kill someone)." Rachel J. Littman, *Adequate Provocation, Individual Responsibility and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1168 (1997).

[65] *See* FEINBERG, *supra* note 60, at 30.

[66] *See* HART & HONORÉ, *supra* note 50, at 58, 143-44.

ment, this means the listener's legal culpability will be accordingly diminished. To return to our case of Tupac Shakur, suppose that Shakur had kidnapped Ronald Howard, hypnotized him, and during the hypnosis implanted the instruction that Howard do exactly what Shakur commanded. Under such a scenario, Howard would be permitted to argue that the rap lyrics he was listening to constituted a command from Shakur, that Howard was incapable of ignoring.[67] Under such circumstances, a jury might choose to acquit Howard (or to punish him less severely). Under this scenario, Howard is just a robot, an extension of Shakur; Shakur is the actor. Shakur will be subject to punishment for his speech, but concommitantly Howard will not be punished for his actions (or will be punished less severely).

This illustration also demonstrates the symmetry between those cases in which the speaker has conquered the listener's will and those cases in which the listener is deemed insufficiently responsible for an act to merit punishment. That is to say, in the actual case of Officer Davidson's murder, Ronald Howard cannot escape punishment and Shakur cannot face punishment,[68] unless it can be shown that Shakur's lyrics overwhelmed Howard's will. If Shakur can face punishment, however, it means he has acted, and if he has acted, then Howard has not. One can view this issue mathematically: A certain quantum of moral blameworthiness attaches to every bad act. That quantum can be divided among several actors, but it is not possible for the entire quantum to be assigned to more than one actor.

A word should be added here concerning Robert Nozick's view of this issue.[69] Nozick defends a principle that prohibits the state from punishing actions that are not wrong in themselves but that merely *facilitate* another's wrongful actions. Yet he also seeks to show that this principle does *not* insulate from punishment one who urges or seeks to *persuade* another to do

---

[67] The operative fact here is that Howard must have been incapable of resisting Shakur's command such that he could not help but follow it. Take as another example the case of *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997). In *Rice*, the defendant published a book called *Hit Man*, which essentially provided step-by-step instructions for planning and carrying out a murder. When James Perry killed three Maryland residents by following the instructions in *Hit Man*, the family members of the victims sued the defendant publisher for wrongful death. The district court granted the defendant's motion for summary judgment, finding that the publication of *Hit Man* did not satisfy the *Brandenburg* test because it did not command the reader immediately to go out and commit murder. While the court's holding strikes me as correct, the distinction that the court drew is somewhat chimerical without recognizing the basic premise of this Essay. Whether a speaker has advised or commanded a listener to commit a lawless act is irrelevant if the speaker did not overwhelm the listener's will such that the speaker conflated his will with the listener's.

[68] By punishment, I certainly mean to include a finding of tort liability.

[69] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

wrong. In arguing that one who persuades another to do wrong should be punished, Nozick writes that it is wrong to think there is a "fixed amount of responsibility" for a bad act.[70] For example, Nozick suggests, if two people cooperate in committing a murder, "[e]ach may receive the same punishment as someone acting alone, *n* years say. They need not each be given *n*/2."[71] Nozick concludes that this proves that "[r]esponsibility is not a bucket in which less remains when some is apportioned out."[72]

Nozick, however, has made three mistakes. First, he has confused the legal matter of punishment with the altogether different concept of responsibility. The fact that two actors may be eligible for the same punishment does not demonstrate, or even imply, that their responsibility for a particular act is the same. One may be responsible for pulling the trigger, the other for driving the vehicle; one may be responsible for firing the gun, another for purchasing the bullets. We simply cannot tell from the fact of similar punishment precisely what a given actor has been deemed responsible for. Second, the state may punish, absent constitutional limitations, varying degrees of responsibility with identical punishment. There is neither a legal nor a moral constraint that compels the state to allocate punishment on the basis of fine gradations of responsibility. Third and most important, the fact that moral and legal responsibility for a given result will at times be shared among more than one actor is not germane to my thesis, which holds simply that when all an actor did was *speak*, the First Amendment dictates that this person may not be included in the group of those to whom the state will assign legal responsibility.

The view of blameworthiness that inheres in the Free Speech Clause is classically Aristotelian. In the *Nicomachean Ethics*, Aristotle claimed that we can blame individuals for their actions that cause harm when two conditions are satisfied: First, the action must indeed be bad, and second, the action must have been voluntary (or, perhaps more precisely, not involuntary).[73] By "action" Aristotle manifestly meant some physical act (as distinguished from speech). In addition, it is telling that the major focus of Aristotle's effort was to make clear what is meant by voluntary (and to explain how voluntariness is a crucial aspect of blameworthiness). In a sense, Aristotle was addressing a version of the problem of free will,[74] a matter which has consumed theologians as well as moral philosophers for

---

[70] *Id.* at 130.

[71] *Id.*

[72] *Id.*

[73] ARISTOTLE, NICOMACHEAN ETHICS 136-40 (Martin Ostwald trans., The Bobb-Merrill Co. 1962). In reaching this conclusion, I also have relied heavily on Professor Smiley's lucid treatment of the issues. *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 37-57 (1992).

[74] Smiley has argued, however, that Aristotle was not "concerned primarily with free will." SMILEY, *supra* note 73, at 39.

millennia.[75] Aristotle's project reveals the same sensibility displayed in almost all discussions of free will: Unless the individual who did something bad acted volitionally, then it is morally troublesome to punish her.

Aristotle defined a voluntary act as one in which the "initiative lies with the agent who knows the particular circumstances in which the action is performed."[76] One could construct a hypothetical in which the act of speaking failed to satisfy this definition of voluntariness. A defendant who has confessed to a crime under duress or coercion has spoken involuntarily. A hostage who on videotape expresses love for her captors while her captors aim rifles at her head has spoken involuntarily. These examples, however, are distractions. When an individual speaks in the public domain and invokes the First Amendment to protect that speech, the speech presumptively is voluntary. The fact that moral philosophy simply does not pay any attention to the possibility that speech might be involuntary (in the same way that action might be involuntary) signals an important normative fact: Speech is not action.[77] If speech were action, it would be necessary to determine whether conditions of voluntariness are satisfied when speech is the first factor in a causal chain that terminates in some harm or injury. Instead, Aristotle, and moral philosophers in general, take for granted that the act of speaking is a voluntary matter.

Why, then, in philosophical discussions of blameworthiness (from Aristotle to the present) is it not a simple matter to punish a speaker whose speech initiates a chain of events that culminated in harm? Insofar as the act is voluntary, the issue of blameworthiness would be clear, but for one fact. That fact—that normative, and constitutional, fact—is that the act of speaking simpliciter is *never* regarded as sufficient to cause the kind of harm that the law addresses. In addition to the speech (the communication), there must be some further act. It is this further act that, assuming the actor is blameworthy, subjects someone to punishment.

That is why the Free Speech Clause dictates that the actor (rather than the speaker) be punished. The state may never permissibly punish a speaker as a culpable actor unless the speaker: (1) specifically intended to cause an unlawful injury, (2) proximately caused that unlawful injury, and (3) exerted

---

[75] A fine treatment is DETERMINISM, FREE WILL, AND MORAL RESPONSIBILITY (Gerald Dworkin ed., 1970); *see also* HARRY G. FRANKFURT, *What We Are Morally Responsible For*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 95 (1988) (discussing whether free will is a necessary condition for moral responsibility).

[76] ARISTOTLE, *supra* note 73, at 57.

[77] It merits emphasis at this point that while the claim in this Essay is that the law anticipated by the Free Speech Clause can punish only action, a cogent moral theory may punish speech with equal force. *See, e.g.*, FRANKFURT, *supra* note 75, at 100 (describing speech and nonspeech as part of a person's "behavior" that subjects him to moral judgment).

a power over the listener so profound that the listener herself could not be held morally accountable for her actions.

4.0. CONCLUSION

To be sure, the legal conclusion I trumpet here will not necessarily coincide with our moral conclusions. An individual may escape legal liability yet remain morally blameworthy for some set of events that results from her speech,[78] but this fact is passé;[79] that there are distinctions between the rule of law and morality does not have any impact on whether speech, even morally opprobrious speech, is shielded by the clear and unambiguous language of the First Amendment. In part this may be because of serious reservations about the causation between word and deed, and in part it may result from the legal status of the free speech guarantee. Whatever the etiology, the First Amendment rests on the solid ethical foundation that distinguishes between word and deed.

The path from speech to action is always mediated by will. Faced with even the most inspiring rhetoric, the listener has a will of her own. Whether listening to the hateful rhetoric of another Hitler or admiring the radical idealism of Thoreau, it is always the listener who chooses to act or not to act. That decision, that exercise of will, is punishable. The rhetoric, the poetry, never is. That is what the Free Speech Clause means.

---

[78] *See* FEINBERG, *supra* note 60, at 30.

[79] *See* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 18 & n.76 (1990).