Rethinking the Clear and Present Danger Test†

DAVID R. DOW* & R. SCOTT SHIELDES**

"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 Howard, did notice the patrolman's flashing lights in his rearview mirror, and 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. Officer Davidson died on the side of the highway. Howard was prosecuted for capital murder. At his trial, he put on 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 his punishment should be mitigated 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 tells us everything we need to know about the central defect of the clear and present danger test, for this test, which is central to interpreting the Free Speech Clause of the First Amendment,[4] rests on the morally unacceptable proposition that words alone can overcome human will. The test ignores the morally salient distinction between speech and action,

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* Professor of Law, University of Houston Law Center.

** B.A. 1994, University of Texas-Austin; J.D. 1998, University of Houston Law Center.

1. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 7, at 5e (G.E.M. Anscombe trans., Alden & Mowbray Ltd., 3d ed. 1967) (1953) (internal cross-reference omitted).

2. The late Shakur produced so-called gangster rap music. The song the teenager was listening to was "Crooked Ass Nigga." It includes the following lyrics: "Coming quickly up the street, is the punk ass police / The first one jumped out and said freeze / I popped him in his knees and shot him punk please." 2PAC, *Crooked Ass Nigga, on* 2PACALYPSE NOW (Interscope Records/Atlantic 1991).

3. *See* Michele Munn, Note, *The Effects of Free Speech*, 21 AM. J. CRIM. L. 433, 467-68 (1994). 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. Many of the earlier free-speech cases, such as *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919), may be characterized as falling within the Free Press Clause of the First Amendment. Despite this potential characterization, this Article will focus primarily on the Free Speech Clause.

between saying and doing. Consequently, the same sentiment that moved jurors to reject Howard's mitigation defense should move constitutional theorists to jettison the clear and present danger test.

INTRODUCTION

Without the freedom to speak, all our other freedoms are empty.[5] In the history of American law, many jurists have recognized that the First Amendment is our most precious freedom,[6] yet few have been willing to admit that the jurisprudential core of Free Speech Clause doctrine is a constitutional embarrassment because it is philosophically untenable.[7] The clear and present danger test ("CPD test") has been used for three-quarters of a century, in one form or another, to determine which utterances the government may legitimately restrain. This test, however, is inimical to our core valucs. While it is thought to be expansive, it in fact protects too little speech. We argue in this Article that the CPD test ought to be abandoned and replaced with a nearly categorical prohibition. The Free Speech Clause should protect all speech unless three

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5. *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."); Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1197-98 (1983) (remarking that free speech is supported by a multiplicity of values including "individual self-expression, social communion, political participation, the search for truth and for informed choice, social catharsis, the social affirmation of the rights of equality, diguity, and respect, and the freedom from arbitrary, official aggrandizing or excessively intrusive government regulation").

6. *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 . . . ."), *overruled in part by* Burks v. Unitcd States, 437 U.S. 1 (1978); *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 (1937) (remarking that "one may say that [the freedom of speech] is the matrix, the indispensable condition, of nearly every other form of freedom"); OWEN M. FISS, LIBERALISM DIVIDED 9 (1996) ("Freedom of speech is one of the most remarkable aspects of American constitutional law."); SUSAN FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS 103 (1992) ("For many people the First Amendment is the heart of the Bill of Rights.").

7. *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 recognizes a disintegration of First Amendment doctrine. He characterizes current free-speech law as follows:

> Current free speech law resembles the Ptolomaic 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.

conditions are satisfied: (1) the speaker's specific intent in uttering the speech is to cause an unlawful injury, (2) the injury in fact occurs 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 we propose would permit almost no speech whatsoever to be punished, and it is superior to the CPD test for two reasons. The first is that the basic evil that gave rise to the CPD test was phantasmagoric, a figment of a collective paranoid imagination. Words do not lead inexorably to evil, yet the creators of the CPD test were so terrified of the anarcho-Communist specter[8] that they crafted a dubious doctrine. Second, unlike the test we propose, the CPD test cannot coexist with those modern notions of individual responsibility that underlie our laws and our form of government itself. 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.

Our argument in this Article consists of two parts. In the first, we review very briefly the cases that developed the CPD test. This terrain has been heavily traversed, and our objectives primarily are to reiterate the historical context in which the cases arose and to linger over the development of the linguistic formulation of the CPD test itself. Part II presents the argument and consists of two strands. Initially we contend that the historical circumstances that gave rise to the CPD test should make us exceedingly wary of the test itself. Next we insist that the CPD test is inconsistent with modern notions of moral responsibility.

I. THE SOMEWHAT EMBARRASSING LEGAL HISTORY OF THE UNITED STATES

Hard cases are known to make bad law. But that aphorism is not limited to judge-made law. It applies with equal force to statutes enacted by Congress. The CPD test cannot be blamed entirely on the courts. Indeed, the blame must be shared at least in equal measure by Congress, and various state legislatures, which equated patriotism with the stifling of all dissent and, at the same time, exhibited such an irrational fear, first of German militarism[9] and later of Communist subversion, that it can fairly be described as paranoia.

A. The Espionage Act: Schenck

On April 6, 1917, Congress voted by joint resolution to enter World War I. Two months later, Congress passed the Espionage Act, which created three new

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8. *See infra* Part I (detailing the American political and legal responses to German militarism, anarchism, and Communism from 1917 through the 1950s).

9. For an example of the extent to which Americans acted out of fear of Germans see WALTER LAFEBER, THE AMERICAN AGE 310 (1989) (relating an incident in which a mob in Collinsville, Illinois "decided that a town resident was a German spy . . . then seized him, wrapped him in a U.S. flag, and murdered him").

federal offenses.[10] The first new offense pertained to creating or conveying false reports or false statements with the intent of interfering with American military efforts or of assisting American "enemies."[11] The second offense included causing or attempting to cause "insubordination, disloyalty, mutiny, or refusal of duty" in the United States armed forces.[12] The third new offense involved obstruction of the draft.[13] In short, Congress had made criticism of government policy during a time of war a federal crime.[14]

One month after the passage of the Espionage Act, Judge Learned Hand, then a federal district court judge in New York, decided the case of *Masses Publishing Co. v. Patten*.[15] The plaintiff was a publishing company that produced a monthly magazine called "The Masses," which consisted of cartoons, political commentary, prose, and poetry from contributors such as Carl Sandburg and Robert Henri.[16] The Postmaster General found that the August 1917 issue of the magazine violated three provisions of the Espionage Act, and he instructed the New York postmaster to declare the issue nonmailable.[17] The plaintiff sought a preliminary injunction to prevent the postmaster from declaring *The Masses* nonmailable.[18]

Hand determined that *The Masses* did not violate the Espionage Act because it did not *explicitly urge* violations of the Act.[19] However, the Second Circuit swiftly reversed his decision.[20] In an opinion written by Judge Rogers, the court of appeals concluded that "[i]f the natural and reasonable effect of what is said is to encourage resistance to the law, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested."[21] Hand believed that the stridency of the speaker's speech was the pivotal fact; the Second Circuit, in contrast, believed that the reasonably predictable consequences of the speech were what mattered most.

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10. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1009 n.3 (12th ed. 1991) [hereinafter CONSTITUTIONAL LAW]. For a discussion of the statute and its history see GERALD GUNTHER, LEARNED HAND 151 (1994) [hereinafter LEARNED HAND]; David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1217-27 (1983).

11. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a) (1994)); *see also* Masses Publ'g Co. v. Patten, 244 F. 535, 538-39 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

12. Espionage Act § 3, 40 Stat. at 219; *see also Masses Publ'g Co.*, 244 F. at 539-40.

13. *See* Espionage Act § 3, 40 Stat. at 219; *see also Masses Publ'g Co.*, 244 F. at 540.

14. *See* LEARNED HAND, *supra* note 10, at 151; *see also* Pierce v. United States, 252 U.S. 239 (1920) (upholding the conviction of a clergyman who distributed a four-page pamphlet decrying war); LAFEBER, *supra* note 9, at 310 (remarking that the Espionage Act allowed the government to arrest anyone simply suspected of being critical of the war effort).

15. 244 F. 535.

16. *See id.*; LEARNED HAND, *supra* note 10, at 153.

17. *See Masses Publ'g Co.*, 244 F. at 536. More specifically, the Postmaster General objected to four cartoons, as well as a "sprinkl[ing of] other texts designed to arouse animosity to the draft and to the war, and criticisms of the President's consistency in favoring the declaration of war." *Id.* at 537.

18. *See id.* at 537.

19. *See id.* at 538-41.

20. *See* Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).

21. *Id.* at 38.

Two years later the Supreme Court decided *Schenck v. United States*.[22] The defendant in *Schenck*, who was the general secretary of the Socialist Party, had mailed leaflets to men who had been drafted for service in World War I. The leaflet railed against the draft as a tool of a despotic Wall Street elite, alleged that there existed a constitutional right to oppose the draft, and concluded by saying that the leaflet recipients "must do [their] share to maintain, support and uphold the rights of the people of this country."[23] Justice Holmes, writing for a unanimous Court, affirmed Schenck's conviction under the Espionage Act.[24] In so doing, he formulated the CPD test:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[25]

As one example of 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 theater, thereby causing a panic.[26]

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 may constitute a punishable act. As an illustration of this moment, Holmes cited *Gompers v. Bucks Stove & Range Co.*[27] In *Gompers*, a court had enjoined the defendants from publishing statements that Bucks Stove & Range Company was ever on the American Federation of Labor's "Unfair" or "We Don't Patronize" lists.[28] The Supreme Court reversed the criminal contempt convictions,[29] 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.[30] Justice Lamar, writing for the Court in *Gompers*, reasoned as follows: The law allows workingmen to organize unions as a means of coalescing power; this united power 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; consequently, where 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 equitable remedy, then the force of the speech may be so great as to constitute a "verbal act."[31]

Holmes, by relying on *Gompers*, accepted the proposition that *saying* can be tantamount to *doing*. Then, a week after the *Schenck* decision, Holmes applied

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22. 249 U.S. 47 (1919).
23. *Id.* at 51 (alteration added) (quotations omitted).
24. *See id.* at 53.
25. *Id.* at 52.
26. *See id.*
27. 221 U.S. 418 (1911).
28. *See id.* at 436.
29. *See id.* at 452.
30. *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").
31. *Gompers*, 221 U.S. at 439.

the CPD test in two other Espionage Act cases: *Frohwerk v. United States*[32] and *Debs v. United States*.[33] In *Frohwerk*, Holmes affirmed the conviction of the publisher of the newspaper *Missouri Staats Zeitung* for conspiracy to violate the Espionage Act.[34] The newspaper declared American involvement in World War I a mistake, analyzed the draft as illegal, argued that Wall Street elites were the cause of the war, and intoned, "'[w]e say, therefore, cease firing.'"[35] In *Debs*, Holmes affirmed the conviction of Eugene Debs, the perennial Socialist Party candidate for President of the United States.[36] Debs had been convicted of violating the Espionage Act after giving a speech in which he discussed the merits of socialism, "expressed opposition to Prussian militarism," praised other Socialists who had been jailed for obstructing the draft, and declared that the listeners were fit for more than "slavery and cannon fodder."[37] In reviewing the trial record, Holmes reasoned that Debs could be punished if the evidence showed that the natural and reasonably probable effects of his words would cause obstruction of the draft.[38]

B. The Espionage Act: Bad Tendency Versus Incitement

Many of the lower federal courts, when they first began to try Espionage Act cases, addressed the First Amendment issue by applying what has been called the "bad tendency" approach to free speech.[39] The bad-tendency approach was based largely on the traditional principle of intent, which holds that an actor's intent may be presumed, in light of the surrounding circumstances, from the natural and usual consequences of his acts.[40] We say that a person intends to cause those effects that a reasonable person would have assumed to be the natural and usual consequences of his action. Accordingly, the bad-tendency approach to free speech held that where the consequences of speech could be bad, then the speaker intended those bad consequences and could therefore be punished for his speech. By using this concept of intent, the bad-tendency test collapsed speech into the action said to be a possible result of that speech (or, to use the language of causation, the test collapsed speech into the action that could possibly be caused by the speech), and the test permitted the speaker to be punished for that potential action.

The bad-tendency approach, therefore, rested on two propositions. The first was that speech is an act. If the act of speech will tend to cause ill effects, then

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32. 249 U.S. 204 (1919).

33. 249 U.S. 211 (1919).

34. *See Frohwerk*, 249 U.S. at 205.

35. *Id.* at 207 (alteration added) (quoting an issue of *Missouri Staats Zeitung*).

36. For an interesting account of Eugene Debs see David Ray Papke, *Eugene Debs as Legal Heretic: The Law-Related Conversion, Catechism and Evangelism of an American Socialist*, 63 U. CIN. L. REV. 339 (1994). President Warren G. Harding pardoned Debs in 1921. *See* LAFEBER, *supra* note 9, at 310.

37. *Debs*, 249 U.S. at 213-14.

38. *See id.* at 216.

39. *See* Rabban, *supra* note 10, at 1229.

40. *See id.* at 1230-31.

the speech is subject to punishment. The second proposition was that in measuring the potential ill effects of certain speech, the proper test was to ask simply whether it was reasonable to assume that certain ill effects would follow.

Not all lower court judges followed the bad-tendency approach.[41] Some employed what has been characterized as the "incitement" approach.[42] This approach originated with Judge Hand's opinion in *Masses Publishing Co.* Hand, as Professor Gunther has put it, asked one question: "When, if at all, may the state penalize political dissenters . . . ?"[43] Clearly, Judge Hand believed, the state may punish a speaker who makes statements of fact that the speaker either knows or believes to be false.[44] And in addition to having the power to punish falsity, the state also had the power, in Hand's view, to punish certain statements that, irrespective of their truth content, would cause ill consequences. Yet Hand was famously uncomfortable with the malleability of the concept of causation. For example, Hand agreed that discontented soldiers who believe they are capitalist tools will be more prone to insubordination than those soldiers who believe in the military action at hand;[45] but Hand believed that interpreting the Espionage Act's insubordination provision's use of the word "cause" so broadly as to encompass *any* statement that might have the effect of arousing discontent would inevitably suppress all "opinion except what encouraged and supported the existing policies."[46] In other words, while Hand accepted the first premise of the bad-tendency test—that speech is action—he resisted the conclusion that the speech may be punished merely because it is reasonable to believe that bad consequences will follow. Hand thought that the state's basis for acting had to be more than merely reasonable.

Consequently, Hand laid down the argument for the incitement approach to free speech. Initially, he reiterated that a person may not counsel or advise another to violate existing law.[47] However, to counsel or advise another, according to Hand, means "to urge upon him either that it is his interest or his duty" to violate the existing law.[48] Under Hand's approach, a speaker could criticize draft laws unless that criticism took the form of urging listeners that

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41. *See id.* at 1235-44.

42. *See* LEARNED HAND, *supra* note 10, at 157.

43. *Id.* at 151.

44. *See id.* at 162-63. The power to punish falsity, however, does not permit the state to punish statements of opinion or criticism, which speakers generally regard as true, or at the very least as not false. "Opinions," insisted Hand, "are at best provisional hypotheses, incompletely tested." *Id.* at 163 (quotations omitted). In a letter to Justice Holmes, Hand argued that because we each doubt to some degree the credulity of our own opinions, we must be tolerant of the opinions of others. *See id.*

45. *See* Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

46. *Id.* at 540. Hand was obviously concerned with the First Amendment here, but his opinion actually includes a significant fudge. Hand added that even if Congress *could* suppress all such opinion in time of war, because the exercise of that power is contrary to democratic principles, he would not believe that Congress had intended to do so without the "clearest expression" from Congress—which he did not find present in *Masses Publishing Co. Id.*

47. *See id.*

48. *Id.*

they had the duty to dodge the draft. Where a speaker "stops short of urging upon others that it is their duty or their interest to resist the law, . . . one should not be held to have attempted to cause its violation."[49] It is not enough for the state merely to say that it is reasonable that some listeners will dodge the draft as a consequence of the speaker's speech; the state loses unless it can also show that the speaker *urged* that very action.

C. The Smith Act and Dennis

In 1940, Congress passed the Smith Act, the first peacetime sedition law passed by Congress since the Sedition Act of 1789.[50] Section 2 of the Act prohibited the knowing or willful advocacy or teaching of the duty, necessity, desirability, or propriety of overthrowing the United States Government by force or violence.[51] The statute also prohibited the organization of groups teaching the forcible overthrow of the government.[52] Section 3 of the Act prohibited attempts and conspiracies to violate section 2.[53] Though Congress modeled the statute on state prohibitions of criminal anarchy, the Smith Act was primarily used as a method of punishing Communists during a period of fervent anti-Communist sentiment.

The statute gained prominence during a period known as the "Red Scare."[54] In the summer of 1948, the Soviet Union blockaded the West-controlled sections of Berlin, prompting a massive Allied airlift of supplies.[55] In the summer of 1950, Julius and Ethel Rosenburg were executed for passing atomic secrets to the Soviet Union.[56] That same summer, a judge sent five people, who had written "PEACE" on a wall in Brooklyn, to jail because he suspected that they were

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49. *Id.*

50. *See* Dennis v. United States, 341 U.S. 494, 562 n.2 (1951) (Jackson, J., concurring). Professor Gunther characterizes the Sedition Act of 1789 as being "enacted by the Federalists because of widespread hostility to ideas stemming from the French Revolution." CONSTITUTIONAL LAW, *supra* note 10, at 998. Further, notes Gunther, the Act was "rigorously enforced, entirely against Jefferson Republicans," until the Federalists were defeated in 1800, and Jefferson pardoned all of those convicted under the Act. *Id.*

51. *See Dennis*, 341 U.S. at 496.

52. *See id.*

53. *See id.* at 497.

54. *See* LAFEBER, *supra* note 9, at 452-55. LaFeber attributes the beginning of the Red Scare to President Truman's speech before Congress on March 12, 1947, in which he established his eponymous doctrine. In that speech, Truman divided the world between "free peoples" and governments that relied upon "terror and oppression." *Id.* at 453. It was up to Congress to decide on which side to fall. Later that year, Truman ordered a federal loyalty plan in order to uncover Communists working within the government. *See also* Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 899-905 (1993) (noting executive orders issued by Truman to investigate loyalty of government officials). Soon, however, Truman lost control of this Red Scare to what LaFeber characterizes as "less responsible politicians," such as Senator Joseph McCarthy. LAFEBER, *supra* note 9, at 455.

55. *See* LAFEBER, *supra* note 9, at 460-61.

56. *See id.* at 497.

Communists.[57] Finally, Senator Joseph McCarthy, searching for an issue to win re-election in 1952, latched onto the pervading anti-Communist sensibilities by initiating the era of McCarthyism.[58] This era, from 1950 to 1955, was marked by a "ruthless search for Communists . . . conducted without evidence but publicly and in a manner that destroyed the reputations of its targets."[59]

In the midst of this Red Scare, in 1949, eleven defendants, leaders of the Communist Party of America, were convicted of violating the Smith Act.[60] The evil that the group presented, argued the government, was the Party's advocacy of the forcible overthrow of the United States Government at the most propitious moment.[61] On appeal, the defendants' main defense relied on clear and present danger.[62] They argued that their political doctrine required the use of force only after securing power through constitutional means.[63] Because their teachings did not present a clear and present danger to the United States Government, they asserted, the convictions should be reversed.[64]

The Second Circuit, however, in an opinion written by Chief Judge Hand, affirmed the convictions.[65] Hand posed the question of "what limits, if any, the advocacy of illegal means imposes upon the privilege which the aims or purposes of the utterer would otherwise enjoy."[66] In answering this question, Hand assumed that it is obvious that the First Amendment does not protect the leader of a mob who gives the word "go" to a group of individuals already ripe to begin rioting.[67] Why this is obvious Hand did not say; he simply assumed that the only difficult question arises when "persuasion and instigation [are] inseparably confused."[68] To deal with this problem, Hand introduced his own formulation of the CPD test[69] (a formula reminiscent of his earlier negligence formula introduced in *United States v. Carroll Towing Co.*[70]). "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."[71] On this basis, the Second Circuit affirmed the convictions, and on

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57. *See id.*

58. *See id.* at 484-85.

59. *Id.* at 484.

60. *See* Dennis v. United States, 341 U.S. 494, 497 (1951).

61. *See id.*

62. *See* United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950), *aff'd*, 341 U.S. 494.

63. *See id.* More specifically, they argued that violence would only become necessary during the dictatorial transitional phase to communism, rather than as a means of securing proletariat success over the capitalist state. *See id.*

64. *See id.* at 212-13.

65. *See id.*

66. *Id.* at 207.

67. *See id.*

68. *Id.*

69. *See* LEARNED HAND, *supra* note 10, at 599.

70. 159 F.2d 169, 173 (2d Cir. 1947).

71. *Dennis*, 183 F.2d at 212; *see also* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986). Posner reduces this formula to the following symbols: $B < PL$, where B is the cost of regulation, P is the probability that the speech will cause harm, and L is the magnitude of the harm. *See id.*; *see also* HARRY KALVEN, JR., A

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.

D. Linguistic Evolution

Holmes's CPD test has generated volumes of controversy and commentary. Professor Rabban, for example, views the test merely as a continuation of the bad-tendency approach taken by the lower federal courts.[72] In contrast, Professor Kalven felt that it was much closer to Hand's incitement argument.[73] Zechariah Chafee actually argued that the CPD test represented the libertarian ideal of free speech.[74] On the other hand, Alexander Mieklejohn attacked the doctrine as one that "'annuls the most significant purpose of the First Amendment . . . [*viz.*,] self-government.'"[75]

What all these commentators agree on, though, is that the only relevant question in any of the tests—bad-tendency, incitement, or CPD—deals with how certain the state must be that bad action will follow speech in order for the state to have the power to ban the speech itself. Under all three approaches the state can act against the speaker even if the speaker is not directly urging the listener to break the law. To be sure, Holmes was somewhat more comfortable with this notion than Hand was, but the question was simply one of degree.[76]

WORTHY TRADITION 198 (1988) (calling Hand's formulation a discounted Holmes test).

72. *See* Rabban, *supra* note 10, at 1265.

73. *See* KALVEN, *supra* note 71, at 133-34. Professor Kalven finds the use of the fire example trivial and misleading because it simply impeaches the premise that the First Amendment protects all speech, and does not begin to respond to the complex premises surrounding political speech. *See id.* Additionally, Kalven argues, "[i]f the point were that *only* speech which is a comparable 'trigger of action' could be regulated, the example might prove a stirring way of drawing the line at incitement." *Id.* at 133 (emphasis in original).

74. *See* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919). Chafee's view has been discredited as revisionist. For a thorough examination of Chafee's revisionist interpretation of Holmes's CPD test see Rabban, *supra* note 10, at 1283-303. *See also* LEARNED HAND, *supra* note 10, at 164; *id.* at 168 (quoting a letter that Hand sent to Chafee in which Hand wrote, "You have, I dare say, done well to take what has fallen from Heaven and insist that it is manna rather than to set up any independent solution.").

75. Dennis v. United States, 341 U.S. 494, 567 n.9 (1951) (Jackson, J., concurring) (omission and alteration added) (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 29 (1948)).

76. Upon reading *Schenck*, Hand attempted to persuade Holmes that incitement was the better standard. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 758 (1975). While Hand conceded that speech may lead to unlawful acts by influencing others, he remarked that:

> [R]esponsibility does not go pari passu. I do not understand that the rule of responsibility for speech has ever been that the result is known as likely to follow. It is not . . . a question of responsibility dependent upon reasonable forecast, with an excuse when the words, had another possible effect. [Instead, t]he responsibility only began when the words were directly an incitement.

Id.

The key words in Holmes's test were "proximity and degree." The struggle over how to apply them began only a few months after *Schenck*. Thus, in *Abrams v. United States*[77] the Court upheld the convictions of five Russian emigrants who had planned to distribute two leaflets, one in English and the other in Yiddish, to workers in ammunition factories.[78] The leaflets described President Wilson as a hypocrite, denounced American involvement in World War I as a capitalist ploy to intervene in the Russian Revolution, and claimed that the proper reply to this intervention should be a general strike.[79] Justice Clarke, writing for the majority, interpreted the main purpose of the leaflets as an attempt to interfere with American war plans through a general strike halting the production of munitions (despite the fact that the express purpose of the leaflets was to stop American involvement in Russian internal affairs).[80] In other words, in affirming the convictions, the Court accepted the view that a speaker's intent may be interpreted simply from the reasonably probable consequences of his speech, rather than from a more specific intent as evidenced by the words themselves.

Holmes and Brandeis dissented.[81] Holmes recognized that the ordinary concept of intent meant "knowledge at the time of the act that the consequences said to be intended will ensue."[82] But where speech is deemed to be an act, he argued, "a deed is not done with intent to produce a consequence unless that consequence is the *aim of the deed*."[83] Holmes professed in *Abrams* to be adhering to the CPD test, yet he clearly tightened it.[84] As he put it:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and *imminent* danger that it will bring about forthwith certain substantive evils that the United States may constitutionally seek to prevent.[85]

Holmes has replaced the word "present" with the word "imminent," and he concluded that there was no imminent danger possibly presented by "publi[cation] of a silly little leaflet by an unknown man."[86] Holmes had drifted towards Hand's view that the danger presented by the speech must be

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77. 250 U.S. 616 (1919).

78. *See id.* at 617-18.

79. *See id.* at 619-22.

80. *See id.* at 623.

81. *See id.* at 624 (Holmes, J., dissenting).

82. *Id.* at 626 (Holmes, J., dissenting).

83. *Id.* at 627 (Holmes, J., dissenting) (emphasis added). It was also in his *Abrams* dissent that Holmes made his famous statement that the freedom of speech is meant to protect the marketplace of ideas, and that the best test for truth is to allow an idea to enter into the market in order to be either bought or rejected. *See id.* at 630 (Holmes, J., dissenting).

84. There has been considerable debate concerning Holmes's change of heart in *Abrams*. *See, e.g.*, G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 427 (1992) (noting that *Abrams* represented a major turning point for Holmes). Chief Justice Vinson, in contrast, continued to insist that Holmes's basic principle never wavered. *See* Dennis v. United States, 341 U.S. 494, 505 (1951).

85. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting) (emphasis added).

86. *Id.* at 628 (Holmes, J., dissenting).

exceedingly clear, but this, of course, was a point about causation;[87] neither Holmes nor Brandeis repudiated the doctrinal premise that some speech could indeed be treated as action.

Over the next two decades the Court's majority, in reviewing convictions under state syndicalism statutes, continued the steady movement toward the bad-tendency approach, while Holmes and Brandeis cemented their resistance.[88] For example, in *Gitlow v. New York*,[89] the Court upheld New York's criminal-anarchy statutes.[90] Benjamin Gitlow, a member of the Socialist Party, had published and circulated a writing called "The Left Wing Manifesto" and a paper called "The Revolutionary Age."[91] The *Manifesto* criticized the parliamentarism of moderate socialism as inferior to a more mobilized revolutionary socialism, which generally takes the form of "mass political strikes."[92] The *Manifesto* then cited recent strikes in Winnipeg and Seattle as starting points from which a mass political strike could be launched in order to bring about revolution and the end of the parliamentary state.[93] Gitlow ended the *Manifesto* by urging: "The Communist International calls the proletariat of the world to the final struggle!"[94] The Supreme Court, in affirming Gitlow's convictions, reasoned that the right to free speech does not defeat the state's "essential" right of self-preservation.[95] A state may treat speech as action, and punish it, if the speech causes the state to fear for its very existence.[96]

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87. *See id.* at 629 (Holmes, J., dissenting) (referring to the Russians as "puny anonymities"). Holmes did continue to believe that congressional power to prevent substantive evils may be greater in times of war because there are certain dangers inherent only in war. Despite these inherent dangers, however, "the principle of the right to free speech is always the same." *Id.* at 628 (Holmes, J., dissenting). What is different is simply the imminence of the danger presented by certain speech. *But see* Posner, *supra* note 71, at 7 (arguing that Holmes went too far).

88. With World War I over and a new Communist regime in Russia, America entered an era marked by fervent hatred of various forms of radicalism. During this period, states passed laws punishing criminal anarchy and criminal syndicalism. For an interesting examination of criminal syndicalism in a more modern context see Lawrence F. Reger, *Montana's Criminal Syndicalism Statute: An Affront to the First Amendment*, 58 MONT. L. REV. 287 (1997).

89. 268 U.S. 652 (1925).

90. New York's statutes had been passed in 1902, shortly after the assassination of President McKinley. The New York statute defined criminal anarchy as the "'doctrine that organized government should be overthrown by force or violence, or by assassination of . . . officials of government, or by any unlawful means.'" *Id.* at 654 (omission added) (quoting NEW YORK PENAL LAW § 160 (Consol. 1909)). The statute also defined advocacy of criminal anarchy as advocating, advising, or teaching the duty, necessity, or propriety of criminal anarchy by word of mouth or writing. *See id.* (quoting NEW YORK PENAL LAW § 161(1)).

91. *See id.* at 655.

92. *Id.* at 656-58.

93. *See id.* at 658-59.

94. *Id.* at 660 n.2 (quotations omitted).

95. *Id.* at 668.

96. *See id.* In *Gitlow*, the Court accepted the state's legislative judgment that the *Manifesto* would tend to produce bad effects. Holmes, joined by Brandeis, again dissented on the basis that there appeared no real danger presented in the *Manifesto*. *See id.* at 673 (Holmes, J., dissenting). And danger, if there was one, was directed toward an indefinite period in the future

Two years later, in *Whitney v. California*,[97] the Supreme Court upheld the constitutionality of California's Criminal Syndicalism Act.[98] Whitney had been convicted of violating the Act by assisting in the formation of the Communist Labor Party of California, a local chapter of the Communist Labor Party of America.[99] Essentially, the criminal nature of Miss Whituey's actions stemmed from the fact that the Communist Party's main purpose was "to create a unified revolutionary working class movement in America . . . to conquer the capitalist state."[100] In affirming her conviction, the Court insisted that a statute like California's should be declared unconstitutional only if the legislature was arbitrary or unreasonable in passing it.[101] Because the statute prohibited acts akin to criminal conspiracy, and because "united and joint *action* involves even greater danger to [the state] than the isolated utterances and acts of individuals," the Court regarded the statute as perfectly reasonable.[102]

Brandeis, in a concurring opinion joined by Holmes, worried that an obsessive focus on whether the state itself perceives that certain speech presents a grave danger will eviscerate the Free Speech Clause, because the state will frequently exaggerate the potential evil of radical discourse. Brandeis recalled, for example, that "[m]en feared witches and burnt women."[103] Fear alone is therefore not enough; the state's fear must be *reasonable*, and reasonableness, according to Brandeis, is best ascertained by applying the concept of clear and present danger.[104] To show clear and present danger, the state must show "either that *immediate serious violence* was to be expected or was advocated, or that the *past conduct* furnished reason to believe that such advocacy was then contemplated."[105]

Neither Brandeis nor Holmes was retreating from the crucial proposition that speech could be action; they were instead insisting that courts police the causation issue more vigorously. Moreover, although both Holmes and Brandeis

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rather than "at once." As Holmes put it, "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." *Id.* (Holmes, J., dissenting). (And even that long-term danger was trivial.) *But see* Fiske v. Kansas, 274 U.S. 380 (1927). In *Fiske*, the Court reversed the conviction of a member of the Industrial Workers of the World ("IWW") under Kansas's criminal-syndicalism statutes for recruiting IWW members. *See id.* at 386. The defendant had been convicted based solely on the preamble of the IWW constitution, which called for the abolition of the wage system. *See id.* Looking at the language of the preamble "standing alone," Justice Sanford concluded that because the IWW advocated abolition of the wage system by *lawful* means, it differed essentially from the *Gitlow Manifesto*. *Id.*; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); Taylor v. Mississippi, 319 U.S. 583 (1943); Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937).

97. 274 U.S. 357 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

98. *See id.* at 372.

99. *See id.* at 360, 364.

100. *Id.* at 363.

101. *See id.* at 370.

102. *Id.* at 372 (emphasis added).

103. *Id.* at 376 (Brandeis, J., concurring).

104. *See id.* (Brandeis, J., concurring).

105. *Id.* (Brandeis, J., concurring) (emphasis added).

argued that the state can justify suppression of speech only in cases of emergency,[106] they also agreed that California's perception of an emergency was reasonable. Even the two most liberal guardians of the Free Speech Clause believed that the threat presented by large numbers of persons, like Whitney, "going from place to place" advocating criminal syndicalism was sufficient to justify removal of First Amendment protection.[107]

E. Proliferation and Denouement

Once articulated, the CPD test, whatever it meant, came to be applied to a smorgasbord of contexts where the state punished speech or expression. It was applied to cases dealing with contempt of court;[108] to cases challenging the validity of state statutes,[109] as well as those challenging the validity of local ordinances or regulations;[110] and to cases presenting common-law offenses.[111]

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106. *See id.* at 377 (Brandeis, J., concurring); *see also* Bridges v. California, 314 U.S. 252, 263 (1941) (requiring "that the substantive evil must be extremely serious and the degree of imminence extremely high," at least in the context of contempt of court).

107. *Whitney*, 274 U.S. at 378 (Brandeis, J., dissenting).

108. *See Bridges*, 314 U.S. 252 (reversing contempt conviction). "[T]he 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue." *Id.* at 262; *see also* Craig v. Harney, 331 U.S. 367 (1947) (reversing contempt conviction). "The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Id.* at 376.

109. *See* Thornhill v. Alabama, 310 U.S. 88 (1940) (holding state statute prohibiting picketing invalid). "Abridgment of the liberty of [peaceful and truthful discussion of matters of public interest] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Id.* at 104-05; *see also* Thomas v. Collins, 323 U.S. 516 (1945) (holding state statute requiring registration of labor organizers invalid as applied).

> [A]ny attempt to restrict [the freedom of speech] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.

Id. at 530.

110. *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating a requirement that school children salute the flag). "[The freedoms of speech and of the press] are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* at 639.

111. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing a conviction of common-law breach of the peace). "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." *Id.* at 308; *see also* Healy v. James, 408 U.S. 169 (1972). In *Healy*, the Court prohibited a college from denying student-organization status to a local chapter of Students for a Democratic Society, when the group followed the proper filing guidelines and there had been no showing that the group refused to abide by reasonable campus regulations. *See id.* at 184, 191. The significance of *Healy* is that it expanded the application of clear and present danger from criminal sanctions to

While the Court generally reversed the convictions at issue in all these contexts, it remains significant that it did so by applying—and thereby entrenching—a test born in an atmosphere of fear that the government would fall, a test, moreover, that treated some speech as action.

During the midst of this rapid expansion of the use of the CPD test, the Court decided *Dennis v. United States*[112] and adopted Judge Hand's formulation of the CPD test. Hand himself had located the formulation attributed to him in Brandeis's *Whitney* concurrence. Whereas Brandeis noted that if a danger is not *imminent*, public discourse can be relied upon to prove the utterance wrong,[113] Hand reasoned that the requisite proof period may not exist in cases of incitement.[114] That is, Hand argued that, as a matter of definition, incitement creates imminent harm. Yet, it is also worth noting that Hand also believed that the Communist threat was imminent.[115] He compared the Communist presence in Europe to the historical movement of Islam, a movement "always agitating to increase their power,"[116] and he pointed to the Berlin blockade as evidence of the tense international scene, a tinderbox in which a spark could lead to war.[117]

Following *Dennis*, the Court attempted to clarify its approach in *Yates v. United States*.[118] In *Yates*, the Court reversed the convictions of several "lower echelon"[119] members of the Communist Party of America, who had been convicted of advocating and organizing a group advocating the forcible overthrow of the government. Justice Harlan, writing for the majority, based the

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administrative sanctions. *See also id.* at 202 (Rehnquist, J., concurring) (taking issue with such an extension).

112. 341 U.S. 494 (1951).

113. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969). "If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.*

114. *See* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494.

115. *See id.*

116. *Id.* at 213. Hand referred to Communism in religious terms at several points throughout his opinion. He referred to its adherents as "infused with a passionate Utopian faith." *Id.* at 212. Additionally, Communism "has its Founder, its apostles, its sacred texts—perhaps even its martyrs." *Id.* Ironically, it is this religious aspect which caused Hand to personally detest having to uphold the conviction. Hand wrote in a letter:

> "For myself, although of course it has nothing to do with my job or what was before me in [*Dennis*], I deprecated the prosecution! If one is going to take any action against Communism, it is of no use to put some of the leaders in prison for three or four years. 'The blood of the martyrs is the seed of the church.'"

LEARNED HAND, *supra* note 10, at 603 (alteration in original) (quoting Letter from Learned Hand to Bernard Berenson (June 11, 1951)). "'Personally I should never have prosecuted those birds. . . . So far as this will do anything, it will encourage the faithful and maybe help the Committee on Propaganda.'" *Id.* (omission in original) (quoting Letter from Hand to Berenson (June 11, 1951)). Gerald Gunther attributes Hand's speech-restrictive decision in *Dennis*, despite his personal animus to prosecution, as stemming from Hand's role as a lower court judge bound by Supreme Court precedents. *See id.* at 603-04.

117. *See Dennis*, 183 F.2d at 213.

118. 354 U.S. 298 (1957), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978).

119. *Id.* at 345 (Clark, J., dissenting).

reversal on the inappropriateness of the jury instructions.[120] At trial, the judge had instructed the jury that in order to convict, it must find that the Party members advocated not only the desirability and propriety of overthrowing the government, but the necessity and duty of forcible overthrow.[121] In other words, the trial judge recited Hand's *Masses Publishing Co.* incitement test. However, Justice Harlan, writing for the Court, found that the trial judge's instructions "misconceived" *Dennis*.[122]

Harlan first defined the essence of *Dennis* as holding that

> indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.[123]

In Justice 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.[124] In the former conspiracy, only action is suspended, whereas in the latter conspiracy, the advocacy is suspended. The essential (and highly subtle) difference for Harlan lies between advocacy to do something and advocacy to believe in something.[125] Because the trial judge did not make this distinction, Harlan felt that a jury might give too much weight to evidence including vague references to unspecified revolutionary action.[126]

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.*

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120. *See id.* at 312-27.

121. *See id.* at 314-15.

122. *Id.* at 324.

123. *Id.* at 321 (citation omitted) (quoting Dennis v. United States, 341 U.S. 494, 511-12 (1951)).

124. *See id.* at 324.

125. *See id.* at 324-25.

126. *See id.* at 327. Following the decision in *Yates*, the United States prosecuted Communists under the membership clause of the Smith Act. Section 4(a) of the Smith Act held that it was a crime to conspire to perform an act that would "substantially contribute" to the establishment of a totalitarian dictatorship in the United States. Scales v. United States, 367 U.S. 203, 208 (1961). Section 4(f), the membership clause, held that it was not a per se violation of section 4(a) to belong to a Communist organization. *See id.* at 207. In *Scales*, the Court upheld the 1954 conviction of a member of the Communist Party of the United States. *See id.* Justice Harlan argued that the clause only punished membership when there was elear proof that a defendant specifically intended to accomplish the aims of the Communist Party, *viz.*, to overthrow the govcrnment "as speedily as circumstances would permit." *Id.* at 229-30. Harlan found that the evidence sufficiently proved this specific intent. *See also* Noto v. United States, 367 U.S. 290 (1961) (reversing conviction under the membership clause because evidence did not support a finding that defendant presently advocated forcible overthrow of the government). "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 297-98.

Ohio,[127] the Court declared an Ohio criminal-syndicalism statute unconstitutional, and in so doing established the modern incitement formulation of the CPD test. Under this test, the First Amendment does not protect incitement to imminent lawless action.

The appellant in *Brandenburg*, the leader of a local Ohio Ku Klux Klan chapter, invited a television reporter to attend a Klan rally, and a film taken by the reporter of the rally, 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."[128] 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."[129]

In reversing Brandenburg's conviction, the Supreme Court noted that while a criminal-syndicalism statute like Ohio's had previously been upheld in *Whitney*, later cases discredited *Whitney*.[130] The Court cited *Dennis* as the primary discrediting case.[131] The Court then reasoned that the later decisions, including *Dennis*, had fashioned the relevant principle as follows:

> [T]he 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.*[132]

Because neither the statute nor the indictment nor the jury charge distinguished between mere advocacy and incitement to imminent lawless action, the Court found the statute unconstitutional, overruled *Whitney*, and reversed the conviction.[133]

The relationship between *Brandenburg* and *Schenck* is to a large degree in the eye of the beholder.[134] Professor Kalven, for example, took the position that the modern incitement approach worked "pure" the doctrine of clear and present

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127. 395 U.S. 444 (1969) (per curiam).

128. *Id.* at 445-46 & n.1.

129. *Id.* at 446 (alterations added) (quotations omitted). Brandenburg was convicted and sentenced to 10 years in prison for violating an Ohio statute that prohibited "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.'" *Id.* at 444-45 (alteration and omission in original) (quoting OHIO REV. CODE ANN. § 2923.13 (Anderson 1953) (repealed 1974)).

130. *See id.* at 447.

131. *See id.*

132. *Id.* (emphasis added).

133. *See id.* at 448-49.

134. *See* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1163 (1970) (stating that the Court's position after *Brandenburg* remained "ambivalent"); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1175 (1982) (stating that *Brandenburg* does not provide an "unambiguous explanation").

danger.[135] Professor Gunther recently wrote that the Court in *Brandenburg* belatedly vindicated Hand's *Masses Publishing Co.* approach.[136] Professor Smolla, on the other hand, has characterized the *Brandenburg* test as an extension of the Holmes/Brandeis refinement of the CPD test.[137] Professor Wells has even argued that the test reflects the Court's acceptance of a Kantian notion of autonomy in First Amendment jurisprudence.[138] It is difficult to decide who is right, in part because the Court has issued relatively few opinions dealing in any substantive fashion with the modern incitement approach.[139] Those opinions that the Court has issued have shed little to no light on the various ambiguities present in *Brandenburg*.[140]

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135. Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 238 (1973).

136. *See* Gunther, *supra* note 76, at 750-55.

137. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 115 (1992).

138. *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997); *see also* Freedman, *supra* note 7, at 907 (arguing that *Brandenburg* permits limitations on speech "only where the speech will cause physical violence so immediately as to forestall the ability of other voices to be heard, thus precluding the recipients of the message from making an *autonomous decision* on how to respond") (emphasis added). To the extent that Professor Wells's contention is correct, then *Brandenburg* surely signals the death of clear and present danger as envisioned by Holmes. Holmes, after all, was a Social Darwinist, who rejected Kant's "moralistic 'dogma of equality.'" Rabban, *supra* note 10, at 1268 (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 43 (1946)).

139. *But see* Freedman, *supra* note 7, at 906 n.116 (claiming that the Court has never upheld a conviction based on the modern incitement test). In fact, Professor Freedman claims that *Brandenburg* has been used as a "rule . . . protect[ing] impassioned advocates of social change operating in turbulent conditions." *Id.*

140. For example, the Court has been unclear as to what exactly constitutes an imminent threat of harm. *See, e.g.*, NAACP v. Clairborne 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, "We'll take the fucking street later," as the local police were clearing the streets of demonstrators. *Id.* at 107. The Court noted that "[a]t 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 *Clairborne 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 Clairborne Hardware Co.*, 458 U.S. at 928; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding unconstitutional regulations prohibiting advertising of nonmedical contraceptives to persons under 16).

> As for the possible "legitimation" of illicit sexual behavior, whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as "directed to inciting or producing imminent lawless action . . . " [because] [t]hey merely state the availability of products and services that are not only entirely legal but constitutionally protected.

Id. at 701 (omission added) (citation omitted) (quoting Brandenburg v. Ohio, 395 U.S. 444, 457 (1969)).

In fact, *Brandenburg* has often been used as a tool of dissent. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972) (upholding the plenary power of the Attorney General to deny a waiver of a

Our view, however, is that it really does not matter who is right. For although it may well be more difficult for the state to convict under *Brandenburg* than it was under *Schenck*, the *Brandenburg* test has not succeeded in expurgating the twin defects of *Schenck*: (1) it perpetuates a test rooted not in sound theory but in historical paranoia; and (2) it continues to treat speech as action.

II. TWO DEFECTS WITH EVEN THE MOST LIBERAL VERSION OF THE CPD 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.'"[141]

Legal phenomena, like cultural phenomena generally, cannot be expected to make sense when wrenched from their historical contexts.[142] While it is nearly impossible, in the aftermath of Vietnam, to imagine that the government has the power to silence even the most inflammatory antiwar rhetoric, it cannot be forgotten that the CPD test and its various permutations arose within the context of war, or at the very least during periods of heightened political paranoia.[143] In other words, the CPD test assumes that the speech to be punished will undermine democracy; it implies that too much speech will collapse the democratic state. But, 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 systematically suppress speech are states that fear democracy, not states where democracy thrives.[144]

In addition, the Free Speech Clause of the First Amendment reflects the intuitive proposition that there is a distinction among thinking something, saying

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statutory exclusion of an alien—in this case a Belgian journalist and Marxist theoretician—who advocated or published Communist doctrine); *id.* at 773 (Douglas, J., dissenting); *see also* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting); California v. LaRue, 409 U.S. 109, 131 (1972) (Marshall, J., dissenting) (stating that "[t]he only way to stop murders and drug abuse is to punish them directly"); United States v. Caldwell, 408 U.S. 665, 716-17 (1972) (Douglas, J., dissenting); Cole v. Richardson, 405 U.S. 676, 688-89 (1972) (Douglas, J., dissenting).

141. Whituey v. Califoruia, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., concurring) (quoting Charles A. Beard, *The Great American Tradition: A Challenge for the Fourth of July*, 123 NATION 7, 8 (1926) (quoting Letter from Thomas Jefferson to Elijah Boardman, New Milford, Conn. (July 3, 1801))), *overruled in part by Brandenburg*, 395 U.S. 444.

142. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3 (1969). "Karl Llewellyn has made us keenly aware of those highly specific differences in legal styles that vary from culture to culture and from period to period." *Id.*

143. *See* Kalven, *supra* note 135, at 237 (stating that "[t]o put [*Debs*] in modern context, it is somewhat as though Gcorge McGovcrn had been sent to prison for his criticism of the [Vietnam] war").

144. We put to the side the controversial question of what constitutes a democracy. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 59-60 (1985).

something, and doing something.[145] That is, although action can at times qualify as speech,[146] and although speech is, in a sense, an action,[147] there is a strong moral intuition that holds that *saying* something is different from *doing* something. 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. The CPD test, from its inception to the present, ignores this powerful intuition, an intuition, moreover, that the Free Speech Clause itself, in its unequivocal language, appears to embrace.

A. The CPD Test as a Paranoid Atavism

Perhaps no other figure of dissent resonates more powerfully in the late-twentieth-century mind than the lone pedestrian blocking a phalanx of Chinese tanks in route to Tiananmen Square. What this and other images from the Chinese summer of 1989[148] illustrate is the extent to which a tyrannous political body will act in order to silence disagreement. Ironically, Article 35 of the Constitution of the People's Republic of China declares that "'[c]itizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.'"[149] Consequently, even at the most visceral level, watching Chinese troops raze the Goddess of Democracy[150] refutes the fundamental assumption of the CPD test: that speech can endanger a democratic system. Rather, these images illustrate, better than thousands of words, that speech, particularly dissenting speech, is a prerequisite for democracy and that speech poses a greater threat to *non*democratic systems.[151] Indeed, when the Soviets removed Alexander Dubcek from political office during the "Prague Spring" of 1968, they were attempting to stifle reform; they were trying to shut Dubcek up. Ironically, during the autumn of 1989, amid a flood of pro-democracy protests in Wenceslaus Square, the Czechoslovakian Politburo dissolved, and Dubcek once again spoke.

Judge Easterbrook has written:

> A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of

145. *See infra* Part II.B.

146. 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).

147. That is, the actual muscular contractions which force air through the vocal cords and produce the sounds recognized as speech.

148. In the summer of 1989, millions of Chinese students and citizens amassed in Tiananmen Square in Beijing, China, seeking democratic reform.

149. SMOLLA, *supra* note 137, at 349 (alteration added) (quoting XIANFA art. 35 (1982)).

150. One of the symbols created by the demonstrators was the Goddess of Democracy, a 33-foot-high statue that resembled the Statue of Liberty.

151. *See* WILTSHIRE, *supra* note 6, at 111 ("The presence of free speech does not ensure good government. Its absence, however, does ensure totalitarianism.").

> the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.[152]

Judge Posner has taken exception to Judge Easterbrook's view and to what he terms "judicial rhapsodi[zing] of free speech."[153] "Indeed," writes Posner, "the suggestion that the first amendment ties our hands in dealing with Nazi and communist revolutionaries . . . is an unintended intimation of that most frightening of constitutional conceptions: the Constitution as a suicide pact."[154] But Posner errs in thinking that Easterbrook's view conceives of the Constitution as a suicide pact, and his error is precisely the same error that the CPD test embodies: Judge Posner, like Judge Hand and Justices Holmes and Brandeis (not to mention lesser mortals), ignores the pivotal distinction between action and speech. That the Constitution permits anything to be *said* does not entail that it permits anything to be *done*.

The concept of democracy dates back to ancient Athens, and essential to Athenian democracy was *isegoria*, or the equal right to speak.[155] Demosthenes characterized *isegoria* as follows: "The fundamental difference between the Athenian and the Spartan constitutions is that in Athens you are free to praise the Spartan constitution, whereas in Sparta you are not allowed to praise any constitution other than the Spartan."[156] While *isegoria* granted each citizen the right to address the various political bodies in Athens, it was not an individual right in the sense that we would consider the right to free expression today.[157] Rather, the concept of *isegoria* acted as a fundamental component of good government.[158] Consequently, Demosthenes argued against the repression of *isegoria*, not because it would infringe on the individual citizen's right to self-expression, but because it would impede the progress of city government.[159]

Throughout the evolution of the CPD test, the same dilemma arose in each case: Do speakers who express opposition to democracy have the right to express such opposition even if it might lead to the destruction of the democratic state? Virtually all of the justices answered no. For instance, Justice Sanford premised his decisions in *Gitlow* and *Whitney* on the state's "essential" right of self-preservation.[160] Even Hand, Holmes, and Brandeis accepted this premise,

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152. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (en banc).

153. Posner, *supra* note 71, at 7.

154. *Id.*

155. *See* WILTSHIRE, *supra* note 6, at 112.

156. *Id.* at 113 (quotations omitted).

157. *See id.* at 112. Professor Smolla details the various societies today that recognize the freedom of speech as a human right, rather than a component of good government. *See* SMOLLA, *supra* note 137, at 347-51. The purpose of this essay is not to answer the riddle whether the freedom of speech is an individual right or a component of good government. Rather, we simply argue that the premise that too much speech can undermine a democratic state is, at bottom, false.

158. *See* WILTSHIRE, *supra* note 6, at 112.

159. *See id.* at 113.

160. *See* Whitney v. California, 274 U.S. 357, 371 (1927); Gitlow v. New York, 268 U.S. 652, 668 (1925); *see also* Dennis v. United States, 341 U.S. 494, 520 (1951) (Frankfurter, J., concurring).

disagreeing merely with the imminence of the danger posed to the state by certain speech.[161] Thus, throughout the evolution of the CPD test, the point of departure among the various judges appears to have been one of fear: How much fear must the state experience before it has the power to silence the speaker? Whereas Sanford would have accepted the suppression of speech tending to make a legislature slightly nervous, Brandeis and Holmes demanded at least some substantiation of the legislature's fear.

Even substantiated fear, however, may amount to nothing more than rationalized paranoia. Yet rather than confront this possibility, judges have tended to hyperbolize supposed threats. For example, Judge Hand portrayed the battle against Communism as the New Crusade. Comparing the Communist threat to the spread of Islam, Hand infused the convictions of the eleven leaders of the Communist Party of America with a sense of holiness. The reality was actually quite different, however, for Communism never truly posed a serious threat to American internal affairs. Even so, fervent anti-Communism was an expression of faith. During this era, as the CPD test became embedded in doctrine, Chief Justice Vinson literally saw the seeds of a "*putsch*" in every dissent.[162] (The rhetoric in the opinions of this era repays rereading. It seems fair to say that many of the decisions affirming the punishment of speech appear to have expended more energy devising incendiary metaphors than accurately assessing the danger posed by various utterances.)[163] Only Justice Douglas recognized the reality that Communism in America never posed any real threat to the democratic system.[164]

Notably, when confronted with the same dilemma, Athenian *isegoria* favored the freedom of threatening speech as less of a danger than the potential effects of stifling such speech.[165] This is not to say that the Athenians did not devise methods of suppression. For instance, Athens punished libel with monetary fines.[166] The Athenians also adhered to a strict standard of accountability and practiced ostracism when certain politicians became too powerful.[167] Despite these methods of suppression, however, two things become very clear. First, the Athenians devised a democracy, in structure and practice, "so that in Aristotle's observation . . . 'all citizens deliberate about all matters.'"[168] Second, unlike the architects of the CPD test, the Athenians assumed that free expression, even threatening expression, was necessary for the continuation of a democratic

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161. *See Whitney*, 274 U.S. at 376 (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494.

162. *Dennis*, 341 U.S. at 509 (emphasis in original).

163. *See, e.g., id.* at 511 (noting the "inflammable nature of world conditions"); *Gitlow*, 268 U.S. at 669 ("A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."); Frohwerk v. United States, 249 U.S. 204, 209 (1919) (arguing that the publication was circulated "in quarters where a little breath would be enough to kindle a flame").

164. *Dennis*, 341 U.S. at 588 (Douglas, J., dissenting).

165. *See* WILTSHIRE, *supra* note 6, at 113.

166. *See id.* at 115.

167. *See id.*

168. *Id.* at 116.

state.[169] Aristotle and the Athenians may well have exaggerated the value of prolific speech or political participation, but Holmes and the creators of the CPD test exaggerated the danger that speech can pose to democratic politics.

B. The CPD Test as a Moral Failure

Laws properly enacted can still be immoral; wars properly declared can 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 a fatally flawed theory. Yet no theory, as the history of the CPD test tends to prove, is capable of treating some speech as action, thereby punishing it, without flowing ineluctably into this fatal flaw.

When Judge Hand attempted in *Masses Publishing Co.*[170] to draw a distinction between advocacy (or persuasion), on the one hand, and incitement, on the other, he was trying to preserve both the freedom of individuals to criticize and the power of the state to punish. But his effort and all subsequent efforts have failed for two reasons. The first (and less interesting) is that the line between advocacy and incitement is primarily a function of the listener, not the speaker.[171] The second reason, and the one we focus on here, is that all such efforts collapse the basic moral distinction between speech and action, between saying something and doing it.

It is true that the modern incitement approach is based on specific intent. This means that not only must the speech be *likely* to incite or produce lawlessness, but the speech must be *directed* toward inciting or producing lawlessness. And 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. Even so, the test continues to blur the morally and legally salient distinction between action and speech. Every generation has its own proponents of this gambit; every generation has its own cadre of silencers. Whereas members of the political right sought to quiet speech a generation ago, today's proponents of silencing are as likely to be from the political left. The forces allied against pornography, for example, comprise an odd assortment of leftists and rightists; and the proponents of removing First Amendment protection for so-called "hate speech" are typically from the political left.[172] What all these silencers have in common is that they, too, embrace the fallacy that lies at the heart of the CPD test: the proposition that speech is action, or so close to action that it can be punished as such.

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169. *See id.*

170. Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

171. 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 important, by negating the moral distinction between saying and doing (the second reason addressed in the text). For a fuller development of the moral argument put forward here see David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL OF RTS. J. (forthcoming 1998).

172. Professor Fiss has observed that the traditional alliance of political liberals has been shattered by divisions over the First Amendment. *See* FISS, *supra* note 6, at 1-6.

1. A Preliminary Caveat

At the outset it is important to emphasize that the moral criticism we level here against the clear and present danger doctrine does not flow in both 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 any doubt on the line of cases which hold that certain conduct must be protected as speech.[173]

In *Texas v. Johnson*,[174] for example, the Court held unconstitutional a Texas statute which 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: Although burning a flag may be speech, the State maintained, it is speech which could deeply offend onlookers; therefore, the law against flag desecration actually protects the public from potential breaches of the peace. In rejecting the State's argument, the Court made the point that is actually sharp enough to shred the entirety of the CPD test. The Court observed that even though certain breaches of the peace may occur when a flag is burned, the state has available to it 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 them for their lawless actions, rather than the speaker to whom they are reacting.[175]

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. This premise is manifestly correct. However, it has no bearing on our thesis, which is that speech—or, more generally, communication—is not action; and that the First Amendment protects communication (as distinguished from action) absolutely.[176]

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173. 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 where the speech or conduct is communicative; however, as we argue in the text, that may not be so good an idea when used to control speech (rather than merely conduct). *See* John Hart Ely, *Flag Desecration*, 88 HARV. L. REV. 1482, 1495 (1975).

174. 491 U.S. 397 (1989).

175. It is true that Texas's breach-of-peace statutes were already in existence when the decision was handed down. This raises the question whether the outcome might have been different had there not already been valid breach-of-peace statutes on the books. While this might be an interesting question to pursue, the answer is irrelevant to our argument. What is essential is that the state punish conduct as such, rather than collapse speech into conduct as a method of punishing the speech.

176. We do not argue, however, that it is beyond the power of the state to regulate speech, such as by placing reasonable time, place, or manner restrictions.

2. Saying and Doing

"Every idea is an incitement," wrote Holmes.[177] There is nothing worth saying that might not cause some listener to take action, action that may 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. For not every idea *is* an incitement; but every idea *might* be, and any idea *can* be. Nevertheless, it is the *act* which the law must punish, rather than the ostensible trigger (or cause) of the act. Partly this is true because we can never be sure about what the trigger actually is,[178] but the more powerful reason why this is true is that saying that speech can be coupled with the bad act that it assertedly causes, and then punished exactly as the act is, is an idea that is at war with the very core of the Free Speech Clause itself. Justice Douglas succinctly made this point nearly a generation ago. Concurring in *Brandenburg*, he wrote, "[t]he line between what may be made permissible and not subject to control and what is impermissible and subject to regulation is the line between ideas and overt acts."[179]

The Free Speech Clause is couched in unequivocal and absolute terms: "Congress shall make no law . . . abridging the freedom of speech . . . ."[180] 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.[181]

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177. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

178. *See infra* notes 182-91 and accompanying text.

179. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring); *see also* Branzburg v. Hayes, 408 U.S. 665, 716-17 (1972) (Douglas, J., dissenting); Scales v. United States, 367 U.S. 203, 262-75 (1961) (Douglas, J., dissenting). Justice Douglas also appears to have shared the view we express in the immediately preceding section: namely, that the test itself can be explained as a disproportionate response to the prevalent mood of fear which so permeated the era. "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war," he wrote, "I am certain it is not reconcilable with the First Amendment in days of peace." *Brandenburg*, 395 U.S. at 452 (Douglas, J., concurring). Moreover, Justice Douglas realized that the threats punished under the CPD test "were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous." *Id.* at 454 (Douglas, J., concurring) (italics in original).

180. U.S. CONST. amend. 1; *see also* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 110 (1982). *But see* Posner, *supra* note 71, at 3-5 (concluding that the language of the Free Speech Clause is "indefinite and noncommittal").

181. *See generally* 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 §§ 3.1 to 3.4 (2d ed. 1986), Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992), and Thomas A. Green, *Freedom and Responsibility in the Age of Pound: An Essay on*

The First Amendment mandates that only overt acts may be punished. More generally, three factors must be present in order to justify punishing an individual. The first is that the individual must have acted; the second is that the action must have caused harm; and the third is that the individual must be culpable. Each of these criteria presents well-known philosophical difficulties, and we do not propose to revisit the entire moral terrain presented by these issues. Rather, our essential claim is that the Free Speech Clause itself resolves these complicated matters where speech is at issue.

The first criterion, for example, implicates the problematic distinction between action and inaction. When is *not* acting tantamount to acting? Charles Fried has given the example of the pedestrian who sees a swimmer drowning, but declines to throw the swimmer the nearby life preserver because it is freshly painted and the pedestrian does not want to soil his clothes.[182] Has the pedestrian acted or refrained from acting? Bentham characterized inaction (or what he called "acts of omission") as "negative" actions on the ground that an individual who declines to act has nonetheless performed an act of will.[183] In the context of speech, if inaction is action, would a refusal to persuade potential rioters not to riot be punishable? Why should a speaker who says "Let's start looting" be liable (whether as criminal or as tortfeasor) while a speaker who declines to say "Let's not loot" not be? This is not an easy question in the context of existing First Amendment doctrine, which holds that the speaker who urges the masses to riot is liable.[184] In contrast, under a theory of the text which holds, as we propose, that no speech is punishable, the question cannot even arise.

The second factor that must be present to justify punishment is causation. Irrespective of one's view on the tenability of the distinction between action and inaction, an individual is not morally blameworthy unless her action causes

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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: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 578 (1987). For a discussion of the breakdown of this idea, see Craig Calhoun, *Social Theory and the Law: Systems Theory, Normative Justification, 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 Amendment put forth in this essay. *See, e.g.*, Meir Dan-Cohen, *Responsibility and Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38, 42 (1989).

182. *See* CHARLES FRIED, RIGHT AND WRONG 52 (1978).

183. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 75-76 (J.H. Burns & H.L.A. Hart eds., 1996) (1789). Gilbert Ryle, however, has argued that one's will cannot be separated from action. *See* GILBERT RYLE, THE CONCEPT OF MIND 62-84 (1949).

184. Nor is it 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).

harm.[185] Causation is a notoriously complicated notion.[186] Moral philosophers have expended great energies stating the conditions under which an individual can be said to cause certain harm.[187] Other philosophers, beginning perhaps with Thomas Nagel, have argued that the question of causation is morally irrelevant because the question of whether a certain action causes external harm is typically susceptible to "moral luck," that is, to factors which the individual cannot control.[188] When Holmes and Hand ask whether speech threatens imminent harm, they are asking a question about causation, about the closeness of the nexus between words and deeds. Law as a whole cannot avoid the morass of causation, of course,[189] but the theory of the First Amendment we endorse 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 he committed murder, Shakur himself might have been imagining murder. He might have imagined that people who heard his music would become murderous. He might even have been advocating murder. But regardless of whether he was imagining any of these things, he did not act; all he did was communicate. If a murder follows a song, then even if we can bridge the impossibly deep 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 have not dissolved the distinction between singing and shooting.[190] By presuming as a fixed axiom that speech is not action, the First Amendment completely circumvents the impossibly complex issues of

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

186. The essential work here is H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

187. A superb treatment of the issues is found in JOEL FEINBERG, DOING AND DESERVING (1970). *See also* John Casey, *Actions and Consequences*, *in* MORALITY AND MORAL REASONING 155 (John Casey ed., 1971); Elliott Sober, *Apportioning Causal Responsibility*, 85 J. PHIL. 303 (1988).

188. *See* THOMAS NAGEL, MORTAL QUESTIONS (1979); Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374 (1987).

189. On the other hand, some philosophers have certainly 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.").

190. For examples of civil suits filed, arguing that music caused harm, see generally *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991) (dismissing wrongful-death suit filed by parents after son committed suicide after repeatedly listening to the music of heavy-metal singer Ozzy Osbourne), *aff'd without opinion*, 958 F.2d 1084 (11th Cir. 1992), and *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (same). 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 to suicide.

causation.[191] Ronald Howard does not even get to try to establish that Tupac Shakur "caused" him to murder Officer Bill Davidson, because what Tupac did was speak. Tupac communicated; Howard acted.

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 harm be legally blameworthy. To be sure, legal responsibility and moral responsibility do not always walk hand in hand. The law may deem someone not responsible who strikes us as in fact being morally responsible; conversely, the law may deem legally responsible an individual who seems morally blameless.[192] 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. Our contention here is that when the listener has in fact had her will overborne by the speaker, then it is apt to say that the speaker has acted in a culpable fashion.[193]

When 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. But if that is so, then the listener's legal culpability will be accordingly diminished. Or, to return to our case of Tupac Shakur, suppose that Shakur had kidnapped Ronald Howard and hypnotized him and, during the hypnosis, implanted the command 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, which command Howard was incapable of ignoring;[194] and under such circumstances,

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191. As one commentator has recently (and correctly) observed: "[t]here 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).

192. *See* FEINBERG, *supra* note 187, at 30.

193. *See* HART & HONORÉ, *supra* note 186, at 58, 143-44.

194. The operative fact here is that Howard must be incapable of resisting Tupac's command; he cannot but follow it. Take as another example the case of *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836 (D. Md. 1996). In *Rice*, the defendant published a book called "Hit Man," which essentially provided step-by-step instructions on 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, inter alia, the publication of *Hit Man* did not satisfy the *Brandenburg* test because it did not command the reader to go out and commit murder now. Instead, explained the court, the book simply provided information regarding murder upon which the reader could act if he so chose. While we agree with the ultimate holding of the court, the distinction that the court made is somewhat chimerical without recognizing our basic premise. Whether a speaker advises or commands a listener to commit a lawless act is irrelevant if the speaker has not overborne the listener's will such that the speaker conflates his will with the listener's.

a jury might choose to acquit Howard. Under this scenario, Howard is just a robot, an extension of Shakur; under this scenario, Shakur is the actor.

What this illustration also demonstrates is the symmetry between those cases where the speaker has conquered the listener's will and those cases where the listener is deemed insufficiently responsible for an act to merit punishment. That is to say, Howard cannot escape punishment, and Shakur cannot face punishment,[195] unless it can be shown that Shakur's lyrics overwhelmed Howard's will. One can view this issue mathematically: A certain quantum of legal 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.

This view of blameworthiness which we locate in the Free Speech Clause is classically Aristotlian. In the *Nicomachean Ethics*, Aristotle claims that we blame individuals for their actions which 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).[196] By "action" Aristotle manifestly means some physical act (as distinguished from speech); in addition, it is telling that the major focus of Aristotle's effort is to make clear what is meant by voluntary (and to explain how voluntariness is a crucial aspect of blameworthiness). In a sense, Aristotle is addressing a version of the problem of free will,[197] a matter which has consumed theologians as well as moral philosophers for millenia.[198] And 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 defines a voluntary act as one where the "initiative lies with the agent who knows the particular circumstances in which the action is performed."[199] One could of course construct a hypothetical where the act of speaking failed to satisfy this definition of voluntariness. A defendant who confesses 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. But these are distractions. When an individual speaks in the public domain and invokes the First Amendment to protect that speech, the speech is presumptively 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

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195. By punishment, we assume that a finding of tort liability may include some element of punishment.

196. We have used the Martin Ostwald translation of ARISTOTLE, NICOMACHEAN ETHICS 52 (Martin Ostwald trans., 1962) (n.d.). We have also relied heavily on Professor Smiley's lucid treatment of the issues. *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 37-57 (1992).

197. Smiley argues, however, that Aristotle was not "concerned primarily with free will." SMILEY, *supra* note 196, at 39.

198. The collected works in DETERMINISM, FREE WILL, AND MORAL RESPONSIBILITY (Gerald Dworkin ed., 1970), provide a fine treatment. *See also* HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 95-103 (1988).

199. ARISTOTLE, *supra* note 196, at 57.

action.[200] 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 which 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 culminating 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 simply is *never* regarded as sufficient to cause the kind of harm that the law addresses. There must be, in addition to the speech (the communication), some further act. It is this further act which, 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 a power over the listener so profound that the listener herself could not be held morally accountable for her actions.

CONCLUSION

To be sure, the legal conclusion we trumpet will not necessarily coincide with our moral conclusions. An individual may escape legal liability yet remain morally blameworthy for some set of events which results from her speech.[201] But this fact is passé;[202] 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; 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 turgid rhetoric of another Hitler or admiring the smooth syntax of a poet such as Cummings, the listener 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.

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200. It merits emphasis at this point that our claim is that the law anticipated by the Free Speech Clause can punish only action, but a cogent moral theory may punish speech with equal force. *See, e.g.*, FRANKFURT, *supra* note 198, at 98-100 (describing the failure to call the police after witnessing an accident as morally significant even if downed phone line would have prevented the speech in any event).

201. *See* FEINBERG, *supra* note 187, at 25-37.

202. *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).