# ON THE DISTINCTION BETWEEN SPEECH AND ACTION

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Does the First Amendment rest on a mistake? More specifically, is the First Amendment's necessary distinction between speech and action fundamentally unsustainable?

The First Amendment, in relevant part, protects "the freedom of speech."[2] By contrast, and importantly, the First Amendment does not simply protect, say, "freedom," or "liberty." And thus it appears, initially and obviously, that the protections of the First Amendment extend to some acts or events or behaviors but not others. Indeed, not only the First Amendment but also any coherent principle of freedom of speech presupposes a meaningful distinction between the activities

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[2] U.S. Const. amend. I.

encompassed by the principle and those that are not. Loosely and preliminarily, we can label the former as "speech" and the latter as "action."[3] And because any non-vacuous account of a free speech principle is premised on the idea that being an act of speech in the relevant sense grants to that act a degree of protection from restriction not granted to non-speech acts causing equivalent consequences,[4] some

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[3] By way of emphasizing the preliminary nature of the terminology, I do not at this point in the analysis want *anything* to turn on the word "action," especially because *all* speech is action (or conduct) in some sense. But the basic idea is that there appears to exist a distinction between speech and non-speech behavior, or between the behavior we designate as "speech" and the behavior we do not.

[4] *See* Frederick Schauer, Free Speech: A Philosophical Enquiry 2-14 (1982) (analyzing the necessary conditions for a distinct Free Speech Principle); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204, 204 (1972) ("The doctrine of freedom of expression is generally thought to single out a class of 'protected acts' which it holds to be immune from restrictions to which other acts are subject."). Although Scanlon now believes that the highly influential account he offered in 1971 is "mistaken in important respects," Thomas M. Scanlon, *Comment on Baker's* Autonomy and Free Speech, 27 Const. Comm. 319, 319 (2011); *see also* Thomas M. Scanlon, Jr, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 534 (1979), his subsequent narrowing of his earlier position, even if relevant to taking the earlier article as a self-standing contribution usable or not on its own terms, does not touch the basic analytic point about the structure of a free speech principle.

Although the most obvious application of the distinction set out in the previous paragraph is with respect to a differential immunity from restriction for speech and non-speech behavior causing equivalent harm or other negative consequences, *see* Scanlon, *A Theory of Freedom of Expression*, *id.* at 204, it is worth noting that the distinction between speech and non-speech behavior might arise in the context of positive benefits or obligations rather than negative consequences. Thus, for example, if there were (which there is not, *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973)) an affirmative obligation on the part of government to subsidize speech-relevant activities, a free speech principle would generate a greater obligation to subsidize or otherwise support speech than to subsidize or support non-speech activities bringing equivalent benefits. What is key is the differential, and not whether the differential attaches to the restrictive as opposed to the supportive activities of the agent against whom the free speech claim is offered. *See* Leslie Kendrick, *What Makes Speech Special?* (unpublished manuscript in possession of author).

sort of distinction between speech and action is a necessary condition for a viable principle of freedom of speech. But unless there are free-speech-relevant attributes that are possessed by speech but not by action, the distinction between speech and action, at least as a matter of free speech theory, cannot do the work that appears to be required of it.

Although some kind of free-speech-relevant distinction between speech and action is a necessary condition for a meaningful free speech principle, it is by no means clear that such a distinction can be maintained. There is, to be sure, a difference between a fire and shouting fire in a crowded theater,[5] just as there is a difference among a pipe, a picture of a pipe, and a verbal description of a pipe.[6] In some contexts, therefore, distinctions between words and things and between speech and action plainly exist. But the existence of such a distinction in some contexts does not entail the conclusion that the everyday distinction between speech and action will mark anything of free speech significance, nor that the distinction can carry the weight that any meaningful principle of free speech must demand of it.

Controversies over the existence (or not) of a distinction between speech and action have occasionally appeared as weapons in contemporary debates about hate

[5] *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[6] René Magritte, The Treachery of Images (Ceci n'est pas une pipe) (1928-29).

speech and pornography, with proponents of regulation questioning the distinction[7] and opponents accusing their adversaries of failing to grasp a distinction that lies at the foundation of the idea of rationality, and, indeed, of what it is to be human.[8] Yet these debates have taken place in such a narrow (and too-often tendentious) context that they have avoided confronting most of the important foundational issues about freedom of speech. In fact, it is not uncommon for the defenders of a speech-action distinction to take the existence of a free speech principle as a given and thus as the premise for the necessity of accepting the distinction.[9] As a matter

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[7] *See, e.g.,* Rae Langton, Sexual Solipsism: Philosophical Essays on Pornography and Objectification 27-37, 103-16 (2009) (drawing on speech act theory to consider speech as action rather than distinct from it); Catharine MacKinnon, Only Words 29-41(1994) (characterizing the speech-action as "legalistic"); Susan J. Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 Legal Theory 39, 56-61 (1998) (challenging the distinction between the verbal and the physical); Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 St. John's L. Rev. 119, 149 (1991) (questioning the distinctions between speech and action and speech and conduct); Alon Harel, *Hate Speech and Comprehensive Forms of Life, in* The Content and Context of Hate Speech: Rethinking Regulation and Responses 306, 308-10 (Michael Herz & Peter Molnar eds., 2012) (same). Stanley Fish also questions the distinction, Stanley Fish, There's No Such Thing as Free Speech – And It's a Good Thing, Too 106 (1994) (noting the "general difficulty of separating speech from action"), but given his skeptical stance about the ontology of distinctions in general it is difficult to know what to make of his claims about the distinction between speech and action.

[8] *See, e.g.*, Amy Adler, *Inverting the First Amendment*, 159 U. Pa. L. Rev. 921, 927, 970-85 (2001) (arguing that the speech-action distinction plays a "central role in the First Amendment"); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 492, 494, 532-33, 541-44 (objecting to the "abrogation of the tradition distinction[] between speech and conduct"); Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 Ariz. L. Rev. 439, 442, 444 (1995) (responding to attacks on the distinction between speech and conduct); Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. Rev. 203, 206, 209-10 (1994) (same).

[9] *See, e.g.* Charles Collier, *Hate Speech and the Mind-Body Problem*, 7 Legal Theory 203, 204 (2001) (relying on Clark v. Community for Creative Non-Violence, 468 U.S.

of positive law or political rhetoric such a strategy may well be defensible, but in the context of a deeper exploration of the foundations of the very idea of free speech it is plainly unacceptable. At times examining with an open mind whether a free speech principle is itself sound is an important task,[10] and for that task we cannot simply assume the conclusion of the inquiry. Rather, when we seek to inquire into whether there can be a sound free speech principle at all, we must subject to critical analysis just what it means to draw a distinction between speech and action, whether the distinction can actually be drawn, and whether the distinction, even if it can be drawn, can provide the basis for a principle of freedom of speech.

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288, 293 n.5 (1984), to assume a "constitutionally significant difference between speech and . . . action"); Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 Alb. L. Rev. 19, 23 (1986) (noting that much of First Amendment doctrine is "predicated on the speech/action distinction").

[10] Such contexts would include not only philosophical inquiry for its own sake, but also institutional and constitutional design in domains in which free speech principles are not yet accepted. One example would be countries with rudimentary free speech protection, and which foundational questions might thus be asked about how much free speech, if any, should be permitted. Another would be non-governmental settings (corporations and private colleges and universities, for example) in which free speech is considered in the context of institutional design decisions about who should be allowed or encouraged to say what, even apart from questions of positive law. And of course the groundings of the idea of free speech are plainly relevant to questions arising in the interpretation of the First Amendment itself, as is apparent both from the fact that much of existing free speech theory has been developed in the context of the First Amendment (*e.g.*, Vincent Blasi, Ideas of the First Amendment (2d ed. 2012); Paul Horwitz, First Amendment Institutions (2013); Robert C. Post, Constitutional Domains: Democracy, Community, Management (1995); Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990)) and from the frequency with which the Supreme Court makes reference to foundational principles in deciding First Amendment cases. *E.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547-50 (2012) (relying on the foundational premise that truth is not to be authoritatively determined by government); Cohen v. California, 403 U.S. 15, 24-26 (1971) (basing decision on self-expression rationale for the First Amendment); Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) (stressing freedom of belief and freedom of thought).

Thus, unburdened by assumptions resting on existing positive law or political history -- including but not limited to the law and history of the First Amendment – I examine here whether the kind of distinction between speech and action that is necessary to any principle of free speech can in fact be sustained. Much of the focus will be on issues of autonomy and freedom of thought, and even more particularly on arguments grounded in respect for the decision-making capacities of autonomous agents whose volitional decisions are often thought to be a necessary mediating step between speech and harmful action. But my goal is broader than that, for in questioning the viability of a speech-action distinction in this context I hope to raise questions about the speech-action distinction in other free speech contexts as well, and thus ultimately about the soundness of any free speech principle at all.

## I. On the Structure of a Free Speech Principle

My inquiry is pre-constitutional and pre-doctrinal, but the structure of American constitutional doctrine may still illuminate the basic idea and the principal problem. And according to that doctrine, government regulation of most of the vast universe of human behavior need only satisfy the minimal scrutiny of the rational basis test.[11]

[11] *See, e.g.* Ferguson v, Skrupa, 372 U.S. 726, 730-32 (1963) (holding that wisdom of law restricting the practice of debt adjustment to lawyers was for the legislature and not for the courts to decide); Williamson v. Lee Optical of Oklahoma, Inc. 348 U.S. 483, 487-90 (1955) (upholding on rational basis grounds the requirement that opticians could not fit eyeglasses without receiving a prescription from an optometrist or ophthalmologist); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391, 398 (1937) (holding that regulation for purposes of health, safety, morals, and welfare satisfied requirements of due process as long as it bore a "reasonable relation to a proper legislative purpose, and [was] neither arbitrary nor

We can call this the "baseline rule," in the sense that it is the default standard applicable to all governmental action. In practice, the American baseline rule is a test of virtually no stringency,[12] although one can imagine tests more stringent than the existing rational basis test that would still operate in this baseline fashion.[13] But under the baseline rule that actually exists, the government may, as long as it meets extremely minimal standards of rationality, regulate most aspects of personal[14] or

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discriminatory"); Nebbia v. New York, 291 U.S. 502, 537 (1934) (applying reasonableness test to regulation of business). *See also* United States v. Carolene Products Co., 304 U.S. 144, 152, 153 (1938) (announcing that "rational basis" is the standard to be employed in evaluating the constitutionality of social and economic regulation).

[12] *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (concluding that courts applying rationality review should not interfere with policy decisions "[n]o matter how unwise" they may be); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1697 (1984) (describing modern rationality review as "extremely deferential").

[13] And thus the same analytic point applies even if, as is occasionally the case, it is argued that rational basis review should have slightly more "bite." *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982) (concluding the rationality review requires "something more than the exercise of a strained imagination"); (United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 535-38 (1973) (invalidating food stamp qualification criterion on rational basis grounds); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in the judgment) (arguing that rationality review should require more than simply a "conceivable" or "plausible" basis.

[14] *See* Washington v. Glucksberg, 521 U.S. 702, 721, 735 (1997) (rejecting right to assisted suicide on rational basis grounds); Kelley v. Johnson, 425 U.S. 238, 248 (1976) (upholding rationality and thus constitutionality of personal appearance regulation for police officers). At one time the rational basis standard applied to sexual conduct, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (finding a moral basis for a law sufficient to satisfy the rationality standard), but no longer. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers*, but not specifying the standard of review).

business[15] behavior. And thus, applying existing doctrine to the preliminary terminology noted above, we can conclude that the government may regulate action subject only to the negligible scrutiny of the rational basis standard.

When the state seeks to regulate speech, however, it must show something more. This "something more" might be characterized as a "compelling interest,"[16] or there might be a different formulation of the exceptionally heavy burden on the state to justify its regulation,[17] but the basic idea of requiring much more of a showing of necessity than is required by the rational basis standard is the same. Indeed, even when the heightened burden of justification embodies a degree of scrutiny less stringent than the compelling interest test, as for example with the so-

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[15] *See* note 11, *supra.*

[16] Although commonly associated with equal protection (Loving v. Virginia, 388 U.S. 1, 9 ("very heavy burden of justification"); Korematsu v. United Sates, 323 U.S. 214, 216 (1944) ("most rigid scrutiny")) or due process (Roe v. Wade, 410 U.S. 113, 163 (1973) ("compelling")), the compelling interest formulation has occasionally surfaced in First Amendment doctrine. *See also* New York v. Ferber, 458 U.S. 747, 757 (1982) (recognizing "compelling" interest, even as against First Amendment concerns, in protecting the wellbeing of minors).

[17] It is more than plausible to characterize the clear and present danger principle (Schenck v. United States, 249 U.S. 47, 52 (1919)) in this way, given that normally the state may, if constrained only by the rational basis standard, deal with dangers that are neither clear nor present. Much the same can be said about the existing crystallization of the clear and present danger standard in Brandenburg v. Ohio, 395 U.S. 444, 447(1969) (holding that advocacy of illegal action may be prohibited if it is directed to producing imminent lawless action and is likely to produce that result), because, again, the assumption is that, when dealing with non-speech behavior, the state may address problems that are neither "imminent" nor even "likely." *See* Hans Linde, *"Clear and Present Danger" Reexamined*, 22 Stan. L. Rev. 1163 (1970); Frederick Schauer, *Is it Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. 301 (2009); Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg, 1969 Sup. Ct. Rev. 1.

called intermediate scrutiny applied to commercial speech,[18] the basic structure remains the same, for the fact of the object of regulation[19] being regulated being "speech," again to put it loosely and preliminarily, is what causes the regulation to be measured against a standard at least somewhat more stringent than that of mere rationality. For present purposes the size of the gap between rational basis scrutiny of "action" and heightened scrutiny of "speech" can be set aside, but the very idea of there being a *right* to free speech presupposes at least some gap. Without the gap between free speech scrutiny and the scrutiny of some larger or other category, free speech would be merely an instance of some larger category, and it would be a conceptual error to think that there was a right to free speech in any meaningful sense.[20]

Implicit in the foregoing analysis and conclusion is a conception of rights as entities or principles that raise the standard of justification for restriction of the activities covered by the right above what it would otherwise be under some

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[18] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 566 (1980) (setting out the standard applicable to commercial advertising). The *Central Hudson* test remains the applicable standard today. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667-68 (2011); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553-54 (2001).

[19] Or, for that matter, the purpose of the regulation, as would be the case under the so-called *O'Brien* analysis, United States v. O'Brien, 391 U.S. 367, 377 (1968), according to which heightened First Amendment scrutiny is triggered not by the nature of the activity regulated but instead by the state's goal in regulating. *See* Laurence H. Tribe, American Constitutional Law 792 (2d ed., 1988); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

[20] The argument in the sentence in the text is developed fully in Frederick Schauer, *Free Speech on Tuesdays*, 34 Law & Phil. 119 (2015).

baseline standard of justification. Thus, for example, in the United States the justification for regulating the activity of operating a pushcart need only satisfy the rational basis baseline standard.[21] According to the conception of rights offered here, therefore, this means that there is no constitutional right to operate a pushcart. But if the justification for regulating pushcarts were required to be different from and higher than the standard for regulating everything else, we could then conclude that there was a right to operate a pushcart. And so too with speech. Because the standard for regulating speech, unlike the standard for regulating pushcarts, is indeed higher than the baseline now associated with rational basis scrutiny, there exists a constitutional right to speak in a way that there is not, as a matter of existing constitutional doctrine, a right to operate a pushcart.[22]

The structure of American constitutional doctrine can thus illuminate this conception of just what it is for a right to exist, but this conception of rights is by no means limited to the United States, or even to the rights created by positive law at all. Consequently, even outside the domain of American constitutional law, the structure of the putative right to freedom of speech is the same. Even as a pre-constitutional or extra-constitutional question of moral or political philosophy, the idea of a right to free speech -- or a free speech *principle* – similarly rests on the existence of a difference between what happens when the right or principle applies

[21] New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[22] This approach to rights appears to be implicit in Ronald Dworkin, *Is There a Right to Liberty,?* in Taking Rights Seriously 266, 267 (1977) (finding the idea of a general right to liberty "absurd"). The argument for just such a right to liberty, developed as an objection to Dworkin, is set out in Douglas N. Husak, *Ronald Dworkin and the Right to Liberty*, 90 Ethics 121 (1979).

and when it does not. Indeed, even if, *contra* Ronald Dworkin,[23] there is a general right to liberty,[24] it is still the case that when we speak of other and more specific rights and liberties we are not simply listing the instantiations of the general right. Rather, when we refer to a right to free speech we are designating something structurally different from, and stronger than, the myriad forms of behavior that would be subsumed by a right to liberty *simpliciter*. And because that differential strength manifests itself primarily in the way in which the right to free speech encompasses behavior whose arguable negative consequences would otherwise justify intervention or restriction even under a general right to liberty,[25] the structure of a right to free speech necessarily presupposes something different between what is encompassed by the right and what is encompassed by any general right to liberty we may happen to possess. Accordingly, if we designate that category of activities encompassed by liberty in general as "action," and the category of activities covered by the putative right to free speech as "speech," then one way of understanding the distinction between speech and action is as the linchpin of the very right to free speech in the first place.

## II. A False Start with a Revealing Premise

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[23] *See* note 22, *supra*.

[24] As is argued in, for example, Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (rev. ed. 2014); Randy E. Barnett: The Structure of Liberty: Justice and the Rule of Law (2d ed. 2014).

[25] *See* note 4, *supra*. *See also* Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's* On Liberty, 36 Cap. U. L. Rev. 571 (2011).

Among the first attempts to grapple with the distinction between speech and action was one that was also, and notoriously so, among the least successful. In *Toward a General Theory of the First Amendment*,[26] and then in *The System of Freedom of Expression*,[27] Thomas Emerson attempted to work out a system of absolute but bounded speech -- a principle of free speech structured such that it covered only a small portion of the universe of communicative or expressive activity but which granted absolute protection to that which it covered.[28] Although everything that counted as "expression" should be absolutely protected, Emerson argued, the protection of the First Amendment should not be understood to extend to those acts, some of which happen to be verbal or linguistic or even communicative, which were not expression but instead were to be considered "action" or "conduct."[29] Accordingly, insisted Emerson, and paralleling Justice Douglas's idea that "speech brigaded with action" was not covered by Douglas's

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[26] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963).

[27] Thomas I. Emerson, The System of Freedom of Expression (1970).

[28] On the distinction between what the First Amendment covers and the degree of protection it offers to what it does cover, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1769-77 (2004). Although the Supreme Court has often conflated questions of coverage and questions about the degree of protection, it has more recently appeared to recognize the distinction and its importance. *See* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (announcing a presumption against creating new categories of uncovered speech). *See also* Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2734 (2011) (same, but using the word "protection" to designate coverage).

[29] Emerson, *supra* note 27, at 8-9, 17-18.

conception of an absolute First Amendment,[30] most criminal solicitation,[31] some picketing,[32] some commercial advertising,[33] some espionage,[34] and some incitements,[35] among others, were "action" and not "conduct," thus being entitled to no protection under the First Amendment, whereas most forms of advocacy,[36] most varieties of protest,[37] and all literature,[38] for example, were primarily "expression" and thus entitled to full (absolute) protection.

As was quickly obvious to his critics,[39] Emerson's distinction was question-begging in the extreme. Rather than employing some sort of distinction between the properties of expression and the properties of action as an analytic device to

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[30] "There comes a time, of course, when speech and action are so closely brigaded that they are really one." Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting). "Speech is closely brigaded with action when it triggers a fight, *Chaplinsky*, as shouting 'fire' in a crowded theater triggers a riot." DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). *See also* Parker v. Levy, 417 U.S. 733, 768 (1974) (Rehnquist, J., dissenting) ("A command is a speech brigaded with action.").

[31] Emerson, *supra* note 27, at 404-05.

[32] *Id.* at 356-59, 444-47.

[33] *Id.* at 414-17.

[34] *Id.* at 58-59.

[35] *Id.* at 403-04.

[36] *Id.* at 124-26.

[37] *Id.* at 356-59.

[38] *Id.* at 495-503.

[39] *See* Tribe, *supra* note 14, at 790; Ely, *supra* note 14, at 1494-96; Louis Henkin, *Foreword: On Drawing Lines*, 82 Harv. L. Rev. 63, 77-80 (1968).

determine which behaviors were encompassed by the First Amendment and which were not, Emerson drew the distinction between expression and action on grounds that appeared, at best, obscure, and then proceeded to apply the label "expression" to those behaviors he found protected[40] and the labels "action" or conduct" to those he found unprotected, all the while saying little about the actual factors that would distinguish the one from the other.[41]

Although Emerson's distinction was thus employed more to label outcomes than to generate or justify them, it was nevertheless premised on the sound idea that the First Amendment could make sense only if there were *some* distinction between speech and action, and only if that distinction related in a meaningful way to the point of the First Amendment. And thus if we examine Emerson's own views about the point of what he called the distinction between expression and conduct, we observe two things. First, and of lesser importance to the analysis here, is Emerson's catalog of positive justifications for a principle of freedom of expression, a catalog that included the conventional appeals to the search for truth, to the role of discourse in democratic governance, and to the virtues of individual self-expression,

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[40] Because Emerson defined the coverage of the First Amendment in a way that made the degree of protection absolute for all covered speech, he forced into the decision about coverage issues that for others would sometimes be about coverage and sometimes about the degree of protection to be given to certain forms of covered speech. On the importance of keeping the questions separate, see Kent Greenawalt, Speech, Crime, and the Uses of Language (1989); Frederick Schauer, *Codifying the First Amendment*, 1982 Sup. Ct. Rev. 285; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 289 (1981).

[41] *See* Robert P. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 285 (1991) (noting that the distinction between speech and action is what we say to mark a distinction drawn on other grounds.

as well as to the less conventional (at the time) idea that various political, sociological, and psychological factors, what Emerson called the "dynamics" of the limitation,[42] made speech especially vulnerable to restriction. Second, and more importantly, Emerson appeared to recognize that the positive values of searching for truth, facilitating democratic governance, and fostering self-expression could also be served by non-expressive (as Emerson understood it) conduct. Moreover, Emerson acknowledged that even the regulation of conduct might be plagued by the same pathologies that affected the regulation of expression. As a result, he understood that it was both difficult yet necessary to offer a distinction between expression and conduct, a distinction implicit in the very idea of the First Amendment.

To meet this challenge, Emerson relied on the conclusion that "expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact."[43] To oversimplify, Emerson premised much of his view about the importance of the distinction between expression (speech) and conduct (action) on the premise that expression, compared to conduct, was normally more self-regarding[44] and therefore less harmful.

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[42] Emerson, *supra* note 26, at 887-93; Emerson, *supra* note 27, at 9-11.

[43] Emerson, *supra* note 27, at 9.

[44] The philosophers' traditional distinction between self-regarding and other-regarding acts (*see* Jovan Babic, *Self-Regarding/Other-Regarding Acts: Some Remarks*, 5 Prolegomena 193 (2006); C.L. Ten, *Mill on Self-Regarding Actions*, 43 Phil. 29 (1968)) is not congruent with the distinction between harmless and harmful acts, because an act can be other-regarding and beneficial, and an act can be self-

Emerson's reliance on what is "normally" the case makes clear that it is unfair to accuse him of making the implausible claim that speech is always or necessarily more self-regarding than action. Rather, Emerson argued that on average, or in the aggregate, the category of speech, *qua* category, was less other-regarding than the category of action,[45] and accordingly that the category of speech could be differentially protected relative to the category of action, even assuming equal positive benefits from the two categories, with less detrimental effect on society's ability to deal with the negative consequences caused by both speech and action. By assuming that the category of speech is less harmful than the category of action,[46] Emerson could argue that protecting speech but not action would have only minimal effect on the state's ability to regulate harmful activities.

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regarding and harmful to the actor. Still, other-regardingness is a necessary condition for harm to someone other than the actor.

[45]To the same effect, see Michael Bayles, arguing that the exercise of freedom of speech "is less likely to interfere with the exercise of other liberties than is, say, liberty of action." Michael Bayles, *Mid-Level Principles and Justification*, *in* NOMOS XXVIII: Justification 49, 54 (J. Roland Pennock & John W. Chapman, eds., 1986). Similarly, Martin Redish maintains that "it is almost certainly true in the overwhelming majority of cases that speech is less immediately dangerous than conduct." Martin H. Redish, Freedom of Expression: A Critical Analysis 5 (1984). *See* also Franklyn S. Haiman, Speech Acts and the First Amendment 85 (1993) (understanding speech as a largely harmless activity). And, perhaps most prominently, Ronald Dworkin, especially in Taking Rights Seriously 200-203 (1977), uses freedom of speech as an exemplar of a broadly-conceived personal liberty based on a right to equal concern and respect.

[46] For my own rather different take on the relationship between speech and harm, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 Sup. Ct. Rev. 81; Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 Ethics 635 (1993). And on the necessarily categorial nature of these determinations, see Frederick Schauer, *The Second-Best First Amendment*, 31 Wm. & Mary L. Rev. 1 (1989).

Not only did Emerson acknowledge that these relative determinations of other-regardingness or harm-producing capacities were based on the tendencies of categories rather than truths about every case, but he also made clear that in shifting from the term "speech" to that of "expression" he was not advocating that the principle of freedom of speech could or should be expanded to include the full range of behavior that might be considered self-expressive.[47] Rather, Emerson's terminological shift was designed to make clear that the freedom of speech encompassed forms of communicative behavior that would not count as "speech" according to the ordinary language meaning of that term -- flag burning (or flag waving), painting, sculpture, music, armband-wearing, uniform-wearing, picketing, and parading, for example, to say nothing of writing and printing – and also to emphasize that there were forms of language – "speech" in the ordinary language sense – that did not fall under his heading of expression. Behind Emerson's distinction was the belief that some forms of human communication operate in a way that is more reflective than reflexive, as when I think about your argument rather than react in the way I do when you surprise me by shouting "Boo!" The difference between the reflective and the reflexive was for Emerson the keystone of distinguishing speech from action, and thus the foundation of the differential protection of speech at the heart of the First Amendment.

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[47] Compare C. Edwin Baker, Human Liberty and Freedom of Speech (1985); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978), which go pretty far in exactly this direction. The iconic critique of this move is Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 25 (1971) (observing that theories of this variety "do not distinguish speech from any other human activity").

Emerson's ultimately question-begging approach nonetheless contained two important ideas. First, the category of speech is better understood as the category of communication.[48] Thus, what we may at times understand as a distinction between speech and action is better conceived as a distinction between communicative and non-communicative conduct. And second, the category of communication, according to Emerson, is, as a category, less likely to produce negative consequences than the category of non-communicative conduct. It is these two ideas – that communication as a category is different from non-communicative conduct in a free-speech-relevant way, and that communication as a category is less harmful than non-communicative conduct – to which we must now turn.

## III. Is Thinking Different from Doing?

Emerson supposed, as his terminological shift from "speech" to "expression" reveals, that the distinction between communication and conduct was premised on, and the natural consequence of, a distinction between thinking and doing. He believed there was an important distinction between thinking about something – contemplating or reflecting on something – and doing something – taking an action. But is the distinction sound, and, even if it is, what does it say, if anything, about the idea of freedom of speech?

The place to start in examining the question is with the seemingly straightforward difference between a person's contemplation of engaging in some

[48] *See* Larry Alexander, Is There a Right of Freedom of Expression? 7-8 (2005) (equating freedom of speech with freedom of communication).

action and her actually engaging in it, with free speech protecting only the former and not the latter. Thus, what might make communication relevantly different from conduct, different in a way that connects with the First Amendment's ideas and ideals, is the way in which communication about some action – whether it is to describe, commend, or condemn it – is conceptually distinct from the action itself. If I urge you to shoot someone, that act is different from my shooting someone, and it is different from you shooting someone. And what might make this undeniable conceptual separation important is not only the possibility that the communication, even if advocating action, might not lead to the action advocated, but also that the link between the communication and the action requires an additional act of volition on the part of the recipient of the communication.[49] If Clarence Brandenburg's advocacy of acts of "revengeance" against African-Americans and Jews[50] had actually inspired, produced, or caused such an act of revengeance, an intentional decision by the person committing the act would also have been necessary.

That a volitional act on the part of the recipient of a communication is necessary to convert a communication into an action reveals the importance of the role that *autonomy* plays in the development of a free-speech-relevant distinction between

[49] This is most obvious with respect to advocacy, but also is applicable to praising and blaming an action, because there is still a non-necessary connection between the commendation or condemnation on the part of a communicator and the recipient of the communication adopting some attitude towards the action that is commended or condemned.

[50] Brandenburg v. Ohio, 395 U.S. 444, 446 (1969). Mr. Brandenburg did not use the word "African-Americans." 395 U.S. at 447.

speech and action.[51] Because the gap between receiving a communication pertinent to action and the action itself is filled by a volitional act on the part of the recipient, the recipient's autonomy of action is accordingly a necessary condition for action. Advocacy, for example, cannot produce action without the conscious intervention of the recipient of the communication. And thus, so it is said,[52] any attempt on the part of government (or, for that matter, anyone else) to impede the flow of communication prerequisite to this decision would amount to a lack of respect for the recipient's autonomy. If we are not able to decide for ourselves what to do, including deciding to do or not do things for which the state will punish us if we do them, then we have lost, so the argument goes, an irreducible element of what it is to be human. And since it would not be plausible to take the value of autonomy as generating or justifying a total right (as a Hohfeldian privilege,[53] or liberty[54]) to liberty – the right simply to *do* whatever one wishes – the right that autonomy

[51] See especially, Scanlon, *supra* note 4; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 353-60 (1991) (defending the "persuasion principle" by reference to the importance of the autonomy of the hearer).

[52] Scanlon, *supra* note 4; Strauss, *supra* note 51. *See also* Gerald Dworkin, *Paternalism: Some Second Thoughts*, *in* Paternalism 105, 106-07 (Rolf Sartorius ed., 1983) (arguing that autonomy is denied when there is manipulation of someone's "information set"); Richard Moon, The Constitutional Protection of Freedom of Expression 21 (2000) (arguing that full autonomy can only "emerge in the social realm").

[53] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 32 (1913).

[54] On the use of the word "liberty" as a synonym for what Hohfeld called a "privilege," see Leif Wenar, *Rights*, Stanford Encyclopedia of Philosophy, www.plato.stanford.edu/entries/rights/#2.1 (2011).

generates is typically restricted to the inputs to autonomous decision-making as opposed to the outputs.[55] Freedom of communication, therefore, is said to be the freedom of a decision-maker to unimpeded access to those arguments and information necessary for her to make the best decision she can. Under this account, therefore, freedom of speech is in the final analysis about freedom of decision, and thus necessarily about freedom of thought.

Yet although freedom of thought certainly seems like a good thing, we need to further sharpen the inquiry. So let us begin by dividing a person's thoughts into four categories. First are thoughts as to which rightness or wrongness is beside the point, such as thinking that vanilla ice cream is better than chocolate, or thinking about any of the other topics that we tend to designate as *tastes*. Second are thoughts that are simply correct, such as the thoughts that skin color is irrelevant to moral worth, or that Louisville is not the capital of Kentucky. Third are thoughts that are actually wrong but generally harmlessly so, as with the beliefs of astrology or the beliefs in the existence of Santa Claus or the Easter Bunny. And fourth are those thoughts that are both wrong and harmful, the category about which much more now needs to be said.

We know, of course, that much of the history of the development of freedom of thought as an idea has stemmed from the frequency with which people, and especially people in power, placed in the fourth category thoughts that more appropriately belonged to the first, second, or third. We know that those in power

[55] *See* Roger A. Shiner, Freedom of Commercial Expression 166-68, 234-38 (2003) (analyzing differences between speaker-focused autonomy and hearer-focused autonomy).

attempted to prohibit people from denying (or, occasionally, affirming) that Catholicism represented the One True Faith,[56] tried to prohibit Copernicus and Galileo from thinking that the Earth revolved around the Sun,[57] and enacted obscenity laws in an effort to prevent people from thinking about extra-marital sex and teenage boys from thinking about sex at all.[58] Yet although such mistakes have been frequent throughout history, their frequency is a contingent empirical fact – that is, their frequency and consequences will vary with time, place, and culture. Moreover, the frequency of mistakes of this kind is still not inconsistent with the existence of the fourth category of genuinely harmful thoughts. Perhaps the frequency of mistakes, especially by the state, in distinguishing the fourth category from the other three should lead to a principle disempowering the state from drawing the distinction between harmful and harmless speech at all, but that would a possible outcome of the analysis rather than a premise.[59] When Justice Powell in

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[56] *See* J.A. Guy, The Public Career of Sir Thomas More (1980); Andrew P. Roach & Maja Angelovska-Panova, *Punishment of Heretics: Comparisons and Contrasts Between Western and Eastern Christianity in the Middle Ages*, 47 J. Hist. 145 (2012).

[57] *See* The Trial of Galileo, 1612-1633 (Thomas F. Mayer ed., 2012).

[58] *See* Alex Craig, Suppressed Books: A History of the Conception of Literary Obscenity 40-53 (1962); Noel Perrin, Dr. Bowdler's Legacy: A History of Expurgated Books 162-71 (1969); C.H. Rolph, Books in the Dock 40-61 (1969).

[59] Moreover, the existence of dangerous mistakes in branding harmless (or beneficial) speech as harmful is only one dimension of a more complex decision-theoretic calculus. Although there are negative consequences to designating harmless or beneficial speech as harmful, so too will there be negative consequences in designating harmful speech as harmless. The full analysis would therefore have to weigh the expected (in the expected value sense of the product of the likelihood of the error multiplied by its consequences) costs of erroneously designating harmless speech as harmful against the expected costs of erroneously designating harmful speech as harmless. *See* Frederick Schauer, *Social Epistemology, Holocaust*

*Gertz v. Robert Welch, Inc.*,[60] announced that "under the First Amendment there is no such thing as a false idea,"[61] he was making a (somewhat exaggerated) descriptive claim about First Amendment doctrine, and is thus best understood not as asserting the implausible conceptual or meta-ethical claim that ideas do not have truth value, or that the truth-value of some ideas, even moral ones,[62] cannot be negative, but as insisting only that the principles of First Amendment doctrine do not authorize governmental inquiry into the truth of ideas, even ideas that are plainly false.

So let us then turn to the fourth category – the category we can call harmful thoughts.[63] To put the matter directly, we want to ask whether there can *be* harmful thoughts, and not just whether under the First Amendment there can be harmful thoughts. Consider as an example, an example inspired by *United States v, Stevens*,[64] the *thought* that it is permissible and maybe even positively desirable for animals to be tortured for the (non-nutritional) gratification of humans. And then let us assume what I hope that most of us (although obviously not all of us, or else *Stevens* would not even have arisen) would accept – that the content of the idea is not just

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*Denial, and the Post-Millian Calculus*, *in* The Content and Context of Hate Speech: Rethinking Regulation and Responses 129 (Michael Herz & Peter Molnar, eds., 2012).

[60] 418 U.S. 323 (1974).

[61] 418 U.S. at 339.

[62] To be clear, claims about inherent racial superiority or the evil of homosexuality, for example, are erroneous moral claims, but still moral claims.

[63] *Cf.* Meir Dan-Cohen, Harmful Thoughts: Essays on Law, Self, and Morality (2002).

[64] 559 U.S. 460 (2010) (invalidating on First Amendment grounds a federal law prohibiting the sale and distribution of images of animal cruelty).

different, and not merely a matter of taste, but wrong. Let us hold off for a moment considering the objection that the thought will not necessarily lead to actual torture, for this is what we are about to address. But first assume simply that the activity – torturing animals for human gratification – that the thought is a thought about is one that is both wrong and harmful.

Initially, we can posit that people who think that animals ought to be tortured are more likely to torture animals than people who do not have that thought. And as so put, the claim seems plainly true, even as we recognize that the percentages may be low. That is, the claim that people who have the thought that animals ought to be tortured are more likely to torture than people who do not have the thought is a claim that is consistent with many or most people who have the thought not committing the act. But as a matter of conditional probability, or relevance in the evidentiary sense,[65] it would be difficult to deny that the probability of a person torturing animals is higher if the person has the thought that torturing animals is a good thing than if the same person does not have that thought. Relatedly, for most animal torturers having the thought that it would be good (or desirable, or necessary, or something of that sort) to torture this animal at this time would be a necessary condition for their engaging in the act of torture.[66] This is decidedly not to say that having the thought is a sufficient condition for a person engaging in the

[65] Thus, Rule 401 of the Federal Rules of Evidence makes a piece of evidence relevant if it "has any tendency to make a [material] fact more or less probable than it would be without the evidence." F.R. Evid.401.

[66] I say "most" only in order to keep open the logical but empirically unlikely possibility of an instinctive or reactive act of animal torture.

act. It is only to say that in the normal case having the thought is a necessary condition, in addition to it being a probabilistic indicator of undetermined size of the likelihood of animal torture.

None of this, of course, is inconsistent with there being many people who think that torturing animals is a good thing but who still do not torture them. Indeed, it is not inconsistent with most people who think that torturing animals is a good thing nevertheless not torturing them. Yet it seems a pretty safe empirical bet that people who do have the thought that torturing animals is a good thing are statistically more likely to torture animals than people who do not have that thought.

Now let us suppose that we as a society believe, and as our laws against animal cruelty reflect, that torturing animals is wrong. And if we believe that torturing animals is wrong, then we ought to believe that the thought that torturing animals is good should be placed in the fourth category – the category of harmful thoughts. The content of the thought is wrong, the behavior that the thought is about is harmful, and the fact of people having the thought is statistically likely to increase the incidence of the harmful behavior itself[67] -- more animals are going to wind up being tortured when more people have the thought that torturing them is a good thing than when fewer people have that thought. The thought is a harmful thought, therefore, not simply because of its content, but because having a thought of this content will increase the likelihood of the harmful behavior. The thought that

[67] Note that "statistically likely to increase the probability" is not the same as the behavior being likely to occur. Sending text messages while operating an automobile is statistically likely to increase the probability of accidents even though most driver texting does not produce accidents.

torturing animals is good therefore properly belongs in the fourth category of thoughts that are both wrong and harmful.

The task then before us is to consider how we as a people and as a collective political institution should react to people who have harmful thoughts. We could (and do) respect the autonomy and their freedom to think as they wish by doing nothing – even if in an increasingly likely technological world we could.[68] After all, having the thought is not itself harmful, and we are now calling it a harmful thought only because the thought, harmless in itself, increases the likelihood of harmful action.

But if the possessor of harmful thoughts ought to be allowed to indulge those thoughts – to keep having them, and not to be punished for having them -- because his autonomy of thinking might not (and probably will not) produce a harmful action, then, similarly, how are we to think about the full range of *actions* preparatory to, and probabilistically indicative of, the commission of a crime. As we know, many of these preparatory actions are designated as independent crimes -- preparatory offenses.[69] Possession of burglar tools is an independent crime, even

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[68] This is not an essay in neuroscience, or, more specifically, in what fMRI scans and other techniques of modern neuroscience now or in the foreseeable future will enable people to find out about what other people are thinking. On the actual or potential application of these techniques to various legal questions, see Michael S. Pardo & Dennis Patterson, Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience (2013). Nevertheless, some of these possibilities, however remote, and however large the moral issues they raise, make inquiring into the topic of freedom of thought (as opposed to the external manifestations of that thought) more important now than would have been the case a generation ago.

[69] *See* Dan Bein, *Preparatory Offences*, 27 Isr. L. Rev. 185 (1993); Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 San Diego L. Rev. 1273, 1282-85 (2011).

though the burglar tools possessor might not actually burgle anything.[70] Similarly, possession of a hand grenade is a crime although the hand grenade owner may not try to blow anyone up.[71] And so too with the assault rifle owner who might not shoot anyone,[72] the pit bull owner who would not allow his pit bulls to go unrestrained,[73] and so on. In such cases we criminalize the preparatory act even though the possessor or preparer in the exercise of his autonomy might not actually go ahead and do what it is we are really worried about. But in most of these cases we nevertheless do not allow respect for an agent's putative autonomy to lead us to refrain from restraining conduct (or arguing for such restraint) that is preparatory to and probabilistically related to intrinsically harmful actions. And then the question is whether these examples are any different from the example of the animal torture thinker who might not actually go ahead and torture animals.

Indeed, the basic point extends beyond the narrow domain of preparatory offenses, because the universe of prohibitions broader than the evil against which they are directed is vast. In the service of the goal of reducing automobile accidents

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[70] An example of the common criminalization of possession of burglar tools is N.Y. Penal Law §140.35 (McKinney 2010).

[71] On the crime of possession of hand grenades, see United States v. Freed, 401 U.S. 601, 609 (1971).

[72] *See* N.J.S.A.2C:39-5(f). Of course the Second Amendment might be relevant here after *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), but exploring that question, including the interesting parallels here between the First and the Second Amendments, would take us too far afield.

[73] On pit bull prohibitions, see, for example, Am. Dog Owners Ass'n v. Yakima, 777 P.2d 1046 (Wash. 1989).

we require people to drive below a designated speed, even if in the exercise of their autonomy they might well compensate for the increased risks coming from higher speeds by driving with greater care. Nor do we permit people to possess heroin, even though it is (remotely) possible that they will neither use nor sell it. And in addition, the existence of vicarious liability in numerous domains again shows that the necessity of a mediating volitional act in order for the tort or crime to be effectuated is often thought not to preclude responsibility. That the seller of alcohol,[74] the seller of guns,[75] or even the employer of a contract killer[76] is under some circumstances liable in addition to (and, importantly, not instead of, showing that even the existence of a legally responsible volitional intermediary does not preclude vicarious liability) the principal shows once again that respect for autonomy is rarely understood to generate a principle immunizing anyone other than the final agent from liability. The entire domain of vicarious liability, as well as

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[74] *See generally* Richard A. Smith, Note, *A Comparative Analysis of Dramshop Liabiity and a Proposal for Uniform Legislation*, 25 J. Corp. L. 553 (2000).

[75] Vicarious liability for those who sell the guns subsequently used for unlawful purposes is now largely precluded by the Protection of Lawful Commerce in Arms Act, Pub. L. No. 101-92, 119 Stat. 2095 (2005), *codified as* 15 U.S.C. §§7901-03, but the issues are still alive. *See* Neil S. Shechter, Note, *After Newtown: Reconsidering* Kelley v. R.G. Industries *and the Radical Idea of Product Category Liability for Manufacturers of Unreasonably Dangerous Firearms*, 102 Geo. L.J. 551 (2014).

[76] That the employer or even the aider and abettor of a contract killer is liable for murder is plain. United States v. Hardwick, 523 F.3d 94, 97 (2d Cir. 2005); United States v. Dorman, 108 Fed. Appx. 228, 231 (6th Cir. 2004). Whether under some circumstances those who provide instructions for contract killing can be liable in tort, or whether instead such instructions are shielded by the First Amendment, remains a contested issue. *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 2000); Wilson v. Paladin Enterprises, Inc., 186 F. Supp. 2d 1140 (D. Or. 2001).

tort liability for foreseeable misuse,[77] all reject the notion that the existence of an autonomous agent whose autonomous decision causes a harm will serve to immunize from liability those other agents whose actions might have contributed to the autonomous agent's harmful acts.

Although the examples that undercut the argument from autonomy thus exist even outside the realm of preparatory offenses, let us stay on the safest ground by considering only the category of harmful preparatory acts. As just noted, such acts, with little controversy, are routinely and generally criminalized or provide the basis for tort liability. It turns out, therefore, that there is no general existing legal principle immunizing intrinsically harmless acts from legal sanction if they are probabilistically related to actual harmful acts. And because we can characterize harmful thoughts in much the same way, the question of how to conceive of harmful thoughts is importantly similar to the question of how to conceive of harmful preparatory acts.

Identifying the similarity between harmful thoughts and harmful preparatory acts enables us to sharpen the inquiry even further. Let us say that having thought T increases the probability of harm H(1) with a probability of P(1), and thus that the expected harm – EH(1) – is P(1) x H(1). But the same structure applies to acts as well, so that we can also say that engaging in *action* A (buying or possessing burglar

[77] *See, e.g.,* Osorio v. One World Technologies, Inc., 659 F.3d 81 (1st Cir. 2011) (upholding judgment against manufacturer of a table saw although proper use of the blade guard would have prevented the injury); LeBoeuf v. Goodyear Tire & Rubber Co., 451 F. Supp. 253 (W.D. La. 1978), *aff'd*, 623 F.2d 985 (5th Cir. 1980) (upholding liability for tire manufacturer when tire user's intentional disregard of normal safety precautions would have prevented the tire blowout that caused the accident).

tools, say) increases the probability of harm H(2) by P(2), and thus that the expected harm – EH(2) – is P(2) x H(2). The important question, therefore, is whether we should treat EH(1) differently – less restrictively -- from how we would (and do) treat EH(2), *when their values are equivalent, or when EH(1) is greater than EH(2)*. To put it differently, should we immunize harm-producing thoughts from restriction more than we immunize harm-producing actions when the expected harms are the same, or when the expected harms of the thought are greater than the expected harms of the action. In other words, should there *be* a principle of freedom of thought?

The alert reader will have noticed that I have just translated into freedom of thought terms the same formulation that Scanlon and others[78] have used to characterize a free speech principle. If a principle of freedom of speech just *means* that speech enjoys a degree of immunity from government action greater than that possessed by non-speech action having the same or equivalent negative consequences, then a principle of freedom of thought must similarly mean that thoughts have a degree of immunity from government action greater than that enjoyed by non-thought conduct again having the same or equivalent negative consequences. But if this is what a robust or genuine principle of freedom of thought must mean, we still must address whether as a normative matter such a principle ought to be accepted.[79]

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[78] *See* notes 4 and 51, *supra*.

[79] I again bracket the question of the physical inevitability of frffeedom of thought, in part because the physical inevitability captured by the concentration camp slogan,

In addressing the question whether there should be a principle immunizing harmful thoughts in a way that harmful preparatory acts having equivalent expected harm are not immunized, it is necessary to return to the argument from autonomy. It seems initially obvious that respect for someone's autonomy requires that we respect her thought processes.[80] But then we must still ask why we should respect someone's right (and the existence of a right in the sense explicated in Section I above is what is now under consideration) to have a wrong and harmful thought? One possibility, of course, is that the possessor of the thought is right and we (or the state) are wrong, and that consequently the thought is not in fact harmful. This Millian perspective – it was John Stuart Mill who most famously connected the liberty of (expressed) opinion to epistemic fallibilism and thus to the possibility that the received opinion is mistaken and the suppressed opinion correct[81] – is certainly a wise caution before acting on any received belief and before restricting any action thought harmful. But it is not yet apparent that such a principle of humility can generate the differential principle we are seeking. For although I might be wrong in thinking that that you are wrong in what you are thinking, I might also be wrong in thinking that you are wrong in what you are *doing*. Humility is in general a good

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"Meine Gedanken sind frei," may in our modern neuroscientific world no longer be so inevitable. *See* note 68, *supra*.

[80] *See* Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 Va. L. Rev. 549, 554 (2011) (emphasizing the importance of "control over one's thoughts").

[81] John Stuart Mill, On Liberty (David Spitz ed., Norton, 1974) (1859). On Mill's fallibilism, see John Skorupski, John Stuart Mill (1989); Stephen Holmes, *John Stuart Mill: Fallibilism, Expertise, and the Politics-Science Analogy*, *in* Knowledge and Politics 125 (Marcelo Dascal & Ora Gruengard eds., 1989).

thing, yet it is far from clear that there is reason to believe that my (over)confidence about my assessment of your thoughts ought to be tempered by a stronger principle of humility than that which should properly temper my assessment of your actions, especially your preparatory actions. Yes, I might be wrong, but it is hard to see why that possibility should be any less applicable to my empirical probabilistic assessments of the consequences of your preparatory or other accessory actions than it is to my empirical probabilistic assessment of the consequences of your thoughts.[82]

Of course we know, as discussed above,[83] that thoughts might well not produce actions. But this rejoinder is unavailing. It is true that thoughts might not produce actions consistent with those thoughts, but harmless (as stipulated) actions that are probabilistically causally related to harmful actions might also not produce those harmful actions. If respect for some agent's ability to change her mind before committing an actually harmful act leads to a principle of moral, constitutional, or legal protection, then it ought logically to lead to a principle protecting harmless acts just as it protects harmless thoughts. Or, to be more precise, there remains no reason to reject a principle protecting acts whose expected harm is no greater than the expected harm of what we have been calling a harmful thought.

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[82] *See* Thomas M. Scanlon, *Comment on Baker's* Autonomy and Free Speech, 27 Const. Comm. 319, 322 n.11 (2011) (noting with respect to autonomy that the "same is true of paternalistic legislation restricting behavior other than expression").

[83] *See* text accompanying notes 63-68, *supra*.

Even more importantly, it is not clear whether the idea of autonomy can do the work that many theorists appear to be requiring of it.[84] Consider, for example, the 1964 incident involving Kitty Genovese, who was brutally attacked and murdered while multiple onlookers allegedly did nothing at all.[85] Now one (deliberately offensive and tendentious) way of describing the behavior of the non-intervening onlookers is as respecting the autonomy of the attacker. But of course this characterization is absurd, and it is absurd precisely because we take the principle of autonomy to be limited by (or to exclude) an agent's autonomous decision to harm others. My freedom to swing my arm ends at the tip of your nose, as it is said.[86] And once we see this, we can understand that autonomy is in an important way asymmetric. Once we engage in the discounting commended by the principle of humility, we have no reason to respect a person's autonomous other-regarding and harm-producing actions, even as she, presumably (or hopefully) applying the same principle of humility to discount her own assessment of her own proposed action, preserves her obligation to do what she thinks best. Just as you have an obligation to do what you think it is best to do, so too do I have an obligation to try to keep you

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[84] On the connection between freedom of thought and autonomy, see especially Shiffrin, *supra* note 80; Seana Valentine Shiffrin, *Reply to Critics*, 27 Const. Comm. 417 (2011); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 Const. Comm. 283 (2011).

[85] The accuracy of the standard story, according to which 38 people heard her screams and did nothing, is the source of some controversy. *See* Kevin Cook, Kitty Genovese: The Murder, the Bystander, and the Crime that Changed America (2014).

[86] "Your right to swing your arms ends just where the other man's nose begins." Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 Harv. L. Rev. 932, 957 (1919). Chafee may have gotten the line from Holmes, or it may even have been around for longer.

from doing so when my assessment is that what you think it best to do will be both other-regarding and harm-producing.[87]

The foregoing argument does not work, of course, for any instance in which a preparatory thought has a lower expected harm than a preparatory action. But we have stipulated an equivalence, and with that stipulation in place the asymmetry of autonomy – your obligation to follow your autonomy where it leads on the basis of your best judgment that it is for the good does not entail my obligation to refrain from attempting to limit that autonomy when in my best judgment your (mistaken) exercise of your (mistaken) best judgment will produce harm to third parties[88] -- produces the conclusion that a principle of autonomy cannot generate a distinct principle of freedom of thought. Of course the stipulation of equivalence may be empirically unsound, and the class of harmful thoughts (a more plausible way of understanding the issue as opposed to making these assessments in each individual case) may be a class less harmful, in the expected harm sense, than the class of harmful preparatory actions. Accordingly, we need to relax the stipulation of equivalence and take this possibility seriously. But before doing so it will be important to shift the analysis from freedom of thought to freedom of speech.

## IV. From Thoughts to Speech

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[87] *See* Larry Alexander, *Can Law Survive the Asymmetry of Authority,?* 19 Quinnipiac L. Rev. 463 (2000); Larry Alexander, *"With Me It's All Er Nuthin": Formalism in Law and Morality*, 66 U. Chi. L. Rev. 530 (1999); Frederick Schauer, *Imposing Rules*, 42 San Diego L. Rev. 85 (2005).

[88] And if we reject anti-paternalism as a distinct principle, a rejection forcefully defended in Sarah Conly, Against Autonomy: Defending Coercive Paternalism (2012), the same argument applies to harms to the agent herself.

I have up to now framed the issue in terms of freedom of thought rather than freedom of speech for two reasons. First, freedom of thought appears to have an even tighter connection to autonomy than does freedom of speech. What, after all, is more mine than my thoughts? And, second, and partly as a consequence of the first reason, the argument for there being no principle of freedom of thought appears initially to be even stronger than the argument for there being no principle of freedom of speech. As a result, if the more difficult argument against a free thought principle is sound, then so too, a fortiori, will the less difficult argument against a free speech principle, at least an autonomy-based or otherwise individualistic argument against a free speech principle.[89]

So if we now examine directly the question of free speech, we can run the same analysis. Initially, we should put aside three different classes of speech, for reasons that will become apparent. First is speech that by its very utterance causes injury, to use the *Chaplinsky* formulation,[90] for here the harm from speech resembles the

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[89] In recent years freedom of thought has been influentially urged as a basis for a principle of free speech. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225 (1992); Shiffrin, *supra* note 80; Shiffrin, *supra* note 84. But as Shiffrin makes clear, *see* Shiffrin, *supra* note 80, at 554 (describing her project as one of developing an "deal theory of freedom of speech"), these efforts have started with the premise that free speech exists as an independent principle, but one which remains in need of justification. That is an important enterprise, but justifying a principle of free speech that is stipulated (in an argument, or in an item of positive law such as the First Amendment) is different from the project, which is mine here, of not assuming such a principle at the outset, but, rather, of exploring whether what others take as their premise can itself be justified.

[90] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing fighting words as words "that by their very utterance, inflict injury"). .

harm from a punch, a kick, or, perhaps even more relevantly, a spit.[91] Second is the class in which the causal relationship simply does not exist, as in the case of the often alleged but never proved causal relationship between non-violent, non-degrading, and non-exploitative sexually explicit material and sexual violence.[92] And the third class is comprised of those instances in which there may be a causal relationship between some category of speech and some category of consequences, but where the consequences are not in fact harmful, as with the nineteenth century worry that exposure to sexually explicit materials would cause teenage boys to masturbate more than would otherwise have been the case.[93]

Having bracketed these three classes, we are left with the task of examining speech that is not harmful in itself but which is genuinely causally likely to increase the incidence of genuinely harmful actions. And we can examine this speech in the same way that we have examined freedom of thought. Thus, if we assume equivalent causal contributions to some harmful consequence by some act of speech

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[91] Spitting is interesting in this context because whatever harm is produced by being intentionally spat upon, just like the harm of being slapped in the face, has little to do with pain, and even less to do with a wound or physical injury. And thus it seems incumbent on defenders of a speech-action distinction to explain why the plainly communicative and non-physically-harmful act of spitting on another ought to be excluded from the realm of free-speech-relevant behavior.

[92] *See* Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 Am. B. Found. Res. J. 737 (distinguishing the harms probabilistically caused by violent, exploitative, or degrading sexually explicit images from the lack of proved harm of non-violent, non-exploitative, and non-degrading sexually explicit images).

[93] *See* C.H. Rolph, Books in the Dock (1969). This worry appears to be at the heart of the case most important in establishing nineteenth century obscenity doctrine, Regina v. Hicklin, L.R. 2 Q.B. 360 (1868), although the court in that case puts the matter in somewhat less transparent terminology.

and by some act of non-speech action, or if we simply assume equivalent expected harm, is there any reason to immunize preparatory speech acts to a greater extent than we immunize preparatory non-speech conduct? There may be, but, as we have just seen, if there is such a reason, it is a not a reason that can be derived from conceptions of autonomy. If the principle of autonomy protects neither autonomous harm-producing actions nor the actions that would increase the likelihood of subsequent and consequent harm, then there seems no reason, just as in the case of thoughts whose consequences have the same structure, to treat speech differently from the way in which we treat action.

At this point it is necessary to return to Emerson. Once we understand that intrinsically harmless preparatory actions are routinely prohibited when they are probabilistically related to harmful acts even though a volitional act is necessary to link the harmless act to the harmful one, the existence of such a volitional link can no longer constitute a sound basis for distinguishing speech from action. Rather, the case for speech being relevantly different from action would have to rest on the determination that the category of speech that is causally productive of harmful action is, as a category, less efficacious than is the category of harmless actions that are causally productive of harmful actions.

Although Emerson and others have simply asserted this to be the case,[94] it turns out that this is a virtually impossible proposition to establish. Once we understand that the relevant comparison is not between speech and harmful actions but rather between speech and those actions, not harmful in themselves that might produce

[94] *See* note 45, s*upra*.

harmful actions, then the existence of a free speech principle that would immunize the former but not the latter from control must rest on this extremely problematic empirical claim. We could of course say that under circumstances of empirical uncertainty the default rule ought to be freedom, but we could say this about action as easily as about speech. And thus the putative default rule would still not provide a sound basis for the distinction between speech and action or for an autonomy-based principle of freedom of speech. This approach may be effective as a matter of existing positive law, but as a matter of pre-positive-law analysis we appear to be left with the view that any autonomy-based or individualistic conception of freedom of speech rests far more on an unestablished and likely false conclusion about the harmlessness of speech than is typically recognized.

To be more specific, if the claim that speech is harmless rests on its inability to be causally related to intrinsically harmful acts, then we have far too many counter-examples in our experience to be comfortable with this formulation. But if the claim instead rests on the view that any harm that is (probabilistically) caused by a communicative act requires the mediation of any additional volitional act on the part of the recipient of the communication, then accepting this conception of harmlessness would unsettle far more of existing tort and other non-speech law than we have previously thought. And with both of these alternatives aside, therefore, what remains is a view of speech that maintains that speech, as a category, is differentially harmless, a view that is in need of far more empirical evidence than it has thus far received. It is of course true that most speech is harmless. But it is also true that most action is harmless, and recognizing this

seemingly obvious but often ignored fact has led many people to make claims about the categorial harmlessness of speech[95] that may not be able to stand up to close analysis or empirical testing.

Because it is true both that most speech will not produce harmful action and that most action will not produce harmful action, the question before us is not whether a society should permit the regulation of harmless speech. Rather, it is the question whether the proper line between permissible and impermissible state intervention is a line between speech and action, or instead, and seemingly preferably, between causally inert (of harm) behavior, some of which is speech and some of which is action, and causally efficacious (of harm) behavior, some of which is speech and some of which is action. Under the latter principle, some speech now protected under existing First Amendment doctrine would be regulable, but if applied accurately the differences between this principle and existing doctrine might well be small. Under non-ideal conditions the difference might of course be greater, but the question then is still whether guarding against the consequences of non-ideal application should be a strategy limited to speech or rather one of more pervasive application.

## V. Conclusion

The basic idea of this Essay is that it is hardly clear that respect for an agent's autonomy ought to lead other agents, or the state, to tolerate autonomous communicative actions that are determined to be likely to cause harm to third parties any more than they should tolerate autonomous non-communicative whose

[95] *Id.*

consequences are equivalent. If the principle of freedom to engage in autonomous actions is one that is limited to cases of harm to others, then, at the very least, this limitation has more impact on standard autonomy views about freedom of speech than has commonly been appreciated. If there is a reason to protect autonomous speech that does not apply as well to autonomous action, then, as we have seen, it cannot be a reason derived from the idea of autonomy itself, and needs instead to be based on a much greater empirical showing of the differential consequences of speech and action than has to date been provided.

All of this might be irrelevant to the very existence of a free speech principle if it turns out that speech, or a subset of speech, or, most accurately, a subset of communication, has as a category positive attributes not possessed by the category of non-speech action. And thus even if the harm-producing capacities of the two categories were equivalent, differential benefit-producing capacities might still be sufficient to justify a sound free speech principle. And although dealing with that possibility must remain for another day, the analysis here may suggest that even that task, and thus the task of distinguishing speech from action for purposes of explaining, say, the value of speech in the search for truth,[96] is considerably more difficult than has traditionally been assumed.[97]

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[96] For a collection of the most important works in the "search for truth" or "marketplace of ideas" free speech tradition, see Vincent Blasi, Ideas of the First Amendment 318-689 (2d ed. 2012).

[97] On the empirical difficulties, see Dan Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 NYU L. Rev. (forthcoming 2015).

In addition, this Essay is situated almost entirely within the domain of individualistic or autonomy-based accounts of freedom of speech rather than democracy-based accounts. Some of the latter are about the methods of democratic deliberation and decision-making,[98] and some are based on the importance in a democracy of using speech and the press as checks on the possibility of governmental overreaching or other abuse of power.[99] But what most species of democracy-based accounts of free speech share is a non-reliance on the distinction between speech and action[100] that is so central to individualistic or autonomy-based accounts, whether they be based on listener-autonomy or speaker-autonomy or both. Listeners may secure information valuable to their autonomy in countless ways, only some of which are based on the propositions uttered by others. And speakers may embody their autonomy also in countless ways, only some of which involve speaking in even the broadest sense. There may be good historical reasons for carving out speech from these broader categories, but if we set aside the history

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[98] *E.g,* Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Robert Post, Citizens Divided: Campaign Finance Reform and the Constitution (2014); Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971). Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978); Frank Morrow, *Speech, Expression, and the Constitution*, 85 Ethics 235 (1975).

[99] See especially Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521.

[100] And that is possibly why such accounts might better be situated as components of a broader protection of democracy, *see* Bork, *supra* note 47; Australian Capital Television Pty. Ltd. v. Commonwealth, (1992) 177 C.L.R. 106 (locating a freedom of political communication within the Australian Constitution's protection of democracy) rather than as a self-standing right.

and the existing legal or constitutional doctrine, we will discover that the non-historical reasons for do doing so – for distinguishing speech from action – do not stand up to close analytic scrutiny.