

# WHAT MARC ANTONY, LADY MACBETH, AND IAGO TEACH US ABOUT THE FIRST AMENDMENT

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## I. INTRODUCTION

During the summer of 1999, I was working on an article about *Planned Parenthood v. American Coalition of Life Activists*,<sup>1</sup> a case in which Planned Parenthood and several abortion providers sued a radical anti-abortion group and some of its members for violating the Freedom of Access to Clinic Entrances Act. I presented my preliminary thesis to a group of colleagues. My thesis was and is that the defendants' conduct is not entitled to First Amendment protection.

My thesis produced a strong, negative reaction from many of my colleagues. One colleague, frustrated by what he no doubt thought was a seriously misguided position, asked, "on your theory, Marc Antony would not be entitled to First Amendment protection?" Taken aback, I dodged the question like a first year law student stumped by a hypothetical that seemed to trap him in his own illogic. Had I hit a dead end in my thesis? My colleague, a Constitutional law scholar and First Amendment expert, seemed to suggest that the law was settled that Marc Antony would indeed be entitled to a First Amendment defense for his funeral oration.

I survived the evening with my colleagues, refined my thesis to address some of their objections, finished my article<sup>2</sup> and went on to other topics. But I continued to reflect on my colleague's question about Marc Antony. When Professor Carl Tobias asked me whether I might submit an article to the *Nevada Law Journal*, I decided to take the opportunity to consider the question posed by my colleague in more depth than was possible in my earlier article. As a Criminal Law professor, I began considering the question by reflecting on what two other Shakespearean characters tell us about the First Amendment.

This essay develops my thoughts about Iago, the villain in *Othello*, and Lady MacBeth, obviously one of the villains in *MacBeth*. To do so, I first discuss principles of accomplice liability. No competent lawyer in America would argue that either Iago or Lady MacBeth was entitled to a First Amend-

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<sup>1</sup> 41 F. Supp. 2d 1130 (D. Or. 1999), vacated by *Planned Parenthood v. Am. Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001).

<sup>2</sup> Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO STATE L.J. 1175 (2000).

ment defense. In fact, our legal system would find both of them guilty of murder despite the fact that their only conduct involved speech.<sup>3</sup> While Marc Antony may appear to have a more plausible First Amendment defense, I argue that, consistent with the Supreme Court's First Amendment case law, he could nonetheless be found guilty of inciting violence or encouraging murder.

## II. SPEECH AS CRIME

Under traditional criminal law doctrine, a person may be guilty of a crime based only on speech in a number of settings.<sup>4</sup> In examining the possible criminal conduct of Iago, Lady MacBeth, and Marc Antony, this section focuses on principles governing accessory or accomplice liability.

As stated by Professor Dressler in his leading criminal law treatise, "a person may be held accountable for the conduct of another person if he assists the other in committing an offense."<sup>5</sup> Accomplice liability has posed some of the most interesting analytical problems in the criminal law and has become the topic of a number of important scholarly articles.<sup>6</sup> Somewhat anomalous in the criminal law, a person becomes an accessory based upon another's conduct, rather than one's own chosen acts.<sup>7</sup> Instead, if a person associates himself with the acts of another person, he derives liability from the actor.<sup>8</sup> Liability is for the act that the accomplice has encouraged the principal to commit.<sup>9</sup>

A person may become an accomplice in innumerable ways. One might provide a murderer with the murder weapon or serve as a lookout or getaway driver for a robber.<sup>10</sup> But as long as evidence of an intent to aid is sufficient, a person may become an accomplice merely by offering words of encourage-

<sup>3</sup> In *Macbeth*, after Lady MacBeth exhorts her husband to kill Duncan, the King, she tells him that she will get the King's guards drunk, allowing him to get past the guards. While that assistance alone would also make her an accomplice, as discussed in this essay, she would be liable for murder as an accomplice based on her speech alone. See WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 7 (John F. Andrews ed., GuildAmerica Books 1990) [hereinafter *MacBeth*].

<sup>4</sup> Solicitation and conspiracy are two obvious examples. The Model Penal Code states that a person is guilty of a criminal offense if "he causes an innocent or irresponsible person to engage in such conduct" or "with the purpose of promoting or facilitating the commission of the offense, he solicits such other person to commit it." MODEL PENAL CODE § 2.06.

<sup>5</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 30.01, at 427 (2d ed. 1995) (citation omitted).

<sup>6</sup> See, e.g., Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

<sup>7</sup> Dressler, *supra* note 6, at 103; see also Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702 (1930).

<sup>8</sup> Kadish, *supra* note 6, at 337-42.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *People v. Hughes*, 161 P.2d 285 (Cal. App. 2d 1945) (serving as a lookout sufficient to be liable for the crime committed by the principal); see also DRESSLER, *supra* note 5, § 30.04, at 435-36 (giving examples of the kinds of conduct that may lead to liability of an accomplice).

ment.<sup>11</sup> Hence, shouting “ataboy” as an offender prepares to shoot his victim, or cheering a person who is committing an offense, may be sufficient to make the offender an accomplice.<sup>12</sup>

A variety of interesting analytical problems arise because liability is derivative. For example, at common law, a person who aids an undercover police officer will not be guilty of the underlying offense because the principal (the officer) will not be guilty of a crime.<sup>13</sup> Hence, despite obvious culpability, the accomplice escapes liability. Similar problems exist at common law if the principal is acquitted of the underlying offense.<sup>14</sup> Because to the formalistic mind an accomplice cannot derive liability from an acquitted principal, the accomplice must also go free. Similar conundrums abound in the common law’s treatment of accomplices.<sup>15</sup>

While the common law, at times, acquits dangerous accomplices on formalistic grounds, the common law and modern accomplice liability law, at times, criminalize those whose role seems quite minor. Remember that the accomplice has the same liability as the principal, even if the accomplice’s role is minor. A wife, who provides her husband dinner, fortifying him to commit serious felonies, may be equally liable for his completed crimes.<sup>16</sup> Leading criminal law texts include a case that routinely outrages law students, *Wilcox v. Jeffery*,<sup>17</sup> in which the defendant paid for a ticket to a concert where Coleman Hawkins, famous American jazz musician, performed in England without securing proper work papers. Wilcox, according to the court,

paid for his ticket. Mr. Hawkins went on the stage and delighted the audience by playing the saxophone. The appellant did not get up and protest in the name of the musicians of England that Mr. Hawkins ought not to be here competing with them and taking the bread out of their mouths and the wind out of their instruments. It is not found that [the appellant] actually applauded, but he was there having paid to go in, and, no doubt, enjoying the performance . . . .<sup>18</sup>

Unfortunately, cases like *Wilcox* may give accomplice liability a bad name.

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<sup>11</sup> *Hicks v. United States*, 150 U.S. 442 (1893) (reversing conviction for murder because evidence of intent was ambiguous; but the Court stated that words of encouragement may be sufficient to sustain a conviction).

<sup>12</sup> See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 647 (6th ed. 1995). The answer to their hypothetical, a variation of the facts of *Hicks*, 150 U.S. 442, is almost certainly that, had Hicks shouted “ataboy” as Rowe threatened his victim, he would have been guilty as an accomplice to murder.

<sup>13</sup> See, e.g., *Vaden v. State*, 768 P.2d 1102 (Alaska 1989) (relying on “the long-standing common law rule that the act of a feigned accomplice may never be imputed to the target defendant for purposes of obtaining a conviction”).

<sup>14</sup> See DRESSLER, *supra* note 5, § 30.03[B][5], at 434 (citing the common law to the effect that acquittal of the principal meant that an accessory could not be prosecuted).

<sup>15</sup> See, e.g., Kadish, *supra* note 6, at 339-41. See also MODEL PENAL CODE § 2.06, cmt. 9 (dealing with cases involving whether a victim, for example, a victim of extortion, becomes an accomplice).

<sup>16</sup> *State v. Duran*, 526 P.2d 188 (N.M. 1974) (holding perpetrator’s child while he commits the crime is sufficient assistance); *Alexander v. State*, 102 So. 597 (Ala. App. 1925) (delivering dinner to husband while he is engaged in a felony is sufficient aid to make the witness an accomplice, requiring state to corroborate her testimony).

<sup>17</sup> 1 All E.R. 464 (K.B. 1951).

<sup>18</sup> *Id.* at 466.

Accomplice liability is also anomalous in the criminal law because a prosecutor does not have to prove that an accomplice caused the crime to occur.<sup>19</sup> Indeed, were causation a requirement, a prosecutor would face formidable theoretical and practical constraints. As a theoretical matter, as developed in Professor Kadish's important article on accomplice liability, the criminal law generally refuses to treat one person's act as the cause of another's conduct. That is so because of the criminal law's insistence that we are all free-will actors.<sup>20</sup> Hence, the accomplice does not cause the principal to act when she encourages his conduct; the principal remains free to choose to commit the crime. As a practical matter, requiring a prosecutor to prove that, but for the accomplice's encouragement, a principal would not have committed a particular crime is almost certainly a matter of pure speculation, not subject to proof beyond a reasonable doubt.

Despite hard cases like *Wilcox*, perhaps better described as the result of the poor judgment of an excessively zealous prosecutor, and despite ways in which accomplice liability departs from traditional criminal law doctrine, accomplice liability serves an important role in the criminal law. As is the case with co-conspirators, accomplices increase the danger that a crime will be committed.<sup>21</sup> Accomplices may provide the necessary encouragement to push the doubting principal to the point of action and may provide meaningful assistance that allows the crime to be completed.<sup>22</sup>

Some of the debate about accomplice liability understates the protection the law provides those accused of accomplice liability. Unlike many areas of the criminal law, accomplice liability turns on proof of intent.<sup>23</sup> Typically, an accomplice must intend to promote or facilitate the actual offense; knowledge that his words or actions may aid the commission of the offense is insufficient.<sup>24</sup>

That requirement has, at times, raised concerns in particularly hard cases. In first proposing that knowledge be sufficient, the first tentative draft of the Model Penal Code cited a variety of examples where a person might provide substantial aid, but lack criminality because of the intent requirement. For example, the drafters cited the case of "[a] lessor [who] rents with knowledge that the premises will be used to establish a bordello. A vendor [who] sells with knowledge that the subject of the sale will be used in the commission of a crime. . . ."<sup>25</sup>

<sup>19</sup> See SANFORD KADISH, *A Theory of Complicity*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 288 (1987). See also Dressler, *supra* note 6 (criticizing the absence of a requirement of causation).

<sup>20</sup> KADISH, *supra* note 19.

<sup>21</sup> *Fuller v. State*, 198 So. 2d 625, 630 (Ala. App. 1966) (accomplices' presence may encourage by adding numbers). See also DRESSLER, *supra* note 5, § 29.03[B], at 395.

<sup>22</sup> *Fuller*, 198 So. 2d at 630.

<sup>23</sup> In many areas of the criminal law, even if a statute requires the state to prove "intent," the mens rea element is satisfied if the state proves that the defendant knew that the harm would result. See DRESSLER, *supra* note 5, § 10.04, at 105-06, for examples.

<sup>24</sup> See MODEL PENAL CODE § 2.06(3) (requiring "purpose" as the mens rea) and § 2.06, cmt. 6(c) (discussing the intent requirement and reasons why the Code rejected "knowledge" as sufficient mens rea).

<sup>25</sup> *Id.*

The Model Penal Code eventually rejected the extension of liability to those who lacked purpose, but knew their conduct would result in the furtherance of the underlying offense.<sup>26</sup> Commentators have offered various justifications for the position taken by the drafters of the Code. For example, Professor Fletcher has argued that extending liability to those who act with knowledge, but not purpose, is akin to asking whether to impose a duty to act to prevent impending harm.<sup>27</sup> Typically, the criminal law imposes no such duty. Others have emphasized concern about imposing unfair inconvenience to legitimate business transactions.<sup>28</sup> For various reasons, courts tend to retain the stringent intent or purpose requirement.

The strict mens rea requirement also serves an important role in cases involving accomplice liability where the accomplice's conduct consists only of words of incitement or encouragement.<sup>29</sup> The criminal law does not articulate concern about the First Amendment as a rationale for the strict mens rea requirement. However, modern First Amendment law has imposed a similar strict mens rea requirement on cases where a speaker interposes a credible First Amendment defense.<sup>30</sup> Courts developing accomplice liability may not have been influenced by First Amendment concerns. At least as a matter of history, the law imposed a strict mens rea requirement in accomplice liability cases long before the Supreme Court imposed a similar mens rea requirement in its modern case law.<sup>31</sup> My point here is that at least some concerns about imposing proper limitations on accomplice liability are answered when we focus on the mens rea requirement. The mens rea requirement allows an accomplice a plausible defense in many cases. For example, in the kind of case that troubles Professor Dressler,<sup>32</sup> a wife who aids her husband by serving him dinner to fortify him to commit his criminal offense, may force the state to prove not only that she knew that her husband was going to commit the offense but that she encouraged that offense, i.e., that she actively desired that he commit the offense and that is why she provided the aid. Passive acquiescence is insufficient to demonstrate intent. Or where a speaker's words incite a mob to violence, he can force the state to prove not just that he was aware that his words might incite the crowd but also that he spoke the words with the desire that his speech would produce that result.<sup>33</sup>

These background principles of the criminal law help develop my thesis, that Marc Antony would not only be subject to prosecution for inciting the mob's murder of Brutus and his co-conspirators, but also that he should be subject to prosecution. To develop my thesis, I want first to explore how the

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<sup>26</sup> *Id.*

<sup>27</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 676 (1978).

<sup>28</sup> *See, e.g.*, GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 369-70 (2d ed. 1961).

<sup>29</sup> *See infra* discussion at notes 94-99.

<sup>30</sup> *See infra* discussion at notes 94-99.

<sup>31</sup> *See Dressler, supra* note 6, at 96-97 (discussing legislative reform of accomplice liability, beginning in the mid-nineteenth century). By contrast, a specific intent requirement, as part of the Supreme Court's First Amendment case law, emerged in the late 1960s and early 1970s. *See infra* discussion at notes 131-38.

<sup>32</sup> Dressler, *supra* note 6, at 102.

<sup>33</sup> *See, e.g.*, *Hess v. Indiana*, 414 U.S. 105 (1973).

traditional principles play out for Iago and Lady MacBeth where, as in Antony's case, the offenses consisted solely of words.

### III. IAGO AND LADY MACBETH

Iago is not just pure evil; he is a criminal. And yet, his conduct consists of nothing but words. Despite that, under modern criminal law doctrine, he would be guilty of murder.

For those unfamiliar with Shakespeare's *Othello*, Iago is a false friend to Othello, a successful warrior and Moor of Venice.<sup>34</sup> Iago intentionally turns Othello against his faithful and loving wife, Desdemona.<sup>35</sup> He does so by convincing Othello that Desdemona is carrying on an affair with Cassio, one of Othello's faithful lieutenants.<sup>36</sup> In the end, Othello murders Desdemona.<sup>37</sup>

In their leading criminal law textbook, Professors Kadish and Schulhofer use the facts of Othello to explore issues of accomplice liability. They ask, "If Othello would be guilty of no more than manslaughter, should it follow that Iago cannot be convicted of first-degree murder?"<sup>38</sup>

A word of explanation is necessary to understand both why Othello may be guilty of manslaughter instead of murder, and then why Iago's precise crime – murder or voluntary manslaughter – is open to question. The law has long recognized provocation as a partial defense to murder. Sufficient provocation reduces murder to voluntary manslaughter. The formal argument is that provocation negates the malice necessary for the killing to be murder.<sup>39</sup> As a matter of policy, courts view the provoked actor as less culpable than the actor who acts rationally.<sup>40</sup>

At common law, courts limited cases in which a defendant might interpose a provocation defense.<sup>41</sup> Quite typically, for example, a defendant could not raise the partial defense unless he witnessed his wife in the act of intercourse.<sup>42</sup> Modern courts have rejected such narrow definitions of the defense and have allowed it in a far wider range of cases.<sup>43</sup>

Obviously, Othello never saw the faithful Desdemona *in flagrante delicto* with Cassio. Iago arranged for Othello to witness Desdemona and Cassio talking intimately together.<sup>44</sup> He also arranged for his wife to take a scarf that Othello gave Desdemona and then had the scarf planted among Cassio's possessions.<sup>45</sup> Even though those events would be insufficient to provide Othello

<sup>34</sup> WILLIAM SHAKESPEARE, *OTHELLO* (John F. Andrews ed., GuildAmerica Books 1990) [hereinafter *Othello*].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at act 5, sc. 2.

<sup>38</sup> KADISH & SCHULHOFER, *supra* note 12, at 680.

<sup>39</sup> See, e.g., State v. Thornton, 730 S.W.2d 309 (Tenn. 1987).

<sup>40</sup> See Maher v. People, 10 Mich. 212 (1862), *overruled on alternative grounds by* People v. Woods, 416 Mich. 864 (1982).

<sup>41</sup> See DRESSLER, *supra* note 5, § 31.07[2][a], at 491.

<sup>42</sup> See, e.g., Holmes v. Pub. Prosecutions, 2 All E.R. 124 (K.B. 1946).

<sup>43</sup> See, e.g., Maher, 10 Mich. at 212; Commonwealth v. Berry, 336 A.2d 262 (Pa. 1975); People v. Berry, 556 P.2d 777 (Cal. 1976); People v. Casassa, 404 N.E.2d 1310 (N.Y. 1980).

<sup>44</sup> *Othello*, *supra* note 34, at act 3, sc. 3, ln. 1-38.

<sup>45</sup> *Id.* at ln. 293-319.

a provocation defense at common law, were Othello charged with murder in a jurisdiction following more modern rules governing provocation, he might be found guilty of voluntary manslaughter if the jury found that a reasonable person would have been provoked under similar circumstances.<sup>46</sup>

Iago's criminal liability poses interesting legal questions. Almost certainly, a prosecutor would charge Iago with murder based on principles of accomplice liability. Accomplice liability poses courts with some of the most interesting analytical questions in the criminal law. As discussed above, the criminal law criminalizes the accomplice because, by encouraging a particular crime, he adopts the criminal conduct as his own. Accomplice liability is derivative liability. At common law, the accomplice could be found liable only for the same crime as the principal because the accomplice derived liability from the principal.<sup>47</sup>

Scholars have questioned whether Iago might be guilty of murder even if Othello would be guilty only of voluntary manslaughter.<sup>48</sup> If Iago is guilty as an accomplice, i.e., he derives his liability from Othello, he would be guilty only of voluntary manslaughter despite his intent that Othello kill. That result, perhaps not troubling to formalistic thinkers, is anomalous to modern criminal law theorists. Professor Kadish has explained how the criminal law may avoid the anomaly of punishing Iago for only voluntary manslaughter despite his premeditation and malice; Othello's actions are not fully volitional because Iago has rendered him partially incapacitated by his poisonous words. Despite the law's hesitation to treat one person as the cause of another's conduct, this would be a case in which Iago would be treated as the cause of Desdemona's death because he has rendered Othello incapable of acting with malice.<sup>49</sup>

For my analysis of the First Amendment and the criminal law, the above example is especially important. The example represents one in which the law recognizes the extraordinary power of words alone. Words may render a free-will actor incompetent. Despite the criminal law's resistance to finding one person the cause of another's criminal conduct, in this situation, words alone may be sufficiently powerful to do just that.

No competent criminal lawyer would attempt to interpose a First Amendment defense on behalf of Iago.<sup>50</sup> Too much case law has established that the accomplices whose conduct consists entirely of encouraging words may be found guilty along with the principal. Where commentators have objected to accomplice liability, their objections have usually focused on concerns about whether an accomplice's punishment is proportional to the underlying, and occasionally fairly minor role that he may have played, rather than on concerns

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<sup>46</sup> See, e.g., *Maher*, 10 Mich. at 212; *Commonwealth*, 336 A.2d at 262; *Berry*, 556 P.2d at 777.

<sup>47</sup> See *supra* discussion at notes 13-15.

<sup>48</sup> See KADISH & SCHULHOFER, *supra* note 12, at 680.

<sup>49</sup> SANFORD H. KADISH, *BLAME AND PUNISHMENT* 183 (1987); see also WILLIAMS, *supra* note 28, at 391; GLANVILLE WILLIAMS, *TEXTBOOK ON CRIMINAL LAW* 374 (2d ed. 1983).

<sup>50</sup> Even in their extremely critical assessment of the Supreme Court's First Amendment case law, David R. Dow and R. Scott Shieldes suggest that when a speaker overwhelms or controls the will of the listener, the state may properly convict the speaker. Dow & Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1219 (1998).

about whether the offender ought to be criminalized at all.<sup>51</sup> And even then, I doubt that those scholars would disagree with Professor Kadish that Iago would be and should be guilty of murder.<sup>52</sup>

One might object that my example does not prove very much about the state's ability to criminalize an offender whose conduct consists only of speech. Iago's words are false and the law gives less protection to those who lie than those who tell the truth.

For example, despite limiting the ability of a state to impose liability for defamation because of First Amendment concerns, the Supreme Court has found that false statements are entitled to less protection than true statements. Cases like *New York Times v. Sullivan*<sup>53</sup> require a plaintiff to make a higher showing than state law might otherwise require, if the plaintiff is a public official or public figure.<sup>54</sup> The Court is concerned with assuring vigorous debate on matters of public concern and with preventing government from stifling criticism of its policies.<sup>55</sup> But the Court leaves the states free to allow such suits and imposes few restrictions on the states if the plaintiff is not a public figure. States may legitimately protect a person's reputation from falsehoods.<sup>56</sup> Thus, one could argue that a state may legitimately prosecute Iago or other false swearers with little concern about the First Amendment because the First Amendment's protection of intentionally false statements is non-existent.

Perhaps. But in other areas, the criminal law has fully criminalized speakers whose crime consisted of truthful statements. Here, Lady MacBeth provides a helpful example. Early in *MacBeth*, three witches hail MacBeth as the future king.<sup>57</sup> He and Lady MacBeth agree that he will kill Duncan, the King, so that MacBeth can fulfill the prophecy.<sup>58</sup> But in his memorable soliloquy, MacBeth suffers from momentary doubts about whether he should commit murder.<sup>59</sup> When Lady MacBeth learns that her husband has lost his resolve, she delivers one of the most famous speeches in all of Shakespeare,<sup>60</sup> a speech

<sup>51</sup> Dressler, *supra* note 6. Dressler also argues that ignoring the general requirement that the state must prove that a defendant caused a particular result before he may be found guilty leads to disproportionate punishment. *Id.* at 103-08.

<sup>52</sup> For example, Professor Dressler would impose liability for acts done by others if the accomplice caused the actor's conduct. *Id.* at 120-30. See also Dow & Shiledes, *supra* note 50, at 1219.

<sup>53</sup> 376 U.S. 254 (1964).

<sup>54</sup> While the Court has extended First Amendment protection to public figures, it has more often than not found that the particular plaintiff was not a public figure. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1970).

<sup>55</sup> *Sullivan*, 376 U.S. at 270.

<sup>56</sup> See, e.g., *Gertz*, 418 U.S. at 347-48 (recognizing a state's interest in protecting individuals from injury to their reputations).

<sup>57</sup> *Macbeth*, *supra* note 3, at act 1, sc. 3, ln. 46-48, 60-67.

<sup>58</sup> *Id.* at act 1, sc. 7.

<sup>59</sup> *Id.* at act 1, sc. 7, ln. 1-28.

<sup>60</sup> When Macbeth tells his wife that he has changed his plans, she counters with:

What Beast was't then/That made you break this Enterprize to me?/When you durst do it you were a Man;/And to be more that what you were, you would/Be so much more the Man. Nor Time, nor Place/Did then adhere, and yet you would make both./They've made themselves, and that their Fitness now/Does unmake you. I've given Suck, and know/How tender 'tis to love the Babe that milks me;/I would, while it was smiling in my Face,/Have pluck'd my Nipple from his

which demonstrates why we criminalize conspiracy and aiding and abetting. The single actor may lose his resolve; the presence of additional parties increases the likelihood that a planned crime will take place. In response to her exhortation to “screw your courage to the sticking-place,”<sup>61</sup> MacBeth announces that “I am settl’d.”<sup>62</sup> Thereafter, he commits the crime.<sup>63</sup> Unlike Iago’s speech, hers is not false.

As discussed above, accomplice liability is demonstrated by a showing that the accomplice assisted the commission of the crime.<sup>64</sup> Assistance is defined broadly to include mere encouragement of the crime. In theory, an accomplice derives her liability from the actor. By encouraging the act, the accomplice makes the act her own. As a result, unlike the law governing conspiracy,<sup>65</sup> she is not guilty of a separate offense of aiding and abetting. She is fully liable for the completed, intended offense.<sup>66</sup>

Commentators have raised a variety of criticisms of accomplice liability.<sup>67</sup> But the *MacBeth* hypothetical is an easy case in which, despite criticism of accomplice liability generally, critics of accomplice liability should have no trouble recognizing that criminalizing Lady MacBeth is an appropriate result. One might hesitate to criminalize an accomplice because in some cases the accomplice’s intent may be uncertain. In this case, however, Lady MacBeth’s forceful speech leaves no doubt about her intent.<sup>68</sup>

Commentators also express concern that the encouragement or assistance provided by the accomplice is often insignificant and may be provided by one who has little choice but to acquiesce. For example, Professor Dressler raises issues of proportionality in a case involving a wife who serves her criminal husband dinner which fortifies him to commit his crimes.<sup>69</sup> The aid provided seems insignificant – for example, her aid seems quite remote and irrelevant to whether her husband would have committed the crime anyway – but nonetheless leads to her conviction for the completed crime as long as the prosecutor can show that she intended to aid the criminal conduct. In addition, if the law criminalizes accomplices because they demonstrate their dangerousness by endorsing the actor’s crime, this may not apply in the case of the wife who may have few options but to serve her husband. She may be trapped in an abusive relationship and have few skills that would let her leave him even if she had the resolve to do so.

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Boneless Gums/And dash’d the Brains out had I so sworn as you/Have done to this . . . We fail?/  
But screw your Courage to the Sticking-place/And we’ll not fail . . . .”

*Id.* at act 1, sc. 7, ln. 47-61.

<sup>61</sup> *Id.* at ln. 59-60.

<sup>62</sup> *Id.* at ln. 79.

<sup>63</sup> *Id.* at act 2, sc. 2.

<sup>64</sup> See *supra* notes 6-17 and accompanying text.

<sup>65</sup> See DRESSLER, *supra* note 5, § 29.03, at 395-96 (discussing approach to conspiracy and concluding that in most states, a conspiracy to commit a felony is punished less severely than the target offense).

<sup>66</sup> Dressler, *supra* note 6, at 92.

<sup>67</sup> See, e.g., Dressler, *supra* note 6; Dow & Shieldes, *supra* note 50.

<sup>68</sup> *Macbeth*, *supra* note 3. See also *supra* note 60.

<sup>69</sup> Dressler, *supra* note 6, at 102.

Lady MacBeth hardly resembles the wife in *Alexander v. State*.<sup>70</sup> Her encouragement is forceful, unequivocal, and rhetorical, delivered at a moment when MacBeth's resolve wanes.<sup>71</sup> But for the criminal law's hesitation to say that one person causes another person (with his own free will) to act,<sup>72</sup> one might be tempted to argue that Lady MacBeth's words did cause her husband to act. Quite unlike the wife in *Alexander*, Lady MacBeth is no shrinking violet, unable to escape a domineering husband. She is a forceful participant in a dangerous plot that results in murder.

Again, as in Iago's case, competent counsel would not dream of interposing a First Amendment defense on behalf of Lady MacBeth, even if her crime consists of nothing but words. In both cases, society may justly punish both offenders even though another person committed the immediate act leading to death. The two examples demonstrate ample historical precedent that we do criminalize offenders whose conduct consists only of words, and, while some cases raise moral questions about the appropriateness of punishing accomplices, Iago and Lady MacBeth's cases prevent no hard moral questions. Their punishment is deserved.

#### IV. MARC ANTONY

In the 1920s, Judge Learned Hand and Professor Zechariah Chafee, Jr. first discussed whether Marc Antony would be entitled to a First Amendment defense if he was charged with inciting violence for his funeral oration for Caesar.<sup>73</sup> Here, I develop the setting in which Antony delivered his oration which led to the mob's action against Caesar's assassins and why we may be disinclined to criminalize Antony. Thereafter, I summarize some of the leading First Amendment cases that bear on whether Antony's conduct is criminal and then, after I conclude that the Supreme Court case law does not provide a definitive answer about whether his speech would be protected, I explore why he should not be entitled to a First Amendment defense as a matter of law. Despite the fact that Antony's crime consisted entirely of speech, even if possibly construed as political speech, he would not be entitled to a judgment of acquittal as a matter of law.

Brutus, one of Caesar's trusted friends, joins a conspiracy to murder Caesar when his co-conspirators convince him that Caesar intends to become a king and a tyrant.<sup>74</sup> Even before the murder, Brutus convinces his co-conspirators they should not murder Caesar's close friend, Marc Antony.<sup>75</sup> After Brutus murders Caesar, he again convinces his co-conspirators that they need not fear Antony, that he, Brutus, should give the funeral oration to convince the

<sup>70</sup> See cases *supra* note 16.

<sup>71</sup> See *supra* note 59.

<sup>72</sup> KADISH, *supra* note 49.

<sup>73</sup> Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 729 n.41 (1975) (letter from Zechariah Chafee Jr. to Learned Hand).

<sup>74</sup> WILLIAM SHAKESPEARE, JULIUS CAESAR, act 1, sc. 2 (William Montgomery ed., Penguin Books 2000) [hereinafter *Caesar*].

<sup>75</sup> *Id.* at act 2, sc. 1, ln. 181-83.

people of Caesar's plan to become a tyrant.<sup>76</sup> Confident he can defuse the crowd's desire for vengeance for Caesar's death, Brutus convinces his cohorts that they can then allow Antony to address the crowd as part of appropriate burial rites.<sup>77</sup>

Brutus miscalculated his own persuasive powers and underestimated Antony's. In one of the most famous of all Shakespearean speeches, Antony plays the crowd to perfection.<sup>78</sup> Like the successful trial lawyer, he opens with a powerful theme: Brutus is an honorable man, as are his cohorts.<sup>79</sup> And so what Brutus said must be so. But, while he repeats his refrain, that Brutus is an honorable man and so his statements must be so, he undercuts each one, first by reference to Caesar's treatment of him,<sup>80</sup> and eventually by evidence found in Caesar's will, evidence of Caesar's concern for the common people.<sup>81</sup>

As Antony works the crowd, members of the crowd, not Antony, cry out for the blood of the traitors. He disclaims his desire to stir up the crowd; for example, at one point, he states, "Good friends, sweet friends, let me not stir you up/To such a sudden flood of mutiny."<sup>82</sup> Antony consciously avoids explicit words urging revenge against the conspirators. Members of the crowd begin early in his oration to call for revenge upon the traitors and in the end, when the crowd leaves to do so, again members of the mob, not Antony, speak the explicit words of vengeance: "Come, away, away!/We'll burn [Caesar's] body in the holy place,/And with the brands fire the traitors' houses. . . ."<sup>83</sup> Not surprisingly, members of the mob route out the conspirators and kill them.<sup>84</sup>

Why might we be inclined to grant Antony a First Amendment defense? Within the play, Antony is the hero and seeks justice against a group that has committed a *coup d'etat*. Still, whether he and the mob might be justified in killing the conspirators would be determined by principles of necessity, not, in Antony's case, a defense grounded in the First Amendment.<sup>85</sup>

From my perspective, as a Criminal Law professor, Antony's liability resembles that of Lady MacBeth and Iago. Despite his protestations to the

<sup>76</sup> *Id.* at act 3, sc. 1, ln. 238-44.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at act 3, sc. 2, ln. 73-244.

<sup>79</sup> *Id.* at ln. 82-83.

<sup>80</sup> *Id.* at ln. 178-79.

<sup>81</sup> *Id.* at ln. 235-43.

<sup>82</sup> *Id.* at ln. 204-05.

<sup>83</sup> *Id.* at act 3, sc. 2, ln. 245-47.

<sup>84</sup> *Id.* at act 4, sc. 2, ln. 225-32 & act 5, sc. 5.

<sup>85</sup> In most jurisdictions, necessity does not provide a defense in cases involving murder. Under narrow circumstances, the Model Penal Code would recognize such a defense. "Conduct that the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . ." MODEL PENAL CODE § 3.02. The necessity defense way also apply to homicide, though in most cases the evil to be prevented is likely less than or equal to the evil of an intentional murder. Yet, the comments state that "it would be particularly unfortunate to exclude homicidal conduct from the scope of the defense." MODEL PENAL CODE § 3.02, cmt. 3. However, many states have explicitly excluded intentional homicide that would otherwise be a murder from the defense. *Id.*

contrary, he is a forceful orator who plays his audience brilliantly. Unlike Iago, Antony did not render his audience incompetent. As a result, the criminal law would not treat Antony as the cause of the mob's violence.<sup>86</sup> But, as developed above, the criminal law does not require a prosecutor to prove that an aider and abettor caused the actors' conduct; it is enough that the speaker encouraged the conduct (and thereby demonstrated a desire to take the actors' conduct as his own).<sup>87</sup> Both before and after his oration, Antony makes clear that his goal is to produce the very result that his words produce.<sup>88</sup> Like Lady MacBeth, his powerful rhetoric results in murder.

Antony's is a difficult case for reasons that relate more to the embarrassing history of our First Amendment case law than with sound principles of criminal law. Many of the leading First Amendment cases were decided during the "Red Scare" after the First World War and, later, during the "Red Scare" that followed the Second World War with the beginning of the Cold War.<sup>89</sup>

Many of those cases involved what today we would call nothing more than political speech, entitled to the greatest First Amendment protection. At the time, political dissent could lead to serious consequences. *Debs v. United States*,<sup>90</sup> especially for those of us who remember the powerful anti-war rhetoric during the Vietnam war, is a low water mark, even in an era of bad First Amendment law. The Supreme Court affirmed Debs' conviction for violating the Espionage Act of 1917.<sup>91</sup> His conduct amounted to what can fairly be characterized as an anti-war speech.<sup>92</sup> Relying on earlier precedent, *Debs* found that the state must prove only that the defendant's words represented a clear and present danger that they will produce a harm that Congress may prevent.<sup>93</sup> Further, it upheld a jury's determination that Debs' "natural and intended effect" was to frustrate the war effort.<sup>94</sup>

During the 1920 term, for the first time, Justice Holmes, joined by Justice Brandeis, began to dissent in a number of cases in which the defendants' "conduct" was, at least in large part, political speech. For example, they dissented in *Abrams v. United States*, a case in which several Bolshevik sympathizers dropped leaflets onto the streets of New York.<sup>95</sup> The leaflet opposed United States support of anti-Soviet forces in the Russian revolution and called for a strike to prevent shipment of weapons to those forces.<sup>96</sup> The Supreme Court affirmed their conviction based on the Espionage Act, which was amended in 1918 to make it unlawful to urge curtailment of military production with an

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<sup>86</sup> See KADISH, *supra* note 49.

<sup>87</sup> See *supra* notes 6-12 and accompanying text.

<sup>88</sup> *Caesar*, *supra* note 74, at act 3, sc. 1, ln. 257-300, & act 4, sc. 1, ln. 29-47.

<sup>89</sup> For a more detailed discussion of this point, see Vitiello, *supra* note 2, at 1199-217.

<sup>90</sup> 249 U.S. 211 (1919).

<sup>91</sup> Espionage Act of June 15, 1917, ch. 30, § 30, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a) (1994)).

<sup>92</sup> See *Debs*, 249 U.S. at 213-14 for the text of Debs' speech.

<sup>93</sup> *Id.* at 213-14, 216-17.

<sup>94</sup> *Id.* at 215.

<sup>95</sup> 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

<sup>96</sup> *Id.* at 620-23.

intent to hinder the war against the Germans.<sup>97</sup> According to the majority, imputing knowledge to the defendants that the strikes they urged would necessarily harm the war effort against the Germans satisfied the intent element.<sup>98</sup>

Justice Holmes' dissent argued that the First Amendment prevented Congress from forbidding "all efforts to change the mind of the country."<sup>99</sup> As a result, the First Amendment required a showing that the defendants had a specific intent to cause the harm that Congress sought to prevent. While Holmes read the Espionage Act to require specific intent, he found the evidence of that intent insufficient.<sup>100</sup> Without more, knowledge that one's speech or conduct may bring about a particular harm is not enough to demonstrate that the speaker intended that result.

Elsewhere, Justices Holmes and Brandeis continued to object when a state or the national government criminalized a person's abstract advocacy. For example, they objected to the Court's affirmation of Anna Whitney's conviction for criminal anarchy and syndicalism based on nothing more than her presence at a Communist Labor Party Convention where the party adopted a resolution supporting the revolutionary working class movement in America.<sup>101</sup> Among other concerns, Justices Holmes and Brandeis argued that the Court improperly deferred to the California legislature's determination that the result advocated by the Convention was a clear and present danger.<sup>102</sup> Instead, they would have required proof of that fact at trial. As a result, the statute might lead to conviction, as appeared to be the case before the Court, for mere abstract advocacy. More must be required because of the risk of stifling all political dissent. That risk exists because "[e]very denunciation of existing law"<sup>103</sup> increases the probability that the law will be violated. In their view, the First Amendment allows dissenting voices to challenge existing laws without fear of prosecution.<sup>104</sup>

Holmes and Brandeis insisted that, as a matter of substantive law, a legislature can only criminalize speech when the danger is clear and present.<sup>105</sup> In their view, as a matter of procedure, a court is not bound by a legislature's determination that a danger is clear and present and has a greater than normal role in reviewing a jury's determination that a harm is sufficiently imminent and that a speaker has the requisite intent.<sup>106</sup>

Judge Learned Hand contemporaneously struggled with the same dilemma, how to protect society without suppressing political dissent. In *Masses Publishing Co. v. Patten*, the publisher of a revolutionary journal sought an injunction to compel the postmaster to accept plaintiff's journal for

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<sup>97</sup> *Id.* at 624. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219, amended by Act of May 16, 1918, ch. 75, 40 Stat. 553 (Comp. St. 1918, § 10212(c)).

<sup>98</sup> *Abrams*, 250 U.S. at 621-22.

<sup>99</sup> *Id.* at 628 (Holmes, J., dissenting).

<sup>100</sup> *Id.* at 628-29 (Holmes, J., dissenting).

<sup>101</sup> *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>102</sup> *Id.* at 378-79 (Brandeis, J., concurring).

<sup>103</sup> *Id.* at 376 (Brandeis, J., concurring).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

mailing.<sup>107</sup> The postmaster's defense rested on his claim that the journal violated the Espionage Act of 1917.<sup>108</sup> For example, the postmaster argued that political cartoons and text expressing sympathy for conscientious objectors violated the act's provision making it unlawful to cause "insubordination, disloyalty, mutiny or refusal of duty in the military."<sup>109</sup>

Hand sought to draw a clear line between protected and unprotected speech.<sup>110</sup> Even the Holmes-Brandeis interpretation of the clear and present danger test left the speaker guessing when First Amendment protection began. Depending on how imminent the harm might be, the same speech might be protected in one setting but not in another. Unlike Holmes and Brandeis, who focused on the effect of the speech, Hand focused on the content of the speech.<sup>111</sup> For Hand, under the Espionage Act, a speech was not criminal unless it directly counseled the listener to resist the draft, even if the speech motivated the listener to resist the draft.<sup>112</sup> Words did not become criminal unless they were a "direct incitement to violent resistance."<sup>113</sup>

The Second Circuit reversed Hand's decision in *Masses Publishing*.<sup>114</sup> Hence, neither the Holmes-Brandeis view nor the Hand view became the law, at least until the late 1960s. But certainly from today's view of the First Amendment, Holmes, Brandeis, and Hand deserve credit for their efforts to limit the government's ability to criminalize political dissent. At least as developed in these cases, the defendants did nothing more than speak out in opposition to policies of the state or federal government. As applied by the Supreme Court, the First Amendment did not go very far in protecting unpopular speech.

While the Holmes-Brandeis and Hand approaches both offered greater protection than the Court did at that time, their approaches differed in significant ways. In fact, the Marc Antony example served to demonstrate that difference. Under the Holmes-Brandeis approach, a court would have to determine, based on an independent review of the record, whether he intended his speech to result in the unlawful killing of the conspirators and that the risk of harm was imminent.<sup>115</sup> As developed in more detail below, Antony planned the very harm that took place, and he expected it to take place immediately, allowing him little protection under the Holmes-Brandeis approach.<sup>116</sup>

In correspondence with Judge Hand, Professor Chafee posed the Antony example.<sup>117</sup> Like a true Socratic professor, Chafee posed the example to demonstrate the weakness of Hand's approach in *Masses Publishing*.<sup>118</sup> While

<sup>107</sup> 244 F. 535, 536 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

<sup>108</sup> Act of June 15, 1917, ch. 30, 40 Stat. 217.

<sup>109</sup> *Masses Publ'g.*, 244 F. at 539.

<sup>110</sup> *Id.* at 540.

<sup>111</sup> Gunther, *supra* note 73, at 720-21.

<sup>112</sup> *Id.*

<sup>113</sup> *Masses Publ'g.*, 244 F. at 540.

<sup>114</sup> 246 F. 24 (2d Cir. 1917).

<sup>115</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>116</sup> See *infra* notes 184-87 and accompanying text.

<sup>117</sup> Gunther, *supra* note 73, at 729 n.41.

<sup>118</sup> *Id.* In one of his letters to Hand, the comment is made that "your test is certainly easier to apply although our old friend Marc Antony's speech is continually thrown at me in discussion. After all, we ought to take the best test we can find, even though it will sometimes break down." *Id.* at app. 1, doc. 16.

Hand's approach did not subject the speaker to "the mercy of fact-finders reflecting majoritarian sentiments hostile to dissent,"<sup>119</sup> his approach "could not easily deal with the indirect but purposeful incitement of Marc Antony's oration over the body of Caesar."<sup>120</sup> While Hand recognized the social harm posed by the indirect inciter, focusing on the literal meaning of the speaker's words allowed a speaker to escape criminal liability through clever manipulation.<sup>121</sup>

The difference between the two approaches is especially important today because of their influences on modern First Amendment law. First, before the Cold War, the Holmes-Brandeis approach gained acceptance,<sup>122</sup> as the Supreme Court began strengthening its clear and present danger test.<sup>123</sup> Second, after a significant step backwards in *Dennis v. United States*,<sup>124</sup> the Court again gave teeth to the First Amendment in a series of cases interpreting the Smith Act,<sup>125</sup> the 1940 legislation used during the 1950s to target members of the Communist Party. For example, in *Yates v. United States*,<sup>126</sup> the Court interpreted the Smith Act to require the jury to distinguish between advocacy of abstract doctrine, protected by the First Amendment, and incitement or advocacy of action, unprotected by the First Amendment.

While cases like *Yates* demonstrate increased awareness that the First Amendment must protect political dissent,<sup>127</sup> the Court's approach to the First Amendment issues changed even more markedly during the 1960s. For example, the Court decided *Brandenburg v. Ohio*<sup>128</sup> at the height of the Vietnam anti-war and civil rights movements.

*Brandenburg*, a Ku Klux Klan leader, invited news reporters to a poorly attended Klan rally.<sup>129</sup> There, he was captured on film giving a speech at a cross burning.<sup>130</sup> His speech was remarkably temperate for a Klansman. In fact, it is hard to determine whether *Brandenburg* threatened illegal action at all. He stated, for example, that "[w]e are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."<sup>131</sup> *Brandenburg* was subsequently convicted of violating Ohio's criminal syndicalism statute which made it unlawful to advocate the duty, necessity, or propriety of crime, sabotage, or violence as a means

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<sup>119</sup> *Id.* at 721.

<sup>120</sup> *Id.* at 729.

<sup>121</sup> *Id.*

<sup>122</sup> See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-9, at 841-45 (2d ed. 1988).

<sup>123</sup> *Id.* at 845-49.

<sup>124</sup> 341 U.S. 494 (1951).

<sup>125</sup> Smith Act of 1940, 54 Stat. 670 (1940) (current version at 19 U.S.C. § 2385 (1994)).

<sup>126</sup> 354 U.S. 298 (1957).

<sup>127</sup> See *Noto v. United States*, 367 U.S. 290 (1961) (defendant's conviction for violating the membership clause of the Smith Act was reversed, on the ground that the evidence introduced at trial was insufficient to show that the Communist Party engaged in actual advocacy of governmental overthrow).

<sup>128</sup> 395 U.S. 444 (1969).

<sup>129</sup> *Id.* at 445.

<sup>130</sup> *Id.* at 446.

<sup>131</sup> *Id.*

to accomplish political reform. In the Supreme Court, *Brandenburg* contended that his conviction under that law violated the First Amendment.

The Court found that the statute was unconstitutional because it purported to punish mere advocacy.<sup>132</sup> It read its earlier case law as establishing that the First Amendment protected advocacy of the use of force unless that advocacy was aimed at inciting or producing imminent lawless action when that advocacy is likely to produce such action.<sup>133</sup> The Court had no occasion in *Brandenburg* to decide whether the defendant's conduct was protected by the First Amendment.<sup>134</sup>

In the more than thirty years since *Brandenburg*, the Court has shed little additional light on the line drawing required by its decision. In *Hess v. Indiana*,<sup>135</sup> a sheriff and his deputies were clearing the streets of anti-war protesters when Hess, one of the protesters, said, "[w]e'll take the fucking street later," or "[w]e'll take the fucking street again."<sup>136</sup> Two witnesses testified that Hess was not urging the crowd to take the street back and that "his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area."<sup>137</sup>

In a per curiam opinion, the Court overturned Hess's conviction for disorderly conduct. To overturn his conviction, the Court conducted an independent review of the record, not bound by the trial court's factual determination. Apparently placing on the state the burden of demonstrating that Hess's speech was not protected by the First Amendment, the Court found the evidence of both an intent to incite and a call for immediate action insufficient.<sup>138</sup> As observed by the Court, the evidence of an intent to incite lawless action was at most ambiguous.<sup>139</sup> The evidence did not reveal whether Hess was making a call for moderation or, at worst, a call for illegal action at some future time.<sup>140</sup> Further, the state failed to show any specific action or any imminent violence urged by Hess.<sup>141</sup>

The only other case decided in reliance on the *Brandenburg* test was *NAACP v. Claiborne Hardware*.<sup>142</sup> There, the African-American community staged a boycott against white merchants in a small Mississippi town.<sup>143</sup> White merchants sued various defendants for the economic losses occasioned by the

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<sup>132</sup> *Id.* at 449.

<sup>133</sup> *Id.* at 447.

<sup>134</sup> The Court did not address that issue because it found that the statute was unconstitutional on its face and did not reach the separate question whether *Brandenburg's* conduct was protected by the First Amendment. That issue would arise only after Ohio passed a properly narrowed statute and sought to convict *Brandenburg* for similar behavior. Then the Court would have to address whether his conduct amounted to a direct incitement or to mere abstract advocacy.

<sup>135</sup> 414 U.S. 105 (1973).

<sup>136</sup> *Id.* at 106-07.

<sup>137</sup> *Id.* at 107.

<sup>138</sup> *Id.* at 108.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 109.

<sup>142</sup> 458 U.S. 886 (1982).

<sup>143</sup> *Id.* at 889.

boycott.<sup>144</sup> Most of the damages suffered were caused by lawful conduct, the decision of those participating in the boycott not to patronize white owned stores.<sup>145</sup> However, the lower court found the NAACP and Charles Evers, its local leader, liable for the full amount of harm caused by the boycott.<sup>146</sup> Their liability was based on three speeches that Evers gave.<sup>147</sup>

Members of the boycott formed an "enforcement" group and collected names of African-Americans who violated the boycott.<sup>148</sup> The trial court found that supporters of the boycott committed ten acts of violence against African-Americans who patronized white owned businesses.<sup>149</sup> Some of those acts of violence took place after speeches by Evers.<sup>150</sup> In those speeches, Evers made statements that might have inspired members of the audience to use violence against members of their community who were violating the boycott.<sup>151</sup> Because, according to the trial court, Evers was responsible for some African-Americans being intimidated from patronizing white businesses, Evers was also responsible for the harm suffered by the white plaintiffs.<sup>152</sup> Rather than finding the NAACP and Evers liable only for the part of the damages that resulted from his arguably illegal speeches, the trial court found the defendants liable for the entire amount of the plaintiffs' losses, even though most of those damages were the result of lawful conduct by members of the community.<sup>153</sup>

Again in a per curiam opinion, the Court reversed the judgment against the NAACP and Evers. In finding that Evers' speech was protected by the First Amendment, the Court discussed three possible theories by which Evers might be found liable for the conduct of the enforcement group: if he authorized, directed, or ratified specific tortious activity; if his speeches were likely to incite his listeners to commit unlawful acts within a reasonable amount of time; or if he gave specific instructions to carry out violent acts or threats.<sup>154</sup> The Court rejected the lower court's finding that Evers did ignite the violent acts of boycott supporters. It did make clear that, had Evers' strong language "been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct."<sup>155</sup>

Review of these three cases, *Brandenburg v. Ohio*, *Hess v. Indiana*, and *NAACP v. Claiborne Hardware*, allows a few generalizations. Consistent with the Holmes-Brandeis view, when the defendant has a First Amendment defense, an appellate court has a greater than normal role in reviewing the facts found in the trial court.<sup>156</sup> In effect, trial court findings are entitled to little or no deference. In addition, while the Court seems to give greater substantive

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 893.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 894-95.

<sup>149</sup> *Id.* at 901-06.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 893.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 927.

<sup>155</sup> *Id.* at 928.

<sup>156</sup> *See generally id.*

First Amendment protection to political dissent than did the Court in the “Red Scare” cases, the extent of that protection is uncertain.

Here, the Marc Antony example demonstrates the uncertainty about the substantive rule articulated in *Brandenburg*; uncertainty that remains after the Court’s decisions in *Hess* and *Claiborne*. How would that case be resolved under *Brandenburg*?

Professor Gunther has argued that *Brandenburg* combines the best of the Holmes-Brandeis approach and of Hand’s approach in *Masses Publishing*.<sup>157</sup> Specifically, according to Professor Gunther, “[u]nder *Brandenburg*, probability of harm is no longer the central criterion for speech limitations. The inciting language of the speaker – the Hand focus on ‘objective’ words – is the major consideration.”<sup>158</sup>

If Professor Gunther is correct, Marc Antony could not be found guilty of aiding and abetting murder or inciting violence against the co-conspirators. As developed above, he carefully avoids any direct exhortation, any explicit call for violence. For example, after the crowd calls for “Revenge! – About! – Seek! – Burn! – Fire! – Kill! – Slay! Let not a traitor live!,” Antony “appeals” to the crowd, “let me not stir you up/To such a sudden flood of mutiny. . . .”<sup>159</sup> If *Brandenburg*, in fact, requires words of incitement as a necessary condition for prosecution, Antony would have to be acquitted despite the fact that the other requirements of the Court’s test would otherwise be met. That is, the harm is imminent – the crowd rushes away from Caesar’s funeral and kills the conspirators immediately, Antony’s intent is not in doubt, and, although not definitively resolved, if the Court requires that the harm threatened must be a grave one, the killing of another obviously qualifies.

In neither *Hess* nor *Claiborne* did the Court indicate whether words of incitement are necessary before a defendant may be prosecuted. Certainly, in *Claiborne*, Evers used words of incitement – for example, he told one audience that “any ‘Uncle Toms’ who broke the boycott would ‘have their necks broken’ by their own people.”<sup>160</sup> Evers was not liable because the evidence was insufficient to show that his words caused the harm suffered by the white merchants.<sup>161</sup>

Hess’s words might or might not have been words of incitement.<sup>162</sup> The record did not support an inference of his intent – did he intend to call for moderation or did he intend to urge some future criminal conduct – and it did not support a finding that harm was imminent, again because, even if his words were a call to action, the record did not indicate when the illegal conduct might take place.<sup>163</sup> The Court did not have independent evidence of Hess’s intent beyond his words.<sup>164</sup> The additional evidence cited by the Court supported an absence of an intent to bring about the feared harm.<sup>165</sup>

<sup>157</sup> Gunther, *supra* note 74, at 755.

<sup>158</sup> *Id.*

<sup>159</sup> *Caesar*, *supra* note 74, act 3, sc. 2, ln. 199-200, 204-05.

<sup>160</sup> *Claiborne*, 458 U.S. at 900.

<sup>161</sup> *Id.*

<sup>162</sup> *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 109.

<sup>165</sup> *Id.* at 107.

Hence, since *Brandenburg*, the Court has not elaborated on whether words of incitement are a necessary condition for conviction or if, absent words of incitement, a defendant has a First Amendment defense as a matter of law. We are left only with the Court's language in *Brandenburg* to try to divine whether words of incitement are in fact a necessary condition for conviction.

The text is ambiguous. The Court stated that the First Amendment protects a speaker unless the speaker's advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>166</sup> Professor Gunther's position, that *Brandenburg* adopts Judge Hand's view, is supported by its self-conscious use of the term "inciting," suggesting that words of incitement are a necessary condition.<sup>167</sup> No doubt, the Court was aware of Judge Hand's use of that term. But, of course, the Court did not state explicitly that a speaker has a First Amendment defense. Rather, it used an additional term, advocacy directed to "producing" the imminent criminal conduct. Arguably, unless the "producing" language was merely surplusage, the Court recognized that language not explicitly inciting lawless conduct may nonetheless be sufficiently dangerous that it should be criminalized.

Absent clear resolution in the Supreme Court case law, one ought to ask whether the policies that support the First Amendment suggest that we ought to protect speakers like Marc Antony. Most of the cases discussed above have involved political dissent where the speaker has attacked governmental policies. While scholars have suggested that the First Amendment advances a number of policies, most recognize that, at its core the First Amendment protects political speech necessary in a free society. Majoritarian sentiment against dissenting voices is likely to be high, demanding prosecution for unpopular ideas. In addition, even if majoritarian sentiment does not demand prosecution, those in power may want to silence dissent in order to cement their own power. Certainly, cases like *Brandenburg*, *Hess*, and the Espionage Act and Smith Act cases all demonstrate the legitimacy of those concerns. Allowing the state to prosecute a political dissenter creates a chilling effect on the vigorous debate necessary in a free society.

Supreme Court doctrine in a number of areas creates a zone in which a speaker may advocate without fear of civil liability or criminal prosecution (or confident that he or she has a defense if the speaker is prosecuted). A speaker who criticizes a public official or public figure may not be found liable unless the person claiming to be defamed can demonstrate that the speaker acted with knowledge that the statements were false or made with reckless disregard of the truth.<sup>168</sup> That burden is not easily met.

*Brandenburg* and *Hess* require that the state demonstrate that the speaker had an intent to incite violence and that the unlawful conduct was imminent.<sup>169</sup> Unlike earlier precedent, the Court's current cases do not allow the legislature to determine whether the harm is imminent; that must be demonstrated on a

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<sup>166</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>167</sup> Gunther, *supra* note 73, at 755.

<sup>168</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>169</sup> *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982); *Hess*, 414 U.S. at 109.

case-by-case basis.<sup>170</sup> The case law also demonstrates a commitment to full judicial review in cases involving First Amendment defenses, apparently based on a mistrust of jury determinations of fact since those determinations may be motivated by the passions of the moment.<sup>171</sup>

Those are significant protections. For example, in *Hess*, the Court overturned a finding that Hess intended to incite the crowd because his statement to the effect that the protesters would take the streets back later did not allow a clear inference of his intent to bring about the feared harm.<sup>172</sup>

The Holmes-Brandeis approach has been criticized because the First Amendment defense seemed to depend on events beyond the control of the speaker and because it was so susceptible to the passions of the moment.<sup>173</sup> For example, the clear and present danger test did little to protect the defendants in *Dennis v. United States*,<sup>174</sup> a prosecution of Communists during the height of the Cold War.<sup>175</sup>

I have argued elsewhere that many of the "Red Scare" cases, including *Dennis*, would come out differently today, under *Brandenburg* and more recent First Amendment cases.<sup>176</sup> Specifically, the intent requirement and the lack of deference shown to findings in the trial court place a significant burden on the prosecution. In addition, the modern cases force the prosecutor to show a meaningful risk of actual harm following the defendant's speech.<sup>177</sup> No longer would a federal court sustain a conviction for aiding the Germans under a statute like the Espionage Act if a defendant merely encouraged resisting efforts to ship arms to forces opposing the Bolsheviks. The prosecutor would have to show that the defendants intended to frustrate the war effort against the Germans. Knowledge that their conduct might have that effect is not enough under *Brandenburg's* intent requirement. Similarly, a prosecutor could not rely on a defendant's membership in an organization like the Ku Klux Klan or the Communist Party to sustain a conviction; more would be necessary to show that the defendant intended to support the illegal goals of the organization.<sup>178</sup> That is, earlier cases that seemed so ripe for criticism because they allowed prosecution of political dissenters without more do not seem to have survived *Brandenburg*.

One might argue, if *Brandenburg* did not adopt the additional requirement of words of incitement, the objective approach urged by Judge Hand in *Masses Publishing*, that the Court should do so. That argument would be grounded on the need to provide the prospective speaker with certainty of the difference between protected speech and criminal incitement.

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<sup>170</sup> This is shown by the Court's review of the trial record, with little deference given and a high degree of emphasis placed on the facts. See generally *Claiborne*, 458 U.S. 886; *Hess*, 414 U.S. 105.

<sup>171</sup> *Claiborne*, 458 U.S. at 915 n.50; *Hess*, 414 U.S. at 108.

<sup>172</sup> *Hess*, 414 U.S. at 108.

<sup>173</sup> Gunther, *supra* note 73, at 749-50.

<sup>174</sup> 341 U.S. 494 (defendant convicted for violation of Smith Act).

<sup>175</sup> *Id.*

<sup>176</sup> Vitiello, *supra* note 2.

<sup>177</sup> Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978).

<sup>178</sup> See *supra* notes 38-55, 63-71 and accompanying text.

A close examination of Marc Antony's speech helps show why that should not be the case. Before examining Antony's First Amendment defense, one ought to consider how his conduct would be judged but for the fact that he gave his speech in a public place. As discussed above, when Lady MacBeth urges MacBeth to murder the King or when Iago deceives Othello into a murderous rage, neither Lady MacBeth nor Iago would have a First Amendment defense despite the fact that their conduct is exclusively speech. Were Lady MacBeth charged with murder, the prosecution would not have to prove any express words of encouragement. It would be enough to show that whatever words used (or any other aid) were intended to encourage the crime.<sup>179</sup> In addition, an appellate court would give no special deference to factual findings in the lower court. Similarly, if Antony delivered his powerful encouragement behind closed doors, it is inconceivable that a court would seriously consider a First Amendment defense. Antony obviously encouraged the murder of the co-conspirators.

Once he speaks in public, he seems to be entitled to First Amendment protection. I find nothing in the case law which explains why that is so. I suspect that it is so because those encouraging murder usually do not do so in a public forum and because people speaking in public are more likely to be engaging in political discourse than in a criminal conspiracy.

That seems implicit in cases like *Brandenburg* and *Claiborne*. Certainly there is something sound in that position. While some sane people are willing to admit openly their intent to commit crimes, most people speaking in a public forum would not do so, suggesting that in fact, even harsh rhetoric is intended as political dissent.

While scholars have differed about the theory underlying the First Amendment, cases involving political dissent are the ones in which First Amendment protection is most important.<sup>180</sup> Government officials are most likely to have an interest in suppressing speech in such cases.<sup>181</sup> Whether one believes that the First Amendment is intended to assure our ability to engage in self government, or that its protection is based on distrust of governmental determinations of truth, cases where criticism of government is involved pose the greatest challenge for the courts.<sup>182</sup>

Despite his feigned praise of Brutus and the other co-conspirators, Antony's speech certainly could be construed as criticism of the government (now that the co-conspirators have usurped power). Antony's false praise shares some of the characteristics of satire, a common form of political commentary in tyrannical regimes.<sup>183</sup>

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<sup>179</sup> DRESSLER, *supra* note 5, § 30.04, at 436-38.

<sup>180</sup> See *Vitiello*, *supra* note 2, at notes 342-47 and accompanying text, at 1221; see also FREDERICK SHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 34 (1982).

<sup>181</sup> See *Vitello*, *supra* note 2, at notes 342-47 and accompanying text, at 1221.

<sup>182</sup> *Id.*

<sup>183</sup> See DUSTIN GRIFFIN, *SATIRE, A CRITICAL REINTRODUCTION* 138 (1994) (rebutting the contention that satire requires freedom of speech as an essential condition and observing that "[i]n the late twentieth century [satire] has appeared not in the liberal West but in Russia and Eastern Europe.").

But does the fact that Antony speaks in public and *may* be engaged in political discourse create a risk sufficient to require an additional protection, to find his conduct criminal only if he uses words of incitement? And here, I assume that Judge Hand would have required a defendant like Antony to use words like, "yes, be stirred to mutiny."

I think the additional requirement of words of incitement would be unfortunate and unnecessary. Any marginal gains in First Amendment protection would be outweighed by the grave social danger. Under this reading of *Brandenburg* and its progeny, that Antony did not use words of incitement would provide him with a defense, if that is the only evidence of his intent to incite the crowd to murder the conspirators. He consistently protests, urging the crowd to desist from mutiny when members of the audience begin to demand revenge. Like Hess's "[w]e'll take the fucking streets later,"<sup>184</sup> Antony's intent should not be inferred from words that allow competing rational inferences. If Antony were convicted, an appellate court, acting in accord with *Hess* would exercise independent review of the record, and would have to find unambiguous evidence of intent.

Antony is unlike the defendant in *Hess*. Both before and after his funeral oration, Antony makes his intent clear. Hence, neither the fact finder nor an appellate court would have to guess whether Antony meant to incite the crowd. In light of unambiguous admissions of his intent, the risk of criminalizing a person advocating some abstract and future harm is non-existent. The requirement of a clear showing of intent goes a long way to protect against criminalizing political dissenters while protecting society against dangerous offenders.

#### IV. CONCLUSION

Thinking about the First Amendment in the context of Shakespearean characters may suggest that the issues discussed in this essay are not serious, contemporary problems. But as I have argued elsewhere, the Internet has opened new avenues of speech, allowing dangerous speakers to share information and to encourage social misfits to commit serious crimes.<sup>185</sup> Iago, Lady MacBeth, and Marc Antony have a great deal to teach us about speech and crime.

Speech is powerful and may be dangerous. The criminal law has long recognized that fact and, in numerous settings, criminalizes offenders whose speech may consist of nothing but words.<sup>186</sup> Iago and Lady MacBeth more than amply demonstrate the need to criminalize those whose conduct may consist entirely of speech.

Obviously, speakers whose words may involve political dissent must have strong First Amendment protection. However, I question whether the Supreme Court has required, or should require, explicit words of incitement. As argued above, leaving a speaker like Marc Antony free to manipulate others to commit serious crimes, simply through the expedience of choosing his words carefully

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<sup>184</sup> *Hess v. Indiana*, 414 U.S. 105, 106-07 (1973).

<sup>185</sup> Vitiello, *supra* note 2.

<sup>186</sup> *See supra* note 4.

is shortsighted and unnecessary.<sup>187</sup> Forcing the prosecutor to make a clear showing of the speaker's intent would give political dissenters protection while allowing society to protect itself against dangerous offenders.

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<sup>187</sup> See *supra* notes 180-87 and accompanying text.