UCLA
UCLA Public Law & Legal Theory Series

Title
Speech, Death, and Double Effect

Permalink
https://escholarship.org/uc/item/2wv4t2ps

Journal
New York University Law Review Online, 78(3)

Author
Shiffrin, Seana

Publication Date
2003-06-01

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

SPEECH, DEATH, AND DOUBLE EFFECT

SEANA VALENTINE SHIFFRIN*

In this Article, Professor Seana Shiffrin identifies and explores a tension between the Supreme Court's recognition of First Amendment protection for incendiary speech and the Court's argument for rejecting the claim to a right to assisted suicide. Constitutionally, speakers may not be held liable for the illegal actions they inspire in audience members, unless the very high Brandenburg *standard is met. By contrast, it is constitutional to prevent those who would seek assisted suicide from doing so, on the ground that a culture in which some elect suicide will encourage a higher incidence of involuntary deaths. Here, those who would voluntarily seek to exercise an important liberty interest are restricted in light of the projected illegal action of others. Shiffrin argues that this same tension is replicated in the contrast between the Court's approach to incendiary speech and its approach to the regulation of secondary effects. Shiffrin contends that this tension holds special interest because the asymmetry it represents privileges intended harm over merely foreseen or foreseeable harm, inverting the traditional priority associated with the doctrine of double effect. Shiffrin argues that, surprisingly, this inversion may be defensible in legal contexts, even if it is not sustainable in interpersonal moral theory. In fact, the inversion can result from the use of double-effect-style reasoning at the level of rule formation. Although this inversion may seem counterintuitive, the justifications for the legal protections for freedom of speech and for self-determination may provide a plausible explanation. We may understand the doctrinal difference by examining the structure of the values at which each regulation is aimed. The value of freedom of speech can only be realized if speakers are insulated from responsibility for the persuasive impact of their speech; by contrast, the liberty interest valued in the context of assisted suicide does not encompass the side effects of that action. This justification may also have implications for the future interpretation of the secondary effects doctrine.*

INTRODUCTION

One of the more persistent and perplexing problems of moral and legal theory is how good-willed people should respond to situations in which *other*, poorly willed people threaten to inflict harm on

* Professor of Law, UCLA School of Law and Associate Professor of Philosophy, UCLA. I have benefited from conversations about this material with friends and with audiences at the Boalt Hall Workshop on Law, Philosophy and Political Theory, the Columbia Law School Faculty Workshop, the NYU Law School Colloquium on Law, Philosophy and Social Theory, the Princeton Center for Human Values, the University of Pennsylvania Legal Theory Workshop, the Yale Legal Theory Workshop, and in graduate seminars at UCLA and U.C. Berkeley. I owe a great deal to the superb research assistance of the UCLA Law Library staff. I am especially grateful to Ed Baker, Vince Blasi, Ruth Chang, Meir Dan-Cohen, David Dolinko, Michael Dorf, Ronald Dworkin, Harry Frankfurt, Stephen Gardbaum, Kent Greenawalt, Barbara Herman, Gillian Lester, Benjamin Pu-Wei Liu, Thomas Nagel, Robert Post, Joseph Raz, William Rubenstein, Samuel Scheffler, Steve Shiffrin, Jeremy Waldron, Jonathan Wilwerding, and John Witt for suggestions and criticism.

Imaged with the Permission of N.Y.U. School of Law

innocents. Should good-willed people make sacrifices to mitigate or prevent the harm to innocents threatened by bad actors? May they be required to do so?

This problem sets the stage for many legal issues, including some of the most important in our constitutional jurisprudence. But despite its prevalence, our reactions to the problem, understood as such, remain underscrutinized and undertheorized. This Article begins a preliminary tap of what I believe to be a rich vein. I explore an aspect of this problem that arises in central constitutional cases concerning freedom of speech and the right to assisted suicide. These cases offer what appear to be competing lines of argument about the problem of noncompliant actors, a tension that, in part, reflects our considerable ambivalence about how to deal with bad agents while preserving a robust and vibrant milieu of protected civil liberties.

To be more specific about these terms as well as the tension in our constitutional jurisprudence: By a compliant agent, I mean an agent who does not directly engage in, plan to engage in, or conspire or collaborate with others to engage in illegal activity. A noncompliant agent violates one of these conditions. In some areas, such as the regulation of incendiary speech, compliant agents enjoy strong protections against being burdened or restricted on account of the predicted harmful actions of noncompliant agents. A speaker may advocate illegal action even though this may inspire some audience members to perform illegal actions. So long as the incendiary speech does not meet the *Brandenburg v. Ohio*[1] standard (that is, it is not likely *and* not intended to incite or produce imminent lawless action),[2] the speaker may not be prevented from giving this speech or criminally penalized for it afterward, even if it is quite foreseeable that some member of the audience will at some point be persuaded by the advocacy and proceed to break the law or commit violence.[3] In this circumstance, we hold the noncompliant agent solely legally responsible for the harm.[4] It is his legal responsibility not to spring to harmful

---

[1] 395 U.S. 444 (1969) (per curiam).

[2] Id. at 477.

[3] This is the case at least so long as the advocacy is public. As Kent Greenawalt has argued, it is not evident that the *Brandenburg* standard does or should apply to private communications. Kent Greenawalt, Speech, Crimes, and the Uses of Language 260-80 (1989). Whether a different standard should apply in private settings or, rather, whether what constitutes mere advocacy in the public domain differs from what constitutes mere advocacy (as opposed to solicitation, for example) in the private domain, is an issue I note but will put aside.

[4] What about *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998) (upholding constitutionality of wrongful death action against publisher of assassination manual)? I believe that this case is best understood not as holding the publisher responsible for the effects of advocacy but as holding the publisher respon-

Imaged with the Permission of N.Y.U. School of Law

action on account of the speech. The speaker herself does no legal wrong; merely advocating wrong is not itself a legal wrong. The speaker's liberty interest is not overcome or superseded by the interest we have in preventing actors from harming others.

By contrast, consider the approach taken toward compliant and noncompliant agents in the opinions in *Washington v. Glucksberg*, the assisted suicide case that took up the substantive due process claim.[5] The Justices refused to recognize a constitutional right to assisted suicide, arguing, among other things, that a legal system that acknowledges a right to die that includes a right to assisted suicide runs a substantial risk that some patients who do not wish to die will be wrongfully pressured and perhaps coerced into electing accelerated death.[6] In Justice Stevens's concurrence, he conceded that many terminally ill patients would choose to die, freely and voluntarily, and that their choice would be made on compelling, reasonable grounds.[7] Their interest was sufficiently strong, in his view, as to be of constitutional significance, to require "careful scrutiny" of the state's claim, and perhaps to rise to the level of a fundamental interest. But their ability to choose death and their exercise of this choice would create a climate in which bringing about death was not aberrational. This would allow or even enable some independent, noncompliant agents to pressure and coerce others to die. Along with many commentators, the Court found this argument, albeit in conjunction with others, persuasive.[8]

The difference here is striking. Under the *Brandenburg* standard, speakers' liberty interests are highly protected even though the foreseeable consequence of their exercise is that audience members may go on to perform illegal and perhaps quite harmful action. In *Glucksberg*, the right to die is denied recognition, in part, because the

---

sible for supplying specific information that aided an active plan to murder. A similar diagnosis may justify regulation of a website that lists the addresses and driving routes of doctors who perform abortions. See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc), petition for cert. filed, 71 USLW 3292 (U.S. Oct. 8, 2002) (No. 02-563).

[5] 521 U.S. 702 (1997).

[6] Id. at 731-35 (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, & Thomas, JJ.); id. at 737 (O'Connor, J., concurring, joined by Ginsburg & Breyer, JJ.); id. at 782-87 (Souter, J., concurring).

[7] Id. at 741-42, 746-48 (Stevens, J., concurring). See also id. at 753 (Souter, J., concurring).

[8] Id. at 732-33. See also Cass R. Sunstein, The Right To Die, 106 Yale L.J. 1123, 1142-44 (1997); J. David Velleman, Against the Right To Die 13-15 (manuscript, on file with *New York University Law Review*). Criticism of this view may be found in Brief of Amici Curiae Ronald Dworkin et al. at 12-20, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 95-1858), and Ronald M. Dworkin, Freedom's Law: The Moral Reading of the American Constitution 144-45 (1996).

Imaged with the Permission of N.Y.U. School of Law

recognition of the right and the foreseeable consequence of its exercise by reasonable, compliant agents is that other agents will behave abusively and harm innocents. The liberty interests of the potential suicides to exert control over the boundaries of their lives are not protected on the ground that other agents would do harm to innocents.

Brandenburg and *Glucksberg* seem to take different approaches to the question of how much responsibility the law should assign to compliant agents in light of others' potential or predicted noncompliant behavior. The contrast is not surprising. Our intuitions pull us in different directions about how, exactly, we are to respond to the range of noncompliant agents in our midst—the bad, abusive, or (merely) irresponsible. On the one hand, it seems wrong to limit the liberty of a compliant agent because of the wrongdoing of another. Compliant agents should not have to suffer or be constrained on account of another person's actual or predicted misdeeds. On the other hand, our consequentialist intuitions push us to minimize the damage inflicted by wrongdoers as well as the inspiration and opportunities for wrongdoing. Even nonconsequentialists agree that the mature moral agent must recognize the harm that others may do and make some protective adjustments to their behavior. Concern for others may involve bearing some burdens that one is not responsible for creating.[9] But while there is a good explanation for our difficulty in striking the appropriate balance, this does not alone justify what seem to be competing approaches to resolving our ambivalence.

In this Article, I pursue three main tasks. In Part I, I argue that there is a doctrinal tension here that is not easily resolved in some of the more obvious, common-sense ways, including arguing that *Brandenburg* is a speech case and therefore special. In fact, as I

[9] Where we should assume these burdens is a central but relatively underexplored topic in normative theory. See Seana V. Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 Phil. & Pub. Aff. 205, 207-08, 236-50 (2000) [hereinafter Shiffrin, Paternalism] (connecting constitutional issues of accommodation to liberalism and to liberal approaches to contract). I defend an accommodationist approach to a different set of burdens in Seana V. Shiffrin, Egalitarianism, Choice-Sensitivity, and Accommodation, in Reasons and Values: Themes from the Work of Joseph Raz (Philip Pettit et al. eds., forthcoming 2003) (arguing that it is morally acceptable to impose burdens on some persons to accommodate others' autonomous activities where necessary to preserve and insulate value of these activities). Compare this approach with Liam Murphy's treatment of the efforts we owe to help others in need. He argues that we together should bear the burdens created by any past failures to discharge duties of assistance but not the burdens created by others' current failures to discharge their duties. See generally Liam B. Murphy, Moral Demands in Non-Ideal Theory (2000). For a recent articulation of the claim that liberals are hard-pressed to defend the burden shifts generated by malfeasors in tort law, see generally Heidi M. Hurd, Is It Wrong To Do Right When Others Do Wrong?: A Critique of American Tort Law, 7 Legal Theory 307 (2001).

Imaged with the Permission of N.Y.U. School of Law

argue, a similar tension can be identified within First Amendment doctrine, revolving around the secondary effects doctrine.

But, although I believe there is a puzzling tension here, I do not start from the assumption that one of these cases is wrong, nor is it my aim to demonstrate that one of them is mistaken. To the contrary, I believe that *Brandenburg* is clearly correct, in so much as it stands for a very high level of speaker protection and for a strong resistance to imputing legal responsibility for the audience's actions onto the speaker. By contrast, although I am skeptical of the outcome of *Glucksberg*, I am not as confident that it is wrong as I am confident that *Brandenburg*'s approach is largely correct. Hence, my second task is to resolve the tension between these cases in a way that is responsive to the sense that *Glucksberg* is a harder case.

In Part II, I introduce some considerations relating to the role of intention in law that may bear on this tension. I argue that the case law here and elsewhere shows a pattern that appears to conflict with common moral views about intention, which holds that intended harm is morally worse than foreseen or foreseeable harm. Often, these views of intention are represented by endorsement of the doctrine of double effect. Put roughly and in its weakest form, the doctrine of double effect asserts that it may, sometimes, be more permissible to bring about harm as a foreseen or foreseeable but unintended side effect of one's otherwise permissible activity than to bring about equally weighty harmful consequences as an intended means or end of one's activity.[10] Although a pattern of responsibility that runs directly counter to the doctrine of double effect is morally counterintuitive, in some legal contexts such an approach may be justified.

The justification for such an approach in legal contexts emerges from adopting an argumentative strategy in which I investigate whether the recognition of a value and the reasons that support it are

[10] See, e.g., Warren Quinn, Actions, Intentions, and Consequences: The Doctrine of Double Effect, in Morality and Action 175, 175-76 (1993). Many traditional formulations of the doctrine of double effect are stronger and more detailed. They not only postulate a moral difference between intending and foreseeing harm, but they also assert that, under specified conditions, the latter may be permissible when the former is impermissible. That is to say, on stronger readings, the doctrine has a verdictive dimension: It marks the difference between right and wrong action. See, e.g., Thomas Nagel, War and Massacre, in Mortal Questions 53 (1979) (arguing for conduct distinctions in war). Although commentators differ about the additional conditions necessary to produce this further dimension, the traditional doctrine roughly holds that it may be permissible to act in a way that produces harm it would otherwise be impermissible to produce: if that harm is not one's intended end or means; if it is instead merely a (possibly foreseen) side effect of one's action; and if the good one does aim at is in some way roughly proportionate to or greater than the harm produced by one's action. See, e.g., Frances M. Kamm, Nonconsequentialism, in The Blackwell Guide to Ethical Theory 205, 211 (Hugh LaFollette ed., 2000).

Imaged with the Permission of N.Y.U. School of Law

consistent with accepting the reasons for regulation. In particular, I argue that the case for restriction in *Brandenburg*-type situations is inconsistent with a recognition of speech's value. The argument for restriction in *Glucksberg*, on the contrary, does not suffer an analogous flaw—that is, it is not inconsistent with the recognition of the liberty interest in controlling the means and timing of one's death (although it may improperly value it in another way). In certain contexts, including this one, this argumentative strategy may lend support to patterns of legal responsibility that invert the traditional significance of intended harm. I further contend that this approach helps to explain and justify a secondary effects doctrine but also that it has critical implications for its past and future application.

In Part III, I turn my attention to the role of intention in legal rule formation, particularly in legislation. I argue that caring about legislative purpose—specifically the belief that what we value legally should constrain the range of permissible legislative aims—has surprising and thus far unnoted results. In some contexts, these constraints on legislative aims may produce rules of responsibility that manifest an inverted concern for the intentions of the agents whose conduct is regulated. That is, strangely, the phenomenon I identify in Parts I and II of the paper, the inversion of the significance of intention in the regulation of agents' conduct, can itself be the product of double-effect-style reasoning at the legislative level. Attending to the impact of double effect reasoning in systematic contexts, like that of rule formation, can shed new light on the significance of intention and double effect. This analysis illuminates a new layer that is bypassed by standard philosophical examples that analyze only isolated cases of conduct. Identifying this layered relationship between double effect reasoning at the legislative level and rules that differentiate between regulated agents' intentions raises new questions about the proper level at which we should be concerned, if at all, with intention in legal reasoning: at the legislative level, at the level of agents' conduct, or both. If we are concerned with both, then where patterns of inversion of the sort I have uncovered arise, we need to assess whether these concerns conflict between the two different levels and if so, how they may be reconciled.

I
Is There Really a Doctrinal Puzzle?

I have already suggested that, prima facie, the approach taken to the problem of compliant agents' responsibility for noncompliant agents' action in *Brandenburg* is in tension with the approach adopted

Imaged with the Permission of N.Y.U. School of Law

in *Glucksberg*. In this Part, I show that the cases are not easily distinguished and that a related tension arises in First Amendment doctrine, made evident in the emerging "secondary effects" doctrine.

Let me begin with what may seem like a crucial disanalogy between the two cases and in particular, the relationship between the behavior of compliant agents and the harm caused by noncompliant agents. In *Brandenburg*, there is a strong connection between the compliant agent's behavior and the noncompliant agents' behavior. The speaker influences the audience to act. The issue is whether legal responsibility should be imposed on the speaker or only on the agents who directly engage in illegal activity. By contrast, in *Glucksberg*, it is less clear that the compliant agents' activity—voluntary suicides—plays anything like this same, albeit indirect, causal or influential role in the production of the abusive acts—coerced suicides. Rather, the state *permission* to engage in assisted suicide is what creates an opportunity for pressure and coercion by noncompliant agents.

In one respect, this redescription makes the restriction on the voluntary suicide even stranger, since the voluntary suicide plays no causal role, direct or indirect, in the noncompliant behavior. So, it may seem inapt that *her* liberty is allowed to be restricted. But, in another respect, it may make the government's decision to preclude the possibility of assisted suicide more natural—for the state has special reason to avoid providing the opportunity for noncompliant agents to engage more successfully in noncompliant behavior.[11]

Whether or not this would constitute an important disanalogy were it established, I am unconvinced there is such a sharp disanalogy here. The exercise of the right to control the means and timing of one's death, and not just the right's legal recognition, plays an important role in the story of the predicted increase in involuntary deaths. The scenario of significant abuse does not depend only upon the government's lifting of the prohibition on assistance or even on its establishment of a regulatory structure governing assistance. It also depends upon the right's not-infrequent exercise. If the right were rarely used, the chances of engaging in coercion or pressure with impunity would be much slighter. The idea that abuse might become prevalent rests upon the assumption that the practice will become common enough that our environment will change in important ways, to wit: The culture's inhibitions against choosing death and against proposing that others elect death must relax; doctors' inhibitions against bringing about unwanted deaths must become significantly corrupted; our scru-

[11] See generally my related argument for the doctrine of unconscionability in contract law in Shiffrin, Paternalism, supra note 9.

Imaged with the Permission of N.Y.U. School of Law

tiny of these practices must wane; discussions about whether to commit suicide must become more commonplace; and the decision to die must be made often enough that noncompliant agents feel tempted to make the suggestion and that the involuntary parties become vulnerable to it. Suicide must stop being an extreme, unusual, almost unthinkable measure that is easily rejected out of hand. For abuse to be prevalent, the culture has to change in many of the ways that the cautious have prognosticated it will. This culture change depends on a more regular exercise of the right, not its mere existence.

Hence, if the worries about abuse form the rationale for refusing to recognize the right, then we should understand the refusal to recognize the right as aiming directly to prevent potential voluntary suicides. The opportunity for abuse is created by the conjunction of both the legal permission and its exercise by compliant agents. There are important differences between the story of how the feared harm comes about in the incendiary speech cases and how the feared harm comes about in the assisted suicide cases, many of which I will discuss. But I do not think the disanalogy may be located in the causal irrelevance of the voluntary suicides. Their behavior, in conjunction with others' behavior of the same and different sorts, helps to create a climate in which abusive actions become easier to accomplish and more attractive to contemplate.

It is worth emphasizing the other side of the parallelism. The noncompliant behavior at issue in speech cases will rarely arise just from persuasion by any particular piece of incendiary speech on its own. Many contributing background factors in the culture play a role in making audiences more open to a speaker's message and in making an agent willing to act. The causal story here, too, is not a simple one.

Turning to another potential disanalogy between the cases, the tension I have described may not, I believe, be explained by arguing that greater harm is at stake in *Glucksberg* or that the likely victims in *Glucksberg*-like contexts are more vulnerable than those who might be protected by greater restrictions on incendiary speech. True, incendiary speech often aims to provoke hostile action against the government, a powerful institution.[12] By contrast, the potential victims in *Glucksberg* are especially vulnerable. But, surely, *Brandenburg* would and should protect a book or a publicly delivered speech that

[12] The particular speech that gave rise to the *Brandenburg* case, though, did not involve direct criticism or a proposed attack on government. The statute, invalidated on a facial challenge, forbade the advocacy of crime or violence to accomplish "industrial or political reform." Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (quoting Ohio's Criminal Syndicalism Act, Ohio Rev. Code Ann. § 2923.13).

Imaged with the Permission of N.Y.U. School of Law

advocated both assisted suicide and involuntary euthanasia. The speech would be protected even if such advocacy were directed toward the same potential bad actors and concerned the same potential class of victims that worry the *Glucksberg* Court.

Further, the *Brandenburg* standard has been successfully invoked to protect speech that is hypothesized to cause quite substantial harm. Speeches advocating violence contribute to a violent climate that imperils our safety. Media depictions of violence also contribute to this climate yet enjoy substantial protection.[13] Witness Judge Easterbrook's reasoning in *American Booksellers Ass'n v. Hudnut*.[14] There, he conceded for the purposes of argument that pornography caused some of its consumers to commit violence against women but held that this only confirmed the speech's persuasive power and solidified the argument for its protection.[15] Nor is it plausible to claim that the harm at stake is more speculative in the incendiary speech context but more certain in the assisted suicide context.[16] The evidence that practices of assisted suicide would spur significant levels of abuse is still speculative and not definitively documented.[17] Indeed, some of

---

[13] See, e.g., Zamora v. CBS, Inc., 480 F. Supp. 199, 204-07 (S.D. Fla. 1979) (denying damages for influencing development of child's violent personality through television violence); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1007-08 (1988) (rejecting liability of musician for suicide committed while listening to pro-suicide lyrics); Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488, 494-95 (1981) (rejecting civil liability for television film that inspired imitative violence); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (rejecting wrongful death claim arising from imitative violence after screening of film with gang violence).

[14] 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

[15] Id. at 328-29.

[16] The speculative nature of speech-caused harm is an explanation sometimes given for the strength of the *Brandenburg* rule. See, e.g., Vincent Blasi, Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing, 33 Wm. & Mary L. Rev. 611, 620 (1992).

[17] See, e.g., Washington v. Glucksberg, 521 U.S. 702, 786-87 (1997) (Souter, J., concurring); Sunstein, supra note 8, at 1143-45; see also Arthur E. Chin et al., Legalized Physician-Assisted Suicide in Oregon—The First Year's Experience, 340 New Eng. J. Med. 577, 580-82 (1999) (finding no evidence that Oregon's assisted suicides were disproportionately elected or forced upon people for financial reasons, poor education, or fear of being burden to family); Ezekiel J. Emanuel et al., The Practice of Euthanasia and Physician-Assisted Suicide in the United States: Adherence to Proposed Safeguards and Effects on Physicians, 280 JAMA 507, 510 (1998) (reporting small survey of oncologists who performed physician-assisted suicide outside of legal setting which revealed many did not observe proposed safeguards and some performed euthanasia upon family member's request without involving patient in decision); Ezekiel J. Emanuel & Margaret P. Battin, What Are the Potential Cost Savings from Legalizing Physician-Assisted Suicide?, 339 New Eng. J. Med. 167, 170-71 (1998) (detailing difficulties in estimating financial savings for Medicare, HMOs, and families that assisted suicide might bring; estimating they are quite low for first two but perhaps not last; and registering uncertainty about what level of savings is likely to provoke pressuring behavior); Joseph J. Fins & Elizabeth A. Bancroft, Letter, Legalized Physician-Assisted Suicide in Oregon, 341 New Eng. J. Med. 212 (1999)

Imaged with the Permission of N.Y.U. School of Law

Justice Souter's argument in *Glucksberg* turns on our underdeveloped knowledge of the influence of assisted suicide on the culture and on others' actions.[18] He argues that it would be better to permit states to experiment, allowing us to gather information about the effects of assisted suicide before codifying a constitutional rule.[19]

(arguing evidence about Oregon is inconclusive); Linda Ganzini et al., Experiences of Oregon Nurses and Social Workers with Hospice Patients Who Requested Assistance with Suicide, 347 New Eng. J. Med. 582, 584 (2002) (reporting nurse survey finding that desire to control death and readiness to die, not psychiatric problems or lack of social support, were central reasons for assisted suicide, although some patients were concerned about financially burdening their families); Linda Ganzini et al., Physicians' Experience with the Oregon Death with Dignity Act, 342 New Eng. J. Med. 557, 561-62 (2000) (noting that physicians are less likely to honor suicide requests from patients who see themselves as burden, though patients rarely cited financial concerns or social isolation as reasons for seeking assisted suicide); Robert Steinbrook, Physician-Assisted Suicide in Oregon—An Uncertain Future, 346 New Eng. J. Med. 460, 460-61 (2002) (reporting no evidence of abuse of Oregon law but very few patients taking advantage of opportunity for assisted suicide); Amy D. Sullivan et al., Legalized Physician Assisted Suicide in Oregon—The Second Year, 342 New Eng. J. Med. 598, 600-03 (2000) (reporting that patients sought assisted suicide primarily to alleviate suffering and to have control over death and did not cite cost as reason for seeking assisted suicide, though many family members thought patients worried about being burden to others).

[18] *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring); id. at 785-88 (Souter, J., concurring).

[19] Perhaps the difference lies in something rather ephemeral about the degree of systematic connection involved. Speech events of the sort protected in *Brandenburg* may seem like isolated events. Whether they happen at all is a matter of individual will, who attends is a matter of individual will and circumstance, and who is ultimately affected is an unpredictable matter. On the other hand, one might think that the concerns addressed in *Glucksberg* are ones stemming from our systemic connections to one another. All of us will die and most of us are likely to fall seriously ill and require hospital care at some point. We all, in one way or another, will be subject to the benefits and burdens of the sort of medical climate that is created by individual decisions about how life is to be treated. One might regard the *Glucksberg* scenario as presenting a sort of collective-action problem: We all want the health-care system to treat individuals with respect and to protect vulnerable people; the individual choices of some to elect assisted suicide may advance their goals, but together, their choices and their protected ability to implement these choices threaten the safety of others; from the standpoint of ensuring the meaningfulness of a right to control the conditions of one's life and death, it would be better for each of us if the option of elected suicide were precluded entirely because it would guarantee a safer climate; but, it would be irrational for any one person to refuse assisted suicide on this ground because assisted suicide may further her aims and isolated refusals will not contribute to the collective goal. One might add that we would all choose, ex ante, such restrictions to give us the best chance of living a full life under our own control.

There are problems with this argument. First, it is not at all clear that from the standpoint of the right to control the conditions of one's life and death, the derivative interest in not being coerced into assisted suicide is clearly more significant than the derivative interest in a right to assisted suicide in circumstances of unrelenting pain, seriously compromised mental function, or serious physical dysfunction. The related point has been made about Chief Justice Rehnquist's claim in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), about a patient's wishes concerning treatment. See id. at 283; id. at 320-21 (Brennan, J., dissenting); Dworkin, supra note 8, at 136-37. More important, it is not clear how this explanation, even if it were persuasive, would distinguish

Imaged with the Permission of N.Y.U. School of Law

Kent Greenawalt has suggested another potential disanalogy.[20] If the legislative concern in *Glucksberg* were characterized differently, then its structure would not parallel *Brandenburg*'s. That is, one might argue that the legislative rationale that really drives the Court's endorsement of the restriction on assisted suicide is not that of forestalling a cause of increased involuntary deaths. Rather, it reflects an epistemic concern. The legislature bans voluntary assisted suicides because it is too difficult to distinguish them from involuntary assisted suicides. The ban sweeps overbroadly because it is the only way to capture that which it may reasonably regulate. The state not only has a strong interest in preventing involuntary suicides as such, but this interest also is integrally connected with the right that is at issue, because those coerced into involuntary suicides are unable to exercise their right to control the means and timing of their deaths.

This recharacterization, though, generates greater difficulties of its own if one's aim is to defend the Court's position. It would cast doubt on the distinction the Court made between the right to refuse treatment and the rejected right of assisted suicide.[21] For, it may be as hard (if not harder given the elaborate checks that would be associated with an approved right of assisted suicide) to distinguish voluntary from involuntary refusals of treatment. Even if this were a better characterization, I think it raises sufficiently similar questions about why those compliant agents interested in assisted suicide should have their fundamental liberty interest restricted so as to make the *apprehension*, if not the prevention, of involuntary ones easier.

Of course, an obvious way to distinguish the cases normatively is to underscore a doctrinal distinction between them: One case involves an interpretation of the First Amendment and the other, the Fourteenth Amendment. From both a doctrinal and a theoretical perspective, it is not so strange to think that the First Amendment may offer stronger protection for individual liberty than the Due Process Clause. The larger social values served by free speech may comple-

---

Brandenburg from *Glucksberg*. *Brandenburg* may well be characterized as presenting similar collective-action problems. It might well be in our ex ante interest, in some sense, to waive our ability to advocate or depict violence because this waiver would substantially contribute to our chances of safety. Yet, it might be that individual abstentions from advocacy or depiction will not make a substantial difference to the culture's feel or tendency. It is unclear in what way the culture around violence is less of a system than the culture and habits concerning the end-of-life treatment. Without a supplementary, separate argument that explains why consequentialist arguments that seek to maximize ex ante prospects are uniquely relevant in *Glucksberg*-type scenarios, I do not think that they serve to distinguish the approaches.

[20] The argument that follows was suggested by Kent Greenawalt during conversation.

[21] See *Glucksberg*, 521 U.S. at 722-26.

Imaged with the Permission of N.Y.U. School of Law

ment the individual liberty interest of the speaker and this may rationalize the disparity in treatment.

Certainly, the *Brandenburg* approach—one that forswears imputing responsibility for noncompliant agents onto others—is not an isolated moment in First Amendment law. For example, the choice between a wide and narrow scope of responsibility attribution is rather clearly articulated in *Schneider v. Irvington*, and the Court decidedly chooses the latter.[22] The Court invalidated a set of ordinances against pamphleting in public places. The state's concern was that pamphleting contributed to littering. With respect to the ordinances in Milwaukee, the state represented that the police department's policy was to arrest "the one who was the cause of the littering, that is, he who passed out the bills . . . rather than those who received them and afterwards threw them away."[23] The Court did not deny that the pamphlet distributors were a cause of the litter that resulted. Rather, they recognized that a greater degree of littering was in fact "an indirect consequence" of the distribution of pamphlets. Still, they declined to hold the speakers or distributors responsible for the litter, pointing out that there are more "obvious methods" of preventing littering—"[a]mongst these is the punishment of those who actually throw papers on the streets."[24]

As was mentioned earlier, the same posture, although in even more exaggerated form, may be found in *Hudnut*.[25] Judge Easterbrook's opinion granted (for the sake of argument) that pornography did cause its consumers to discriminate against and to inflict bodily harm on women.[26] This, he argued, showed the power and persuasiveness of the speech as speech and underwrote the argument for its protection.[27] Oddly, the view Easterbrook seemed to express was that since the speaker is *so effective, so causally responsible* for influencing his audience, the speaker must not bear legal responsibility for

---

22 308 U.S. 147 (1939); see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918-20 (1982) (reiterating that structure of associational freedom demands that individuals not be held responsible for actions of others within common organization unless they have knowledge and specific intention to further organization's criminal activity).

23 *Schneider*, 308 U.S. at 156.

24 Id. at 162. But see Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831-32 (Rehnquist, C.J., dissenting, joined by White, Scalia, & Thomas, JJ.) (arguing that interest in preventing litter may be sufficient grounds for ban on distribution of literature in airport terminals).

25 Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

26 Id. at 329.

27 Id. at 329-30.

Imaged with the Permission of N.Y.U. School of Law

his actions. The greater the effectiveness of the speech, the less legal responsibility is apt.[28]

Quite recently, in *Bartnicki v. Vopper*,[29] the Court struck down the imposition of liability under federal and state wiretapping statutes on those who broadcast illegally intercepted messages but who were not themselves involved in the illegal interception.[30] In justifying the protection for the broadcaster, the Court was explicitly hostile to holding speakers responsible for others' noncompliant activity. Justice Stevens, writing for the majority, declared that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . .[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."[31]

But, although much First Amendment doctrine bears the structure of the *Brandenburg* approach,[32] free speech cases do not evince a consistent responsibility for noncompliant agents that marks a clear,

---

[28] This cuts against the concern that the underlying principle driving the doctrine is a view of causation—that the speaker does not cause others' action inspired or suggested by the speech. Easterbrook seems quite content to concede that pornography does cause harm, albeit through intermediary agents and via persuasion, but then holds that this is exactly what supports the inappropriateness of legal responsibility. See also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action" through social pressure and threats of ostracism).

[29] 532 U.S. 514 (2001).

[30] This case has a different structure than those considered so far. Here, the relevant speech happens after the illegal activity and its commission is not inspired or caused by the content of the speech. Nonetheless, the speech may be undertaken with an eye to the prospect of payment or, as perhaps was true in the actual case considered in *Bartnicki*, because it is desirable to the noncompliant agent that the materials be broadcast. Speech, or the market for it, may provide the motive for the illegal activity and so, in a different way, is causally connected to its occurrence.

[31] *Bartnicki*, 532 U.S. at 529-30. The Court did note some occasions in which it was willing to deploy such reasoning, though. Id. at 530 n.13 (citing Osborne v. Ohio, 495 U.S. 103 (1990), New York v. Ferber, 458 U.S. 747 (1982)). See discussion infra note 63 and accompanying text.

[32] And, of course, other parts of substantive due process doctrine bear the structure of *Glucksberg*. See, e.g., Dep't of Hous. and Urban Dev. v. Rucker, 535 U.S. 125 (2002) (finding no constitutional defect in mandated public housing lease terms that allowed eviction of tenants whose family or associates engaged in drug-related activity, even if tenant was innocent of and even unaware of activity, but suggesting different standards might apply where government was not acting as landlord but engaged in more direct civil or criminal regulation). The military's "don't ask, don't tell" policy is also susceptible to this characterization. Noncloseted gay, lesbian, and bisexual people are banned from military service to prevent the hypothesized weakening of discipline, "unit cohesion," and morale that might result from *other* service members' bigotry and other prejudiced reactions. See, e.g., Judge Nickerson's opinion in *Able v. United States*, 968 F. Supp. 850 (E.D.N.Y. 1997), rev'd, 155 F.3d 628 (2d Cir. 1998) (characterizing "don't ask, don't tell" policy as such).

Imaged with the Permission of N.Y.U. School of Law

sharp divide between the First Amendment and other constitutional categories.[33] Consider the puzzling doctrine of secondary effects. It

[33] If one assigned responsibility to compliant agents in light of others' noncompliant behavior except when the First Amendment is implicated, then one would expect that these arguments might have a greater prominence than they do in cases involving the interpretation of the Fourteenth Amendment. From this perspective, though, the absence of such an argument in *Roe v. Wade*, 410 U.S. 113 (1973), is notable given the terms of the debate at the time. That is, *Roe* was a prime moment for a *Glucksberg*-like move, although one cutting against rather than in favor of a prohibition: If we do not legalize abortion, women will be maimed by backstreet abortionists. But the Court does not entertain that argument. Justice Breyer refers to this consideration briefly in his opinion in *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (holding Nebraska law criminalizing performance of "partial-birth" abortions unconstitutional). It was an abiding, albeit unsuccessful, point made in Justice Marshall's dissents in cases concerning minors' access to abortion and abortion funding. See, e.g., H.L. v. Matheson, 450 U.S. 398, 439 (1981) (Marshall, J., dissenting); Harris v. McRae, 448 U.S. 297, 343 (1980) (Marshall, J., dissenting); Beal v. Doe, 432 U.S. 438, 458 (1977) (Marshall, J., dissenting). Or consider the critical presuppositions about responsibility implicit in the Court's analysis of what responsibilities the state has to its citizens in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). *DeShaney* denies that the state is responsible for the bad acts of parents as well as the consequences of this failure to react to them. The power of these examples is limited because these cases are concerned with whether the state, constitutionally, must assume responsibility for the effects of citizens' noncompliant behavior on others. On the other hand, *Brandenburg* and *Glucksberg* concern whether the state may hold some citizens responsible for others' noncompliant behavior. Nonetheless, the language of the cases suggests a broader skepticism about the imputation of responsibility onto compliant agents for others' behavior.

Also, something like the *Brandenburg* structure of argument may be discerned, for example, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), a substantive due process case in which the Supreme Court refused to uphold the denial of child custody to an interracial couple. The argument given for denying custody was that the child would be subjected to ridicule and discrimination by other members of the community. The Court declined to allow the predicted bad reactions of other agents to serve as a reason to deny custody. See also City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (dismissing negative attitudes of local property owners as legitimate basis for subjecting facility for mentally disabled to special municipal licensing requirement). But see the military's "don't ask, don't tell" policy discussed supra note 32. Of course, *Palmore* introduces an important new factor. Here, the intermediate, noncompliant agent is directly opposed to the actions of the primary agents. The undesirable effects arise from this opposition. As the Court noted, to deny custody on these grounds would allow the opponents of interracial marriages to succeed by threatening the innocent. The Court would be lending its support and reinforcing the discriminatory aims of the opponents of the primary conduct. Although the Court's First Amendment stance on hostile audiences has been somewhat equivocal, its recent remarks in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1982), suggest a similar refusal to allow hostile reactions of others to a speaker to count as a reason to burden or restrict the speaker. Compare Feiner v. New York, 340 U.S. 315, 317, 321 (1961) (upholding application of breach-of-peace ordinance to speaker who "stirred up a little excitement" and undertook "incitement to riot"), with Terminiello v. Chicago, 337 U.S. 1 (1949) (invalidating application of breach-of-peace ordinance to speakers whose speech created crowd antagonism) and Forsyth County v. Nationalist Movement, 505 U.S. 123 (1982) (invalidating municipal fee mechanism that varied fees for parades depending on level of predicted hostile reaction by others).

Imaged with the Permission of N.Y.U. School of Law

was introduced in *Young v. American Mini Theatres*[34] and *City of Renton v. Playtime Theatres*[35] to justify content-based zoning restrictions on adult theaters, its expansion beyond zoning was floated in *Barnes v. Glen Theatre*[36] to justify a ban on nudity that applied to nude dancing,[37] and this expanded approach was endorsed in *City of Erie v. Pap's A.M.*[38] The doctrine of secondary effects is difficult to grasp. It appears to be something as follows: Speech, even low-value or entirely unprotected speech, may not be directly prohibited or restricted on the ground that its content is offensive or disapproved of.[39] Nor may it be directly prohibited or restricted on grounds that appeal to its "primary" effects. Neither the term itself nor the case law make transparent what these are. I take them to be effects such as that its listeners find the speech interesting, persuasive, repulsive, offensive, erotic, compelling, or just deadly dull.[40] But, there are

---

[34] 427 U.S. 50 (1976) (upholding zoning ordinance that regulated concentration of adult movie theaters). Justice Stevens's plurality opinion emphasized both the lower value of erotic speech and the city's justification that dispersal of adult theatres would contribute to the preservation of neighborhood character. Id. at 70-72. Footnote thirty-four of Stevens's opinion suggested that the relevant secondary effect was that a prevalence of adult theaters would contribute to the decline of a neighborhood and the increase of crime. Id. at 71 n.34. He contrasted this with the unsuccessful appeal to a secondary effect in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), to justify an ordinance prohibiting drive-in theaters from showing films containing nudity. Stevens remarked that the phenomenon of increased traffic concomitant with a drive-in theater might come about even if nudity were not displayed. This suggests that Stevens's position was that the secondary effect must derive from the low-value erotic speech and that it was not sufficient to save a speech restriction that it aimed at a secondary effect or even at low-value speech. The restriction must be of low-value speech because of a secondary effect, and the secondary effect must flow from the low-value aspect of the speech.

[35] 475 U.S. 41 (1986) (upholding zoning ordinance that prohibited adult movie theaters from locating near residential zones, residences, churches, parks, or schools). The Court acknowledged that the ordinance singled out speech according to but not because of its content. Id. at 47 ("[T]he Renton ordinance is aimed not at the content of the films shown at adult motion picture theatres but rather at the secondary effects of such theaters on the surrounding community." (internal quotation and emphasis omitted)). The aims were to avoid those secondary effects that interfered with the prevention of crime, the protection of trade, and the maintenance of neighborhoods and property values. Id. at 48.

[36] 501 U.S. 560, 581-87 (1991) (Souter, J., concurring). Souter affirmed the state's substantial interest in combating the secondary effects of adult theaters, by which he meant prostitution, sexual assault, and other criminal activity. Id. at 582.

[37] Id. at 562 (upholding ban on "totally nude dancing").

[38] 529 U.S. 277, 291-92 (2000).

[39] See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[40] See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 436 (2002) (stating that secondary effects of theaters include effects on crime rates, property values, and neighborhood quality); id. at 444 (Kennedy, J., concurring) (explaining that primary effects include changing of minds and prompting of actions whereas secondary effects are those "unrelated to the impact of the speech on its audience" such as pollution, view-obstruction, and "damage [to] the value and integrity of a neighborhood"); *R.A.V.*, 505 U.S. at 394 (finding that listeners' reactions are not secondary effects); Forsyth County v. Nationalist

Imaged with the Permission of N.Y.U. School of Law

other effects associated with speech events that may provide a plausible ground for restricting the speech. Venues that feature such speech may have higher rates of prostitution, crime, or littering associated with them. One may zone such speech or pass regulations that have the effect of restricting such speech if the rationale for the regulations is not to suppress the speech but instead to control effects that are not clearly forms of direct reaction to the speech. I believe this accurately states the secondary effects doctrine, although I do not claim to understand entirely what distinguishes a primary from a secondary effect. I will return to the question of what the distinction between primary and secondary effects is and whether the distinction, as the Court understands and has applied it, is a sensible one. At this point, I just want to note that these cases impose a fairly high level of responsibility on people engaged in First Amendment activity for others' noncompliant behavior associated with their speech. Their speech may be curtailed or significantly restricted in order to prevent a certain sort of indirect harmful effect perpetrated by distinct parties.

This characterization also obtains of the disposition of *Arcara v. Cloud Books, Inc.*[41] The Court upheld the closure of a bookstore selling sexually oriented publications pursuant to a New York statute authorizing the forced closure of a building used for prostitution-oriented purposes. Despite the fact that the evidence at trial showed only that the bookstore owners were aware of incidents of solicitation but did not engage or conspire in them (or otherwise facilitate them), the closure was upheld. The bookstore operators were held responsible for the actions of unrelated parties with whom they were not cooperating or assisting.

I find it quite difficult to reconcile this line of cases with the view that the First Amendment evinces a more principled rejection toward arguments for restricting liberty based upon the projected noncompliant activity of others, and that that pure stance explains the different approaches taken in *Brandenburg* and *Glucksberg* to these similar styles of argument. Of course, these represent only a small sample of the relevant case law. All I mean to have shown is that there are other interesting places where similar tensions arise that cannot, at least without deeper explanation, be satisfactorily resolved by referring to standard doctrinal categories.

Movement, 505 U.S. 123, 135-36 (1992) (holding that basing permit fees on estimated costs associated with hostile listeners' reaction is not content-neutral); Boos v. Barry, 485 U.S. 312, 320-21 (1988) (holding that offense to listener's dignity is not secondary effect).

[41] 478 U.S. 697 (1986).

Imaged with the Permission of N.Y.U. School of Law

II
INTENDING AND FORESEEING

A. Doctrinal Structure

In this Section, I aim to develop the tension a little further. I believe that, ironically, one of its more puzzling features may point us in some new directions. I propose to turn our attention to the motive of the agents whose liberty is either to be restricted or protected. At first blush, an inquiry into the agents' motives may seem to be an unpromising avenue. Obviously, there is no easy or familiar distinction to be drawn between *Brandenburg* and *Glucksberg* by appealing to the different motives of the relevant agents. The protected agents do not have purer motives than the unprotected agents here; quite the contrary may be true. The incendiary speaker often suspects or even knows the nonnegligible likelihood that his speech will persuade others to engage in illegal, harmful action. Most often, this is the speaker's subjective aim—to influence others to disobey the law. At least, the aim is to provoke others to consider illegal activity. By contrast, the harms at issue in the *Glucksberg* context are not intended by, or even the reasonable interpretation of, the aim of the person who seeks protection. The potential suicide aims just to end her life. Her aim does not encompass having others pressured to do the same, encouraging others' lives to be taken against their will, or even for the question of assisted suicide to come up or be posed for others; nor is coercion or even the salience of the option of suicide instrumentally useful in bringing about the potential suicide's aim to end her life.

So, strangely, this doctrinal pair enforces a theory of agential responsibility that reverses the traditional moral distinction between intending and foreseeing harm, often associated with what is known as the doctrine of double effect.[42] Again, roughly, the doctrine of double effect roughly states that morally, it may be more permissible to bring about harm as a merely foreseen or foreseeable side effect of an otherwise permissible aim than to intend this harm as a means or an end. I am assuming that when a law punishes activity, this is a way of holding people responsible for their actions. If there is more punishment in virtue of an action's side effects than its intended effects, and if one holds that the degree to which we hold people responsible for actions should be a reflection of an action's permissibility, then this pattern would be in tension with the doctrine of double effect. Here, understood in light of its rationale for denying the right to assisted suicide, the law holds potential suicides responsible only for the fore-

[42] See supra note 10.

Imaged with the Permission of N.Y.U. School of Law

seeable, but unintended, consequences of their desired activity on intermediary agents; incendiary speakers are protected, however, despite the fact that the relevant intermediary agents' actions are both intended and foreseeable by the speakers. The law here seems to enforce what I will call (for lack of a better term) a *reverse* pattern of double effect. More precisely, this part of the constitutional law permits a state to hold agents more (legally) responsible for merely foreseeable consequences than for foreseeable and intended consequences.

One might also observe this pattern in some of the First Amendment cases discussed in the last Part. If one puts the *Brandenburg* line of cases side by side with *Arcara* and the *Young-Renton-Barnes-Erie* line of cases, it looks as though a speaker may be held responsible for incidental effects of her speech but not (except under special circumstances) for direct, intended effects. The negative or positive effects on an audience from its understanding and directly reacting to the contents of one's speech may not be the grounds for restriction, but the side effects of one's speech may be so used.[43]

To be sure, the cases do not line up neatly along this divide. As I will argue later, *Arcara* and the *Young* line of cases do not actually hew in application to their official line. Much of that over which they permit regulation extends to what we should regard, legally, as within the scope of a speaker's intended effects.

Moreover, even *Brandenburg* may seem only partly to fit this description: After all, the threshold at which a speaker may be restricted emphasizes that the speaker must *intend* a harm that is also likely and imminent. And, of course, my characterization stems from only a very limited sample of the constitutional terrain.

In brief reply, I think the threshold conditions of *Brandenburg* should be understood as specifying the point at which a speaker's expression moves beyond advocacy and becomes a more direct form of active participation in the generation of harm.[44] But it is not important for my purposes to argue that point here or to try to interpret the other cases so that, consistently and in all respects, they

---

[43] See supra notes 34-40 and accompanying text. I argue below, however, that there is a limit to the use of side effects of speech as a rationale for restriction and that *Brandenburg* also establishes an outcome-based floor for First Amendment doctrine. A law of general applicability that incidentally precluded incendiary speech across the board would be invalidated. See infra notes 66-69 and accompanying text.

[44] I believe this is a plausible analysis of the *Brandenburg* conditions in the case of public advocacy and also of Mill's famous corn-dealer case. See John Stuart Mill, On Liberty, in On Liberty and Other Essays 62 (John Gray ed., Oxford Univ. Press 1998). A more nuanced discussion of the expression/action distribution and its only partial usefulness in other speech contexts may be found in Greenawalt, supra note 3, passim.

Imaged with the Permission of N.Y.U. School of Law

permit the assignment of more responsibility to an agent for the harm she foresees others will do than the harm she intends others will do. All that matters for my purposes is to observe that some aspects of the law exhibit this pattern.

Whether we enforce this pattern across the board or not, it is interesting that even in some cases, we permit more responsibility to be assigned for unintended harmful consequences than for intended harmful consequences; this pattern, even if not consistently adhered to, represents an inversion, however localized, of the doctrine of double effect. This inversion is rather strange in light of the doctrine's persistent appeal and the sense many have that distinctions in legal permissibility and responsibility should be roughly responsive to distinctions in moral culpability. Many, of course, have denied that this doctrine is a defensible one and have claimed that agents are not necessarily less responsible for the merely foreseen consequences of their actions than for the intended consequences.[45] But, to my knowledge, none of the doctrine's critics has articulated, much less argued for anything like its inverse. Yet at least some parts of our constitutional doctrine seem to have this inverse structure.

B. Two Methodological Asides About the Doctrine of Double Effect

To those familiar with the doctrine of double effect, my claims that there is an inversion here may seem unusual, strained, or even suspect for two reasons.

First, one might object to the reverse doctrine designation on the ground that the regulated activities that I compare are too far apart. The doctrine of double effect isolates and emphasizes the special significance of *intention* as contrasted with mere foresight; when the doctrine of double effect operates, the actions under consideration are identical but for the difference in mental state. (But, so goes the objection, the differences between incendiary speech act and suicides are quite numerous and significant. They are not distinguishable only by the relationship between the actor's mental states and the harm produced.)

Put in this way, the claim about when double effect operates is overstated. In the "standard" double effect examples discussed in the philosophical literature, the contrasted cases differ in ways other than the agents' mental states. Take, for instance, the claim that the doc-

[45] Jonathan Bennett, The Act Itself 194-226 (1995); Alison McIntyre, Doing Away with Double Effect, 111 Ethics 219, 233-37 (2001); see also generally Shelly Kagan, The Limits of Morality (1989).

Imaged with the Permission of N.Y.U. School of Law

trine of double effect distinguishes between terror bombing and strategic bombing, even where the latter involves a comparable number of civilian casualties as side effects.[46] In this example, the targets in the bombing cases differ—one involves the shelling of a city or a population center and the other involves a military target. The consequences of the bombings likewise may differ, though both involve some sort of roughly comparable harm; different people will die, in different ways, and different things will survive and be destroyed. The doctrine of double effect is also used by some to distinguish between a hysterectomy performed on a pregnant woman that will save the woman's life but incidentally will kill the fetus and an operation that crushes the fetus's head in order to avoid labor and delivery that would threaten the woman's life. Put aside whether this is an apt case. My point, again, is that even in this standard case, these operations also differ not only in motive but in type as well. So it is misleading to suggest that, as standardly construed, the doctrine of double effect operates only where the action type is identical, excepting the motive.

Still, one might claim that the action types are closely related in the standard cases but that there is excessive distance between those discussed here. First, it seems to me that the speech cases involve fairly closely related sorts of activities, and it is unclear to me what the criterion of distance is such that these fall on the wrong side of the line. Second and more important, I am not sure what, substantively, motivates the objection. The standard double effect examples may involve substantially similar actions, but that does not, alone, establish limits for the application of the doctrine, assuming its plausibility. The cases may help to isolate a factor for clarification, but that does not itself provide a reason to think that the doctrine's force is restricted to such contexts. One may understand the doctrine of double effect as identifying something significant about the relationship between the structure of our actions and reasons for action and our causing harm. If so, then what would matter more would be whether the harm was comparable, not the action types per se.

A second methodological point: So far and in what follows, I have not been and will not be especially concerned with the subjective contents of the minds of the particular individual agents subject to, or enjoying the freedom from, legal restriction. I will not here concern myself with the incendiary speaker whose strange intention in advocating publicly that audience members refuse to register for the draft is just to test a sound system but not to communicate. Likewise, I will put aside the case of the suicide whose subjective interest is not in

[46] See, e.g., Quinn, supra note 10, at 177.

Imaged with the Permission of N.Y.U. School of Law

ending her life but in pulling off the ultimate bit of protest-performance art. Instead, I will be focusing on a more objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated.

Actually, objective constructions of intention are not uncommon in discussions of double effect in the philosophical literature and are especially familiar in law. As Elizabeth Anscombe has pointed out, any plausible accounting of the doctrine of double effect must distance itself somewhat from the idiosyncrasies of particular individuals and their willful or perverse constructions of the purposes of their actions. Terror bombing may not plausibly be said to involve only accidental killings just in case the bomber wishes the lethal bombs only to scare the country but not to kill the targets.[47] Moreover, double effect is often used to evaluate policies, such as terror bombing or strategic bombing. It is assumed in such discussions, rightly I believe, that we may reasonably evaluate the justifiability of these policies by considering their rationales, even though we lack information about the subjective mental states of the particular people who will later implement these policies, perhaps for their own differing individual purposes. Likewise, objective construals of intention have a familiar, reasonable place in law where an action's or rule's purpose or rationale is important for its evaluation and where it is also essential to be able to establish and identify categories or classes of actions and rules. For example, in contract law, we adopt, as a default rule, the principle that objective manifestations of intent are what governs whether offers and acceptances have transpired; an individual's private intention to make a joke will not negate a conclusion that he has instead intended to make an offer if he acted in ways that publicly conveyed his intention to make an offer.[48] Of course, in punitive contexts, it may be critical to assess a particular person's subjective intentions, although again, as Anscombe's example brings out, an individual's subjective construction of her aim may be unreasonable and may not be the full story even for assessing blame.[49] Our prac-

[47] See G.E.M. Anscombe, War and Murder, reprinted in Moral Problems: A Collection of Philosophical Essays 280-81 (James Rachels ed., 1971).

[48] See, e.g., Lucy v. Zehmer, 84 S.E.2d 516, 521 (Va. 1954) ("In the field of contracts as generally elsewhere, [w]e must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts." (internal quotations omitted)).

[49] See generally Anscombe, supra note 47.

Imaged with the Permission of N.Y.U. School of Law

tices of praise and blame, however, do not exhaust our use of or interest in notions of intention. A thorough articulation and defense of the use of objective notions of intention is obviously beyond the scope of this Article. I mean merely to acknowledge my use of it and to point out some of its familiarity and rationale.

C. *Could the Reverse Doctrine Be Justified?*

As far as I am aware, the reverse doctrine of double effect has not been previously identified as such, much less discussed.[50] My preliminary efforts here to evaluate it will thus be fledgling, highly tentative, and regrettably, more suggestive than precise.

Although this inversion is highly counterintuitive at first, I do not think it should be immediately rejected. Diffidently, I suggest that there is something interesting to be gleaned from this pattern and something interesting about how one can generate this pattern. In this Section, I will discuss two arguments for a reverse double effect doctrine that appeal to positive features of enforcing this pattern of responsibility within a legal context. One is unsuccessful, but its articulation and evaluation help to highlight the distinctive structure of double effect reasoning. The other, I contend, has some plausibility. Its plausibility suggests that there may be a reason that the legal doctrines that I am discussing assume the shape of the reverse pattern, and that this pattern is not a mere accidental byproduct of no intrinsic significance. In the next part of the Article, I extend the argument by claiming that double-effect-like reasoning can produce the reverse pattern of double effect. This raises issues about the appropriate context for application of the doctrine. It may also yield a distinct argument for the reverse doctrine.

1. *Compliance with the Doctrine of Double Effect as a Goal*

The first argument that might be made for the reverse doctrine might go as follows. Whether or not they are correct to believe in the doctrine of double effect, many moral agents regard it as plausible. There may be some danger that adherents to the doctrine take the distinction too seriously. They may exaggerate the moral distinction between intended and merely foreseeable consequences and overestimate the distance between the degree of responsibility associated with intended, as opposed to merely foreseen, consequences. Such agents may, as a consequence, be overly forgiving of their actions that have

[50] Although Ed Baker has made some thematically related arguments from a more consequentialist, but still autonomy-valuing, point of view. See, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech 73-88 (1989).

Imaged with the Permission of N.Y.U. School of Law

merely foreseen harmful consequences and may disclaim responsibility for them to an extent greater than would be supported by the doctrine of double effect. Hence, they may be insufficiently vigilant in avoiding merely foreseeable consequences that should be avoided.

If this is a real phenomenon among well-motivated, but fallible, moral agents, then in some circumstances it might make sense for a legal system to compensate for moral agents' failures to gauge correctly the significance of the merely foreseeable consequences of their behavior. The legal system might, in response to citizens' frailties, focus on providing special incentives to agents to attend to the foreseeable consequences of their behavior; it may trust that well-motivated moral agents will do a better job of regulating themselves when it comes to the intended consequences of their behavior for which these agents have a more accurate sense of their obligations. To allocate resources efficiently, the legal system may pay more attention to the negligent, where they are a larger or more dangerous group, than to the actively bad.

This argument has perverse appeal but also some rather difficult problems. It relies on some empirical assumptions, in which I lack confidence (although I do not reject them out of hand either), to wit: first, that much of the population accepts the doctrine of double effect but, largely, applies it improperly; and, second, that it may be more efficient to focus law enforcement efforts on malfeasant foreseers. In addition, it seems more like an argument about how to organize enforcement efforts and resources rather than how the law should structure its regulations and penalties. Finally, this justification takes a fairly consequentialist line. It provides no principled reason to accept the reverse doctrine of double effect. If one views the law as aiming to provide unique, effective incentives against undesirable behavior, then this sort of focus may, sometimes, make sense. But that aim represents a narrow take on the functions and limits of the law. If the doctrine of double effect were, in some formulation, a true (and not merely believed-to-be-true) reflection of the moral responsibility people had for their actions, then this justification would run counter to the presumption that individuals' degree of legal responsibility should run parallel to their degree of moral responsibility.[51] For, certainly, as a doctrine of moral responsibility, the reverse doctrine of double effect seems quite difficult to defend. While this presumption that legal and moral responsibility should be parallel might be over-

[51] I am by no means suggesting this principle is always manifest in criminal law. Felony murder may carry greater penalties than attempted murder, even though attempted murder requires proof of subjective intent to kill and felony murder may be established without such intent. See Model Penal Code § 210.2(1)(b) (1985).

Imaged with the Permission of N.Y.U. School of Law

come for principled reasons, it seems inapt to cite merely consequentialist reasons for its violation.

One might venture that there is a nonconsequentialist rationale for putting aside this presumption: namely, that this legal regime would provide incentives that would increase the likelihood of proper compliance with the recommendations of the doctrine of double effect. This strikes me as an implausible avenue of defense and as inconsistent with a thoroughgoing nonconsequentialist methodology. For compliant agents, such a regime might serve a signaling function that helped to remedy or compensate for predictable errors of application. But noncompliant agents would not be deterred and would be subject to liability and punishment in such a regime. Thus they would be held more responsible for their foreseen harm than for their intended harm—the law's assignment of responsibility would directly conflict with the doctrine of double effect—in order to promote an overall system that encouraged compliance with the doctrine of double effect. In essence, the doctrine of double effect would be violated in order to maximize compliance with the doctrine of double effect. This, it seems to me, wrongly treats the doctrine of double effect as a goal of a pattern of behavior toward which we collectively aim, instead of as a criterion of evaluation for types of action. The problem with this view of the doctrine of double effect seems quite similar to the problems associated with rights-maximization.[52]

2. *Appealing to the Structure of the Values of the Liberty Interests*

A more promising line of justification for the reverse doctrine may be this. Suppose we want to protect a class of activities because we believe it is valuable, generally, for both its practitioners and, where relevant, for those toward whom the practitioners aim their activities. And suppose that the value of the conduct derives, in large part, from the agents' intentions being expressed and put into action and from the typical, normal consequences of this behavior. This value need not be construed in a consequentialist manner. The agent, or those toward whom the agent's behavior is directed, may have special interests or rights to implement these intentions (or in having these intentions implemented).

Protecting this value may require protecting all agents who engage in this conduct—even those who lack the typically valuable intentions associated with the conduct and who produce harm. If that

[52] See 2 Frances M. Kamm, Morality, Mortality: Rights, Duties, and Status, 207-354 (1996) (arguing that rights-maximization arguments lack coherence); Thomas Nagel, Equality and Partiality 148 (1991) (same).

Imaged with the Permission of N.Y.U. School of Law

were so, one might see how one could arrive at a situation in which one's regulations reasonably treated some conduct that intentionally produced harm more leniently than it treated conduct that unintentionally produced the same sort of harm. The former conduct might be part of a generally valuable class of conduct (whose rogue members cannot or should not be differentiated out), whereas the latter may not be. The poorly intentioned conduct might well enjoy greater protection because of the value of the class of intentional action to which it belongs—a value whose achievement and production is inextricably connected to the possibility of producing harmful consequences. The conduct producing unintended harms may not have such compensating virtues (or the way it produces such harms may be unrelated to the operation of its valuable aspect).

It is not so farfetched to think that this abstract description portrays one important aspect of free speech's value. Although there is quite substantial value associated with the pure act of self-articulation and self-expression associated with speech, a predominant value of speech lies in its nature as a communicative enterprise. We prize speech, in large part, because it communicates content to others and stimulates thought, understanding, critical reflection, emotional reactions, subtle and radical changes in self-conception and behavior, and other responses in audiences about that content. Speakers offer visions of what our lives represent and what they should become; that is, how we, as citizens and moral agents, should act. In part, a commitment to free speech manifests a hope and optimism that what a speaker aims or intends to convey will in fact offer or stimulate insights that may catalyze necessary change, on a large or small scale. Alternatively, it may prevent unnecessary change; speech may provide reasons for maintaining or recommitting anew to our prior path or merely may help to understand better our situation. A large part of what we value about speech is located in the speaker's intentions to communicate to an audience and to influence, through the transmission of content and its uptake, that audience's perceptions, beliefs, and plans. Speech is valued, in large part, for the intentions it expresses and the effects that should be reasonably construed as within the scope of that intention.

Our optimism about speech's possibilities is part of what motivates us to make room for the chain of events that follows from the expression of an aim to a responsive audience. Making room for these possibilities, however, may require that we forego efforts to differentiate between truly valuable and misguided speech—for all the standard pessimistic reasons: The state is a poor and deeply biased judge about what visions for stability and change are defective; whether

Imaged with the Permission of N.Y.U. School of Law

something is a good or a bad vision may often depend on the possibilities for consensus around it—it may depend upon one's degree of success in enlisting audience support and may not be fully determined prior to its communication; our vitality as a democratic collectivity depends on our joint engagement with and evaluation of competing visions; differentiation may fuel worry that one's speech will be perceived as poorly intentioned, thus deterring valuable speech from being delivered; etc. We want speakers to have full freedom in the construction and dissemination of their intent. Our legitimacy depends on it. Protection of the bitter alongside the sweet, then, may be a necessary condition of protecting those valuable processes and outcomes provoked by insightful speech.

Familiar Millian arguments[53] give us reason to venture deeper and toward a deliberate, positive argument for protecting disruptive and misguided intentions alongside insightful ones (whether peaceful or revolutionary). It is not merely that pragmatic constraints counsel us to tolerate the bad alongside the good in order to produce, identify, or protect the good. It is not merely that it is too difficult or too dangerous to attempt to identify poorly intentioned speakers. We also value misguided speech precisely for its communication of a speaker's vision and the effect this has on an audience. Confrontations with misguided views provoke audiences to reconsider their judgments and to reassess the foundations of their convictions. Negative audience reactions to them provoke reconsideration and reassessment by *speakers*. It is vital to legitimating functions and authentic compliance with the law that audiences have opportunities to be exposed to others' good-faith, but misguided, intention that the former do wrong and that speakers be exposed to the reactions and responses, both positive and negative, of audiences to their visions. Ongoing public confrontation and reaction to other citizens' good-faith visions of how we should live together is central to our way of both discovering and understanding our convictions of how we should go on.

Something akin to these notions is reflected in the eloquent dicta of Justice Douglas's opinion in *Terminiello v. Chicago*.[54] As Douglas observed,

> [A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It

---

[53] See Mill, supra note 44, at 73-76.

[54] 337 U.S. 1, 4 (1949) (overturning, on facial challenge, speaker's conviction for disruption of peace caused by crowd's angry reaction when statutory language prohibited speech that caused anger or invited dispute).

Imaged with the Permission of N.Y.U. School of Law

> may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment . . . .[55]

And these ideas may make some more sense of (although not sensitivity out of) Judge Easterbrook's declarations in *Hudnut* that it was the very persuasiveness and effectiveness of pornography that underwrote its basis for protection.[56]

It is central, then, to this conception of speech and its role in bringing about authentic legitimacy and the evaluation of ideas that strong doctrines of responsibility for others' reactions to advocacy should be rejected. Legal responsibility for action responsive to advocacy should be confined to those who react and respond to it or else the values associated with such speech cannot be well realized.

The primary motivation here is not one about causation. That is, speaker liability is rejected not because there is a sense that the speaker does not directly or indirectly cause the harm. Rather, speaker liability is rejected primarily because the point of the activity and our protection of it depend on a separation of responsibility between speakers and audiences. It depends on a view of the role of audience members that conflicts with assigning a large amount of responsibility to the speaker, namely a view that audience members are, or are able to act as, independent minds who react to the content of speech for themselves and perform their own evaluations of these ideas and their relevance to action. Moreover, pragmatically achieving the ends of a free speech regime requires that speakers float ideas and views for independent evaluation: Holding them responsible for convincing others to act in certain ways will deter speech, the voicing of which the institution's protection is designed to encourage, for independent review, evaluation, and understanding.[57]

---

[55] Id. (internal citation omitted). See also Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturning conviction for breach of peace when Jehovah's Witness's speech activity critical of Catholics incited angry reactions in audience). But see Feiner v. New York, 340 U.S. 315 (1951) (upholding conviction of speaker who was ordered to stop speaking when audience member threatened violence against him).

[56] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985). This is not to affirm Easterbrook's conclusion. Easterbrook's opinion goes wrong, I think, in not taking seriously the claims that pornography subordinates women through special, non-standard modes that do not resemble the sorts of communicative activity or understanding that properly garner First Amendment protection. See generally Catharine A. MacKinnon, Only Words (1993); Catharine A. MacKinnon, Feminism Unmodified (1987) (same); Jennifer Hornsby & Rae Langton, Free Speech and Illocution, 4 Legal Theory 21 (1998).

[57] The view I am articulating bears some affinity with David Strauss's views in focusing upon the relationship and interaction between speaker and audience. David Strauss has advocated reading the First Amendment as embodying what he calls the "persuasion prin-

Imaged with the Permission of N.Y.U. School of Law

Socially and politically, the intent of those who advocate illegal or harmful action is quite valuable. This is a point about political value, not moral value. This may, depending on your favored picture of Mill, indicate a departure from the tenor of Mill's celebration of the devil's advocate. The speaker who—as in *Brandenburg*—advocates destructive illegal activity may well be morally culpable for believing in this course of action and for urging it upon others. Nonetheless, he may morally bear responsibility for his influence on others and partial, significant responsibility for their actions. Whatever the merits of devil's advocacy concerning all manner of topics, we need not believe that, morally, it should occur at all times and places. Malign advocacy may indeed be morally mistaken, all things considered, despite its ability to strengthen and deepen our understanding of our own resolve to the contrary. Nonetheless, if agents believe their positions and advocate them in good faith, then from a political and legal perspective, we should value their speech qua intentional act. Their visions are good-faith suggestions of how we should live. We owe it to them and to ourselves to give them an airing and to decide for ourselves whether their proposals (broadly understood) are apt.

From a political and legal perspective, there may be greater reason to protect speakers with respect to the intended consequences

---

ciple"—that "government may not suppress speech on the ground that the speech is likely to persuade people to do something the government considers harmful." David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 335 (1991). My view differs from his in three important respects. First, the protection I defend goes beyond harmful effects stemming from persuasion as Strauss defines it—namely as "denot[ing] a rational process." Id. at 334. I aim to defend a wider range of influence through the process of content-transmission and cognition that may alter a person's beliefs or influence her actions, but may not necessarily do so through a process of transparent rational evaluation and deliberation. Although I defend a wider scope of influence than that suggested by "persuasion" where this "denotes a rational process," my view is compatible with thinking that speech that circumvents, disables, or resists cognitive evaluation may fall outside this wider scope. Thus, on my view, if pornography silences in the distinctive way that some of its feminist critics claim, it may not be subject to the same argument for protection. Oddly, Strauss indicates that pornography may be covered by his principle although he does not indicate why he believes that it persuades in his sense. Id. at 340. He does, however, note an openness to restrictions if pornography psychically wounds women. Id. at 340 n.14. Second, I believe the insight behind the persuasion principle extends beyond merely ruling out certain government rationales, but it also rules out government restrictions whose consequences are to obstruct speech because of effects stemming from speech's content or uptake. Third, Strauss's defense places special weight on persuasion—on speech's working to unify an audience behind a speaker, in creating alliances about propositions. The view I am defending does not place special weight on audience agreement as above audience disagreement. For Millian sorts of reasons, the prospect of sparking or clarifying opposition or stimulating doubt seems to represent equally important contributions of speech. Unlike Strauss, I would not characterize the value of speech as lying in its capacity to persuade as such but rather in its ability to influence thought and action through content-transmission to potentially responsive subjects.

Imaged with the Permission of N.Y.U. School of Law

of their speech on others' agency than there is with respect to those that are merely foreseeable. Speech that produces intentional harm by stimulating others into endorsing and acting upon the speech's content is operating as it should—as it is supposed to. It is also operating as it should when listeners consider the content and reject it. That is, it operates as it should when audiences consider and react to its content. A central reason for protecting speech is to permit a variety of ideas to be promulgated to, and evaluated and tested by, independent agents. To restrict or burden speech on the ground that its content motivates some agents to act seems inconsistent with the very grounds for protecting and valuing speech in the first place: Our conception of speech's value depends on the assumption that audiences will have an opportunity to evaluate the speech for themselves and that they may evaluate that speech in a way that affects their agenda for action. If we value speech as a communicative enterprise and we value the voicing of a range of ideas (including mistaken and possibly mistaken ones), we have strong reason not to use the effectiveness of speech qua speech, in the context of its normal mode of operation, as grounds for its suppression. To use speech's effectiveness as grounds for its regulation or restriction would betray an inconsistent attitude toward its value and toward the role and function of audiences.

By contrast, we do not face the same presumption against efforts to control harm that is a byproduct of speech and not the product of those qualities about speech that we value politically and legally. Such efforts do not betray an inconsistent attitude toward the value of speech. This is not to say that there is no presumption at all against such regulation or that indifference to the effects of such regulation on the climate for speech is warranted. One may, quite reasonably, take the view that regulations that burden speech should face a heavy presumption against them, no matter why that speech is burdened. This, I take it, was the dissent's point in *Arcara*: Even if the rationale for a law that burdened speech (in this case, supposedly incidentally) is a permissible one, the fact that the effect is one that burdens speech itself provides a reason to apply a heightened standard of review, to require a showing that a significant interest is served that outweighs the burden on speech, and to require a showing that the least restrictive means have been adopted.[58] The worry here is that too much speech will be suppressed or deterred and that the cost of this sup-

[58] 478 U.S. 697, 710-12 (1986) (Blackmun, J., concurring). Justice Kennedy suggests a similar standard in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445-49 (2002) (Kennedy, J., concurring). See also generally Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175 (1996).

Imaged with the Permission of N.Y.U. School of Law

pression—of the constriction of opportunities for speech—is not outweighed by the harm to be prevented.

This is a different sort of concern from the one I mean to have been articulating—namely that there is a special, additional reason why speech should not be burdened on the ground that its content provokes others to act in harmful ways as a speaker intends it to. My objection is not merely that the consequences on the amount or variety of speech are costly but also that the grounds for restriction involve the state in an inconsistent attitude toward the value of speech. This particular inconsistency is not (necessarily) present where the harm targeted is an incidental side effect of the speech. So there may indeed be a normative asymmetry between the justificatory burden for restricting the intended effects of speech versus at least some of the merely foreseen ones.

D. Some Implications for the Secondary Effects Doctrine

Even supposing that a defense of the reverse doctrine along these sketchy lines could be developed, it would not necessarily vindicate the whole of the Court's current approach—especially with respect to secondary effects. Much depends on our understanding of the scope of what an intended effect is and what about it we value in this context, as well as on our understanding of what a foreseeable effect is. Encouraging prostitution may not be what a nude dancer has in mind as a desirable outcome of her dancing; her subjective concern may be entirely on making a living, and she may have no specific attitudes toward her audience. But, as I suggested earlier, this subjectivist construal of what should count as an intended effect would be overly narrow. Construing the scope of intentional effects in terms of what the agent has in mind, wishes, or desires, and foreseen effects in terms merely of what the agent actually knows, has long been associated with weak and implausible construals of intent and of the doctrine of double effect. Such an approach is implausible for many of our purposes in legal and policy settings; a more objective construal that locates the scope of intentional effects in terms of the natural trajectory of a certain sort of action and foreseen effects in terms of accidental, foreseeable side effects holds more promise.[59] In this sense, it seems that the intentioned effect of nude dancing is, at least, to draw attention to the nude body in motion and its responsiveness to music. Specifically, too, understanding agents' intended effects merely in terms of their wishes would be an overly narrow construction in this context given the justification, just rehearsed, for valuing speech as an

[59] See Quinn, supra note 10, at 187-88.

Imaged with the Permission of N.Y.U. School of Law

intentional activity aimed at communication. That argument suggests that if speech is to be restricted because of associated harm, one should be sensitive to whether that harm stems in a nonaccidental way from its content, from understandable reactions to it by its audience, or from its typical, reasonable means of transmission. If so, then a higher threshold of harm should be applied than, ceteris paribus, would be appropriate when harm issues from other activity or from aspects of speech that are not intrinsically connected to the speaker's content-transmission.

Such an approach would suggest that a more sophisticated inquiry than has been employed is necessary to decide cases like *Barnes*, *Erie*, and even *Arcara*. I remarked earlier that the Court's account of its distinction between primary and secondary effects is obscure. The Court has been frustratingly silent about how this sort of speech "produces" or is associated with these secondary effects. In *Barnes*, Souter blithely declared that while adult theaters may be "correlated" with prostitution, sexual assault, and increased crime, nudity in a play like *Hair* or *Equus* would not be.[60] (What about showings of *Pretty Baby* or *Pretty Woman*?) I do not quite know what sense of correlation Souter had in mind and on what basis he believes we can establish such correlations and then distinguish between primary and secondary ones. In fact, strangely, he appeared to celebrate his agnosticism about the origins of such effects; not knowing how they were caused, he seemed to suggest, left it open that their production was unrelated to their expression.[61] He's right, of course: Closing one's eyes can leave a lot of hypotheses open.

I believe that the connection between the speech and these effects is not as mysterious as vague talk of "secondary" correlations may suggest. Take one of the effects mentioned in *Barnes* and *Erie*. How might nude dancing increase the incidence of prostitution in the area where the dancing occurs? Four possible explanations come to mind, the last two of which seem most likely.[62] First, the dancing

---

[60] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 n.2 (1990).

[61] Id. at 585-86. See also City of Erie v. Pap's A.M., 529 U.S. 277, 313-15 (2000). In *Erie*, Souter showed much more concern that there be a strong evidentiary record that such effects occur and that the regulatory measures under consideration reduce them. Id. See also *Alameda*, 535 U.S. at 457-59 (Souter, J., dissenting). Nonetheless, he (and the rest of the Court) showed little interest in refining the notion of a secondary effect or in inquiring into the nature of the causal chain that brought it about.

[62] My discussion of the latter two explanations expands upon points made more concisely in Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 55 (1999). See also Dorf, supra note 58, at 1223, 1224 n.224 (arguing that secondary effects should not encompass effects that derive from communicative impact of speech); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 486 (1996) (same). As I discuss infra notes 68-69 and

Imaged with the Permission of N.Y.U. School of Law

might occur at a venue that has previously served as a gathering place for prostitutes or a brothel. Although the brothel may have been dissolved, prior customers who were unaware of its dissolution might return to the site and prostitutes might, in an uncoordinated fashion, pick them up there. Second, the dancing establishment may be a front for a prostitution ring. Third, the dancing may signal to members of the community interested in pursuing paid sexual services that others with similar interests may congregate at the venue so that it would be an effective place to establish such contacts. Finally, the nude dancing might orient its audiences to sexual pleasure. It may put them in the mood and make them more inclined to seek out such encounters. This effect would not be a primary reaction, in some sense, to the dance. It is not a direct endorsement of the dance, a rejection of it, or a direct reaction to it qua dance. It is a way that the dance, through its content, affects audience members and orients their attention toward sexual encounters. Notably, as it has so far been developed, the announced doctrine of secondary effects would not distinguish between these explanations. But, I will argue, there are important distinctions between them and these should influence the development of the doctrine.

If this last explanation is correct, then *Barnes* and *Erie* become difficult to distinguish from *Brandenburg* and, especially, from *Hudnut*. Given the approach of *Brandenburg* and *Hudnut*, why is not the appropriate reaction to this criminal activity, inspired by the dancing, to hold the parties who participate in the prostitution fully responsible? Why should we not hold the audience member responsible for how he reacts to the dancing and what conclusions he draws about what sort of conduct would be appropriate? Here, as in *Brandenburg* and *Hudnut*, contentful activity of a certain kind inspires another person to perform illegal activity. That the speech is not political and instead is so-called "low-value" sexual speech does not distinguish it from the materials considered in *Hudnut*.[63] Nor does the fact that the speakers did not subjectively aim to inspire that

---

accompanying text, I would add that secondary effects should not encompass effects that derive from the attractiveness or popularity of the speech's content or the speaker.

[63] The Court in *Bartnicki* distinguished *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), by arguing that the speech in those cases was of minimal value. Bartnicki v. Vopper, 532 U.S. 514, 530 n.13 (2001). I find this an insufficiently fine-grained explanation in light of *Hudnut* and the range of hardcore violent materials that enjoy First Amendment protection. Both *Ferber* and *Osborne* involved child pornography and may suggest there are lower standards applied when children are at risk. This may make some independent normative sense: All of our positive duties toward the protection of the innocent may be higher toward children; their heightened vulnerability may ground a stronger collective duty of care.

Imaged with the Permission of N.Y.U. School of Law

activity mark much of a difference from *Hudnut*: The pornographers surely did not claim that their conscious purpose was to provoke discrimination and violence toward women. The consumption of the materials made those reactions more likely in a way that was not coincidental and was related to the content of the materials and their transmission; still, the Court's reaction was to hold the consumer responsible for how he reacted to the materials presented.

A similar problem besets the third explanation. The theory behind it, I think, is that some people have a predilection for engaging in prostitution that is not influenced (at least not in a decisive way) by the dancing itself. They come to the dancing establishment with this indefinite intention, or at least predilection, and the presence of the dancing establishment permits coordination between those interested in buying sex and those interested in selling sex. The main problem with this explanation is, I think, that it bears little connection to the restriction upheld in *Erie* (and *Barnes*). It is quite unclear how the presence of pasties and G-strings would interfere with the *signal* sent by the presence of such an establishment unless it is by making the performance less enjoyable or enthralling to its audience.

Perhaps that would discourage attendance and these connections would be made less frequently. But, then, the rationale for the restriction again resembles the structure that is rejected in *Brandenburg* and in *Hudnut*. On this theory, the speech is being restricted on the grounds that it is too interesting or too enticing and that this attracts listeners who may use the opportunity to make other arrangements to commit illegal activity. Many audience members of incendiary speeches are attracted to them because these audience members already share sympathies with the speaker's views. Yet, it should be constitutionally unthinkable for a legislature to restrict *interesting* incendiary speech on the grounds that it attracted people who were already susceptible to committing crimes and allowed them to meet and coordinate, thus making certain crimes more likely (but not imminently so), but that such people would be unlikely to come out to a duller lecture. Unless our theory of free speech protection depends on the cynical view that most speech is powerless, a speaker should not be restricted on the mere ground that others find his speech interesting and that it serves as an opportunity to meet similarly inclined, rebellious people. And, could it really be restricted because the speech's content or purveyor was so compelling that it drew a number of people, known to be messy, who tended to litter?[64] It seems quite

[64] Likewise, one wants a more elaborate description of how a concentration (*Young*) or dispersal (*Renton*) of adult theaters contributes to a neighborhood's deterioration and the

Imaged with the Permission of N.Y.U. School of Law

peculiar to regulate speech on the grounds that it is effective and compelling to its listeners. Ultimately, this seems to be at the foundation of one of the possible explanations of the production of the "secondary effect" as the Court delineates this category. If there is a justification for the doctrine of secondary effects something along the lines I have outlined, it must be applied in a much more genealogically sensitive way. Some distinction must be drawn between those effects that flow from the natural trajectory of the content-related intentional activity between speaker and audience and those that occur as mere accidents of the nonintentional, event-like character of the speech.

A similar analysis of *Arcara* seems apt as well. The mere fact that the regulation applied neutrally to all businesses in *Arcara* should seem like an insufficient justification for the bookstore's closure. I do not have in mind the worry that the closure had such a detrimental impact on *future* speech opportunities,[65] although, as I remarked earlier, I am also sympathetic to this concern. Rather, the application of the regulation was insufficiently attentive to the underlying cause of the offenses. It should matter if the explanation for the prevalence of prostitution resided in the fact that it was an adult bookstore whose contents inspired open, bold approaches to sexual expression or an interest in immediate sexual gratification, or if its contents attracted like-minded thinkers who also were interested in paid sexual services, rather than if solicitors were attracted to the venue because a bookstore seemed like a safe rendezvous point. Suppose it were one of the former explanations. The contents of the purveyed speech persuaded, in the broad sense, the audience to react and to pursue paid sexual services. How, really, does this differ from the speech that is to be protected by *Brandenburg*?

The relevant difference between them cannot be that in *Brandenburg* the law specifically targeted speech but that it did not in *Arcara*. Even though the law challenged in *Brandenburg* targeted speech, it need not have. What concerns us about the harm of incendiary speech is not so much the speech but its violent effects. One could imagine a broader law that targeted all events that produced violent episodes and that happened to apply to incendiary speeches. Such laws, I would think, should still be regarded as unconstitutional as applied to speech. No matter what the structure, content, or purpose of a law aiming to restrict it, the speech protected in

---

increased incidence of crime. Is it that the speech interests the wrong sort, the wrong class of people? Can the class or interests of an audience really be a valid reason to relocate speech?

65 This was the thrust of the dissent's argument in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 712 (1986) (Blackmun, J., dissenting).

Imaged with the Permission of N.Y.U. School of Law

Brandenburg merits First Amendment protection. That is, the outcome in *Brandenburg* should not depend upon the fact that the law in question targeted incendiary speech, nor that it targeted speech at all. It cannot be an acceptable outcome that the sort of speech discussed in *Brandenburg* could be suppressed, just so long as the suppression results from a content-neutral law. It should not depend upon whether the government aims to restrict the speech because of its communicative impact or whether the government merely aims to restrict the speech because it is concerned about the harms it happens to or may be likely to produce, while being unconcerned about the fact that they are produced through communicative means. The First Amendment should stand at least for the principle that in a democratic society, there are protected opportunities to advocate illegal activity with the intention to persuade listeners in full command of their faculties.

If this is a given, as I think it should be, it shows why, at least on one understanding of them, purely purposive accounts of the First Amendment of the sort Jed Rubenfeld has recently defended cannot be correct. On his account, a law violates the First Amendment *only* if the government makes communicative harm the basis for liability.[66] "The only real First Amendment question . . . is whether the state's purpose was to punish someone *for speaking*."[67] On Rubenfeld's account, for a prima facie speech claim to be made, communication must be an element of the offense; the legislative purpose must have been to target speech or the law must be selectively enforced against speech.[68]

Whether one agrees with Rubenfeld that the government's purpose may be sufficient to invalidate a law, this does not commit one to the view that an illicit purpose to suppress speech as such is necessary to find the First Amendment is implicated. For one thing, usually, the state's purposes associated with speech suppression are not all that connected to speech as such. Sometimes they are: The very expression of dissent or rebellion may be what offends the state. But, often, the state's concern is just to regulate or minimize harm—whether it is caused by speech or other forms of conduct. To focus solely on the state's purpose would permit a variety of forms of suppression of speech we should protect, so long as the suppression followed from a nonpretextual, comprehensive, content-neutral ban. Should we really feel comfortable with suppressing the speech in *Brandenburg* if the

[66] Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 777 (2001).
[67] Id. at 776.
[68] Id. at 784.

Imaged with the Permission of N.Y.U. School of Law

relevant law were one of general applicability that punished all actions that caused others to, or substantially enhanced the probability they would, commit violence? Second, such approaches wrongly locate the sole disvalue of speech suppression on analogy with a common, though quite incomplete, understanding of the wrong of discrimination. The trouble with the suppression of speech is not solely procedural. It is not entirely that the *state* adopts the wrong attitude toward speech or misidentifies the importance of communicative activity. Some part of the trouble has to do with the consequences of suppression. Many forms of speech are valuable and we should ensure there are protected opportunities to engage in them.

To be explicit, the distinction I am urging is between different causal sources of the harm that speech produces and is not about the reasons why the legislature seeks to regulate speech. There are important values served by the intentional modes of communication that constitute free speech ability. These values justify ensuring that opportunities for such activity exist. Our recognition of these values also restricts what rationales may animate our regulations and they also restrict what sorts of things we may regard as legally cognizable harm. To focus predominantly on whether the legislature has animus toward certain speech would lead to an overly narrow rendering of freedom of speech driven by an excessive concern to avoid enacting certain negative motives into action. Animus toward speech is contrary to the commitments of the First Amendment, but these commitments are broader and encompass an active interest in promoting and protecting speech because of its positive value. What must be protected also are the pathways of communication, as well as the effects that stem from there being pathways of communication, irrespective of why legislatures object to them. But, if this is correct and *Brandenburg* should be read to protect speech against restrictions whose impetus comes from objections to the effects of audience reaction, then it seems that one cannot affirm the closure in *Arcara* if the prostitution resulted from the effectiveness of materials that encouraged interest in sexual activity.

Likewise, it seems relevant if the explanation for the prostitution were that the bookstore purveyed materials that were of interest to consumers who also were interested in paid sexual services. Allowing restriction in this case seems like allowing restriction of an anarchist speaker on the ground that his speeches tended to attract anarchists who had an interest in meeting one another and who tended to make criminal agreements with one another upon meeting. So long as the speaker was not an active participant in these conspiracies, it seems as though it would be wrong to restrict the speaker on the ground that

Imaged with the Permission of N.Y.U. School of Law

she was an attractive nuisance—that her speech was interesting enough to attract people to it, at which point they formed other sorts of alliances. Permitting restriction here seems to amount to permitting restriction on the ground that the speech operates as it is supposed to, as it is intended to—where it is exactly this aspect of its intentional operation that we are committed to protecting.

The situation would be different if it were just that the bookstore happened to occupy the site of a former prostitution ring, was a front for prostitution, or was a bookstore full of nuclear physics textbooks. In such cases, the harm that is targeted (the prostitution) is not emanating from the content of the speech; it is not an intended effect of the communication of the speech's content (nor should it reasonably be construed as such) and so restriction is not in tension with commitment to the value of communication of even harmful ideas.[69]

E. Glucksberg *Revisited*

This has taken us some distance from the initial tension between the argument structures of *Brandenburg* and *Glucksberg*. The argument structures of *Brandenburg* and *Glucksberg* do not necessarily conflict—at least not if the reverse doctrine has some scope. First Amendment rights are valued for the communicative intentions expressed in their exercise and their being directed toward independent agents who engage evaluatively with these expressions. This, in part, serves to justify why it is especially inappropriate to enforce high levels of responsibility on speakers where the harm follows from the content of the communication.

This argument may help to explain why *Brandenburg* and *Glucksberg* feel different—why one feels like an easier case and the other harder, even if we begin from the starting point that the compliant agents are asserting entirely legitimate, comparably strong liberty interests that we are committed to valuing. The incendiary speaker's intention, for which we value the speech, is to affect others and influence their thoughts. This may inspire action that involves harm to others. Typically, this inspiration is intentional; it is partly in light of the agent's belief that the audience *should* consider action of

[69] I have only remarked on restrictions that have the effect of precluding speech. One might think that zoning regulations, triggered by the association with secondary effects, should be treated differently. Note, though, that even if one is inclined to treat zoning differently, the argument I have given suggests that the problem with *Renton* is not merely that speech was singled out as special, as the dissent suggests. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 57-58 (1986) (Brennan, J., dissenting). Even laws of general applicability that happen to restrict speech due to secondary effects that flow from the speech's content may be inconsistent with the commitments to and foundational motivations for speech protection.

Imaged with the Permission of N.Y.U. School of Law

this sort that we value and protect such speech. By contrast, the interest patients have in assisted suicide is not primarily other-regarding. The intention of the assisted suicide is, dominantly, self-regarding—to end one's own life; to exercise self-determination over the conditions and boundaries of one's life. To be sure, such patients intend to involve others by gaining their assistance and often, to spare family and friends from overseeing a slow, drawn-out death and to save them from its draining expenses. But these are intentions that relate to one's own life and sphere of concerns. The intention of the assisted suicide is not to affect the public at large or to influence the general views or practices associated with death. What we are committed to valuing when we recognize the potential suicide's liberty interest are not the sorts of side effects that motivated the Court's refusal to enshrine the liberty interest as a right.

Suppose the argument against the right to assisted suicide were instead this one: While there is a strong liberty interest in having the opportunity to control the manner and timing of one's death, under suitable deliberative circumstances, its recognition would result in too many people freely, but *incorrectly*, choosing to end their lives.[70] If this were the argument, then this pattern of argument would also manifest the same inconsistency as an argument against incendiary speech on the ground that it causes others to commit violence. In essence, it would be objecting to the recognition of a right that is grounded in valuing autonomy on the ground that while individuals do have strong interests in autonomy, some might exercise it poorly. Such an objection is insincere: It admits as an aspect of what is balanced that there is a strong interest in autonomy, but then in articulating the other side of the balance, contradicts what has supposedly been conceded. For to acknowledge a strong interest in autonomy is already to acknowledge an interest in allowing people to make decisions, well-considered or poor, for themselves. One may reject the value of autonomy for this reason, but one cannot concede it and then claim that an essential element of its value weighs against it.

By contrast, an argument that assisted suicide has the foreseeable but unintended side effect of contributing to a climate of coercion

[70] I stress "incorrectly" deliberately because it is this aspect of the recited argument that generates the inconsistency. I mean to put aside complications that arise in circumstances where our willingness to recognize a right depends upon our assumption that not too many people will exercise it (whether rightly or wrongly) because resources or the like allow only so many to act in a particular way. Such cases may require a more nuanced articulation of the liberty interest or the conditions under which its exercise is valid, but I do not believe that such cases present the sort of inconsistency (or a challenge to the claim that there is an inconsistency) in which I am interested. I am grateful to Harry Frankfurt for stressing this point.

Imaged with the Permission of N.Y.U. School of Law

does not suffer from the same flaw. It does not give as grounds for balancing against the liberty interest of the person seeking assisted suicide, something that is essentially part of the properly understood characterization of the liberty interest. None of this fully justifies the argument made in *Glucksberg* or its assignment of a rather strong level of responsibility to the putative suicide. The difference marked by the reverse doctrine need not be a verdictive difference. It may just mark a difference of degree.

If, of course, patients do not just have a strong liberty interest, but have a full-fledged, recognized *right* to control the timing and means of their deaths, then as Frances Kamm has persuasively argued about the general structure of rights, it seems quite unjustified to abridge that right to prevent others from violating that right, more often, towards other innocents.[71] But the issue may be, as the Court sees it, the more preliminary one: whether there is (or should be) such a right at all and when one's utterly justifiable and strong liberty interest in a thing should bend to accommodate others' like interests and the reality of badly behaved intermediaries.

While I began by denying that the difference could be explained merely by the doctrinal distinction between First Amendment activity and other sorts of freedoms, it may seem as though this denial was grounded only on the actual twists and turns of particular cases. The doctrine may be off-track, but an explanation for the different approaches may be found in the different natures of the liberties they protect and the different rationales behind their protection. This is correct in a sense, but it is important to notice that the difference to which I am calling attention does not hang upon claiming, as some do, that the liberty interests protected by the First Amendment are intrinsically more important than those protected by substantive due process or, more specifically, that the right of freedom of speech matters more than the right to control the timing and conditions of one's death. The argument I have pursued does not depend upon comparing the *importance* of the values. Instead, it turns on the values' *structure*, on the nature of the arguments for their protection, and on the structure of the arguments for restricting these liberties or the opportunities for their exercise. Hence, it is possible for an analogous apparent tension to arise (and to be resolved similarly) *within* First Amendment doctrine as is manifest between *Brandenburg* and the secondary effects doctrine.

This argument about the reverse double effect and *Glucksberg* is only preliminary. What we ultimately want to know, after all, is

[71] See generally Kamm, supra note 52, at 207-353.

Imaged with the Permission of N.Y.U. School of Law

whether the *Glucksberg* approach is correct, not merely whether it represents a harder case than *Brandenburg*. Further, the explanation is only a negative one: It provides a reason why restriction in the incendiary speech context would involve some inconsistency, but it gives no positive reason why one should bear more responsibility for the predicted, but not intended, noncompliant actions of others.

This larger topic deserves a longer exploration than is feasible here, but I will make two tentative, prefatory remarks relevant to an in-depth discussion. First, I suspect the reverse doctrine phenomenon is not isolated to the cases I describe and may range beyond some of their conditions. Consider the following case.[72] Suppose a medical experimenter seeks to prove that a new treatment she has confidence in is in fact superior to the standard treatment for a serious disease. It may be more effective or may not produce the harmful side effects of the standard medication. There is sufficient uncertainty in the scientific community about the new treatment that there is need for a trial. She initiates a trial and in some sense intends for the control group to fare worse than the experimental group so as to establish the necessary proof. Assuming such controlled experiments are ethically defensible, we may think it reasonable not to hold the researcher responsible for the worse effects suffered by the control group that results from their having the disease and receiving the standard treatment. Yet if the experimenter is negligent and the negligence causes the same sort of detrimental effects, the imposition of liability would be reasonable.

One might object, of course, that the difference lies in what the experimental patient has agreed to: possible detrimental effects from the trial but not from other sources. But this neither exhausts nor completes the explanation. It would be unreasonable for the experimenter to ask for liability to be waived for the negligently caused harm though it may be entirely reasonable for her to ask for liability to be waived for the effects that stem from the experiment—effects that are intended. Some other explanation must support the distinction between when a request for consent is reasonable and when it would not be.

Unlike the legal cases that have been the focus of the Article, this example does not involve the malfeasant activity of other parties (although it involves another agent by way of her consent). It suggests, perhaps, that there may be some appeal to the reverse doctrine outside the scope of the non-ideal problems involving noncompliant agents.

---

[72] I am grateful to John Witt for helping me to formulate this case.

Imaged with the Permission of N.Y.U. School of Law

But there are continuities here. This case also involves the feature that if the larger intentional activity is intrinsically valued in some respect, it can seem stranger to restrict it in light of its intended bad effects than its unintended ones. One thing to note about the examples I have considered is that, in these cases, the intended bad consequences are not essential to the completion of the end. The researcher's career and cause may be enhanced if she can show the standard treatment is faulty; catalyzing illegal conduct will advance the speaker's cause. But, the experiment will be successful qua experiment if there are results, even if the standard treatment is indicated and no harm of any sort is done to the control group. The incendiary speech will be successful in some respect qua speech if the meaning is communicated and understood by the audience even if they remain unconvinced that they should violate the law or if the paucity of the arguments confirm their view that they are obliged to obey. By contrast, where the doctrine of double effect seems to exert more force is where the end will not be accomplished (in the actual world) unless the harm occurs; e.g., the terror bombing does not succeed unless the bombs kill and terrorize the innocent. This suggests that the intending/foreseeing distinction may not be sufficiently fine-grained. There are intermediate categories of consequences that naturally follow from intentional activity; they are not sought for their own sake and may even be disvalued, but it is inaccurate to think of them as merely foreseen. These examples tend to revolve around these sorts of consequences.[73]

The main examples in this Article involve more than one agent. An agent acts in a way that influences another who then directly generates harm. Do these interpositions of others' agency play any role in the explanation of how these cases should be considered? I suspect so, although it is difficult to articulate why in any precise way. Some rough and tentative thoughts: Suppose we begin with an understanding that in shared social life, we must all accommodate some burdens generated by others, but feel some ambivalence about this because it is in tension with some of our notions of individual responsibility. We are trying to find reasonable boundaries to the general social obligation to share some portion of those ambient social burdens for which we do not bear any *direct* responsibility, where sharing these burdens may impinge upon or make difficult the exercise of

[73] Frances Kamm has recently produced some extremely interesting work pointing out a wholly different way in which there is room for further distinctions here that may make important ethical differences. Frances M. Kamm, The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to His End, 74 Aristotelian Soc'y Supplement 21 (2000).

Imaged with the Permission of N.Y.U. School of Law

important liberty interests. It may be more responsive to these competing concerns to allow broader assignments of responsibility in some contexts for unintended rather than intended effects. Why?

In cases with this structure—involving intermediary agents who themselves act voluntarily, where the primary agent intends or aims at harm in the context of some intrinsically valuable activity—there is often an invitation to an intermediate agent that has some degree of transparency. If it is an activity of a certain type that is strongly associated with certain intentions, these intentions should be fairly evident, or at a minimum, it should be reasonable to expect that they are there. At the least, this seems true of speech. Where there is such a clear invitation, morally, we can expect the intermediary agent to turn it down and to refuse to do as the other, primary agent aims for her to do. Holding people responsible for the intended actions of others may pose more of an insult to the intermediary actors' independent agency—it is as though their agency is restricted or obstructed qua agency or as though we were positing a closer relationship between the two agents than existed. We treat them as though they were acting in concert when in fact they were not, or as though the intermediary actor were the agent of the latter. And it makes the primary agent more responsible for the intermediary's behavior than may seem fair: In the speech case, the primary agent is addressing the intermediary agent as an independent agent, not as a hired assistant, a subordinate, or a collaborator. On the other hand, restrictions that aim at the side effects of a primary agent's action do not manifest the same sort of practical denial of the independence of agents. Because the causal chain is not one that involves a transparent invitation to make an independent decision to act or not, the restrictions on the primary agent do not bespeak a lack of respect for the intermediary's independence or action qua agent or an overextension of the primary agent's responsibility for others. It does not mistake (implicitly) their connection for one of collaboration, coordination, or command.

III

THE SOURCES OF REVERSE DOUBLE EFFECT

I have just argued that, strangely, there may be something to be said, in some contexts, for the reverse doctrine of double effect. One might be tempted, though, to argue that it just cannot be correct because it is inconsistent with the doctrine of double effect. Here, I will not confront that objection by arguing against the doctrine of double effect. I do not believe that is the relevant burden of argument. Both may exert force, albeit in different contexts. Instead, I

Imaged with the Permission of N.Y.U. School of Law

want to suggest that proponents of the doctrine of double effect cannot confidently ignore or dismiss the reverse doctrine because a rule enforcing the reverse doctrine's pattern of responsibility can arise from the application of double-effect-like reasoning at a different level of argumentation.

A. Double Effect Reasoning for Legislators

Suppose one holds the following constellation of views: One may not aim to regulate speech directly because of its content or the reactions of an audience to its content. But, one may permissibly regulate the side effects of speech, so long as one does not *intend* to engage in content regulation, even if a side effect of such regulation is to make some speech (or even the expression of particular viewpoints or topics) more costly or too costly to engage in; or at least, one may do this so long as the disadvantages of such regulation are not too weighty.

This looks like double effect reasoning: There is something that one may not aim at directly, but if it comes about as a side effect of some permissible aim (and suitable conditions are met about the importance of the aim versus the costs of the side effect), then it may be permissible to have brought it about (or at least more permissible than taking direct aim). The impact of regulation that follows these dictates will be to hold speakers more responsible for the indirect harmful side effects of their speech than for its direct effects. This is, in essence, the reverse doctrine. It is the product of the application of the doctrine of double effect at a different level on different actors—in articulating the permissible contours and intentional objects of a rule of conduct.

This description fits, roughly, some of the Court's own description of its method.[74] A rough description of the Court's view is that it is extremely difficult for the state to directly restrict or prohibit the

[74] For a more thorough treatment of the Court's emphasis on content-neutrality and a more consequentialist and epistemically-oriented defense of this emphasis, see generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46 (1987); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983); see also Kagan, supra note 62, at 413 (arguing that much of Court's First Amendment doctrine is aimed at restricting impermissible legislative motives, despite Court's seeming declaration to contrary in *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968)). While I agree with much of Elena Kagan's critique of other ways to understand cases such as *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), her characterization of the way in which this aim is executed differs from mine by characterizing the requirement of content-neutrality as an indirect way to police and restrict the operation of disfavored, underlying motives. I instead take the restriction on content-based regulations as already a direct, not merely prophylactic, restriction on legislative aim. My approach also differs from hers in focusing more on developing a nonconsequentialist justification and reconstruction of that part of

Imaged with the Permission of N.Y.U. School of Law

content of speech on the ground that the speech's content has or may have a harmful effect on or through its listeners.[75] But the state may permissibly aim to regulate other sorts of harms, such as noise pollution, even if this regulation has the side effect of restricting or prohibiting speech that the state could not directly aim to restrict. This may be a way to characterize the time, place, and manner cases.[76] The legislature aims to control such things as noise and traffic. These are perfectly permissible state aims and may be pursued, even if the rules adopted in their pursuit make it more difficult for certain speeches to be delivered at the optimal time or for certain messages to be delivered at all. It would be impermissible to aim directly to discourage or deter such speech, but, assuming the costs to speech generally are not too high, it is permissible for such obstacles to be created as side effects in the pursuit of otherwise permissible aims. Or, consider again the explanation given in *Arcara*. A regulation that aimed to control prostitution by closing buildings in which prostitution frequently occurred was applied to an adult bookstore. The Court held that the statute was directed at conduct that was not itself expressive in character and that the statute's application was not intended to suppress speech.[77] That its application happened to target a bookstore was an unintended consequence of a statute that had a permissible non-expression-oriented aim. The Court echoed this explanation in *Erie*, holding that if the governmental purpose behind a nudity ban was to regulate content, it must meet a strict scrutiny test; if its purpose was otherwise but has the dead-on, certain effect of restricting speech anyway, it need only meet the less stringent *O'Brien* test.[78] Interestingly, in some of these cases, the disputes between the majorities and dissents look like arguments about whether the conditions of

---

the doctrine concerned with motive than on the project of providing a sound descriptive model of the doctrine.

[75] There are, of course, glaring exceptions to this generalization, as is evident, for example, in the more forgiving analysis of regulations on fraud, defamation, fighting words, and obscenity. Although even regulations of these "exceptional" categories are subject to related strictures, how one regulates such categories of speech cannot be driven by other content-oriented concerns. *R.A.V.*, 505 U.S. at 383-84.

[76] See, e.g., Thomas v. Chi. Park Dist., 534 U.S. 316 (2002) (upholding content-neutral permit system for city parks having policy of avoiding inconsistent uses and preventing dangerous or unlawful behavior); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (rejecting challenge to city-controlled loudspeaker system for park concerts on grounds that city had valid interest in protecting citizens from unwanted noise); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (refusing exemption for anti-homelessness protestors from policy that attempted to preserve attractiveness and accessibility of parks by forbidding overnight camping in park).

[77] Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986). See also Bennett, supra note 45, at 204-08.

[78] City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).

Imaged with the Permission of N.Y.U. School of Law

the double effect doctrine have been met. The dissent in *Arcara*, for example, stressed that the majority had not properly weighed the significance of the possible loss of an alternate venue for the bookstore against the interest in combating prostitution.[79]

These are, it might be pointed out, possibly controversial applications of double effect reasoning. In the time, place, and manner cases as well as in *Arcara*, the detrimental effects on speech opportunities may not seem to fall cleanly into the category of by-product or side effect. To prevent the undesirable activity, the speech is actually prohibited from taking place *at that time* or *in that place*; the speech restrictions are *means* to achieving the end that is desired, not side effects of the achievement of the aim. This may not seem to be double effect reasoning at all since the doctrine of double effect rules out using evil as a means or an end, although permitting it as a side effect: Here, one may think that restrictions on speech are endorsed as means so long as they are not ends.

Perhaps the Court is not relying on double effect reasoning but is instead embracing the idea that it may be more permissible to inflict some sorts of harm as a means than to seek them as an end. I do not deny that such characterizations are possible. Indeed, vexing questions about what exactly counts as a side effect fill the literature on double effect.[80] Although there are many possible approaches to untangling the problem, I find it plausible that what matters in deciding whether something is a means of achieving an end or a side effect of its achievement is the aspect under which it is (reasonably) described and valued. Under an eligible description, speech is not being suppressed as such. The event causing (or threatening to cause) traffic difficulties happens to be a speech event,[81] but it could also

---

[79] 478 U.S. at 710-11 (Blackmun, J., dissenting).

[80] See, e.g., Nagel, supra note 10, at 60-61; Nancy Ann Davis, Contemporary Deontology, in A Companion to Ethics 205, 214 (Peter Singer ed., 1993); McIntyre, supra note 45, at 233-37. For example, there are two sorts of dispute about the relevance of double effect in the abortion debate. First, is it sensible to say that performing a hysterectomy on a pregnant woman produces the death of the fetus only as a side effect, distinguishing such operations from the intentional killing involved in abortion? Second, should this distinction, if it can be made out, amount to a moral difference? With respect to the first question, some critics want to say that the death of the fetus from the hysterectomy and the death of the fetus from the abortion are on all fours: The fetus's death is not sought as such in the abortion, just its removal from the body. Either its death is a side effect of its removal or if the death's being "so close" to its removal does place it in the scope of the abortionist's intention, then so does its death from the removal of the uterus in the hysterectomy. One might say that the patient seeking a hysterectomy and the patient seeking the abortion may indirectly seek the fetus's expulsion for different reasons, but then the dispute has more to do with what ends legitimize intentionally seeking death, rather than whether one is intentional and the other not. See, e.g., McIntyre, supra note 45, at 233-34.

[81] See generally Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

Imaged with the Permission of N.Y.U. School of Law

have been a bazaar or a farmers' market; the business associated with solicitation happens to be a bookstore.[82] It is not in its aspect as a speech event that its closure is a means to the achievement of the state end. Thus, I think it plausible to resist characterizing the Court as endorsing the idea that some harms are permissible as means, not ends; rather, the Court is engaging in double-effect-type reasoning.[83]

I will avoid arguing this point at length, though, because less hangs on its resolution than it may appear. Even if the strong claims—that the Court's model for permissible legislative reasoning is in fact a model of double effect reasoning and the application of this model can produce reverse double effect regulations—are threatened, a weaker, unchallenged claim underlies these ideas that contains what is of most interest. To wit, concern about the role of intention may take opposite forms at the level of legislative formation and at the level of regulation content and these different forms of concern may be dynamically related to each other.

B. The Relationship Between the Doctrine of Double Effect and the Reverse Doctrine

Whether by looking to actual doctrine or imagining a doctrinal system like the one I have described, we can generate examples of double effect reasoning that, when implemented, will allow the production of rules of conduct that hold speakers more responsible for

---

[82] See generally *Arcara*, 478 U.S. 697.

[83] However, in *Erie*, Justice Scalia's opinion suggested that an even further step would be permissible, a step that would go rather far. In his view, the legislature could single out nude dancing, as such, for a direct ban, so long as its motivation was not hostility to nude dancing's communicative character or content per se but rather to tackle some distinct problem associated with nude dancing. *Erie*, 529 U.S. at 310 (Scalia, J., dissenting). As I have already argued, see supra notes 62-65 and accompanying text, I doubt there is a distinction to be drawn here. But, in another way, this approach would represent a rather significant twist. Typically, the doctrine of double effect is thought to concern what acts one is justified in performing. One may permissibly act in a certain way, intentionally, even if that action has foreseen but unintended side effects—even though one could not permissibly act in some other way if one's intentions were to bring those same effects about. This idea is a step short of the idea that although one could not perform a certain action intentionally, in light of its known consequences, one may perform that very same action so long as those consequences are not one's motives, but the foreseen, unintended, yet still known consequences of one's behavior. As I noted in the text, the more plausible versions of the doctrine of double effect draw distinctions between different acts one may perform, not between acts-as-they-are-performed-under-a-certain-motive. Plausible versions rely upon the foreseen, unintended consequences being actual side effects—accidental, contingent effects of an action (such as the children being near the bomb site). Plausibility becomes more strained when what counts as a side effect is just that which one does not directly desire (even if it is a constant element or consequence of the action), as if one could make the troublesome effects of an action go away by not wanting them. See infra note 85 and accompanying text.

Imaged with the Permission of N.Y.U. School of Law

the foreseeable side effects of their speech than for the intentional effects of their speech. This is a rather curious and, to my knowledge, unremarked-upon phenomenon. It raises a host of questions about the validity and the proper provenance of the doctrine of double effect.

There are two central questions: First, is the doctrine of double effect properly applied at the level of articulating the criteria for a permissible rule of conduct? Second, if the application of the doctrine of double effect produces a rule of conduct adhering to the reverse doctrine, is this an inconsistency? Does it work as a *reductio* of the doctrine of double effect that its application produces its mirror opposite? Alternatively, is it an argument for the reverse doctrine that it is the product of the application of the doctrine of double effect?

The phenomenon I describe has gone unnoticed, I believe, both because legal writers have not identified this form of legal reasoning as double effect reasoning and because philosophical commentators on the doctrine of double effect imagine its application in a different context. The standard discussion of the doctrine of double effect in the philosophical and theological literature pictures the doctrine of double effect as informing deliberations about how to act or as informing our assessment of the permissibility of certain sorts of actions by agents.[84] Some *actions* are considered more permissible than others because their bad consequences are merely foreseeable, not intended.[85] The doctrine is used to distinguish between sorts of conduct, not between possible forms of state regulation.

---

[84] The doctrine of double effect was deployed explicitly in this latter way in Chief Justice Rehnquist's majority opinion in *Vacco v. Quill*, the equal-protection-based companion case to *Glucksberg*, both to differentiate between the refusal of life-saving treatment and the provision of assisted suicide and to differentiate between palliative care that hastens death and assisted suicide. See Vacco v. Quill, 521 U.S. 793, 800-01 n.6, 802-03, 808 n.11 (1997). Justice O'Connor seemed to endorse some version of the distinction between palliative care and assisted suicide as well. See Washington v. Glucksberg, 521 U.S. 702, 737-38 (1997) (O'Connor, J., concurring). There, the argument was that the difference between the two sorts of actions rationalized the distinction drawn by the legal rule. This is not an example of the sort of phenomenon to which I am drawing attention. This use is more standard: The doctrine is applied at the level of characterizing actions, rather than to differentiate between permissible and impermissible legal rules.

[85] The reverse pattern that I have identified operates at this level: Some actions with detrimental effects are legally more permissible than others, and the degree of permissibility turns on whether the effects are intentional or not, at least insofar as the effects are typically intentional for that type of action. They receive less constitutional protection where the targeted bad consequences flow as a mere side effect from intentional conduct than when the bad consequences have a more integral connection to the relevant intentional conduct. Although, here, the disparity in permissibility is a legal one, not fundamentally a moral one.

Imaged with the Permission of N.Y.U. School of Law

Consider the standard example, cited by supporters of the doctrine of double effect, of terror versus strategic bombing. Put aside whether this example is persuasive and in particular, whether, if persuasive, the doctrine of double effect is so strong that it suffices to distinguish the cases *verdictively*—that is, whether the distinction is so great that one action is impermissible and the other action permissible. Suppose it is persuasive. In a standard case like this one, its application does not produce its mirror image. Those who are killed as a side effect of the bombing of a munitions factory have their liberty restricted, to put it mildly, and those who would be the victims of terror bombing have their liberty protected. But the difference between those innocents whose liberty is protected and those whose is restricted does not turn upon what motivations, intentions, and foresight they have or should reasonably be expected to have. The application of the doctrine of double effect does not, in the standard examples associated with it, generate a pattern of restriction matching the reverse doctrine of double effect. This is no accident. In general, the reverse phenomenon is unlikely to appear in the central cases discussed in the literature because the salient features of the actions considered in these cases have little to do with reactions to others' intentions or intentional activities. The reverse-doctrine phenomenon is more likely to occur when the doctrine of double effect operates at another, higher level—in establishing rules of conduct where it is a salient feature of the conduct regulated or affected by regulation, that it is or is not intentional. As I remarked, this is not the usual context of the doctrine of double effect's application. Given the peculiarity of the reverse doctrine, this may raise questions about whether the doctrine of double effect is properly applied at the level of rule formulation and, more narrowly, whether it is properly directed at actions or consequences that involve others' intentional conduct.

How one answers this question may depend on one's account of the appeal of the doctrine of double effect. If double effect distinguishes between intentional harm and foreseen harm because of something especially troubling about the mental states associated with intentional harm as an end or a means, then one may have doubts about its use at the level of rule formulation. Legal institutions and legislatures do not have unified mental states of those sorts. But, as I have suggested repeatedly, I do not think that this is the only source of the doctrine's appeal. The doctrine may be defended as distinguishing between what sorts of considerations may properly serve as one's rationale for action, may properly guide one's plan or course of action, and may properly serve as the criteria under which actions are recognized as having value. So long as one believes that institutional

Imaged with the Permission of N.Y.U. School of Law

action may be motivated by reasons and that these reasons may have constitutional significance (that is, that some sorts of purpose matter) alongside outcomes, then it is likely that something like the double effect reasoning will have some purchase at the institutional level. There are some ends that the institution may not intentionally pursue, even if their production does not by itself serve as a dispositive disqualification.

Suppose, however, that double effect reasoning in some contexts produces the reverse doctrine effect. Is this an inconsistency? I am inclined to think that it is not. The context of rule formulation is different enough from the context of conduct regulation that there is no contradiction. The doctrine of double effect at use in the context of rule formulation has a different content than the one whose contradiction is contained in the reverse doctrine of double effect, in the context of conduct regulation, that is its product. That is, the intentions that legislators are constitutionally forbidden to act on, and that it is forbidden for legislation to manifest as its purpose, differ from those intentions that are then favored as a consequence of those regulations that conform to these proscriptions. In the speech case, legislators may not intentionally restrict content as such; this helps to produce a rule of conduct that privileges agents' intended harm through speech over their unintended harm. The "intentional" forbidden at the rule-formation stage differs in kind from that privileged at the level of conduct. (Also, it is relevant that the agents who are regulated are not themselves directly bound by most constitutional strictures because of state-action requirements.)

But, though there may not be an inconsistency, there may still be an issue of priority. If the application of a plausible double effect rule at the level of rule formulation conflicts with a rule of legal liability that gives greater weight to intended harm than foreseen harm and so conflicts with familiar and plausible double effect principles of morality, which should give way?

This question also deserves a longer discussion than is feasible here, but I will offer a very quick suggestion. In some contexts, the law has purposive and expressive aims. Some of these expressive aims are directly connected to furthering the norms of interpersonal morality. In criminal law, for instance, a number of aims are pursued through systems of punishment, some of which are expressive and educative in nature. In such cases, there is something especially troublesome about the law enforcing a reverse pattern of responsibility, at least if it does so pervasively and with respect to closely related patterns of behavior. In other situations, I am less sure which level should carry more weight. It may be more important that we

Imaged with the Permission of N.Y.U. School of Law

implement the right reasons when we act together (through collective legislative action) than that we produce a pattern of responsibility that mirrors individual agents' underlying moral responsibility.

C. *Broader Theoretical Implications*

The phenomenon this Article describes—in which the context and level of evaluation may radically alter the normative valence of intention—is both practically and theoretically significant in itself. But it also illustrates a broader lesson about the relationship between legal and moral theory.

There is an implicit tendency among some nonconsequentialist thinkers to approach legal theory as though moral theory were always prior to, and determined the content of, legal theory. We can figure out what *legal* rights and permissions we should have by investigating what *moral* rights and permissions we should have and then lifting or beaming the latter up to the legal level. In this picture, the law only provides a set of guarantees and methods of enforcement—a framework or setting within which we codify the correct moral theory. Of course, there are rough differences—because of transaction costs, concerns about institutional abuse of power, and the role of precedent, there will be some differences between the permissions, prohibitions, and rights that appear in the moral theory and those which we ought to provide legally. But by and large, it is at least a reliable, fruitful starting place for legal theorizing to start by thinking about what holds true at the level of individual moral relations.

The discoveries about intention in this Article provide reason to question this approach. Nonconsequentialist approaches to legal theory do not necessarily generate a system that mirrors moral theory but adds measures of coercive enforcement, making some adjustments along the way for the risks associated with coercion. The contents of our legal rights and permissions may justifiably differ substantially from our moral rights and, in part, this may be due to the application of nonconsequentialist approaches to intention at the legislative level. If we believe the intention or purpose of legislation has special significance, independent of the effects of legislation, and must itself pass evaluative muster, then in some contexts, this may produce a system of legal regulation whose contents place a very different weight on the intention of actors, thereby generating an asymmetry with respect to our moral evaluation of the relevant intentions. As I have argued, these features may be plausible, and this example suggests that the temptation to read the legal theory off the moral theory should be tempered.

Imaged with the Permission of N.Y.U. School of Law

I do not find this surprising. The assumptions that there should be a tight symmetry between our views about the moral relations between individuals in daily life and the contents of legal theory, with the former always determining the latter, undervalues, I suspect, the complexity and independent value of our social, cooperative undertakings. I think that we err in thinking that law is merely a codification device to represent and enforce our individual moral relations amongst each other. We achieve ends together through forms of social cooperation and social organization that have their own value and are not merely modes of protecting or facilitating independently defined individual projects. The independent value of social relations and the systematic nature of law suggest that while the normative standards that regulate them may bear similarities to those that regulate individual moral relations, the contents of both spheres may be driven by a normative theory yet may be, at important points, independent and autonomous from one another.

Obviously, this is another large topic than cannot be thoroughly pursued here. I hope merely to underscore through the examples involving intention and constitutional law that the problems that arise when considering the structure of rights in a legal setting are not easily or correctly disposed of by thinking merely of what each of us owes to the other. The interconnectedness and systematic nature of common social life present distinct challenges and distinct points of interest. I fear that consequentialists have been more sensitive to this feature of law. Nonconsequentialists have not taken it seriously enough, at least not directly, although as these results about double effect suggest, there is much of interest here. This inattention represents both an oversight and an opportunity to engage in a more sustained effort to articulate nonconsequentialist approaches to legal theory.

Imaged with the Permission of N.Y.U. School of Law