ESSAY

FREE SPEECH AND GUILTY MINDS

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It is axiomatic that whether speech is protected turns on whether it poses a serious risk of harm—in Holmes's formulation, a "clear and present danger." If this is correct, then the state of mind, or intent, of the speaker should be irrelevant. Yet First Amendment law makes speaker's intent a factor in the protection of many different kinds of speech. This Essay offers an account of why and how speaker's intent matters for speech protection. It argues that strong intuitions work against imposing strict liability for speech. These intuitions are best explained by an interest in speaker's intent. An autonomy-based account of free speech provides reasons for this interest. Such an account also suggests what kind of intent is necessary before a given speaker may be subject to regulation. Elucidating speaker's intent thus explains a mysterious aspect of First Amendment law and uncovers a new argument for autonomy theories of free speech.

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INTRODUCTION

Should protection for speech depend on the state of mind with which it is said? If a certain statement is likely to incite violence, for instance, should it matter whether the speaker intended for it to do so? If a false statement damages someone's reputation, should it matter whether the speaker knew the statement was false? An incendiary or defamatory statement wreaks the same harm, regardless of the state of mind with which it is said. It would therefore seem unnecessary to consider the speaker's mental state in order to determine whether the speech should be protected from regulation. Speech protection should turn on the potential effects of speech, which, good or ill, bear no necessary relation to the state of mind of the speaker.[1]

Yet throughout First Amendment law, protection for speech often depends on the speaker's state of mind, or, as this Essay will call it, the

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1. See, e.g., New York v. Ferber, 458 U.S. 747, 763 (1982) ("The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (plurality opinion)) (internal quotation marks omitted)); Dennis v. United States, 341 U.S. 494, 510–11 (1951) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (alteration in Supreme Court opinion) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.)) (internal quotation marks omitted)); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (recognizing unprotected speech categories that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); Herndon v. Lowry, 301 U.S. 242, 258–59 (1937) ("[T]he penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."); see also Larry Alexander, Free Speech and Speaker's Intent, 12 Const. Comment. 21, 21 (1995) [hereinafter Alexander, Speaker's Intent] (arguing one cannot "locat[e] the 'value' of speech in the intentions of its authors"); Frederick Schauer, Intentions, Conventions, and the First Amendment: The Case of Cross-Burning, 2003 Sup. Ct. Rev. 197, 218–21 [hereinafter Schauer, Intentions, Conventions] (arguing First Amendment protection of speech turns on value or harm of speech, not on intentions of speakers).

Although the Supreme Court has recently distanced itself from the categorical balancing approach it so obviously took to speech protection for so many decades, its new approach, too, does not admit of an obvious role for speaker's intent. See United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) ("From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations." (alteration in *Stevens*) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)) (internal quotation marks omitted)).

speaker's intent.[2] The same statement may be protected advocacy or unprotected incitement, depending on whether the speaker intended to cause imminent lawlessness or violence.[3] A threat is unprotected only if the speaker intended to intimidate.[4] Distribution of either obscenity or child pornography is unprotected only if the distributor was aware of or reckless about the factual contents of the materials.[5] Some false and defamatory statements are unprotected only if the speaker knew they were false or had clear reason to believe they were.[6] Other examples abound.[7] If speaker's intent does not relate to the harm speech poses, then what explains this pervasive interest in the contents of speakers' minds?[8]

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2. In this Essay, the term "intent" refers generally to the mental state of the speaker, in the same way that the criminal law uses the terms "mens rea," "state of mind," "mental state," "general intent," and "intent." One type of mental state is "specific intent," which means the speaker intends a certain action, circumstance, or result. Others are "lesser" mental states, such as knowledge or recklessness. "Speaker's intent" here refers to all such descriptions of a speaker's state of mind.

On the subject of terminology, this Essay will use the term "speech" to refer to the various forms of expression typically encompassed in discussions of "freedom of speech."

3. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding unprotected only speech "directed to" inciting imminent violence or lawlessness).

4. Virginia v. Black, 538 U.S. 343, 359–60 (2003) (holding unprotected only statements said "with the intent of placing the victim in fear of bodily harm or death").

5. Osborne v. Ohio, 495 U.S. 103, 113 n.9, 115 (1990) (approving recklessness requirement for distribution of child pornography); *Ferber*, 458 U.S. at 764–65, 774 (finding constitutional state statute criminalizing knowing distribution of child pornography and stating, "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); Smith v. California, 361 U.S. 147, 152–55 (1959) (finding unconstitutional statute criminalizing distribution of obscenity without scienter requirement).

6. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing this standard for civil libel regarding public officials); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40, 342 (1974) (extending *Sullivan* standard to civil libel regarding public figures); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (extending *Sullivan* standard to criminal libel regarding public officials). Some other false and defamatory statements are unprotected if said negligently and protected if said without fault. *Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

7. See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (approving fraud standard requiring knowledge of falsity and intent to deceive); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 46 (1988) (requiring actual malice for public figure's claim of intentional infliction of emotional distress); Keyishian v. Bd. of Regents, 385 U.S. 589, 606–07 (1967) (protecting members of Communist organization against penalties unless they had specific intent to further unlawful aims of organization); Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (applying actual-malice standard to claim for invasion of privacy). For a survey of intent requirements in First Amendment law, see Leslie Kendrick, Speech, Intent, and the Chilling Effect, 54 Wm. & Mary L. Rev. 1633, 1640–48 (2013) [hereinafter Kendrick, Speech].

8. Although interest in speaker's intent pervades First Amendment law, this Essay does not claim that it is ubiquitous. It is not clear that the test for "fighting words" has an

The few commentators to consider the problem comprehensively have concluded that intent is, strictly speaking, irrelevant.[9] If intent requirements are justified at all, they are justified "derivatively and instrumentally" because they help ensure that valuable speech is not chilled by regulations targeting unprotected speech.[10] For example, the "actual malice" standard of *New York Times Co. v. Sullivan* protects certain false and defamatory statements, so long as the speaker was not aware of or reckless about falsity.[11] On the instrumental view, this inquiry into the speaker's state of mind is justifiable only as a prophylactic means to ensure "breathing space" for true statements.[12] False and defamatory statements do not deserve protection themselves, but imposing strict liability could chill valuable true statements whose speakers are not absolutely certain of their facts.[13]

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intent requirement. Kendrick, Speech, supra note 7, at 1647. As explained later, false and misleading commercial speech may be restricted without attention to the speaker's intent—though there are arguably intent-related reasons for this particular rule. See infra notes 136–137 and accompanying text (explaining commercial speakers' motivations justify exclusive focus on listener interests). While not universal, then, attention to speaker's intent is pervasive enough to require explanation.

9. See Larry Alexander, Is There a Right of Freedom of Expression? 8–10 (2005) [hereinafter Alexander, Freedom of Expression] (arguing speaker's mental state is not intrinsically relevant to speech protection); Frederick Schauer, Free Speech: A Philosophical Enquiry 159–60 (1982) [hereinafter Schauer, Free Speech] (same); Alexander, Speaker's Intent, supra note 1, at 25 (same); Larry Alexander, Low Value Speech, 83 Nw. U. L. Rev. 547, 548 (1989) (same); Larry Alexander, Redish on Freedom of Speech, 107 Nw. U. L. Rev. 593, 596 (2013) (same); Martin H. Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 Calif. L. Rev. 1159, 1178 (1982) (same); Martin H. Redish, Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era, 73 U. Cin. L. Rev. 9, 62 (2004) (same); Schauer, Intentions, Conventions, supra note 1, at 217 & n.67 (same); cf. Kent Greenawalt, Speech, Crime, and the Uses of Language 47 (1989) ("[M]otives are not usually crucial for free speech . . . ."). For arguments for attention to speaker's intent in specific contexts, see id. at 48 (arguing speakers' beliefs should matter in regulation of false speech); Seana Valentine Shiffrin, Speech, Death, and Double Effect, 78 N.Y.U. L. Rev. 1135, 1156–64 (2003) (offering justifications for specific intent in incitement context); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 338–39 (1991) (arguing mental state should matter in regulation of false speech).

10. Alexander, Speaker's Intent, supra note 1, at 25; see also Schauer, Free Speech, supra note 9, at 159–60 ("The interest of the speaker is recognized not primarily as an end but only instrumentally to the public interest in the ideas presented.").

11. 376 U.S. at 279–80 (applying actual-malice standard to statements about public officials in their official capacities); see also *Gertz*, 418 U.S. at 340 (extending actual-malice standard to statements about public figures and applying fault standard to statements about private figures).

12. *Sullivan*, 376 U.S. at 272 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)). For more on the chilling-effect rationale, see infra Part II.C.

13. See *Gertz*, 418 U.S. at 340 ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

The chilling effect, however, is a roundabout justification for such a persistent feature of the law.[14] It is also an implausible basis for many intent requirements.[15] The weaknesses of the chilling effect leave a major feature of First Amendment law without a convincing justification. The question thus remains whether intent requirements may be justified other than instrumentally—whether speaker's intent matters in its own right. This Essay argues that it does.

The argument for speaker's intent begins with the intuition that it often seems wrong to hold speakers strictly liable for speech-related harms. This intuition cannot be fully accounted for by other principles, such as those of tort and criminal law.[16] Nor can it be fully explained by speaker-insensitive free-speech principles, such as the chilling effect.[17] Instead, intuitions across multiple cases are best explained by a sense that strict liability for speech-related harms is unfair to the speaker as a speaker. If strict liability seems wrong for speaker-oriented reasons, then speaker's intent must matter for the protection of speech.

Furthermore, this conclusion both supports and is supported by an existing category of free-speech theory—namely, autonomy theories. Autonomy theories hold that people's status as autonomous agents capable of forming thoughts and beliefs for themselves generates reasons to give speech special protection from regulation.[18] Autonomy theories explain why strict liability would be inappropriate for speech, regardless of what principles govern other areas of law. The autonomy account also

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14. See infra Part II.C (arguing speaker's intent only instrumentally relevant under chilling-effect rationale). Similarly, Fred Schauer has posited:

> [The specific-intent requirement for threats may be] a purely prophylactic measure designed to ensure that threats not likely to have been taken seriously will not be subject to legal liability, but such an approach seems rather an indirect way of achieving that end given the irrelevance except in an evidentiary way of the likelihood of the threatened act actually occurring. If we are concerned with erecting a buffer zone around the concept of a threat, there are ways of achieving those ends that are much less exercises in indirection, of which the most obvious is perhaps simply to have a more precise definition of what is to count as a threat in the first place.

Schauer, Intentions, Conventions, supra note 1, at 217.

15. See Kendrick, Speech, supra note 7, at 1683–84 (arguing chilling effect cannot explain existing intent requirements and is generally too soft a justification to explain choice of one intent requirement over another).

16. See infra Part II.A (arguing intuition against imposing strict liability on speech is separable from tort- and criminal-law principles).

17. Here, "speaker-insensitive free-speech principles" are reasons to protect speech that do not turn on the interests of speakers. The chilling effect is an example, because one need not take speaker interests into account to conclude that deterrence of speech is detrimental to the interests of listeners and society at large in having free access to information.

18. See infra Part III.A–B (describing relationship between autonomy theory and speaker's interest).

suggests what level of intent might be necessary to make regulation permissible.

Of course, autonomy theories of free speech are themselves controversial, and, unsurprisingly, those commentators who reject the inherent importance of speaker's intent tend also to reject autonomy theories.[19] This Essay questions that position by suggesting that the intuitive appeal of speaker's intent is not so easy to dismiss. More importantly, however, this Essay seeks to engage with two other groups of readers. First, it asks those who have never thoroughly considered speaker's intent to analyze its connection to speech protection. Those who find a persuasive connection should consider autonomy theories anew. Second, those who already ascribe to an autonomy theory may find that their theory should lead them to consider speaker's intent important to speech protection.

The argument proceeds in four parts. Part I introduces the problem of speaker's intent. Part II builds the case for speaker-oriented intuitions against strict liability for speech. The argument takes three different tacks, with hypothetical scenarios in each, in order to strip away other principles that cut against strict liability. The aim is to demonstrate that speech cases involve a speech-specific intuition that a speaker's state of mind helps to determine whether she should be held liable for her speech. Part III argues that an autonomy-based account of free speech makes sense of these intuitions in a persuasive and economical way. Part IV provides tentative answers to a further question: if strict liability for speech is often inappropriate, what intent requirements are necessary? An autonomy account offers some guidance in this regard.

I. THE PROBLEM OF SPEAKER'S INTENT

At the outset, a clarification is necessary. The question here is about the relation of speech protection to the mental state of the *speaker*. Many constitutional standards, including free-speech standards, ask about the objects or purposes of *governmental actors*. These include the Establishment Clause's "secular purpose" requirement,[20] heightened forms of scrutiny in the Equal Protection context,[21] and the deep suspi-

19. See, e.g., Alexander, Freedom of Expression, supra note 9, at 175–76 (arguing autonomy theories of free speech inevitably collapse into contradiction).

20. Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971) (inquiring whether statutes evinced legislative purpose of advancing religion).

21. See, e.g., Hernandez v. New York, 500 U.S. 352, 363–64 (1991) (holding courts may at times properly infer invidious discriminatory purpose from facts); McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (requiring showing that legislature adopted statute "because of" discriminatory effect in order to establish discriminatory purpose); Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (requiring showing that legislature took action at least in part because of discriminatory effect in order to establish invidious discriminatory purpose); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (describing inquiry into whether discriminatory purpose was motivating factor).

cion toward "content-based" speech regulation.[22] These inquiries ensure that certain impermissible considerations do not form the basis of governmental action. Much has been written about governmental "purpose" in such contexts.[23]

Here, the issue is not the reasons of the regulators but the minds of the regulated. This is a much rarer consideration in constitutional law and a more mysterious one.[24] Some of the most important First Amendment scholars, including Fred Schauer, Larry Alexander, and Martin Redish, have argued that intent is not intrinsically relevant to

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22. See, e.g., Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

23. For the speech context, see generally Laurence H. Tribe, American Constitutional Law § 12-3, at 794 (2d ed. 1988) (describing inquiry into government's reasons for regulating); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1496–97 (1975) [hereinafter Ely, Flag Desecration] (same); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996) (same); Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 235 (2012) [hereinafter Kendrick, Content Discrimination] (same); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 190 (1983) (same).

24. Examples do seem rare. A nearby analogue is the First Amendment requirement that, in order to receive protection under the Free Exercise Clause, a claimant must sincerely hold the religious belief in question. See, e.g., Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833–34 (1989) (holding claimant's sincerely held belief enabled him to claim protection). Another potential example is the due process rule that confessions must be voluntary in order to be admissible. See, e.g., Dickerson v. United States, 530 U.S. 428, 433 (2000) (noting only voluntary confessions are admitted into evidence because coerced ones are untrustworthy). This inquiry is ultimately about the subjective experience of the defendant but in practice turns on external indicia of likely coercion. See id. at 433–39 (stating test for voluntariness requires examination of external factors such as presence of *Miranda* warning, characteristics of accused, and details of investigation). Another potential example is the Supreme Court's interpretation of federal criminal statutes to require mens rea on the part of the criminal actor. See, e.g., Staples v. United States, 511 U.S. 600, 604–05 (1994) (discussing interpretive presumption). This interpretive presumption is a creature of common law and has not consistently been characterized as a constitutional requirement. Compare Brogan v. United States, 522 U.S. 398, 406 (1998) (describing "common-law requirement of mens rea"), *Staples*, 511 U.S. at 605–06 (noting "common-law rule requiring mens rea"), and Morissette v. United States, 342 U.S. 246, 251 (1952) (tracing principle at least as far as "English common law in the Eighteenth Century"), with United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." (citations omitted)).

Other apparent examples are actually about when a *government* actor's conduct violates a private person's constitutional rights, not about a private person's mental state. Examples are qualified immunity standards under 42 U.S.C. § 1983 (2006), see Pearson v. Callahan, 129 S. Ct. 808, 815 (2009), and due process violations predicated on officials' bad-faith failure to preserve evidence, see Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

speech protection.[25] Generally speaking, speech is protected unless it poses extremely serious harm that is not mitigated by important value.[26] Speaker's intent bears no necessary relation to either the harm of speech or its value.[27] Speaker's intent, therefore, is not essential to speech protection.

On this view, the real mystery is how an irrelevant concern infiltrated so many aspects of First Amendment law. One plausible answer is that it did so, first, accidentally and, second, instrumentally. It did so accidentally in the early days of First Amendment jurisprudence, when Justice Holmes analogized speech to criminal attempt in *Schenck v. United States*.[28] Charles Schenck was convicted of conspiring to violate the Espionage Act by distributing Socialist leaflets critical of American efforts in World War I.[29] Writing for a unanimous Court in rejecting Schenck's First Amendment claim, Justice Holmes presumed that Schenck could have been punished if the leaflets had succeeded in persuading readers to resist the draft.[30] Following the logic of criminal attempt, Holmes argued that Schenck's actions should likewise be punishable even if the leaflets persuaded no one: "If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[31]

In *Schenck*, Holmes used the attempt analogy to uphold a conviction. The next Term, he used the same analogy to argue that another speaker's conviction should be overturned. Like Schenck, Jacob Abrams was convicted of conspiring to violate the Espionage Act by distributing

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25. See supra note 9 and accompanying text (citing literature asserting irrelevance of intent).

26. See supra note 1 (providing relevant background literature).

27. See Alexander, Speaker's Intent, supra note 1, at 21–22 ("Whatever the author intends to communicate by her speech, it is always possible and indeed highly likely that the ideas the audience receives will be different."); Schauer, Intentions, Conventions, supra note 1, at 218–21 (arguing case law does not treat speaker's intent as requirement for unprotected speech).

28. 249 U.S. 47, 52 (1919). The fact that Holmes's analysis in *Schenck* drew upon his views of criminal attempt has been well established and explored. See, e.g., Edward J. Bloustein, Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment, 74 Cornell L. Rev. 1118, 1128 (1989) ("[T]he somewhat impenetrable conclusion from *Schenck* was a variant of Holmes's . . . theory of attempts . . . ."); David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1271–73 (1983) ("[Holmes's] analyses of criminal attempts and torts [in *The Common Law*] most directly foreshadow his opinions almost forty years later in *Schenck* [and others]."); G. Edward White, Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension, 80 Calif. L. Rev. 391, 414 (1992) ("Holmes treated the facts of *Schenck* as an attempt to violate the Espionage Act, analogous to an attempt at criminal law.").

29. *Schenck*, 249 U.S. at 52.

30. Id. ("It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.").

31. Id.

leaflets critical of the war effort.[32] Like Schenck, he failed to persuade a majority of the Court that the First Amendment barred his conviction.[33] But Justice Holmes, dissenting, argued that the First Amendment required more than had been proved. "[O]nly the present danger of immediate evil *or* an intent to bring it about" could justify punishment of the defendant's speech.[34] Because no one could imagine that Abrams's "silly leaflet" actually posed any danger, he could only be punished if he intended to cause harm.[35] This was so because the danger of speech depends upon further acts by other people. If the defendant intended for his listeners to commit further, harmful acts, then he could be punished for that risk. But if he did not have this intention, and instead hoped to achieve some other object not dependent upon causing harm, then he could not be punished for the risk of harmful acts by others.[36] Abrams, Holmes concluded, should not be punished, because he might have been trying only to prevent interference with the Russian revolution, without seeking to obstruct the American war effort.[37]

This introduction of speaker's intent into First Amendment law was "accidental" in that it was the product of a single analogy to criminal law by a single Justice, an analogy elliptically drawn and never thoroughly explored by any member of the Court. Moreover, in *Abrams*, Holmes posited intent not as a *requirement* but as an *alternative* to the existence of a "present danger of immediate evil," which apparently licensed punishment without regard for the speaker's state of mind.[38] This approach, it is fair to say, raises as many questions as it answers. One might conclude, as

32. Abrams v. United States, 250 U.S. 616, 616–17 (1919).

33. Id. at 618–19.

34. Id. at 628 (Holmes, J., dissenting) (emphasis added).

35. Id.

36. Id. ("[Intent] is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked.").

37. Id.

38. Id. Indeed, a further oddity of Holmes's introducing intent as a feature of speech protection is that his broader conception of attempt held that subjective intentions did not matter; only the dangerous tendencies of an act did. See Oliver Wendell Holmes, Jr., The Common Law 62 (Belknap Press 2009) (1881) ("Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them."); see also Rabban, supra note 28, at 1271–73 (describing Holmes's disregard of intent and preference for objective standards in determining culpability). In *Abrams*, Holmes seems to keep a place for dangerous tendencies—in the form of a "present danger of immediate evil"—while also deviating from his usual view by suggesting that the subjective intentions of the speaker can matter. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting). How exactly to characterize this view is a matter of some debate. Compare Bloustein, supra note 28, at 1143–45 (arguing *Abrams* best articulated Holmes's general view of criminal attempt), with Rabban, supra note 28, at 1306–07 (arguing earlier cases reflected Holmes's general view, from which *Abrams* departed). For present purposes, these questions offer further proof that Holmes's analogy was both complex and underexplained.

Gerald Gunther did, "What 'intent' had to do with a constitutional test purportedly focusing on the consequences of speech was never made clear, here or in later cases."[39]

References to something like Holmes's view have occurred intermittently over the years. For example, the Court deemed it unconstitutional to punish participation in a Communist Party meeting when neither the meeting nor the individual participant had any unlawful purpose.[40] In *Garrison v. Louisiana*, the Court suggested that the state of mind behind some false statements rendered them less worthy of protection, because "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[41] Beyond this bare claim, however, the Court offered no more elaboration.

Second, speaker's intent entered First Amendment law instrumentally when the Court identified the chilling effect as a major free-speech issue. Beginning in the mid-twentieth century, in several areas the Court worried that legal rules targeting unprotected speech would have an undesirable chilling effect on protected speech. To take the most famous example, one might posit that, on the merits, all false and defamatory statements should be unprotected, because of the harm they cause.[42] But punishing all false statements would chill true statements whose speakers are not certain of their truth.[43] The remedy for this chilling effect is to impose an intent requirement—in this case, "actual malice," defined as knowledge or serious recklessness—to ensure that the law reaches only people who have notice that they are making false and defamatory statements.[44] This creates "breathing space" for protected speech.[45] Across several areas, the Court introduced various intent requirements expressly

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39. Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 737 (1975).

40. See, e.g., Herndon v. Lowry, 301 U.S. 242, 258–59, 263–64 (1937) (concluding punishment for participation in Communist meeting violated free-speech and assembly rights); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (invoking First Amendment to conclude "peaceable assembly for lawful discussion cannot be made a crime"); Fiske v. Kansas, 274 U.S. 380, 386–87 (1927) (concluding conviction in absence of any evidence of advocacy of crime violated due process).

41. 379 U.S. 64, 75 (1964).

42. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

43. Id. at 340–41 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *Sullivan*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'").

44. *Sullivan*, 376 U.S. at 279–80 (internal quotation marks omitted).

45. Id. at 272 (internal quotation marks omitted).

or impliedly designed to combat chilling.[46] For critics of speaker's intent, instrumental applications such as these are its only justified use.[47]

Thus, one could argue that speaker's intent does not matter in itself. It appears in First Amendment law merely through some combination of instrumental reasoning and historical accident. But this view does not explain everything. It is inconsistent with longstanding and pervasive doctrine. And if, with regard to a particular instance of speech, the speaker's state of mind seems directly relevant to whether the speech deserves protection, this approach cannot explain that intuition. To the contrary, it suggests that there is never a good reason for it.

This Essay contends that speaker's intent is often relevant to speech protection. The aim of the next Part is to demonstrate that, as a matter of intuition, intent often seems intrinsically relevant to protection. This intuition suggests perhaps speaker's intent is a feature of First Amendment law neither accidentally nor purely instrumentally.

II. THE CASE FOR SPEAKER'S INTENT

Before testing intuitions about speaker's intent, it may be helpful to situate the inquiry within the larger free-speech landscape. Where free-speech principles operate,[48] it is usually wrong for the government to interfere with communication *because of* the message it conveys.[49] First

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46. See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (approving intent requirement for proving fraud); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) (imposing intent requirement for proving intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (imposing intent requirement for proving invasion of privacy); *Sullivan*, 376 U.S. at 279–80 (imposing intent requirement for proving defamation); Smith v. California, 361 U.S. 147, 148–49, 152–55 (1959) (imposing intent requirement for proving obscenity); Speiser v. Randall, 357 U.S. 513, 526 (1958) (imposing intent requirement for criminalizing Communist affiliation).

47. See Alexander, Speaker's Intent, supra note 1, at 25 (arguing speaker's mental state may matter "derivatively and instrumentally" to prevent chilling but not in itself); Schauer, Intentions, Conventions, supra note 1, at 217–18 (recognizing potential use of intent requirements to prevent chilling while questioning advisability of such requirements).

48. Like all rules, free-speech principles have a particular scope of operation. See, e.g., Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1769–74 (2004) (discussing scope, or "coverage," of First Amendment). Within free-speech theory, there is disagreement about this scope. This project does not require a defense of a particular conception, because the available alternatives largely overlap to create a core in which free-speech principles clearly operate, and the examples employed below derive from this core. To the extent possible, then, this Essay puts aside disagreements about the scope of the right to ask, where it inarguably operates, what is the role of speaker's intent?

49. See, e.g., Tribe, supra note 23, § 12-2, at 790 ("[I]f the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness."); Ely, Flag Desecration,

Amendment doctrine captures this idea with the term "content discrimination."[50] Regulation that targets speech "because of its message, its ideas, its subject matter, or its content" must face strict scrutiny and will usually fail.[51] Regulation for other reasons—say, because speech is noisy or causes congestion—will be judged by more permissive standards.[52] There is a great deal of disagreement about the scope and consistency of content-discrimination doctrine, however, and so this Essay will not use doctrinal terms.[53] The principle at issue is that, within the scope of the free-speech right, it is rarely permissible for the government to interfere with messages *because of what they say*. This is the presumption against *purposeful interference*.

The presumption against purposeful interference is very strong, in part because multiple free-speech theories converge on it.[54] The result is

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supra note 23, at 1497 (identifying critical question as whether regulated harm "grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever").

50. See, e.g., Kendrick, Content Discrimination, supra note 23, at 235; Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 618 (1991) ("Most observers appear to agree with the Court that the special danger in cases of content discrimination lies in the fact that the government's purpose is connected to the 'communicative impact' of the speech regulated.").

51. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); see also Tribe, supra note 23, § 12-2, at 789–90 (explaining regulations targeting expression "because of the specific message or viewpoint" are presumptively unconstitutional).

52. See, e.g., Tribe, supra note 23, § 12-2, at 792–93 (describing lower level of scrutiny for regulations aimed at "noncommunicative" aspects of activity); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) ("[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."). How much scrutiny such regulations should receive will depend on whether one's conception of free speech includes an interest in the *incidental effects* of regulation, as well as a presumption against *purposeful interference*. On some views, a free-speech right should provide some protection against regulations that seriously affect speech opportunities, even when not designed to do so. Although the author has expressed support for this view elsewhere, see Leslie Kendrick, Disclosure and Its Discontents, 27 J.L. & Pol. 575, 575–76 (2012), this Essay sets aside incidental effects to consider the relationship between speaker's intent and purposeful interference.

53. See Kendrick, Content Discrimination, supra note 23, at 241–42 (discussing controversy around definition of content discrimination).

54. Multiple theories suggest that governmental interference with messages because of what they say is highly suspect. For example, many autonomy-based theories hold that a special harm arises when the government acts in order to suppress ideas. See, e.g., Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 618 (1982) [hereinafter Redish, Value of Free Speech] ("Since the concept of self-realization by its very nature does not permit external forces to determine what is a wise decision for the individual to make, it is no more appropriate for external forces to censor what information or opinion the individual may receive in reaching those decisions."); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 213–15 (1972) [hereinafter Scanlon, Theory of Freedom of Expression] (developing "Millian Principle" restricting justifications for purposeful interference with speech); Strauss, supra note 9, at 338 ("[I]f

a principle that permits purposeful governmental interference with messages only upon a showing of extreme circumstances—namely, when the harm posed by a message is especially severe and other remedies are insufficient to address it. Holmes's "clear and present danger" test is the most famous definition of such circumstances.[55]

This Essay is interested in those rare circumstances in which purposeful interference may be permissible. The question is, where extreme circumstances make purposeful interference plausibly acceptable, does the speaker's intent place any additional constraint on regulation? Imagine a statement likely to incite a mob to imminent violence. Such a circumstance could well qualify as a "clear and present

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freedom of speech is to mean anything, it must mean that speech may not be restricted simply because it persuades people to engage in harmful actions."); see also T.M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 534 (1979) [hereinafter Scanlon, Categories of Expression] (modifying "Millian Principle").

Democratic self-governance theorists have a special interest in regulation that deliberately targets political expression, however that category is defined. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 112 (1980) ("If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate.").

Meanwhile, under a variety of essentially liberal moral or political views that are not explicitly centered on either autonomy or democratic self-government, a governmental purpose of interfering with a message specially implicates freedom of expression. See, e.g., Stone, supra note 23, at 212–14 (finding support for prohibition on content-based regulation in anti-intolerance and antipaternalist views of First Amendment); Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones, 90 Cornell L. Rev. 1277, 1304 (2005) (invoking antipaternalism as basis for prohibition on restricting speech for its persuasiveness); Williams, supra note 50, at 617–18, 695 (1991) (finding multiple quasi-liberal justifications for protection against purposeful interference). Larry Alexander argues that any liberal free-speech principle must take the shape of a prohibition on purposeful interference, see Alexander, Freedom of Expression, supra note 9, at 11, but he ultimately concludes that this principle is unsustainable and endorses a consequentialist adoption of content-neutrality within particular spheres, see id. at 186.

Interestingly, even some proponents of a cost-benefit approach have said that purposeful governmental interference with messages should trigger heightened analysis. See, e.g., Daniel A. Farber, Free Speech Without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554, 576–79 (1991) (arguing purposeful interference is more detrimental than other regulation); Richard Posner, Pragmatism Versus Purposivism in First Amendment Analysis, 54 Stan. L. Rev. 737, 739–40 (2002) (arguing cost-benefit analysis should be reserved for questions outside settled "heartland" of First Amendment doctrine, leaving in place heavy presumption against purposeful interference).

55. Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."); see also Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.").

danger" permitting regulation. Should it matter, in addition, whether the speaker *intends* this harmful result?

One difficulty in answering this question is that the law offers several reasons to care about a speaker's state of mind, and it is sometimes hard to distinguish them. The task of this Part is to attempt to disentangle the various arguments in favor of intent to identify the work being done by a speaker-oriented free-speech principle. At times, this endeavor may feel like a search for a trace element. Nevertheless, it is possible to isolate various intuitions in favor of intent and to test how far they go. The process will have three phases. First, it will consider an argument that intent is in fact intrinsically related to harm. Second, it will unwind free-speech intuitions from criminal- and tort-law intuitions. Third, it will distinguish a speaker-oriented free-speech principle from other free-speech principles, most notably the chilling effect.

A. *Intent and Harm*

Some people may have the intuition that intent *is* intrinsically related to the harm speech poses, because a specific intent to cause harm increases the likelihood that harm will occur. T.M. Scanlon has called this the "predictive significance" of intent.[56] But intent's predictive significance seems a weak reason to care about intent as consistently as the law does. It is certainly not an adequate explanation of the role intent currently plays in First Amendment law.

As to the first point, it is far from clear that intent predicts harm strongly and consistently enough to justify its position in the law. A person may intend to shoot an arrow at a target while having little chance of success.[57] Perhaps she might have more of a chance of hitting the target than if she did *not* intend to hit it. But even this is doubtful, in matters of marksmanship and otherwise. Life presents far too many examples of situations where one's ability to do something—for example, to say the right thing—seems inversely proportional to one's intentions of doing it. In any case, even if one is usually more likely to achieve something when one intends it than when one does not, this relative claim offers very little purchase on the question that really matters: how likely is an action to cause harm in an absolute sense? If specific intent only modestly raises the chances that harm will result, then it has little place in defining liability. Perhaps in some cases intent correlates with a serious likelihood of harm, but it does not do so in universal enough a way to justify a general concern with intent.

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56. T.M. Scanlon, Moral Dimensions 13 (2007) [hereinafter Scanlon, Moral Dimensions].

57. Cf. A.P. Simester & G.R. Sullivan, Criminal Law: Theory and Doctrine 136 (5th ed. 2013) ("If D aims a pistol at V and pulls the trigger, it may not be virtually certain, or even very likely, that V will die—perhaps it is a difficult shot—yet we would normally infer that D's intention was to kill; that he was trying to kill.").

Also, to the extent that the predictive argument works at all, it only applies to specific intent, not to other mental states such as knowledge or recklessness. For example, to say that a speaker knows that his statement is false does not increase the chances that it is false. "Knowledge" describes his mental relationship to an independently existing risk. It does not describe a way in which the contents of his mind make some risk more likely. Such mental states thus have no predictive significance whatsoever. If a mental state other than specific intent seems necessary, it cannot be for predictive reasons.

Secondly, if one aim of this inquiry is to account for the role of speaker's intent in existing law, the predictive account fails to do so. The First Amendment standards at issue here already explicitly assess the likelihood that speech will cause harm. For example, defamation must be false and defamatory.[58] A threat must be objectively threatening.[59] Child pornography must depict actual minors,[60] and obscenity must appeal to the prurient interest and lack serious literary, scientific, or artistic value.[61] The test for unprotected incitement asks whether the speech is *likely* to cause imminent violence or lawlessness, in addition to whether the speaker *intended* for it to do so.[62] Within such standards, intent requirements are hardly necessary for purposes of predicting harm. If they are justified in being there, it must be for other reasons.

B. *On Criminal Law and Tort*

The question thus remains whether speaker's intent bears any intrinsic relation to speech protection. One way to get at an answer is to consider strict liability as a regulatory option. If speaker's intent imposes no constraint, then the government should be able to interfere with a message by imposing strict liability on the speaker. If strict liability seems improper, however, then speaker's intent may play a role in defining speech protection.

A focus on strict liability gets at the binary possibilities of caring about speaker's intent to some degree or not caring about it at all. It will not show, for example, that negligent statements should be protected

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58. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (specifying liability for "defamatory falsehood[s]").

59. Watts v. United States, 394 U.S. 705, 708 (1969) (asserting First Amendment principles demand unprotected statements be true threats, not "political hyperbole").

60. Ashcroft v. Free Speech Coal., 535 U.S. 234, 251–54 (2002) (holding "virtual" child pornography, not depicting actual minors, is protected).

61. Miller v. California, 413 U.S. 15, 24 (1973) (providing test for unprotected obscenity).

62. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

while knowing ones should not. The goal simply is to determine whether speaker's intent plays any intrinsic role in speech protection.

To this end, this section considers situations in which (1) a message is harmful enough to be a plausible candidate for regulation, and (2) the speaker (a) neither intends nor is aware of the harmful feature and (b) is reasonable in lacking awareness. Requirement (1) ensures there is a colorable case for purposeful interference. Requirements (2)(a) and (b) identify scenarios that are "strict liability" under any sense of the term: the speaker has neither specific intent nor knowledge regarding the harmful aspect of the speech and is neither reckless nor negligent about it.

As mentioned previously, a complicating factor is that other legal principles also argue against strict liability and in favor of intent requirements. The criminal law opposes strict liability in many contexts.[63] Tort law, too, employs it only to a limited extent.[64] This section attempts to disentangle those sources of intuitions from free-speech sources.

Incitement offers a starting point. It meets requirement (1) in that it is unprotected as a matter of First Amendment law. *Brandenburg v. Ohio* defines unprotected incitement as speech that is (i) *likely* to trigger violence or illegality in (ii) an *imminent* fashion and is (iii) specifically *intended* to do so.[65] Thus, in the following example, the speaker should receive no protection:

> (A) *The Intentional Inciter.* A speaker encourages an angry crowd to storm a local jail and kill a prisoner inside, with the aim of achieving that result.

The speaker intends to bring about imminent violence and, given the situation, is likely to do so. His expression is therefore unprotected.

If speaker's intent does not matter, however, a strong likelihood that speech will incite imminent violence should be enough to render it unprotected. The intent requirement of *Brandenburg* should be superfluous:

> (B) *The Unknowing Inciter.* A visitor wanders into an angry crowd while wearing a new shirt bearing a design that,

63. See, e.g., United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) ("While strict-liability offenses are not unknown to the criminal law . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status." (citations omitted)); Joshua Dressler, Understanding Criminal Law 148 (2012) ("Support for strict liability is largely limited to its use in the enforcement of public welfare offenses, and is premised on utilitarian grounds.").

64. 2 Dan Dobbs et al., The Law of Torts § 437, at 841–43 (2d ed. 2011) (explaining strict liability "is not so common in tort law" and is generally confined to situations involving abnormally dangerous animals or activities).

65. See supra note 62 (providing relevant language from *Brandenburg*).

> unbeknownst to him, is in that context likely to trigger violence.[66]

If the Unknowing Inciter's shirt is sufficiently likely to provoke the crowd to imminent violence, then, under a listener-based rationale, he should be punishable regardless of his innocence with respect to the message he was sending. This, however, seems incorrect. The speaker did not intend to cause violence. Because he is a visitor, he had no way of knowing that his new shirt communicated an incendiary message, or possibly any message at all. It seems inappropriate to hold him responsible for the effects of his message on the actions of third parties, when he was unaware of and did not intend those effects.

One could object, however, that criminal-law principles are driving the intuition against strict liability.[67] But the criminal law's commitment to intent requirements is hardly absolute. Not only are there "strict liability offenses," but also many offenses require intent with respect to certain elements but not others.[68] The question at issue here is whether speakers may be held strictly liable for the harm-causing aspects of their messages. Thus, one must ask whether the criminal law would require mens rea regarding the "result" element of incendiary speech.

As a descriptive matter, it appears not. Criminal-syndicalism laws did not generally require that subversive action occur or that the speaker

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66. Cf. Richard Sandomir, Yankee Caps Pulled After Protesters See Gang Links in Symbols and Colors, N.Y. Times (Aug. 25, 2007), http://www.nytimes.com/2007/08/25/nyregion/25caps.html (reporting New York Yankees and official cap manufacturer claimed ignorance that some baseball cap designs included gang insignia); Malia Wollan, Fresno State Loves Its Bulldogs, but So Does a Gang, N.Y. Times (Nov. 7, 2013), http://www.nytimes.com/2013/11/10/sports/ncaafootball/fresno-adopts-its-college-team-but-so-does-a-gang.html (reporting sportswear for Fresno State Bulldogs football team was appropriated as gang symbol, leading to shootings and other violence).

67. See Alexander, Speaker's Intent, supra note 1, at 25 (arguing intent matters for criminal-law purposes, not free-speech purposes). The criminal-law literature on strict liability is voluminous. See generally Appraising Strict Liability (A.P. Simester ed., 2005) [hereinafter Appraising Strict Liability] (collecting works on strict liability); R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 229–61 (2007) (discussing contexts in which criminal law imposes strict liability and evaluating when strict liability is warranted); Thomas Nagel, Mortal Questions 31 (1979) (exploring concept of "mortal risk," where actual results of actions after actor's point of decision influence culpability); Andrew Ashworth, Should Strict Criminal Liability Be Removed from All Imprisonable Offences?, 45 Irish Jurist 1, 1 (2010) (arguing strict liability is inconsistent with personal autonomy and unfair in political system that claims to respect individual rights); Tony Honoré, Responsibility and Luck: The Moral Basis of Strict Liability, 104 Law Q. Rev. 530 (1988) (exploring relationship between luck, moral and legal responsibility, and human freedom); Stephen J. Morse, Inevitable Mens Rea, 27 Harv. J.L. & Pub. Pol'y 51 (2003) (arguing mens rea element in criminal law is crucial to understanding of humans as "intentional and potentially rational creatures").

68. See, e.g., A.P. Simester, Is Strict Liability Always Wrong?, *in* Appraising Strict Liability, supra note 67, at 21, 21–22 (noting many offenses are "strict liability" with respect to certain elements).

have any particular state of mind regarding such a result. The law at issue in *Brandenburg v. Ohio*, for example, punished "persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy."[69] Achieving actual violence was not an element of the crime at all, let alone one for which the speaker had to possess specific intent. Nor does it appear that laws like Ohio's were challenged on the basis that they flouted criminal-law principles. Instead, in *Brandenburg*, it was the First Amendment that required the speaker to have specific intent to achieve a particular result.[70]

As a normative matter, one could adopt a view that the criminal law *should* generally take account of an actor's state of mind toward a harmful result.[71] There are two responses. One is simply that the presence of criminal-law principles does not prove the absence of free-speech principles. Both could be working in the same direction. If freedom of speech seems important over and above a general freedom not to have one's actions impeded by the criminal law, then the reasons that generate interest in intent in the criminal law might also apply to speech protection.[72]

A second response is to remove the example from the province of the criminal law. Consider the following:

> (C) *The Tortious Musician*. An entertainer produces a song whose lyrics advocate violence against police officers. A person who recently listened to the song kills a police officer. The victim's family sues the entertainer for wrongful death.[73]

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69. 395 U.S. 444, 448 (1969) (per curiam) (quoting Ohio Rev. Code Ann. § 2923.13 (1958)); see also Whitney v. California, 274 U.S. 357, 359–60 (1927) (describing California Criminal Syndicalism Act), overruled by *Brandenburg*, 395 U.S. at 449.

70. 395 U.S. at 447.

71. See, e.g., Larry Alexander & Kimberly Kessler Ferzan with Stephen Morse, Crime and Culpability: A Theory of Criminal Law 31–41, 67–71 (2009) (arguing criminal culpability is characterized by "insufficient concern," a subjective state comprising criminal-law terms "specific intent," "knowledge," and "recklessness," but not "negligence"). A large part of the scholarly literature in the criminal law is devoted to such normative questions. For examples on the question of strict liability, see supra note 67.

72. See infra note 98 and accompanying text (invoking autonomy theory as one ground for treating speech as distinct from other action, and providing relevant secondary literature).

73. See Dennis R. Martin, The Music of Murder, 2 Wm. & Mary Bill Rts. J. 159, 161–63 (1993) (describing killings allegedly inspired by lyrics of Ice-T and Tupac Shakur and wrongful-death lawsuit against Shakur's record label); see also Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 890–91 (Ct. App. 1982) (involving tort claims arising from minors' rape of nine-year-old girl with soft-drink bottle after viewing movie depicting similar assault); Byers v. Edmondson, 712 So. 2d 681, 684 (La. Ct. App. 1998) (involving tort claim

Once again, imposition of strict liability seems inappropriate. By stipulation, per requirement (2)(b), the Tortious Musician was reasonably unaware of the risk that his song would provoke violence. He meant simply to provide entertainment. It seems unfair to penalize him for the risk that adult third parties would choose to act wrongfully. But this intuition cannot be a product of the criminal law, because criminal liability is not at issue.

One might respond that, this time, tort principles are doing all the work. Tort liability here is governed by the negligence standard, not strict liability.[74] If, consonant with requirement (2)(b), the Tortious Musician acted reasonably in failing to foresee and forestall the risk of harm to police officers, then he did not act negligently and thus should not be liable in tort.[75]

A temporary suspension of requirement (2)(b) (the assumption that the defendants acted reasonably) in the hypothetical will highlight the distinction between tort principles and free-speech principles. Assume the Tortious Musician acted without intent, knowledge, or recklessness but may have behaved negligently. If tort principles are the only force defining liability, then liability will depend on factual determinations. The issues should be essentially the same ones faced by other defendants whose conduct allegedly enabled intentional third-party misconduct, such as the owners of a shopping center whose poorly lit parking lot allegedly facilitated an attack. The defendant should be facing a trial on the questions of breach (whether his behavior was unreasonable) and proximate cause (whether the risk that materialized was of the kind that made his behavior negligent in the first place).[76] Both breach and proxi-

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under negligence and intentional-tort theories brought by paraplegic victim of two eighteen-year-old shooters, who claimed to be inspired by film *Natural Born Killers*).

74. A negligence standard should govern regardless of whether the court views the song as an activity or a product. If it is an activity, the question is whether the person engaged in the activity should have acted to prevent foreseeable intentional wrongdoing toward the victims. If it is a product, the question is whether the risk it posed to third parties amounted to a design defect, an issue governed essentially by a negligence standard. Compare Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 6 (2010) (imposing negligence standard for liability for physical harm), with Restatement (Third) of Torts: Prods. Liab. § 2 (1998) (stating design is defective "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design").

75. See Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7(a) (asserting, under negligence doctrine, "actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm").

76. See id. § 6 cmt. b (outlining "four factual elements of a prima facie claim for negligently causing physical harm: (1) *failure to exercise reasonable care*; (2) factual cause; (3) physical harm; and (4) *harm within the scope of liability (which historically has been called 'proximate cause')*" (emphasis added)).

Tort liability could also turn on duty, which is a question of law. See id. ("The first element, duty, is a question of law for the court to determine . . . ."). The argument would be that the plaintiff's harm resulted from the intentional misconduct of a third party, and

mate cause are questions of fact. Further, in this day and age, reasonable people could well disagree over whether the risk of what are essentially copycat acts is one that an entertainer should foresee and try to avoid. Not only are these factual questions; they are factual questions that judges might be inclined to give to a jury.

If, however, lack of liability seems a matter of law, then free-speech principles are likely at work. Factual questions of breach and proximate cause should be beside the point, because the Tortious Musician should be able to argue that speakers who negligently risk copycat acts should be insulated from liability. They should by definition be differently situated from other actors, such as shopping-center owners. This outcome seems to capture more accurately the intuition against strict liability in this case. It thus speaks to what free speech, not tort, requires.

One final observation is that both tort and criminal law countenance strict liability to some extent, and some speech could be described as having the characteristics that make strict liability appropriate. The criminal law permits strict liability for "regulatory" or "public welfare offenses"[77] said to "result from neglect rather than from positive aggression or invasion of the rights of others, . . . inflict no immediate injury to persons or property but merely create the risk thereof, . . . carry relatively minor penalties, and . . . not cause grave damage to the reputation of the offender."[78] Examples include the sale of dangerous drugs or impure foods.[79]

But the harm in speech often arises not from positive aggression but at most from neglect, and speech is typically penalized not because it actually causes harm but because it risks it. The question then arises why speech should not be able to trigger at least minor penalties because of its risks to the public welfare. Consider:

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the defendant does not owe the plaintiff a duty to protect against such harm. Under modern doctrine, however, a duty is often recognized in such cases and, to the extent it is analyzed, is often determined by the foreseeability of the plaintiff's harm. See id. § 19 ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."). When this occurs, the duty question dissolves into the (factual) issues of breach and proximate cause.

An emphasis on duty may also disguise a concern with free speech. If one is inclined to think that actors engaged in nonexpressive conduct, such as the owners of poorly lit shopping-center parking lots, would owe a duty to protect against intentional misconduct foreseeably arising from their enterprises, then an intuition that a speaker lacks such a duty may be a product of free-speech principles rather than tort principles.

77. See, e.g., United States v. Balint, 258 U.S. 250, 254 (1922) (imposing penalty on seller of narcotics without requiring mens rea with respect to fact that drugs at issue were narcotics).

78. John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1373 (1979).

79. See Morissette v. United States, 342 U.S. 246, 254 (1952) (discussing public-welfare offenses for food and drugs); *Balint*, 258 U.S. at 254 (approving strict liability for sale of narcotics).

(D) *The Realistic Procedural.* A police-procedural television show explains a sophisticated crime in sufficient technical detail to enable viewers to commit it. The governing regulatory authority fines the show's producers for the two minutes of the episode that created this risk.

In this example, the creators of the episode might not have apprehended the risk or might have acted reasonably toward it. And the producers of the show, who are the parties being fined, might not have been aware of the contents at all. Their product nevertheless creates a risk, no less than an adulterated drug or food. Similarly, the offense is not a product of positive aggression but at worst of neglect; it creates a risk rather than definitely generating harm; and it is punished by a regulatory sanction. Moreover, the Supreme Court has explained that public welfare offenses became appropriate when "[w]ide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care."[80] The Realistic Procedural is an example of the same problem in another mass-distribution context.

Yet no matter how strong the parallels, strict liability for the Realistic Procedural seems incorrect. The situation is not far removed from that of the Tortious Musician. It seems unfair to impose strict liability on those who produce or distribute speech because of a risk that inheres in the expression. Yet this conclusion is more cleanly and easily reached as a matter of free speech than a matter of criminal law. As Justice Frankfurter said, in rejecting the regulatory-offense parallel for speech, "[T]here is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain."[81]

On the tort side, tort law holds manufacturers strictly liable for products with manufacturing defects.[82] If a chainsaw comes off the assembly line with a deviation from its intended design, and if the chainsaw injures someone by virtue of that defect, the manufacturer is strictly liable, even if it could not have eliminated the defect through the exercise of reasonable care.[83]

Some speech harms might resemble manufacturing defects. Consider the following:

(E) *The Well-Meaning Defamer.* A citizen speaking at a political rally says that a candidate for city council has recently been

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80. *Morissette*, 342 U.S. at 254.

81. Smith v. California, 361 U.S. 147, 162 (1959) (Frankfurter, J., concurring).

82. See Restatement (Third) of Torts: Prods. Liab. §§ 1, 2(a) (1998) (stating manufacturers are strictly liable for manufacturing defects).

83. Id. § 2(a) (explaining manufacturers are strictly liable for deviations from intended design, even if not avoidable through reasonable care).

> cited for domestic disturbances. The citizen has understandably confused the candidate with another person with a similar name. A few days later, the candidate loses the election and sues the citizen for defamation.[84]

Like the product that deviates from its intended design, the Well-Meaning Defamer's statement contains a latent defect that poses harm—in this case to the subject of the statement, whose reputation has suffered as a result.[85] The "intended design" of the statement could well have been factual accuracy, and the speaker could have had no reason to suspect falsity. Despite this lack of fault, like the manufacturer, the defamatory speaker has produced something that is defective and dangerous.

At common law, of course, defamation was indeed a strict-liability tort.[86] Despite the anachronism of the parallel, just as the manufacturer of a defective product now produces it at his peril, so too at common law the author of a defamatory statement published at his peril.[87] But strict liability for the Well-Meaning Defamer seems quite wrong, and of course it has not been the law since *New York Times Co. v. Sullivan*.[88] There, the Supreme Court decided that the First Amendment required more protection for speech than the common law afforded. Here is an example where tort principles and free-speech principles clearly deviate. If strict liability for the Well-Meaning Defamer seems wrong or unfair, only free-speech principles can explain why.

Once examined, then, criminal-law and tort principles prove to have limitations and implications different from those of free-speech principles. A general intuition that speakers should not be held strictly liable

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84. Cf. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 295–97 (1971) (describing news report mistakenly identifying political candidate as defendant in pending case).

85. Cf. Frederick Schauer, Cable Operators as Editors: Prerogative, Responsibility, and Liability, 17 Hastings Comm. & Ent. L.J. 161, 171–72 (1994) [hereinafter Schauer, Cable Operators] (drawing parallels between chainsaws and information as products before distinguishing them on chilling-effect grounds).

86. See, e.g., Robert D. Sack, Sack on Defamation: Libel, Slander & Related Problems § 5:1 (3d ed. 2002) ("At common law, the defendant was held strictly accountable for the defamatory falsehoods he or she uttered."); 1 Rodney A. Smolla, Law of Defamation § 1:7 (2d ed. Supp. 2013) ("[T]he American common law of defamation was a strict liability tort."); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 905 n.178 (1956) (collecting cases of strict liability). Certain privileges mitigated the rule in some cases, see id. at 917–34, but the dominant standard was strict liability.

87. See Peck v. Tribune Co., 214 U.S. 185, 189 (1909) ("'Whenever a man publishes he publishes at his peril.'" (quoting R v. Woodfall, (1774) 98 Eng. Rep. 914 (K.B.) 916; Lofft 776, 781 (Mansfield L.J.)). Strict liability for defamation of course predated strict liability for manufacturing defects, but at this point the latter is familiar and the former in the United States essentially a memory. Compare N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (rejecting strict liability for defamation), with Restatement (Second) of Torts § 402A (1965) (imposing strict liability for defective products).

88. *Sullivan*, 376 U.S. at 279–80 (imposing actual malice standard for statements about public officials in their official duties).

for the harmful consequences of their speech is unlikely to derive from either of these other sources.

C. *On the Chilling Effect*

At times, then, only free-speech principles are at work, and strict liability continues to seem inappropriate. The Well-Meaning Defamer offers one example. One must however, draw further distinctions *among* free-speech principles. In particular, one must consider the chilling effect.

The chilling effect is a free-speech principle that could explain why strict liability is inappropriate without making speaker's intent intrinsic to speech protection. Speakers who face strict liability will stay silent when uncertain of the accuracy of their information. In this way, valuable true speech will be chilled.[89] Intent requirements (such as actual malice) protect some low-value speech in order to provide "breathing space" for valuable speech.[90] They are useful only in that regard.

One problem with the chilling-effect rationale is its empirical uncertainty. It is difficult to measure chilling and possibly even more difficult to know how to fix it with the level of precision necessary to justify choosing one mental-state requirement over another, such as actual malice over fault.[91] But the primary objection to the chilling effect is that it does not completely capture the intuition against strict liability. The chilling-effect account is about the deterrent effect that liability will have on future speakers. It is not about the justice or injustice of liability for the speaker at hand. If the chilling effect is the only free-speech argument against strict liability, then the intuition against strict liability for the Well-Meaning Defamer is not about the Well-Meaning Defamer at all. The intuition instead is that the Well-Meaning Defamer deserves to be held liable, but the law will spare her for the sake of others who have true information to share. This approach essentially says to such speakers, "You're just lucky there are so many nice speakers out there who actually deserve protection. To keep from chilling them, we will tolerate you."

This is not a complete account of the intuition in this case. Yes, strict liability might deter other speakers, and that might be a reason to reject it. But strict liability also seems incorrect because the speaker herself should not be penalized for making an innocent mistake while engaged

89. See, e.g., Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685, 703–05 (1978) (explaining mechanics of chilling effect).

90. *Sullivan*, 376 U.S. at 272 (internal quotation marks omitted).

91. See, e.g., Richard A. Epstein, Was *New York Times v. Sullivan* Wrong?, 53 U. Chi. L. Rev. 782, 817 (1986) (concluding difficulty with defamation is that "choice of legal principles rests heavily on certain elusive, empirical issues"); Kendrick, Speech, supra note 7, at 1683–84 (describing empirical difficulties of assessing and remedying chilling); Frederick Schauer, The Dilemma of Ignorance: *PGA Tour, Inc. v. Casey Martin*, 2001 Sup. Ct. Rev. 267, 286–87 (noting empirical uncertainty of *Sullivan* rule).

in political discourse. Strict liability seems inappropriate not (or not only) because it will deter future speakers, but because it seems unfair to this one.

Thus, once free-speech principles are isolated, an intuition against strict liability remains. This intuition may be partly explained by the chilling effect, but it also arises from another quarter: from a sense that it is unfair to penalize a speaker whose speech innocently poses a risk. This sense must derive from a speaker-oriented free-speech principle, one that regards the speaker not merely as a conduit for valuable information but as a participant whose own interests deserve some amount of regard.

* * *

This Part has offered various scenarios involving strict liability for the harms posed by speech. These examples offer a wide variety of circumstances in which strict liability seems incorrect. They also suggest that this intuition is best explained by the view that speaker's intent plays a role in speech protection. Other principles, such as criminal law, tort, and the chilling effect, also argue against strict liability, but they do not account for the underlying intuitions as economically or persuasively. If objections to strict liability in any one of the above scenarios seem best explained by an interest in speaker's intent, then speaker's intent may be playing a role in defining speech protection. To the extent that strict liability has seemed incorrect across a number of scenarios, it is worth noting that what these scenarios have in common is that they involve speakers being held strictly liable for expression. Perhaps it is this feature, rather than a mosaic of other principles, that best explains the intuitions across these cases.

III. WHY INTENT MATTERS

So far this Essay has argued that intuitions against strict liability might be justified by a free-speech principle that is independent of both the chilling effect and listeners' claims against purposeful interference. Although other free-speech theories could perhaps generate such a principle, it most clearly and readily derives from a conception of freedom of speech that emphasizes the significance of speaker and listener autonomy.

A. *The Autonomy Account*

A number of theorists have made autonomy-based claims for free speech.[92] Here, "autonomy" does not mean anything as elaborate as self-

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92. See, e.g., C. Edwin Baker, Autonomy and Free Speech, 27 Const. Comment. 251, 254 (2011) (positing conception of formal autonomy that includes "right to seek to persuade or unite or associate with others—or to offend, expose, condemn, or disassociate with them"); Redish, Value of Free Speech, supra note 54, at 593 (arguing free speech

governance or as narrow as personal decisionmaking (unless one characterizes every effort at thought and understanding as a decision). Rather, "autonomy" refers to the more basic sense of individuals' capacities, rational and otherwise, to form thoughts and beliefs for themselves.[93] These capacities may generate other important qualities, including moral agency, self-governance, and the capacity for and interest in democratic participation. But one need not rest on these other capacities to identify a special relationship between speech and autonomy. At a fundamental level, freedom of speech both facilitates and respects individuals' capacities to form thoughts and beliefs.[94] Freedom of speech facilitates these capacities because free and open communication enables people to receive ideas and to develop their own thoughts. It respects autonomy by recognizing individuals as agents capable of forming and expressing their own thoughts and views.

When the government purposefully restricts certain speech because of its message, it both hinders and disrespects listeners' capacities to process competing messages and form views for themselves.[95] But purposeful interference also hinders and disrespects speakers' capacities.[96] Speakers use expression to develop and articulate their own

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serves "individual self-realization," a value seemingly encompassing autonomy); Scanlon, Theory of Freedom of Expression, supra note 54, at 213–14 (deriving protection for speech from citizens' self-conception as "equal, autonomous, rational" agents); Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. 283, 287 (2011) [hereinafter Shiffrin, Thinker-Based Approach] (developing free-speech theory that "takes to be central the individual agent's interest in the protection of the free development and operation of her mind"); Strauss, supra note 9, at 354 (developing "persuasion principle" forbidding interference with certain speech on basis of autonomy).

93. See, e.g., Scanlon, Theory of Freedom of Expression, supra note 54, at 215 (advancing conception of individuals as "sovereign in deciding what to believe and in weighing competing reasons for action"); Shiffrin, Thinker-Based Approach, supra note 92, at 290 ("[R]ational agents have an interest in forming thoughts, beliefs, practical judgments, intentions and other mental contents on the basis of reasons, perceptions, and reactions through processes that, in the main and over the long term, are independent of distortive influences.").

94. See, e.g., Shiffrin, Thinker-Based Approach, supra note 92, at 291 (arguing free speech is necessary condition for realization of individuals' interests as thinkers).

95. See, e.g., Scanlon, Theory of Freedom of Expression, supra note 54, at 212–13 (arguing purposeful interference based on message-related harm is prohibited by due accord for listeners); Strauss, supra note 9, at 355–56 (arguing purposeful interference designed to influence individuals' behavior violates their autonomy).

96. Seana Shiffrin has argued that both speaker and listener interests are facets of a more fundamental thinker-based interest in freedom of expression. See Shiffrin, Thinker-Based Approach, supra note 92, at 283 (arguing "more plausible autonomy theory of freedom of speech arises from taking the free thinker as the central figure in a free speech theory"). This Essay identifies listeners and speakers in order to emphasize the role of speaker interests but acknowledges that the speaker/listener dichotomy risks mischaracterizing communication as a tidy collection of inputs and outputs, rather than a process in which both speaking and listening are constitutive of more fundamental processes of thought.

thoughts and beliefs. Purposeful interference interrupts a speaker's own thought and communication processes and substitutes a process whose terms have been determined by the government. Therefore, purposeful interference with expression hinders and disrespects the capacities of both listeners and speakers. The fact that a particular instance of purposeful interference affects either speakers or listeners is sufficient to implicate autonomy-based free-speech principles, and of course most instances of interference will affect both.

Like all free-speech theories, these premises are contested, and this Essay will not pause to defend what has been ably defended by others.[97] Nor does this Essay claim that autonomy is the only legitimate grounding for a free-speech right. Its contention, rather, is that autonomy is one sufficient basis for discussing free speech as an idea distinct from a general right of liberty that comprehensively constrains governmental action.[98] There may be other sufficient bases for doing so, such that the most accurate account of free speech is pluralistic.[99]

But this Essay does suggest that the autonomy account bears a natural relationship to speaker's intent. An autonomy theory finds some support in intuitions in favor of speaker's intent and in the doctrines that make speaker's intent a factor in speech protection.[100] Meanwhile, intuitions regarding speaker's intent find some justification in the autonomy

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In addition to the interests of speakers and listeners, Scanlon has noted that freedom of expression also involves the interests of third parties who are, in a given speech transaction, neither speakers nor listeners. See Scanlon, Categories of Expression, supra note 54, at 527–28 ("A bystander's interests may be affected simply by the fact that the audience has acquired new beliefs if, for example, they are beliefs about the moral character of the bystander. More commonly, bystanders are affected when expression promotes changes in the audience's subsequent behavior.").

97. See, e.g., supra note 92 (citing sources proposing autonomy-based claims for free speech).

98. On the importance of distinguishing freedom of speech from a general liberty right, see, e.g., Greenawalt, supra note 9, at 9–11 (explaining necessity of distinguishing speech protection from "minimal principle of liberty" that would protect innocuous conduct, including speech); Frederick Schauer, Must Speech Be Special?, 78 Nw. U. L. Rev. 1284, 1301–06 (1983) [hereinafter Schauer, Must Speech Be Special?] (arguing free-speech theory must plausibly distinguish speech from noncommunicative exercises of liberty). On autonomy as a value that distinguishes free speech from a general liberty right, see, e.g., Greenawalt, supra note 9, at 31–34 (identifying autonomy as one of several values capable of distinguishing free speech). But see Lawrence Alexander & Paul Horton, The Impossibility of a Free Speech Principle, 78 Nw. U. L. Rev. 1319, 1346–52 (1983) (rejecting autonomy as value that sufficiently distinguishes free speech). On the extent to which a free-speech right must be distinct, see Leslie Kendrick, Speech as Special 11–15 (Feb. 26, 2013) (unpublished manuscript) (on file with the *Columbia Law Review*).

99. On the possibility of a pluralistic free-speech theory, see, e.g., Greenawalt, supra note 9, at 9–16 (arguing multiple consequentialist and nonconsequentialist values may justify free speech); Steven H. Shiffrin, The First Amendment, Democracy, and Romance 9–45 (1990) (arguing for eclectic approach to justifications for free speech).

100. See supra notes 2–7 and accompanying text (summarizing doctrines incorporating speaker's intent).

account of free speech. The appeal of the autonomy account and the appeal of speaker's intent are at once mutually reinforcing and mutually refining.

B. *The Interest in Free and Open Communication*

An autonomy account of free speech offers at least one reason that strict liability for speakers is wrongful.[101] On an autonomy view, free and open communication facilitates individuals' cognitive capacities and recognizes their status as agents capable of forming thoughts and beliefs. Even where the speaker's immediate aims are noisome or inane, communication deserves special protection because it is both the raw material out of which individuals form thoughts and beliefs and the finished product through which they share them. Meanwhile, listeners have an interest in receiving communication about the thoughts and beliefs of others: they have a claim to process this information and to use it to facilitate formation of their own thoughts and beliefs. Thus, speakers and listeners share an *interest in free and open communication.*

The immediate focus here, however, is on the *speaker's* interest. An important implication of this interest is that purposeful interference with speakers' communicative projects will rarely be justified. Interference that is motivated by the expressive content of speech—by the message that it is communicating—implies that the thoughts expressed in the speech are repugnant, disfavored, or dangerous and should be regulated on this basis. Conclusions of such kinds risk inadequate regard for both speakers' capacities as autonomous agents and the importance of communication to their formation of thoughts and beliefs. Purposeful interference should therefore be permitted only when absolutely necessary, and it should be consistent with recognition of the attributes that make free speech important.

Strict liability does not show proper regard for speakers' interest in free and open communication. Strict liability penalizes a speaker for an unintended aspect of her message and disregards her actual communicative projects. It reaches speakers who do not intend harm and who are reasonably unaware of the harmful aspects of their speech. Such speakers

101. Another reason may be that the imposition of strict liability creates *systematic uncertainty* about liability, which undermines speakers' ability to engage in free communication. This argument resembles a chilling-effect argument, but the harm in a chilling-effect argument is the chilling effect itself: the deterrence of expression. In contrast, systematic uncertainty suggests that the threat of liability is a wrong to speakers, quite apart from whether they ultimately decide to risk speaking. This Essay does not explore this objection to strict liability in the main text, however, because it seems best understood as an incidental effect of speech regulation, rather than a variety of purposeful interference. The state does not intend to create systematic uncertainty about valuable expression. Instead, systematic uncertainty is a side effect of the state's attempts to regulate harmful expression. This issue is thus distinguishable from the question in the main text of why strict liability seems improper as a form of purposeful interference.

have no relation to the aspect of their speech for which they are being penalized. They also have personal communicative aims that reflect the reasons that communication is important and thus are deserving of respect. Thus, for example, the Well-Meaning Defamer sought to supply information pertinent to a political debate.[102] Such communicative projects represent efforts to engage with others in the interest of articulating and developing thoughts and beliefs. To penalize speakers for ends they do not have, while disregarding their actual communicative projects, fails to accord them proper regard as autonomous agents whose communication is central to that status.

The speaker's interest in free and open communication also explains why the Unknowing Inciter should not be penalized for his t-shirt.[103] In this case, the alleged speaker did not mean to communicate a message and was not aware he was doing so. The government, however, is attributing a message to his behavior and penalizing him for it. This purposeful interference shows insufficient regard for the Unknowing Inciter as an agent who may choose to speak *and* may choose *not* to. Strict liability may thus show disregard for speech-related interests even when applied to a nonspeaker.

One important qualification: strict liability only implicates the interest in free and open communication in this way when it is imposed for harm arising from the message of speech. Thus, for example, a law prohibiting the transport of obscene material across state lines, which imposes strict liability for the element "across state lines," does not for that reason fail to show proper regard for speakers as speakers. This element of the offense does not target speech for its harmfulness; it gives a particular authority jurisdiction over the offense. It thus does not implicate this autonomy objection.

This qualification applies to speech-related harms that do not arise out of what the speech communicates. One example is child pornography, where the primary harm is the abuse of children in production, not the cognitive import of the message.[104] Other examples involve violations of agreements about information, such as violations of duties of confidentiality, nondisclosure agreements, or other contracts or promises, and violations of intellectual-property protections. Violations of privacy also fall within this category, because, analogously to explicit contracts of confidentiality, they upend societal expectations about what types of information are shielded from disclosure. In these cases, harm resides in a speaker's violation of the information restriction, quite apart from

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102. See supra note 84 and accompanying text (discussing Well-Meaning Defamer).

103. See supra note 66 and accompanying text (discussing Unknowing Inciter).

104. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 251–54 (2002) (holding "virtual" child pornography—which does not depict actual minors—protected because, although it may be used by pedophiles to solicit children or to increase pedophiles' interest in child abuse, it does not involve abuse of actual minors).

whether the speech causes further harm through its message. Dissemination of, say, the lyrics to a pop song would cause no harm if they were not under copyright. Any copyright-related harm is not intrinsic to the message of the lyrics but arises from the property restriction that surrounds them. This type of harm is distinct from message-related harm, where the message itself causes harmful reactions or enables people to pursue harmful projects. Of course, some speech imposes both message-related and non-message-related harm.[105]

When strict liability is applied for non-message-related harm, it does not implicate the interest in free and open communication in the way described above. This is because the government is not describing the cognitive message itself as harmful. It is instead assessing whether the speech implicates an extrinsic interest in privacy, confidentiality, and so on. Thus the particular argument against strict liability described above does not apply. (That does not mean, however, that free-speech interests are not implicated at all. Other free-speech principles, such as concerns about chilling, might argue against strict liability.)[106]

To summarize, speakers have an interest in free and open communication. On a general level, this interest generates strong protection against purposeful interference with speakers' messages. On a more particular level, it suggests that, in the rare circumstances where purposeful interference may be justified, strict liability for speech is inconsistent with speakers' status as autonomous agents. For the same reasons that purposeful interference is usually wrong, when it is appropriate, speaker's intent must play a role in shaping it.

C. *Speaker's Intent in Context*

As argued above, speakers and listeners have an interest in free and open communication that derives from their status as autonomous agents. For present purposes, the most important implication of that interest is that speakers usually have a claim against purposeful interference and, when purposeful interference may be justified, speakers have a claim not to be held strictly liable for speech. But the interest in free and open communication generates other claims as well. At this point, it is worth identifying these other claims and placing speakers' claims within

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105. For example, a leak of national security information causes non-message-related harm in violating the employee's terms of employment and causes message-related harm if the disclosure weakens security.

106. Even autonomy-related free-speech values might be implicated, just in a different way from that described above. One might conclude that the *incidental effects* of strict liability impose too great a burden on the interest in free and open communication, either because strict liability creates systematic uncertainty at odds with that interest or because it too drastically infringes speakers' speech opportunities. Strict liability for non-message-related harm can thus offend free-speech principles in a number of ways, just not in the particular way described here.

that larger context. The interest in free and open communication generates the following claims:

(1) Speakers generally have a claim against purposeful interference, and, where purposeful interference is otherwise justified, speakers still have a claim not to be held strictly liable for their messages.

(2) Listeners have a claim against purposeful interference with the messages they receive, except where it is necessary to prevent serious harm not outweighed by the value of the speech.

(3) Even where purposeful interference is justified, speakers and listeners have a claim against purposeful interference that is discriminatory or arbitrary.

These other interests will be briefly rather than fully explicated. First, listeners, like speakers, have claims against purposeful interference. As explained above, when the government interferes with a message because of what it is saying, it denies listeners the opportunity to consider the message for themselves, thus disregarding their status as autonomous agents and obstructing their capacities to form thoughts and beliefs.[107]

Second, both speakers and listeners have claims against discriminatory or arbitrary interference. These claims remain even when purposeful interference is otherwise justified. Thus, for example, the government may penalize incitement, but it may not do so out of animus or for no reason at all. In other words, the reasons for which the government regulates must be consistent with the reasons for which the government *may* regulate. Otherwise, the government, while appearing to regulate consistently with the autonomous status of speakers and listeners, will actually be acting inconsistently with it.

All of these claims on the parts of speakers and listeners must be satisfied before regulation is permissible—that is, before a particular instance of speech may be deemed unprotected. This will mean that, sometimes, the government will have satisfied the speaker's claim (1) against purposeful interference, but the speaker's speech will be protected for other reasons.

For example, listeners may retain their claim (2) to be free of purposeful interference with messages they receive. This Essay has stipulated all along that the speech at issue is harmful enough plausibly to overcome listeners' usual claims against purposeful interference. But imagine this is not the case:

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107. See supra notes 95–96 and accompanying text (characterizing listener interest against purposeful interference).

(F) *The Lucky Defamer*. A citizen at a political rally says that a candidate for city council has been cited for domestic disturbances. The citizen intends to make a false statement but makes an accurate one.

Speakers usually have a claim to be free from purposeful interference. This speaker, however, intends to make a false and defamatory statement. As is explored further below, it is possible that this intention causes him to lose his speaker-based claim against interference. Nevertheless, his statement ultimately deserves protection, because it is, in fact, true. Because it is true, there is no good argument for interfering with listeners' access to it. Thus listener claims require the speech to be protected, even if speaker claims do not.

Similarly, a speaker whose speech could otherwise be regulated has protection against discriminatory or arbitrary enforcement. Thus one might consider

(G) *The Evangelical Inciter*. A speaker encourages an angry crowd to riot. The speaker refers often to his religious views. A police officer arrests him, not because of the likelihood of harm, but because she is irritated by his religiosity.[108]

The Evangelical Inciter may only be arrested if his words constitute unprotected incitement, and, if they do, he may only be arrested *because* they do, not for other reasons.[109] Of course, sometimes it will be difficult to tell whether a speaker was penalized for the right or wrong reason. Sometimes it will seem likely that the wrong reasons were operative, but it will be difficult to prove. For some types of speech, this risk may be so strong and so predictable that it is better to protect the speech than to run the risk of discriminatory or arbitrary enforcement. If, for example, regulation of hate speech constantly presents risks of discriminatory or arbitrary enforcement, then even hate speech that has no other claims to protection ought to be protected for that reason.

The point, quite simply, is that autonomy generates more than one claim on the part of speakers and listeners. Speaker's intent is but one factor that determines whether speech regulation is permissible. In many cases, other claims against regulation will also exist. But sometimes speaker's intent will be the last factor standing between a speaker and regulation. For example, if a speaker's words are highly likely to incite

108. Cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 569–72 (1942) (involving prosecution of Jehovah's Witness for uttering unprotected "fighting words" at police officer, where circumstances strongly suggested religious animus toward speaker).

109. See R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (rejecting notion "city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government").

imminent violence, whether she can be regulated will depend upon what mental state she has and what mental state makes regulation permissible. As to the latter question, this Essay has thus far said nothing beyond the fact that strict liability is not permitted. The next section offers some further thoughts.

IV. How Intent Matters

Thus far, this Essay has sought to establish that, even where regulation of a message is otherwise permissible, strict liability for the speaker is not. Part II argued that, across many different examples, strict liability seems to wrong the speaker as a speaker. Part III showed that these intuitions find support in an autonomy theory of free speech. The relationship between speech and autonomy can explain not only why purposeful interference with messages is rarely allowed but also why, when it is allowed, attention must be paid to the speaker's state of mind. These are the primary contentions: that speaker's intent matters to freedom of speech and that an autonomy theory explains why.

But the question inevitably arises *how* speaker's intent should matter in certain contexts. Is the actual-malice standard of *New York Times Co. v. Sullivan* justified?[110] What standard of liability should govern the case of the Unknowing Inciter? This Part begins to sketch some responses. Given the diversity of communicative acts and the potential diversity of the standards that should govern them, however, the claims here are much more tentative.

At issue is the mental relation that a speaker must have to the harm-causing aspect of her expression. Again, the question here is not when speech should lose all protections. As explained above, in some cases, multiple claims against regulation will exist. The question is simply, what mental state must a speaker have in order to lose her claim (1) against purposeful interference? The answer will determine when speaker's intent should act as a barrier to regulation and when it should not.

A. *Specific Intent*

The strongest contention of this Part is that speakers forfeit their speaker-based claims against purposeful interference when they intend to cause harm through their speech. Speakers who intend to cause harm by speaking lose their ability to claim that the government has no good reason to interfere with their speech. The speech may still be protected for other reasons, but the speaker has lost one particular claim for protection.

110. See supra note 11 and accompanying text (discussing *New York Times Co. v. Sullivan*'s actual malice test).

In terms of the speaker's culpability, specific intent to achieve harm by means of speech seems ultimately indistinguishable from specific intent to achieve harm by means of conduct. Consider:

> (H) *The Thief's Accomplice.* A speaker recites the combination of a safe, with the intention that the listener use the combination to open the safe and steal the contents.

The speaker here cannot assert an autonomy claim for avoiding regulation. He shares the safe's combination with the intention that it be used for criminal conduct. Liability does not show disregard for his rational agency, nor does it seem disrespectful of his communicative projects, which ex hypothesi consist entirely of robbing a safe.

One objection is that this utterance should be altogether outside the scope of protection for speech, because it is said in the course of an ongoing criminal enterprise. Some argue that speech in service of such an enterprise is better conceived as conduct or performative utterance.[111] Such accounts have appeal, but they do not easily explain some forms of criminal regulation:

> (I) *The Soliciting Burglar.* A speaker places a post online seeking a lookout for a burglary.

This speech is not part of an ongoing criminal enterprise, nor does it qualify as a performative utterance. Some online postings may function as performative utterances in that they constitute offers that simply require acceptance in order to create a new state of affairs. This initial request for a lookout, however, requires further description and negotiation. Many people would nevertheless conclude that it is a plausible candidate for regulation, one that implicates autonomy claims little more than the speech of the Thief's Accomplice.

In short, Holmes's analogy to criminal attempt was not so inapt.[112] The speaker who intends to cause harm is in a similar position to an actor who undertakes an otherwise benign action with the intent of furthering a criminal enterprise. If, on one hand, the speaker finds a partner who completes the intended harm through further conduct, he stands in a similar position to a criminal accessory. If, on the other hand, he is stopped before his speech can produce harm through further conduct, or if he is punished for seeking to impart harm through cognitive effect, he stands in a similar position to one accused of criminal attempt. In either case, the speaker is using his own expressive capacities

111. See, e.g., J.L. Austin, How to Do Things with Words 79 (2d ed. 1975) (describing performative utterances); Greenawalt, supra note 9, at 57–58 (arguing "situation-altering utterances" are outside scope of free speech).

112. See Schenck v. United States, 249 U.S. 47, 52 (1919) ("If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.").

for harmful ends. This is wrongful, and its wrongfulness is sufficient to eliminate the speaker's claim against purposeful interference.

One might object that a principle of criminal responsibility has no place within a free-speech framework.[113] But the analogy does not import criminal law into free speech. Culpability may matter for both because both rest on moral conceptions that implicate culpability. An autonomy theory of free speech provides such a conception.[114] Speaker interests in free and open communication arise from the status of speakers and their potential listeners as autonomous agents. Using speech intentionally to harm others, while claiming immunity for oneself, is at odds with these premises. It asserts the prerogatives of the speaker to speak at the expense of others' prerogatives to exist unmolested by intentional invasions. A speaker who tries to do this loses a particular claim against interference.[115]

Of course, in the speech context, the speaker's forfeiture of this particular claim does not render her speech unprotected. The speech may ultimately merit protection for other reasons—because listeners have a claim to it or because of a risk of discriminatory or arbitrary enforcement. Thus, free-speech principles include consideration of various interests, of which the speaker's culpability is only one. Still, in *some* such cases, the speaker's intentions *will* determine speech protection, and in *all* such cases, the speaker loses a particular claim for protection

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113. See, e.g., Alexander, Speaker's Intent, supra note 1, at 25 (arguing intent should matter for criminal-law analysis but not for speech protection).

114. See supra Part III.A (providing account of autonomy theory of speech).

115. This point about culpability brings up the relationship between the argument here and the claims of a burgeoning group of philosophers that an actor's intent does not—or does not generally—help to define the permissibility of an action. See, e.g., Scanlon, Moral Dimensions, supra note 56, at 2–4 (introducing objections to view that intention determines permissibility of action); F.M. Kamm, Terrorism and Intending Evil, 36 Phil. & Pub. Aff. 157, 162–63 (2008) (arguing intention does not define permissibility regarding doctrine of double effect); Judith Jarvis Thomson, Physician Assisted Suicide: Two Moral Arguments, 109 Ethics 497, 514–16 (1999) (arguing against significance of intention for permissibility). This debate is distinct from the question at hand. First, it concerns "intent" in the narrower sense of "specific intent," rather than the larger question of state of mind. At least some who argue that "intent" does not matter would still contend that permissibility should take account of what actors foresee or *should* foresee given what they know. See Scanlon, Moral Dimensions, supra note 56, at 38–39 (arguing agent acts impermissibly if he intends harm, foresees harm, or should foresee harm given information he has). Thus, the actor's mental state does matter to some degree to permissibility; it is only the special role of intending a result that is called into question. The primary contention here has been simply that state of mind should matter to some degree.

More importantly, however, this Essay is not about moral permissibility. It is about a particular activity that, given its importance, requires protection different from that given to action generally. The endeavor here is to draw the line not between permissible and impermissible action but between protected and unprotected speech. It seems possible, if not probable, that the two lines would not correspond.

and, as an analytical matter, is rightly distinguished from speakers who retain it.

A final note is that some speakers who intend harm also forfeit their claim for another reason. These are speakers who intend to cause harm by *antirational*, rather than rational, means. Some speech causes harm by rational means—say, by instructing one in committing a crime or offering rational arguments for doing so. Of course, normal mental processes are not perfectly rational, nor must speech be perfectly rational in order to count as "rational" for present purposes. But certain speech effectively overrides rational processes.[116] This line, obviously, is difficult to draw, but that does not mean that it does not exist: Mill's corn dealer,[117] Holmes's crowded theater,[118] and Brandeis's *Whitney* concurrence[119] all get at the notion that, in some contexts, speech short-circuits deliberative processes and cannot adequately be addressed by time and counter-speech. Some examples include incitement, fighting words, and threats. Another important set of examples involves false statements of fact, such as defamation and fraud. These too are antirational, because they give listeners faulty premises for their rational processes.[120]

Speakers who intend to cause harm through antirational means forfeit their claims against purposeful interference for two independently sufficient reasons. They forfeit their claims in the same way as any speaker who intends to cause harm. But they also forfeit their claims because the use to which they put speech is at odds with the reasons that speakers have interests in the first place. They are neither faithfully representing their own capacities as autonomous agents nor sincerely attempting to engage others' on their own imperfectly but importantly rational terms. Instead, they are trying to subvert the very capacities on which speech interests are founded. They therefore cannot rely upon their interest in free and open communication to shield them from regulation.

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116. Cf. Strauss, supra note 9, at 339 ("[T]he risk of law violation can justify suppression of speech only if the speech brings about the violation by bypassing the rational processes of deliberation.").

117. John Stuart Mill, On Liberty 121 (David Bromwich & George Kateb eds., 2003) (1859) ("An opinion that corn-dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . .").

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

119. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.").

120. See, e.g., Strauss, supra note 9, at 335 ("The clearest example of speech that might induce action by non-rational means is a false statement of fact. A rational person never wants to act on the basis of false information.").

B. *Unintentional Speech Harms*

What about speakers who risk harm but do not intend it? These speakers do not act wrongfully in the same way as those who intend harm. They are not using speech as a tool to harm others, nor are they deliberately manipulating others. They thus do not *forfeit* their claim against purposeful interference. How far they may speak with immunity deserves further consideration, if only in a tentative fashion here.

First, imagine a speaker who foresees that his speech might incite others, but who does not intend that result. Unlike the entirely innocent speaker who is held strictly liable, this speaker cannot argue that he is being held responsible for harms that were not part of his reasoning process at all: he foresees the risk and decides to speak. But like the innocent speaker, he retains an interest in pursuing his own communicative aims, which do not include causing harm. It is possible, however, that where speech poses a real and serious harm, and the speaker's mental state encompasses that risk, the conditions for purposeful interference have been met.

So far, this Essay has argued that (i) speakers usually have a claim against purposeful interference, and (ii) where purposeful interference is otherwise permissible, strict liability is not. It has also argued that (iii) where speakers have a specific intent to cause harm, they forfeit the above claim against purposeful interference, even where their speech does not ultimately pose a danger of harm. That is, specific intent to cause harm so undermines the premises of their claims that they cannot rely upon them, even when their speech is benign (though they may ultimately receive protection for other reasons).

It seems possible that, where a grave risk of harm *actually does* exist, and the law *does* take account of the speaker's state of mind, say by requiring foresight or subjective recklessness, purposeful interference is appropriate. It is not that the speaker has forfeited a claim. It is that the conditions for purposeful interference have been satisfied. Forfeiture operates even when the speech is actually innocuous: the speaker's intent transforms innocent speech into blameworthy speech. Here, the speech must actually be dangerous. But if it is, and if the law takes account of the speaker's state of mind toward that danger, perhaps regulation is permissible. At the least, no proposition advanced here has ruled out that possibility.

By contrast, regulation on the basis of negligence seems more inconsistent with speaker interests in free and open communication. A negligence standard takes no account of the actual state of mind of a speaker. It is instead an objective assessment that a speaker should have acted differently for a particular reason.[121] Like strict liability, negligence penalizes a speaker without regard for whether the harmful aspect of her

121. See supra notes 74–76 (providing negligence standard).

message played any part in her decision to speak. It therefore punishes speakers for an aspect of their speech to which they have no necessary relation. Negligence thus resembles strict liability and seems an unsuitable ground on which to penalize a speaker.

In conclusion, then, speakers who intend to cause harm forfeit a claim against purposeful interference. Speakers in this class are the clearest example of speakers whose mental state poses no obstacle to their regulation, though their speech may ultimately warrant protection for other reasons. Speakers who are subjectively cognizant of an actual, grave risk may also ultimately be appropriate subjects of regulation, though this proposition warrants further examination. Provisionally, one may conclude that such regulation does take account of speakers' mental attitudes toward their speech. The question is whether it takes enough account of the speakers' own communicative projects.

C. *Applications*

Comparing the above sketch with existing law suggests that many First Amendment standards are sound, and a few are lacking. As noted earlier, speaker's intent is only one factor in the protection of speech.[122] The goal here is thus not to evaluate each speech standard comprehensively but to analyze the role that speaker's intent is playing.

1. *Specific-Intent Categories.* — Several First Amendment standards require specific intent to cause harm. Most of these deal with harms that can be caused by antirational means. These standards thus embody the clearest and strongest cases for regulation: the speakers have forfeited their claims, for more than one reason. Examples include the *Brandenburg* incitement standard,[123] the "true threats" standard of *Virginia v. Black*,[124] and standards for fraud.[125]

Another specific-intent doctrine primarily involves speech causing harm by rational means. In a line of cases about penalizing individuals for associating with Communist groups, the Court eventually concluded

122. See supra Part III.C (discussing listener's interests and acknowledging relevance of incidental effects of regulation generally as additional factors in determining speech protection).

123. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (defining unprotected incitement as speech (1) likely to cause (2) imminent harm and (3) intended to do so). Of course, nothing in the *Brandenburg* standard *requires* that the harm come about by antirational means, but the core examples—such as Mill's corn dealer, Holmes's crowded theatre, and the facts of *Brandenburg* itself—involve antirational mob mentalities. See supra notes 69–70, 117–118, and accompanying text (discussing *Brandenburg*, Mill's corn dealer, and Holmes's crowded theatre, respectively).

124. Virginia v. Black, 538 U.S. 343, 359 (2003) (defining unprotected "true threats," in which "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence").

125. See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (approving fraud standard requiring both knowledge of falsity and specific intent to deceive).

that penalties were only appropriate where an individual knew of an organization's unlawful aims and had specific intent to further those aims.[126] These cases suggest that otherwise innocuous expressive association takes on a different cast when the speaker intends it to further a criminal object. (Normatively speaking, the activity should also pose a serious threat of actual harm before it may be subject to purposeful interference, but the intent requirement is consistent with a forfeiture view of speaker claims.) Note too that requiring specific intent in addition to knowledge is difficult to justify on chilling-effect grounds,[127] but it makes sense if a speaker's specific intent removes a particular reason for protection.

2. *Defamation.* — The relationship to defamation is more complex. First, imagine a nonmedia speaker who says something false and defamatory. Where *Sullivan* applies, this speech is unprotected only when the speaker knows or is subjectively reckless about the fact that it is false.[128] Possibly this standard suggests that where (1) serious risk of harm actually exists and (2) the speaker's state of mind is taken into account, purposeful interference is permissible. Alternatively, it may translate a forfeiture view into an evidentiary rule, where knowledge or recklessness counts as sufficient evidence of an intent to deceive. Neither view is patently at odds with speaker interests in free and open communication.

Less salvageable is the *Gertz* negligence standard, which holds that private figures may recover for defamation upon a showing of "fault" on the part of the speaker.[129] A negligence standard pays no regard to the actual state of mind of a speaker and thus takes insufficient account of speaker interests.[130]

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126. See, e.g., United States v. Robel, 389 U.S. 258, 265–66 (1967) (finding federal statute prohibiting members of certain Communist organizations from employment at defense facilities unconstitutional where statute "made irrelevant . . . that an individual may be . . . unaware of the organization's unlawful aims" (citations omitted)); Keyishian v. Bd. of Regents, 385 U.S. 589, 606–08 (1967) ("[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (finding unconstitutional laws "not restricted in scope to those who join with the 'specific intent' to further illegal action" because such laws impose "a conclusive presumption that the member shares the unlawful aims of the organization" (quoting Scales v. United States, 367 U.S. 203, 230 (1961))); see also *Scales*, 367 U.S. at 228 (referring to constitutional principles in interpreting Smith Act to target only active Communist Party members with guilty knowledge and intent).

127. See Kendrick, Speech, supra note 7, at 1658–62 (arguing chilling is poor justification for specific-intent requirements, because knowledge is sufficient standard to protect speakers worried about unknowingly violating law).

128. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (defining "actual malice" standard).

129. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (permitting states to impose "fault" liability for statements regarding private figures).

130. Supra note 121 and accompanying text.

Media speakers, however, raise another issue, one that highlights an important limitation to the interest in free and open communication. Some speakers labor under special duties related directly to the cognitive import of their speech. Attorneys and accountants have professional obligations to give accurate advice;[131] medical personnel[132] and product manufacturers[133] have duties to provide adequate warnings; product manufacturers have an obligation not to market defective products.[134]

In all of these cases, failures in obligation can cause message-related harm. The client of a faulty attorney or accountant may break the law on the basis of her advice. The patient who does not receive adequate warnings may elect a procedure she would not otherwise have chosen. The purchaser of a product may rely on inadequate warnings, or, where the product itself is informative—as in the case of a map—she may rely on defective information to her detriment. These harms arise directly from listeners' reliance upon the cognitive meaning of the speaker's expression.

Despite the fact that such expression causes message-related harm, it may be regulated without the regular regard for speaker intent. This is so because these speakers have special duties to achieve certain results with their expression—typically, to provide accurate or complete information to certain beneficiaries.

On this analysis, the press requires its own consideration. First, press claimants are typically corporate entities, whose autonomy interests would require much further critical examination. More importantly for present purposes, however, one core function of the press is to provide accurate information. This duty overrides the usual interests against purposeful interference. Accordingly, the intent principles set forth above do not apply to the press.

At the same time, however, it will strike many as repugnant for the press to be strictly liable for defective information in the same way that product manufacturers are strictly liable for manufacturing defects.[135] This is for reasons unrelated to speaker intent. For one, the prospect of government regulation of the press may implicate speaker and listener interests against discriminatory or arbitrary enforcement. Such concerns may limit the government's role in punishing the press for falsity. Even where the law might allow interventions, as in civil actions for defama-

131. See Restatement (Second) of Torts § 299A (1965) ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.").

132. Restatement (Second) of Torts § 892A (1979) (stating, in order to be valid, consent must be to particular conduct at issue).

133. See Restatement (Third) of Torts: Prods. Liab. § 2 (1998) (listing inadequate warnings as form of product defect).

134. Id. (listing defective design as form of product defect).

135. On strict liability for manufacturing defects, see id. §§ 1–2.

tion, concerns about the chilling effect remain. As applied to the press, then, the *Sullivan* actual-malice standard and *Gertz* fault standard must find their justification in other free-speech principles, including the chilling-effect arguments on which the Court relied in those cases.

3. *Commercial Speech.* — False and misleading commercial speech is routinely regulated without apparent regard for the intentions of the speaker.[136] It seems that this approach actually *is* in response to speaker intentions and adequately takes them into account. One reason that commercial speech receives less protection is that commercial speakers are commercially motivated.[137] The assumption is that commercial motivation translates into intent, because commercial speakers communicate with the intent of selling their products or otherwise furthering their commercial interests. Commercial speech may provide information that is of interest to listeners, and to that extent listener interests argue for its protection. But as a matter of speaker interests, commercial speech is not the product of free and open engagement in thought and belief formation. The fact that commercial speakers shape their speech to their commercial intentions is a reason not to take intent into account when defining speech protections. Protection should instead focus primarily on listener interests. Prevailing legal standards thus properly regulate false and misleading commercial speech without reference to speaker's intent.

4. *Non-Message-Related Harms.* — Finally, recall that this Essay's field of inquiry is narrowed to harm that arises from the message of speech. Some First Amendment categories involve harm that is not message-related. One example is child pornography.[138] The fundamental harm of child pornography is that children are abused in its production.[139] Regulation that seeks to prevent this harm does not constitute purposeful interference with a message for what it is saying.

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136. See 15 U.S.C. § 45 (2012) (imposing liability for deceptive commercial acts, including false advertising, without apparent regard for intent). In *FTC v. Sterling Drug, Inc.*, the Second Circuit explained the rationale for disregarding intent: "[S]ince the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader." 317 F.2d 669, 674 (2d Cir. 1963); see also FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 (10th Cir. 2005) (finding intent is not element of § 5 of Federal Trade Commission Act); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989) (same); United States v. Johnson, 541 F.2d 710, 712 (8th Cir. 1976) (same).

137. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) (concluding economic motivation for printing of pamphlet, though alone insufficient to render pamphlet commercial speech, was one of "combination of . . . characteristics" to render it such); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (arguing profit motive makes commercial speech less susceptible to chilling).

138. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 251–54 (2002) (holding "virtual" child pornography—which does not depict actual minors—is protected).

139. Supra note 104 and accompanying text.

Speech's special relationship to autonomy grows out of its ability to convey, and thus to help to form, thoughts and beliefs. When the government interferes with speech for the message that it sends, it implicates autonomy in a special way. Government regulation for other reasons does not cause the same problem. It may implicate autonomy in other ways—say by having unacceptable effects on speech opportunities—but not in the one explored here.

CONCLUSION

This Essay has made two primary claims. First, intuitions against strict liability for speech suggest that speaker's intent matters to speech protection. Second, this conclusion can be explained by an autonomy-based account of freedom of speech. Having developed these two claims, the Essay has also considered the level of intent sufficient to remove speaker interests as a barrier to regulation. Speakers who intend to cause harm through speech forfeit their claims against purposeful interference. Speakers who lack such intentions retain their claims against purposeful interference, but where serious danger exists and the law takes account of the mind of the speaker to some degree, the conditions of the claims may be satisfied.

A guilty mind alone is not sufficient to render speech unprotected. Some ill-intentioned speech will receive protection as a result of other free-speech considerations, such as listener interests. Nor is intent necessary to the regulation of certain speech categories, such as speech involving special duties and commercial speech. These exceptions are consistent with an autonomy-based account of free speech. Outside of such categories, speaker's intent is one important factor in the question of whether speech is protected. Where other free-speech considerations have been satisfied, it forms a final barrier between speech and regulation. The fact that First Amendment doctrine often makes it so is not an accident or mistake, but rather a reflection of the intuitive relationship between speaker interests and protection for expression, between autonomy and freedom of speech.