

SPEECH, INTENT, AND THE CHILLING EFFECT

LESLIE KENDRICK*

Speaker's intent requirements are a common but unremarked feature of First Amendment law. From the "actual malice" standard for defamation to the specific-intent requirement for incitement, many types of expression are protected or unprotected depending on the state of mind with which they are said. To the extent that courts and commentators have considered why speaker's intent should determine First Amendment protection, they have relied upon the chilling effect. On this view, imposing strict liability for harmful speech, such as defamatory statements, would overdeter, or chill, valuable speech, such as true political information. Intent requirements are necessary prophylactically to provide "breathing space" for protected speech.

This Article argues that, although the chilling effect may be a real concern, as a justification for speaker's intent requirements, it proves unsatisfactory. It cannot explain existing intent requirements, and the difficulties of measuring and remedying chilling effects cast doubt on whether they could ever provide the sole justification for the choice of one intent requirement over another. The inadequacy of the chilling effect leaves the problem of speaker's intent in need of further explanation and raises more general concerns about the use of deterrence-based arguments in constitutional law.

* Associate Professor of Law, University of Virginia School of Law. For their helpful comments, I am grateful to Kenneth Abraham, Lillian BeVier, Vincent Blasi, John Duffy, Kim Forde-Mazrui, Risa Goluboff, John Harrison, John Jeffries, Douglas Laycock, Elizabeth Magill, Helen Norton, George Rutherglen, Richard Schragger, Frederick Schauer, Micah Schwartzman, Seana Shiffrin, Paul Stephan, the participants of the University of Virginia Faculty Workshop, and the students of Seana Shiffrin's Legal Theory Workshop. Special thanks go to Albert Choi, Michael Gilbert, Richard Hynes, and Louis Kaplow for generously sharing their expertise. I thank Aaron Lerner and Tiffany Parrot for research assistance. All errors are mine.

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INTRODUCTION

Although much has been written about the role of government purpose in First Amendment analysis,¹ remarkably little has been said about speaker's intent.² And yet, across many areas, First Amendment law determines the protection of speech by reference to

1. See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 13-123 (2005); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 to -7, at 789-825 (2d ed. 1988); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59-61 (2000); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1502 (1975); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 739-47 (1980); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650-53 (2002); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414-16 (1996); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235-54 (2012); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1350-55 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 116-17, 126-27, 131-33 (1981); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 415-20 (1995); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214-31 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227-33 (1983); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1301-11 (2005).

2. See Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 25 (1995) [hereinafter Alexander, *Speaker's Intent*] (discussing speaker's intent generally); Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 548 (1989) [hereinafter Alexander, *Low Value Speech*] (same); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 217-23 (same).

Some works have offered valuable discussions of particular intent requirements. See KENT GRENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 47-48 (1989) (discussing speaker's intent in crime-related speech); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354-55 (1991) (examining false speech); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 (discussing pornography); Jonathan D. Varat, Lecture, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) (discussing false speech); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1174 (2005) (examining speech that contributes to criminal activity); see also Vincent Blasi, Lecture, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 538-39 (2011) (suggesting that John Stuart Mill's conception of incitement took speaker's intent into account). For a rare account that brings together governmental and speaker purposes, see Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1777-80 (2003).

the state of mind, or intent, of the speaker.³ Incitement, for example, is speech that intends and is likely to produce imminent lawless action.⁴ The constitutional standards for defamation famously turn on the state of mind of the speaker.⁵ Punishment for distributing obscenity or child pornography requires proof of recklessness or knowledge as to the factual contents of the material.⁶ In these and other areas, a speaker's state of mind determines the status of his expression under the First Amendment.

Despite the frequency of these intent requirements, the reasons behind them are not clear. The harm or value inherent in expression is unlikely to change with the state of mind with which it is said. Why, then, should the same statement be treated differently depending on the speaker's intent? This puzzle is rarely remarked upon, let alone analyzed.

To the extent that the Supreme Court has answered the question, it has relied on the chilling effect.⁷ The few commentators to address the issue have also concluded that the chilling effect is the only

3. I use the term "intent" to mean a concern with the speaker's state of mind in the same way in which the criminal law uses the terms "mens rea" and "mental state," and sometimes the terms "general intent" and "intent." Some of the requirements at issue in First Amendment law are "specific-intent" requirements, in that they demand an intent to do a certain thing or to bring about a particular result. Others involve lesser mental states, such as knowledge or recklessness. In referring to "intent requirements," I am referring to all such state-of-mind requirements.

4. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); see also *infra* notes 32-34 and accompanying text.

5. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (protecting false and defamatory statements about private figures when said without fault); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (imposing an "actual malice" requirement of knowledge or recklessness with respect to falsity for false and defamatory statements about public officials in their official job duties); see also *infra* notes 27-31 and accompanying text.

6. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982); *Smith v. California*, 361 U.S. 147, 152-53 (1959); see also *infra* notes 37-41 and accompanying text.

7. The Supreme Court has also employed the term "breathing space." *Sullivan*, 376 U.S. at 271-72. Use of the term "chill" first occurred in one of the Communist-affiliation cases, *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), but the Court identified the problem in earlier cases without using the magic words. See, e.g., *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393 (1950). The term "chilling effect" first occurred in a case examining Florida's efforts to compel disclosure of the NAACP's membership out of a purported concern that it was being infiltrated by Communists. See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963). In *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), the Court said that known lies were "at odds with the premises of democratic government," but it has not elaborated on this idea and appeared to contradict it recently in *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012).

normatively legitimate reason for constitutional speech protection to turn on speaker's intent.⁸ On the chilling effect account, the intent of the speaker has no inherent relation to the protection of the speech: speech is protected or unprotected based upon its value or harm. Intent requirements are useful, however, in ensuring that regulation of unprotected expression does not incidentally deter protected expression. For example, on a chilling effect account, all false and defamatory statements are, on their own merits, unprotected.⁹ But allowing liability for all such statements might deter true speech because people might hesitate to speak unless they are certain about the truth of their statements. Protected, true speech will thus be "chilled" by the regulation of unprotected, false speech.

One possible way to prevent this chilling effect is to give some false and defamatory statements "strategic protection."¹⁰ Protecting negligent and good-faith false statements will encourage uncertain speakers to make true statements. By drawing the actual line between protected and unprotected speech prophylactically, courts create "breathing space" for expression that is truly protected.¹¹ Speaker's intent is simply an expedient basis on which to draw the line.

This chilling effect account holds some appeal. It explains a variety of First Amendment intent requirements with a single theory. That theory neatly resolves the puzzle of why speaker's intent should matter by concluding that, in fact, it does not, except as a convenient way to resolve other concerns. Moreover, the Supreme Court has explained its interest in speaker's intent in chilling effect terms.¹²

But there are reasons to doubt the chilling effect account. A claim of a chilling effect necessarily rests upon suppositions about the

8. See Alexander, *Speaker's Intent*, *supra* note 2, at 25; Alexander, *Low Value Speech*, *supra* note 2, at 548; Schauer, *supra* note 2, at 217 & n.67.

9. See *Gertz*, 418 U.S. at 340 ("[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 *Sullivan*, 376 U.S. at 270)). See generally Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978) (analyzing the mechanics and justifications of chilling effect doctrine).

10. *Gertz*, 418 U.S. at 342.

11. See *Sullivan*, 376 U.S. at 271-72.

12. See *infra* notes 65-73 and accompanying text.

deterrent effects of law. These suppositions rest in turn upon predictions about the behavior of speakers under counterfactual conditions. Meanwhile, the selection of a remedy for chilling—such as an intent requirement—rests on similar predictions about the remedy's speech-protective effects.¹³ In short, both the detection of a problem and the imposition of a remedy involve intractable empirical difficulties.

In the case of speaker's intent, these difficulties seriously undermine the chilling effect account. Though at first blush the existing intent requirements might seem convincing as products of rough empirical surmise, upon further scrutiny they often fail to persuade even by this standard. The existing empirical literature confirms the implausibility of the current requirements and illustrates the challenge of converting concerns about chilling into reliably precise and accurate legal rules.¹⁴

This is not to say that the chilling effect is not a real phenomenon. Nor is it to say that the chilling effect should play no role in the development of First Amendment rules. After all, intuition suggests that some legal rules will chill speech. The further a law encroaches on protected speech, the greater the risk that such speech will be penalized. The more likely speakers are to be penalized, the less they will speak. I do not deny this basic intuition. Moreover, First Amendment law should accommodate this intuition. The First Amendment is the appropriate place to acknowledge fears about chilled speech, and it would be unsound to deny such fears simply on the ground that they cannot be measured.

The problem comes in translating a legitimate concern about chilling into a legal rule. Our best instincts about the existence of chilling may be wide of the mark and, in any case, must usually remain a matter of surmise. Likewise, the imposition of a remedy—the choice of one intent requirement over another, not to mention over all other possible remedial rules—is likely to require more refinement than the available evidence will allow. Even when a constitutional remedy seems clearly preferable to the dangers of ignoring chilling, these uncertainties remain. They render it all but inevitable that the chilling effect will be invoked inconsistently

13. See *infra* notes 110-16 and accompanying text.

14. See *infra* note 229 and accompanying text.

across cases whose outcomes cannot be reconciled and whose accuracy must remain largely a matter of faith.

The significance of this conclusion is twofold. First, to the extent that speaker's intent presents a puzzle within First Amendment law, the chilling effect leaves the puzzle unsolved. Reliance on the chilling effect cannot render the existing intent requirements consistent with each other.¹⁵ Furthermore, given the difficulties of measuring chilling and the seemingly subtle differences in the deterrent effects of existing intent requirements, the chilling effect is too weak to serve as the sole justification for the choice of one intent requirement over another.¹⁶ If certain intent requirements have strong intuitive appeal, it is worth exploring whether this is because they find support in other justifications.

Second, the problems with the chilling effect account of intent requirements suggest a broader difficulty. Other applications of the chilling effect, and indeed other deterrence-based justifications in constitutional law and elsewhere, may be subject to similar empirical quandaries. In the constitutional context, courts and scholars have justified rules from qualified immunity¹⁷ to the exclusionary rule¹⁸ on the basis of predictions about deterrence of unwanted conduct or overdeterrence of valuable activities. If our empirical assumptions have little demonstrable basis, and if those assumptions are the primary or sole justification for a constitutional rule, then the legitimacy of that rule ought to be a matter of some concern. The problem of speaker's intent offers an opportunity to consider responses to this issue.

This Article proceeds in four parts. Part I shows the pervasiveness of speaker's intent requirements in First Amendment law and then outlines the chilling effect account of these requirements. Part II describes the chilling effect as a product of unsubstantiated

15. See *infra* Part II.

16. See *infra* Part III.

17. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 351 & n.16 (2000) (discussing and providing sources for the conception of qualified immunity as protection against the chilling of valuable activity by government officials).

18. See Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 579-606, 627-45 (1983) (discussing the exclusionary rule's justification as a deterrent on police misconduct); Levinson, *supra* note 17, at 417 (same).

empirical judgment and argues that, even on those terms, it cannot justify existing First Amendment intent requirements. Part III argues that the chilling effect account fares no better when subjected to serious empirical inquiry. Finally, Part IV offers potential responses to the weakness of the chilling effect account.

I. INTENT AND THE CHILLING EFFECT

To assess the chilling effect as a justification, it is important first to identify the intent requirements it is supposed to justify and then to set out the chilling effect account of those requirements.

A. *Intent Requirements in First Amendment Law*

Scholars have generally overlooked the prevalence of intent requirements in First Amendment law. When they do remark upon such requirements, they treat them as infrequent outliers.¹⁹ This is decidedly not the case.

A discussion of First Amendment intent requirements calls for some orientation within free speech doctrine and principles. Within the scope of the First Amendment,²⁰ the most important factor is the government's reason for regulating.²¹ If the government is regulating activity for reasons other than concern about the activity's message, the regulation is highly likely to pass First Amendment muster.²² For example, a law regulating parades out of concerns about noise and traffic would likely be upheld. If, however, the government is regulating out of some concern about the message being

19. See, e.g., Schauer, *supra* note 2, at 216-24.

20. Some laws implicate the First Amendment, and some do not. Fred Schauer's notion of the "coverage" of the First Amendment captures this point. 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). In Schauer's view, a great deal of regulation of expression—such as insider trading, price fixing, and criminal solicitation—occurs outside the scope, or coverage, of the First Amendment. *Id.* at 1770-71. Because my interest here is with intent requirements in various First Amendment standards, I am by definition working within the scope of the First Amendment.

21. See, e.g., TRIBE, *supra* note 1, § 12-3, at 794 (describing First Amendment doctrine); Kagan, *supra* note 1, at 413-14 (same); see also Alexander, *Speaker's Intent*, *supra* note 2, at 22 (making a normative case for this position); Ely, *supra* note 1, at 1496-97 (same).

22. See, e.g., TRIBE, *supra* note 1, § 12-2, at 791-92.

expressed, a serious First Amendment issue arises.²³ For example, a decision to prohibit a parade because of its controversial message would be deeply suspect. A law of this kind must either survive strict scrutiny or it must be found to regulate one of a set of categories of unprotected expression. If it does not, the law is invalid.²⁴

As this sketch makes clear, a great deal of First Amendment analysis may take place before there is an opportunity to consider a speaker's state of mind. The first order of business is the government's intentions, so to speak, not those of the speaker. If the government is not regulating for message-related reasons, the law is likely valid; if it is regulating for impermissible message-related reasons, the law is invalid. In neither case does the speaker's state of mind enter the analysis. It is only when the government plausibly *may* regulate for message-related reasons that the focus turns from the government's purpose to other factors, including the speaker's state of mind. Thus, my argument here concerns (1) the unprotected categories of speech and (2) the conditions under which other message-related regulations may survive strict scrutiny.

1. *Unprotected Categories*

The Supreme Court has recognized several categories of speech that the First Amendment does not protect, such as defamation, incitement, threats, obscenity, child pornography, fraud, and fighting words.²⁵ The Court has also accorded commercial speech a lower level of protection, typically described as intermediate scrutiny.²⁶ Virtually all of these categories are defined by reference to the speaker's state of mind.

Defamation: At common law, speakers could be held strictly liable for false and defamatory statements.²⁷ Beginning with *New York*

23. See, e.g., *id.*

24. See, e.g., *id.* § 12-2 to -3, at 790-92.

25. For a partial list, see *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

26. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

27. See, e.g., RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:42 (2d ed. 1999 & Supp. 2012). Although a series of privileges shielded speakers from liability in certain instances, the threat of liability was real and avoiding it depended upon proving that a privilege applied. In some jurisdictions, falsity, malice, or damages could be presumed. For example, the court instructed the Alabama jury in *New York Times Co. v. Sullivan* that the statements at issue were

Times Co. v. Sullivan, the Supreme Court modified the common law with intent requirements.²⁸ Currently, false and defamatory statements about a public official or public figure regarding a matter of public concern are unprotected only when said with “actual malice,” meaning that the speaker either knew the statement was false or was gravely reckless toward this risk.²⁹ False and defamatory statements about private figures on matters of public concern require negligence for compensatory damages and actual malice for presumed or punitive damages.³⁰ False and defamatory statements about anyone regarding a matter of private concern may be governed by more permissive common law standards.³¹

Incitement: After decades of wrestling with the line between protected and unprotected political advocacy,³² in *Brandenburg v. Ohio* the Supreme Court defined unprotected incitement as “advocacy of the use of force or of law violation” that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³³ The Supreme Court has glossed the phrase “directed

libelous per se, meaning that both falsity and malice were presumed, and that damages too could be presumed. 376 U.S. 254, 262 (1964). The only questions for the jury were whether the defendant had published the statements and whether they concerned the plaintiff. *Id.*; see also ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 34-35 (1991).

28. See *Sullivan*, 376 U.S. at 279-80.

29. *Id.* The Court quickly extended the same reasoning to criminal libel. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). “Recklessness” in this context means that the speaker must “in fact entertain[] serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

30. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41, 350 (1974). *Gertz* also defined what constituted a public figure. See *id.* at 345, 351.

31. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (plurality opinion). In *Dun & Bradstreet*, the plaintiff was permitted to recover presumed and punitive damages under a negligence standard. *Id.* at 760-61. After *Dun & Bradstreet*, it is not entirely clear whether *Gertz*’s prohibition on strict liability remains, or whether a state could impose liability without fault for statements on matters of private concern.

32. See, e.g., *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

33. 395 U.S. 444, 447 (1969) (per curiam). While some previous incarnations of the constitutional standard were never overruled, *Brandenburg* is generally taken to draw the definitive line between protected advocacy and unprotected incitement. See, e.g., Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 656-57 (2009).

to inciting” as imposing a specific-intent requirement.³⁴ Thus, only advocacy *intended* to produce imminent lawless action qualifies as unprotected incitement.

Threats: The unprotected category of “true threats” is confined to “those statements where the speaker *means to* communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁵ The Court specified that “[t]he speaker need not actually intend to carry out the threat,” but he must have intended to communicate a threatening statement.³⁶

Obscenity: At first glance, speaker’s intent seems irrelevant to obscenity: no part of the three-prong *Miller* test turns on the intentions of the defendant.³⁷ But in *Smith v. California*, the Supreme Court held that criminal liability requires that distributors of

34. See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam) (“[S]ince there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a ‘tendency to lead to violence.’”).

A few critics do not read *Brandenburg* to involve speaker’s intent. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975); Schauer, *supra* note 2, at 218-19. Like Gunther, Schauer argues that *Brandenburg* should be read as requiring “a ‘direct’ encouragement” of a lawless act, where “direct” refers “to the literal or explicit meaning of the words of incitement.” *Id.* at 218. But in addition to the Supreme Court’s having applied *Brandenburg* as requiring intent, an overwhelming majority of courts and commentators have read it the same way, as Schauer acknowledges. *Id.* at 220 n.72; see, e.g., RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10:23 (2011 & Supp. 2012); WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 107 n.43 (1984); Alexander, *Speaker’s Intent*, *supra* note 2, at 25; Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2017 (2002); Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 1015 (2010); Frank R. Strong, *Fifty Years of “Clear and Present Danger”: From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 42; Volokh, *supra* note 2, at 1191.

35. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (emphasis added).

36. *Id.* at 359-60; see also *id.* at 360 (“[A] prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” (internal quotation marks omitted)); Schauer, *supra* note 2, at 216-18 (discussing *Virginia v. Black*).

37. See *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” (citations omitted)).

obscenity have acted with knowledge or recklessness regarding the factual contents of obscene materials.³⁸

Child Pornography: Likewise, the definition of child pornography at first appears to have nothing to do with a speaker's state of mind.³⁹ But at least with regard to distributors and possessors of child pornography, the Supreme Court has required proof of knowledge of⁴⁰ or recklessness toward⁴¹ the subjects' minor status.

Fraud: Analogizing to defamation, the Supreme Court has held that liability for fraud must involve "exacting proof requirements."⁴² The Court has upheld a state law requiring proof that the defendant knew a statement was false and intended to deceive, and the Court has emphasized that the mere existence of a false statement is insufficient ground for liability.⁴³

Commercial Speech: Intermediate protection for commercial speech is in one regard strict liability and in another regard seemingly geared to speakers' intentions.⁴⁴ On one hand, false or

38. 361 U.S. 147, 149, 152-55 (1959) (invalidating conviction when law lacked scienter requirement); *see also* Ginsberg v. New York, 390 U.S. 629, 643-45 (1968) (affirming conviction when law required that defendant have "reason to know" of factual contents); Mishkin v. New York, 383 U.S. 502, 510-11 (1966) (affirming conviction when state law had been construed to require knowledge of factual contents). This scienter requirement extends only to knowledge of the factual contents of expression, not to knowledge of its legal status as obscene. *See* Hamling v. United States, 418 U.S. 87, 123 (1974).

39. New York v. Ferber, 458 U.S. 747, 764 (1982) (defining child pornography as sexually explicit depictions of actual minors).

40. *Id.* at 765 (requiring scienter to impose criminal liability as is required for obscenity prosecution); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (interpreting a federal statute to require distributors' knowledge of minor status, as compelled by First Amendment reasons as well as principles of criminal liability).

The Supreme Court has suggested that scienter may not be required for producers of child pornography, as opposed to distributors or possessors. *See X-Citement Video*, 513 U.S. at 76 n.5. Most circuit courts have relied upon this dictum to reject any mens rea requirement for producers, though the Ninth Circuit has required an affirmative defense of mistake-of-age. *See* United States v. Humphrey, 608 F.3d 955, 960 (6th Cir. 2010) (describing various circuit courts' requirements and distinguishing them from the Ninth Circuit).

41. *See* Osborne v. Ohio, 495 U.S. 103, 115 (1990) (holding that an Ohio court's construal of a child pornography statute to require recklessness satisfied *Ferber's* scienter requirement).

42. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 (2003); *cf.* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 502 & n.19 (1984) (observing "kinship" between the *Sullivan* standard and the typical common law standard for fraud).

43. *Madigan*, 538 U.S. at 606, 620-21.

44. Commercial speech inhabits an intermediate tier of protection. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562-63 (1980). False and misleading commercial speech is unprotected, as is commercial speech regarding illegal activity. *Id.* at

misleading commercial speech is completely unprotected without regard for the speaker's state of mind.⁴⁵ On the other hand, commercial speech garners lesser protection than other speech in large part because it is economically motivated and thus "there is little likelihood of its being chilled by proper regulation."⁴⁶ On the Court's hypothesis, commercial speakers say what they do out of economic motivation, and thus economic interest informs their intentions in speaking. In this way, speaker's intent, while irrelevant to the status of false and misleading commercial speech, arguably helps to define the entire category.

Of course, the fact that commercial speech is economically motivated is not alone a sufficient reason for according it lesser protection. Some economically motivated expression has full First Amendment protection, including the advertisement at issue in *Sullivan*.⁴⁷ But the question is not whether economic motivation is a *sufficient* basis for according commercial-speech status. In none of the other categories I have mentioned is the speaker's state of mind the only feature that defines an unprotected category. The question is whether economic motivation is a *necessary* condition for commercial speech. The Court has suggested that it may be.⁴⁸

563-64. Other commercial speech receives intermediate protection, wherein a regulation must directly advance a substantial government interest by means that are no more extensive than necessary. *Id.* at 566.

45. The Federal Trade Commission Act, for example, imposes liability for deceptive advertising without regard for whether the speaker intended to deceive. 15 U.S.C. § 45 (2006); *see, e.g.*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *United States v. Johnson*, 541 F.2d 710, 712 (8th Cir. 1976); *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) ("[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.").

46. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976); *see also Cent. Hudson*, 447 U.S. at 564 n.6 (explaining that commercial speech, as the "offspring of economic self-interest," is less susceptible to chill).

47. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 482 (1989) (citing the *Sullivan* example); *see also Schauer, supra* note 2, at 221 n.78.

48. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) (holding that the economic motivation for the printing of a pamphlet, though insufficient in itself to make the pamphlet commercial speech, was one of a "combination of ... characteristics" to render it such); *Cent. Hudson*, 447 U.S. at 564 n.6 (explaining that the economic motivation of commercial speech justifies its lesser protection because this motivation makes it less susceptible to chilling). *But see Schauer, supra* note 2, at 221 ("That someone who advertises a product does not possess the profit-seeking motivation that partly justifies the lower level

2. Other Examples

Other cases afford additional examples in which speaker's intent matters to the protection of expression.

Communist affiliation: A long line of cases considered the conditioning of government employment and other benefits on lack of Communist ties. For a period, the Court allowed benefits to be denied only to people who *knew* that the organization to which they belonged advocated the violent overthrow of the government.⁴⁹ In later cases, the Court required both "knowledge of the [Communist] Party's unlawful purposes *and* specific intent to further its unlawful aims."⁵⁰

Invasion of privacy and intentional infliction of emotional distress: The Court has held that liability for expression under both these tort actions is limited by the *Sullivan* actual malice standard. At least in the case of a newsworthy plaintiff, a successful claim for invasion of privacy predicated on a false statement requires a showing that the defendant acted with actual malice.⁵¹ A public

of protection does not change the approach that would be used to determine whether the material itself can be controlled, or whether the purveyor of the product may be sanctioned.”).

Alexander appears to recognize, and reject, this implication of the commercial speech doctrine. *See* Alexander, *Low Value Speech*, *supra* note 2, at 548-49 (“[T]he ‘value’ of ‘buy a Chrysler’ does not decline when its author is Lee Iacocca rather than Ralph Nader.”). But his position is complex. He reads *Virginia Pharmacy* as making profit motive irrelevant to the “intrinsic value of the speech” but says that it may nevertheless be relevant to constitutional protection “in the few situations in which profit motive might affect coerciveness or the potential for fraud and deception.” *See* Lawrence Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 374 (1977).

49. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); *Adler v. Bd. of Educ.*, 342 U.S. 485, 494-95 (1952); *Wieman v. Updegraff*, 344 U.S. 183, 189-91 (1952); *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 723-28 (1951); *Gerende v. Bd. of Supervisors*, 341 U.S. 56, 56-57 (1951); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412-13 (1950).

50. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606-07 (1967); *see id.* at 606 (“Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion.”); *see also Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (same); *Scales v. United States*, 367 U.S. 203, 228 (1961) (referring to constitutional principles in interpreting the Smith Act to target only active Communist Party members with guilty knowledge and intent); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919-20 (1982) (noting that civil liability may only be imposed when the individual belonged to a group with unlawful goals and had the intent to further those goals).

51. *Time, Inc. v. Hill*, 385 U.S. 374, 387-89 (1967).

figure's claim for intentional infliction of emotional distress must meet the same standard.⁵²

Criminal instruction: Courts and lawmakers have also struggled with speech that instructs listeners on how to commit crimes.⁵³ The Fourth Circuit, for example, concluded that tort liability for an instructional manual entitled *Hit Man* rested on whether its publishers intended to enable crime.⁵⁴ A federal law punishing distribution of bomb-making instructions requires proof that the defendant intended that the information be used in furtherance of a federal crime of violence.⁵⁵ Originally, the proposed legislation did not include a specific-intent requirement.⁵⁶ It was modified after a 1997 Department of Justice Report, compiled at Congress's behest,⁵⁷ concluded that the First Amendment required specific intent.⁵⁸

None of this is to say that the First Amendment always takes speaker's intent into consideration. For example, the unprotected category of fighting words, to the extent that it still exists, appears to require neither intent to insult nor intent to provoke a fight.⁵⁹ Similarly, in the campaign finance context, the Court has held that the distinction between express advocacy and issue advocacy does not involve the intent of the speaker but rather the objective meaning of the expression.⁶⁰ In recent years, the Supreme Court has had a somewhat complex response to two invitations to impose intent requirements. In *Holder v. Humanitarian Law Project*, the

52. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

53. On criminal instruction, see generally Volokh, *supra* note 2, and Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973 (2005).

54. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266 (4th Cir. 1997).

55. 18 U.S.C. § 842(p)(2) (2006).

56. See Act of Aug. 17, 1999, Pub. L. No. 106-54, 113 Stat. 398, 398-99 (adding subsection (p) to § 842).

57. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 709, 110 Stat. 1214, 1297 (requiring the DOJ to conduct a study and prepare a report).

58. See U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMaking INFORMATION, <http://purl.access.gpo.gov/GPO/LPS13089>.

59. See *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (stating that one may be guilty of breach of the peace "if he commit acts or make statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended*," while suggesting this principle passes constitutional muster so long as it is limited to certain classes of speech (emphasis added)).

60. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 466-68 (2007); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976).

Court upheld a law prohibiting knowing provision of material support to terrorist organizations.⁶¹ The Court saw no constitutional need to construe the law to reach only intentional support of such organizations,⁶² but in passing it suggested that the knowledge requirement helped to make the statute “carefully drawn.”⁶³ In *United States v. Alvarez*, a plurality of the Court concluded that the false statements at issue were entirely protected, at least so long as they were not said “for the purpose of material gain.”⁶⁴ The Court thus declined to impose a requirement of knowledge or recklessness while seemingly reiterating that fraudulent intent renders false speech unprotected. Whatever the import of these more recent cases, the fact remains that, in many areas, the law treats otherwise identical speech differently depending on the speaker’s state of mind.

B. The Chilling Effect Account of Speaker’s Intent

Of the existing First Amendment intent requirements, the Supreme Court has explicitly invoked the chilling effect to explain defamation,⁶⁵ obscenity,⁶⁶ commercial speech,⁶⁷ fraud,⁶⁸ invasion of privacy,⁶⁹ intentional infliction of emotional distress,⁷⁰ and the Communist-affiliation cases.⁷¹ Other requirements, most prominently specific intent for incitement and true threats, have not expressly relied on chilling.⁷² Meanwhile, some scholars have argued

61. 130 S. Ct. 2705, 2712 (2010).

62. *Id.* at 2718.

63. *Id.* at 2723.

64. 132 S. Ct. 2537, 2547 (2012) (plurality opinion).

65. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

66. *Smith v. California*, 361 U.S. 147, 148-50 (1959). To the extent that the Court has relied upon *Smith* and other obscenity cases in imposing the same scienter requirement for child pornography, it may have relied implicitly upon the chilling effect in that context as well. See *New York v. Ferber*, 458 U.S. 747, 764-65 (1982).

67. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980).

68. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

69. *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967).

70. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

71. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

72. Indeed, the test for incitement began its development long before the Court first invoked the chilling effect. Though *Brandenburg* itself offers no justification for the intent requirement, earlier cases likened incitement to criminal attempt. See *infra* note 245 and

that, normatively speaking, *any* First Amendment intent requirement can be justified *only* by the chilling effect.⁷³

The term “chilling effect” refers to a claim that an otherwise legitimate regulation has the incidental effect of deterring—or chilling—benign activity, in this case protected expression.⁷⁴ Of course, rules are generally understood to have deterrent effects on conduct. A law against murder, one hopes, deters murder. An obscenity law is thought to deter obscene expression. Such an effect would not be a chilling effect as the term is typically employed.⁷⁵ Instead, the term “chilling effect” refers to the spillover effects of laws on benign conduct outside their scope. For example, an obscenity law that inhibited nonobscene expression would exert a chilling effect.⁷⁶ “Chilling” denotes *overdeterrence of benign conduct that occurs incidentally to a law’s legitimate purpose or scope*.

1. *Why Chilling Matters*

Overdeterrence of benign conduct is usually a policy matter, not a constitutional one. Moreover, many ordinary legal rules, such as criminal and tort rules, are taken to represent an acceptable balance of deterrence of undesired conduct and chilling of benign conduct.⁷⁷ The premise of the chilling effect, however, is that when the conduct in question is speech, the balance represented by ordinary legal rules is subject to judicial review and may well be

accompanying text. In *Virginia v. Black*, 538 U.S. 343, 359-60 (2003), the Virginia threat statute included a specific-intent requirement, which the Supreme Court constitutionalized with no explicit justification. See Schauer, *supra* note 2, at 216-18.

73. See Alexander, *Speaker’s Intent*, *supra* note 2, at 25; Schauer, *supra* note 2, at 217-23.

74. As Schauer notes, the term “chilling effect” may denote unwelcome deterrent effects with respect to any rights or values, but it originated in and remains closely associated with the First Amendment context. Schauer, *supra* note 9, at 686-87 n.10.

75. See, e.g., *id.* at 693; see also Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 745-46 (2012) (using the term “deterrence” to denote deterrence of harmful acts and “chilling” to denote deterrence of benign acts).

76. See Schauer, *supra* note 9, at 693.

77. See, e.g., Kaplow, *supra* note 75, at 745-46.

found wanting.⁷⁸ Traditional tort principles must be rejected,⁷⁹ as must the regular operation of the criminal law.⁸⁰

The question is why the chilling of expression is a constitutional concern warranting the review and alteration of generally acceptable rules. The answer must depend, as most First Amendment arguments do, on the contention that expression is special in some way.⁸¹ The chilling effect is of constitutional moment because protected expression is a particularly valuable activity toward which legal rules must show special solicitude. Professor Frederick Schauer, for example, has argued that chilling effect arguments are based on a conception of free expression as an *affirmative value*.⁸² On this view, the First Amendment is “based on the assumption, perhaps unprovable, that the uninhibited exchange of information, the active search for truth, and the open criticism of government are positive virtues.”⁸³ Accordingly, the government is under a duty not only to refrain from regulating protected expression but also to promote it.⁸⁴ At the same time, freedom of expression is also a *preferred value*, such that, when it conflicts with other state values—such as the interest in regulating unprotected expression—it must receive more weight.⁸⁵ Hence the chilling effect of an otherwise legitimate law becomes a matter for judicial review and a likely cause for invalidation.⁸⁶

78. See Schauer, *supra* note 9, at 685.

79. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (invasion of privacy); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

80. Compare *United States v. Balint*, 258 U.S. 250, 253-54 (1922) (upholding a law imposing strict liability for the improper sale of a controlled substance), and *People v. Commons*, 148 P.2d 724, 730 (Cal. App. Dep’t Super. Ct. 1944) (allowing prosecution under a Los Angeles ordinance imposing strict liability for carrying a dangerous weapon in a car without a permit), with *Smith v. California*, 361 U.S. 147, 152-54 (1959) (invalidating a Los Angeles ordinance imposing strict liability on a bookseller in possession of obscene material).

81. See generally Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

82. Schauer, *supra* note 9, at 691.

83. *Id.* at 693 (footnotes omitted).

84. *Id.* at 691 (“[W]e are concerned with encouraging speech almost as much as with preventing its restriction by the government.”).

85. See *id.* at 703-05; see also, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010) (“First Amendment standards, however, must give the benefit of any doubt to protecting rather than stifling speech.” (internal quotation marks omitted)).

86. See Schauer, *supra* note 9, at 694.

Schauer's view appears to capture the operating ideas beneath many scholarly and judicial conceptions of the chilling effect.⁸⁷ Some might not go so far as to argue that the government has a duty to promote expression, rather than a duty to avoid deterring it.⁸⁸ But even so, the basic idea remains that protected expression has special value, which generates special solicitude against chilling.

It should also be clear that the use of the terms "deterrence" and "chilling" here does not imply an efficiency-based theory of free expression. Some scholars, such as Professor Daniel Farber, have advanced an efficiency-based view according to which expression requires special treatment not because it is superior to other goods but because it has some attributes of a public good.⁸⁹ One result of this view is that speech requires special subsidies, such as constitutional protection against chilling.⁹⁰ An interest in chilling may thus be generated from efficiency-based premises, but it hardly equates with them. Anyone who thinks that expression has affirmative value—for its role in democratic self-government, for its facilitation of autonomy, or for whatever other reason—will regard an interest

87. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (explaining constitutional libel law as attempting to reduce press self-censorship in order to ensure vigorous public debate).

88. For example, *Gertz*, 418 U.S. at 340-41, and *Sullivan*, 376 U.S. at 278-79, protect against chilling without endorsing a positive state obligation to promote expression. But it is difficult to conceive of protection against chilling as anything other than a subsidy of protected expression. And it is difficult to see why the government would have a duty to subsidize protected expression in one context and not others. The issue is controversial, however, and tangential to the argument here. For present purposes, it is sufficient to say that expression has special value that, at the least, places an obligation on the government to avoid chilling it through regulation.

89. See, e.g., Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 569-70 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 19-24 (1986). Farber argues that speech need not be more valuable than other activities in absolute terms. Farber, *supra*, at 560. Instead, it may be special because a high proportion of its value is social rather than private, and producers are likely to have suboptimal incentives to produce it. *Id.* at 559-60.

90. See Farber, *supra* note 89, at 569-70.

in chilling as consistent with, if not required by, her conception of freedom of expression.

2. *How Chilling Works*

The question arises why legal rules not directed at protected speech might nevertheless chill such speech. Chilling may arise from different sources, foremost among which is uncertainty in the legal process.⁹¹ Uncertainty may stem from ambiguous rules or erroneous applications. Either of these may make a speaker fear that he will be held liable for speech that should properly be protected. The closer his speech is to the line between protected and unprotected, the more pronounced this uncertainty will be.⁹² Given the existence of both ambiguity and error, would-be speakers of marginal statements might well decide that they would prefer not to speak rather than to risk liability. Speech that is actually protected will therefore be chilled.⁹³

It is worthwhile to examine this description in more detail. The mechanisms of chilling are diverse, and some so distinct as to have their own labels. The most prominent examples are vagueness and overbreadth.⁹⁴ The doctrine of void-for-vagueness is partly explained on chilling grounds.⁹⁵ A vague law creates uncertainty as to its

91. See Schauer, *supra* note 9, at 694. Although legal uncertainty is an important source of chilling, it is not the only one. If chilling is objectionable because it constitutes a negative incidental effect on protected expression, it is important to recognize that all regulations impose some incidental burden on protected expression. See ALEXANDER, *supra* note 1, at 17 (“[A]ll laws affect what gets said, by whom, to whom, and with what effect.” (emphasis omitted)).

For example, an ordinance against outdoor burning, although directed at preventing fires, has a detrimental incidental effect on certain symbolic conduct. *Cf.* *United States v. O'Brien*, 391 U.S. 367, 386 (1968) (upholding a prohibition on draft-card burning justified by administrative interests). Similarly, an antileafleting ordinance directed at reducing litter may well have a detrimental incidental effect on protected expression. In their implication of speech as an affirmative value, such effects seem no different from the unintended detrimental effects of a law directed at unprotected expression. See *infra* Part II.B.3.

92. See, e.g., Schauer, *supra* note 9, at 696 (arguing that chilling is greatest at the margins of protection).

93. See *id.* at 694.

94. See, e.g., TRIBE, *supra* note 1, § 12-33, at 1037-39; see also Farber, *supra* note 89, at 570 & n.67 (discussing vagueness and overbreadth as instances of concern about chilling).

95. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); TRIBE, *supra* note 1, § 12-31, at 1033-34. Vagueness also creates problems of fair notice and potential for

scope; speakers who would otherwise engage in protected speech accordingly self-censor. Although vagueness is a general due process issue, its special significance in the First Amendment area is consistent with the conception of free speech as an affirmative value.⁹⁶

Similarly, one chief explanation for the First Amendment doctrine of overbreadth rests on the chilling effect. An overbroad law is invalid not because it incidentally chills protected expression but because it directly reaches protected expression: hence the term “overbroad.” The chilling effect comes in as one explanation for why unprotected speakers—those who would have been reached by a properly drawn law—nevertheless may challenge the overbroad law.⁹⁷ They may do so, according to this account, because the law is chilling would-be speakers of protected expression who stay silent to avoid prosecution but thereby lose the opportunity to challenge the law.⁹⁸ The overbroad law essentially exerts a chilling effect on its own appropriate judicial review, the remedy to which is a special standing rule.⁹⁹

But chilling also arises outside the context of these doctrines. A law that is not void for vagueness may still contain ambiguities, and even the clearest rule may be applied in error. These circumstances may make speakers uncertain of a law’s application. This uncertainty may translate into a variety of risks, any of which may cause a speaker to remain silent. For example, a speaker may be deterred

arbitrary or discriminatory applications. *See Grayned*, 408 U.S. at 108-09.

96. *See, e.g., Grayned*, 408 U.S. at 109; *TRIBE, supra* note 1, § 12-31, at 1033-34.

97. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.94, at 824-25 (3d ed. 2008).

98. *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) (“[W]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack.”).

99. This is, of course, not the only account of overbreadth, and I do not endorse it here. If anything, my arguments about the weakness of the chilling effect as a First Amendment justification militate against the standing account of overbreadth and in favor of the substantive account. *See, e.g., Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85 (1989) (suggesting the existence of a substantive right not to be subject to an invalid statute); WRIGHT, MILLER & COOPER, *supra* note 97, § 3531.94, at 801 (same); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1-2 (same).

- by the risk of wrongful criminal conviction and sanction;¹⁰⁰
- by the risk of wrongful liability in tort for damages or other civil remedies;¹⁰¹
- by the risk of losing benefits to which he is entitled;¹⁰²
- by the litigation costs of defending himself in criminal, civil, or administrative procedures, regardless of their outcomes;¹⁰³
- by the personal and reputational costs of defending against a criminal, civil, or administrative proceeding, regardless of its outcome;¹⁰⁴
- by the costs of obtaining legal advice prior to speaking;¹⁰⁵ or
- by the threat of investigation or surveillance, whether or not it results in legal proceedings.¹⁰⁶

100. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964); *Smith v. California*, 361 U.S. 147, 153-54 (1959). But see *Younger v. Harris*, 401 U.S. 37, 41-42 (1971) (rejecting standing of plaintiffs to seek federal injunction of state law when they were not facing prosecution but allegedly felt chilled by the risk of sanction).

101. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

102. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that predicated a government benefit on loyalty oath may chill protected association).

103. See *Calder v. Jones*, 465 U.S. 783, 790-91 (1984) (claiming that *Sullivan* budgeted for the chilling effect of litigation costs in rejecting the claim for an amended jurisdictional standard for defamation suits); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (rejecting the claim that the chilling effect of libel litigation costs required a change in discovery rules); see also Farber, *supra* note 89, at 569 (recognizing litigation costs as a potential cause of chilling); Schauer, *supra* note 9, at 711-12 (same).

104. Compare *Younger*, 401 U.S. at 46 (concluding that “the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution” did not justify a federal injunction against the enforcement of a state law in an ongoing prosecution), with *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (“So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.”).

105. See *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney.”).

106. Compare *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (holding that exposure of NAACP membership lists during investigation would impermissibly chill free association), with *Laird v. Tatum*, 408 U.S. 1, 10-11 (1972) (rejecting standing of individuals claiming that existence of Army civilian surveillance program chilled their free expression and association), and *Branzburg v. Hayes*, 408 U.S. 665, 693-94 (1972) (rejecting as speculative claims about the chilling effect of permitting grand jury subpoenas regarding journalist sources). See also *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 143-45 (2d Cir. 2011) (holding that journalists and others have standing to challenge U.S. surveillance of international communications), *cert. granted*, 132 S. Ct. 2431 (2012) (mem.).

The Supreme Court has treated these claims with varying degrees of sympathy. For example, it has rejected claims based on defamation litigation costs¹⁰⁷ but said in *Citizens United* that “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney.”¹⁰⁸ Despite the Court’s varying treatment of some of these claims, as a logical matter they are all risks imposed by legal uncertainty and capable of chilling protected expression. Chilling effects have been invoked in a wide variety of contexts to justify customized adjustments of particular legal rules in light of their purported uncertainties.

Thus, the term “chilling effect” refers to a concern that an otherwise legitimate rule will curb protected expression outside its ambit. This phenomenon generally arises when would-be speakers, faced with the uncertainties of the legal process, refrain from making protected statements. This is an evil of constitutional proportions because free speech is an affirmative value, which the government has a particular obligation to promote, or at least not to deter. Chilling is combatted by legal rules that reduce the likelihood that protected expression will be punished. Intent requirements are but one example of such rules.

II. ROUGH JUDGMENT: THE SPECULATIVE CHILLING EFFECT

The difficulties with the chilling effect account of speaker’s intent begin with the fact that the Supreme Court has not invoked the chilling effect to explain some intent requirements, including those for incitement and true threats.¹⁰⁹ This difficulty, however, is surmountable: if intent requirements can only be justified on chilling grounds, then all such requirements must be assessed in light of the chilling effect. One must simply apply the Court’s reasoning in other contexts to these doctrines.

107. See *Calder*, 465 U.S. at 790-91; *Herbert*, 441 U.S. at 176.

108. *Citizens United*, 130 S. Ct. at 889.

109. See *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). The Court has also not explicitly relied on the chilling effect in the child pornography context, see *New York v. Ferber*, 458 U.S. 747, 765 (1982), but it has analogized to obscenity, an area in which it has relied on chilling, see *Smith v. California*, 361 U.S. 147, 148-49 (1959).

This approach, however, encounters the further difficulty that, when the Supreme Court has used the chilling effect to explain intent requirements, it has relied on little more than crude empirical speculation about the effects of the challenged rule and the relief that an intent requirement would provide.¹¹⁰ In signal areas such as defamation and obscenity, the Court has provided no evidence whatsoever to support either its diagnosis of chilling or its favored cure.¹¹¹ The Court has shown the same uncorroborated confidence when curing chilling through rules other than intent¹¹² and when rejecting chilling effect claims altogether.¹¹³

Nor is the Court unaware of this problem. Dissents and majorities routinely criticize each other for the flimsy empirical basis of their assessments of chilling. In some cases in which majorities have rejected or ignored potential chilling effects, dissenters have been equally convinced of their existence.¹¹⁴ In other cases, when the

110. See Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267, 286 (noting that the *Sullivan* actual malice standard, “right or wrong, was based on what was at best armchair economics and at worst casual speculation, not about the law itself, but about the newspaper industry, its organization, and the incentives of its inhabitants”); Russell L. Weaver & Geoffrey Bennett, *Is the New York Times “Actual Malice” Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1189 (1993) (noting that the Supreme Court in *Sullivan* did not rely on “detailed empirical studies” but instead “chose, as it often does, to speculate about the need for an actual malice standard”).

111. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Smith*, 361 U.S. at 148-49. The chilling effect of defamation law in the United States pre- and post-*Sullivan*, and under current English law, is a matter of contention. See *infra* Part III.A and sources cited therein.

112. See, e.g., *Citizens United*, 130 S. Ct. at 891; *Reno v. ACLU*, 521 U.S. 844, 872 (1997); *Dombrowski v. Pfister*, 380 U.S. 479, 485-89 (1965); *NAACP v. Button*, 371 U.S. 415, 435-36 (1963).

113. The Court often concludes that any chilling is insignificant compared with the interests served, an approach that implies an ability to approximate the chilling involved. See, e.g., *United States v. Am. Library Ass’n*, 539 U.S. 194, 209 (2003); *Younger v. Harris*, 401 U.S. 37, 51-52 (1971); *Barenblatt v. United States*, 360 U.S. 109, 134 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 79-81 (1959). At other times, the Court says that the litigants have provided insufficient evidence of chilling. See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 167 (1971). The Court undermines this approach by accepting chilling elsewhere in the absence of evidence. See, e.g., *Citizens United*, 130 S. Ct. at 933 n.5 (Stevens, J., concurring in part and dissenting in part) (noting lack of evidence for majority’s finding of chilling); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 390 (1974) (White, J., dissenting) (same).

114. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 561 (2009) (Breyer, J., dissenting) (“[T]he result [of the majority’s approach] is a rule that may well chill coverage—the kind of consequence that the law has considered important for decades.”); *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 596 (1973) (Douglas, J.,

Court has recognized a chilling effect, the majority has found itself attacked by some dissenters for acting without evidence¹¹⁵ and by others for not taking chilling seriously enough.¹¹⁶

Thus, although the chilling effect has exerted a pervasive influence on First Amendment jurisprudence, this influence is founded on little more than a collection of unsubstantiated empirical judgments. Of course, this state of affairs is not unique to the area of chilling effects. Judicial decision making, including constitutional decision making, often involves empirical determinations for which judges have little guidance beyond their own rough sense of what is true about the world.¹¹⁷ Professor Schauer has termed this “the dilemma of ignorance”: some legal standards allow, or require, empirical judgments, but the questions involved are beyond the ken of courts.¹¹⁸

dissenting) (“The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration.”); *Branzburg v. Hayes*, 408 U.S. 665, 740-41 (1972) (Stewart, J., dissenting) (finding that investigations “create uncertainty and needlessly discourage First Amendment activity”).

115. See, e.g., *Citizens United*, 130 S. Ct. at 933 n.5 (Stevens, J., concurring in part and dissenting in part) (“[T]he majority’s argument for striking down § 203 depends on its contention that the statute has proved too ‘chilling’ in practice We have no record with which to assess that claim.”); *Gertz*, 418 U.S. at 390 (White, J., dissenting) (“To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.”). Of course, Justice White was correct that the Court supplied no evidence for its conclusion; he in turn supplied none for his.

116. See, e.g., *Citizens United*, 130 S. Ct. at 982 (Thomas, J., concurring in part and dissenting in part) (arguing that the majority also should have held disclosure requirements invalid on chilling effect grounds); *Gertz*, 418 U.S. at 361 (Brennan, J., dissenting) (arguing that the majority’s rule did not offer adequate “breathing space” and that only an actual malice standard was acceptable); see also *Sullivan*, 376 U.S. at 293-94 (Black, J., concurring) (rejecting actual malice in favor of an absolute press privilege); *Smith*, 361 U.S. at 156 (Black, J., concurring) (“The fact is, of course, that prison sentences for possession of ‘obscene’ books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity.”).

117. See Schauer, *supra* note 110, at 286 (“[T]he phenomenon of lawmaking on the basis of dimly informed policy speculation can arguably be said to be an accurate, even if possibly mean-spirited, characterization of the entire common law process.”); *id.* at 287 (suggesting that a Supreme Court decision on the nature of golf may seem untrustworthy, “but there is no reason to believe it was any more amateurish than the Court’s knowledge of newspaper practices in [*Sullivan*], its knowledge of educational psychology in *Brown*, or for that matter its knowledge of the empirical dimensions of voting behavior in *Bush v. Gore*”).

118. See *id.* at 268-69.

The very pervasiveness of the dilemma counsels a cautious response. To reject the chilling effect outright will lead to the rejection of many other doctrines and outcomes. Unless we are to conclude that all such law making is illegitimate, we need a more nuanced response to adjudication on the basis of incomplete information.¹¹⁹

With this necessity in mind, this Part evaluates the chilling effect on its own terms, as a product of rough empirical judgment. The question is whether, on these terms, the chilling effect offers a satisfactory normative account of existing First Amendment intent requirements. The working premise is that, if ignorance equally besets all instances of chilling effect reasoning, then we should be able to judge these instances in comparison with each other. Justifications based on the chilling effect should all look roughly reasonable. Aspects of the doctrine that reject the chilling effect should seem plausibly distinguishable from those that rely on it.

Even by this standard, however, the chilling effect account of speaker's intent is unpersuasive. As a justification for existing law, the chilling effect is both over- and underinclusive to an extent that undermines its plausibility.

A. Overinclusiveness

In some areas, the premise that the chilling effect is the only legitimate justification for intent requirements leads to an attempt to justify standards that seem unnecessary to prevent chilling. In these instances, the chilling effect rationale seems overinclusive.

1. Specific-Intent Requirements

The Supreme Court has imposed specific-intent requirements in contexts such as incitement and threats.¹²⁰ Interestingly, the Court

119. *See id.* at 292-94 (discussing possible responses to the problem of judicial empirical ignorance).

120. *See supra* notes 33-36 and accompanying text. The Communist-affiliation cases also involved a specific-intent requirement, *see supra* note 50 and accompanying text, but they provoke an objection different from the one outlined above. These cases are best understood as instances in which the Court invoked the chilling effect in order to avoid the substantive question of whether Communist affiliations were protected under the First Amendment. The premise of the chilling effect argument was that it was arguably constitutional to penalize

has not expressly justified these standards on chilling grounds, but to the extent that our normative hypothesis is that the chilling effect is the only legitimate justification for such standards, their plausibility must be tested. As it turns out, it is difficult to argue that the chilling effect justifies any First Amendment specific-intent requirement, and certainly not these particular ones.

To see why, it is useful to consider the actual malice standard. The perceived problem in *New York Times Co. v. Sullivan* was that strict liability for defamation chilled true speech because speakers would hesitate to share true information unless they were sure it was true.¹²¹ The actual malice standard remedies this effect by distinguishing those speakers who have reason to know that their speech is unprotected from those who do not. False and defamatory speech is unprotected when speakers (1) know their speech is false or (2) have subjective awareness of a substantial risk of falsity¹²²—that is, when speakers have subjective notice of falsity. Other false and defamatory speech is protected.

With this demarcation, speakers can judge the status of their speech *ex ante*. Speakers with subjective notice of falsity are not likely to mistake themselves for unknowing speakers—they know they are not. Nor, more importantly, are negligent or innocent speakers likely to mistake themselves for unprotected speakers—they lack the subjective notice to make them so. True, a court may misjudge a speaker's state of mind, and this risk may cause some degree of chill. But on the whole, speakers have a much clearer

membership in subversive organizations, except for the fact that doing so might cause citizens to hesitate to join other organizations. *See, e.g.,* *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958) (assuming without deciding that California could proscribe Communist affiliation under criminal syndicalism act); Schauer, *supra* note 9, at 701-02 n.78 (suggesting that *Speiser* may have been decided on chilling effect grounds to avoid the substantive validity of the loyalty oath, which today would be considered unconstitutional). Only later did the Court take the view that the First Amendment “prohibit[ed] a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization.” *Baird v. State Bar*, 401 U.S. 1, 6 (1971). Thus, the chilling effect account of this area is inadequate not because the Court employed an implausible prophylactic standard but because it should have employed a substantive rule rather than a prophylactic one.

121. *Sullivan*, 376 U.S. at 279; *see also Gertz*, 418 U.S. at 340-41.

122. *See St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). A better elaboration is probably that the speaker must have subjective awareness of a risk of falsity substantial enough that a reasonable person would have made further investigations or refrained from publishing.

sense of their liability because the line between protected and unprotected speech depends on something speakers may judge fairly easily. Instead of being liable every time they do not have accurate information about the world, they are liable only when they realize their information may not be accurate; liability turns on their knowledge not of the world but of themselves.

The question, then, is why the same standard is not sufficient for unprotected speech such as incitement or threats. Recall that, on a chilling effect rationale, all speech that causes the harm of inciting or threatening is, in its own right, unprotected.¹²³ An intent requirement forms a prophylactic shield around some of this speech in order to safeguard other truly protected speech. To the extent that some incitement or threats must be protected in order to shield other expression, it is sufficient to draw the line at knowing and reckless speakers—that is, to impose an actual malice standard. As in the defamation context, these speakers have subjective awareness that their expression has a high probability of causing harm. They are unlikely to mistake themselves for unknowing speakers, and vice versa. Again, the danger exists that courts will misjudge a speaker's mental state, but this chill is mitigated by the fact that (1) it should be difficult to prove that a speaker had subjective awareness of the risks of her speech and (2) close cases should be decided in favor of the speaker.

By contrast, the specific-intent standard is unnecessary. It is not needed to give speakers notice of their status *ex ante*; in fact it protects speakers who had notice that they were making unprotected statements. As a matter of rough empirical judgment, it is difficult to see why actual malice should be a satisfactory standard in the defamation context, but specific intent should be required for incitement and threats.

One possible response is that incitement and threats require higher intent standards because they involve criminal liability, while defamation involves civil liability. I do not wish to understate the significance of criminal conviction and punishment, or the likely deterrent effect that their prospect might have. Nevertheless, as an explanation for the difference in intent requirements, this

123. See *supra* note 9 and accompanying text.

concern runs up against several difficulties. For one, in *Garrison v. Louisiana*, the Supreme Court extended the actual malice standard to criminal libel.¹²⁴ This acceptance of actual malice in one criminal context suggests that the Supreme Court does not regard specific intent as necessary to prevent chilling whenever criminal law is involved.

This view, moreover, is defensible in light of the distinction between general criminal law requirements and First Amendment requirements. The criminal law may favor specific-intent requirements in certain contexts, but this is not necessarily, let alone exclusively, because such requirements prevent chilling of benign conduct.¹²⁵ It therefore does not follow that *First Amendment* intent requirements, if imposed exclusively to address chilling, would necessarily have to conform to criminal law preferences. This is all the more true in light of the fact that First Amendment intent requirements are imposed *in addition* to the due process safeguards that criminal law already requires, such as proof beyond a reasonable doubt. If chilling is all that matters, and if a knowledge or recklessness standard is sufficient to give speakers advance notice of the status of their expression, it is unclear why a higher intent standard would be necessary as a matter of First Amendment law.¹²⁶

Another possible response is that some types of expression require more protection than others to achieve the same defense against chilling. For example, some might argue that in the campaign setting, it is necessary to protect even deliberate lies, because any prospect of state adjudication of truth would create an impermissible chill.¹²⁷ One could construct similar arguments about the need to protect knowing threats or incitement.

124. 379 U.S. 64, 74 (1964).

125. See, e.g., R.A. DUFF, INTENTION, AGENCY AND CRIMINAL CULPABILITY 113 (1990) (arguing that intentional wrongful action is inherently more culpable than foreseen wrongful action); A.P. Simester, *Why Distinguish Intention from Foresight?*, in HARM AND CULPABILITY 71, 71-72 (A.P. Simester & A.T.H. Smith eds., 1996) (arguing that foreseen and intended wrongful actions are both culpable, but intended wrongful actions cannot be justified on grounds of reasonableness).

126. See Alexander, *Speaker's Intent*, *supra* note 2, at 25 (arguing that specific intent may be required for purposes of criminal law, but some lower mental state may be sufficient to address First Amendment interest in combatting chilling).

127. See, e.g., Varat, *supra* note 2, at 1119-22.

But too many exceptions of this kind will return us to the difficulties surrounding nuanced empirical judgment. Only by demonstrating that a particular type of speech is distinctive may a court justify a distinctive standard. In the absence of evidence to distinguish them, defamation, incitement, and threats present similar issues. As a matter of unsubstantiated empirical judgment, the chilling effect is not a satisfactory justification for specific-intent requirements.¹²⁸

2. *Low-Value Expression: Obscenity and Child Pornography*

The standards governing obscenity and child pornography seem similarly overprotective. As noted earlier, in *Smith v. California* and later cases, the Supreme Court required proof of the distributor's knowledge or recklessness regarding the factual contents of obscene materials.¹²⁹ The Court later extended the same standard to the child pornography context.¹³⁰ Thus, a standard very close to the actual malice standard governs distribution of obscenity and child pornography, with the caveat that it is unclear whether their recklessness requirement is quite as demanding.¹³¹

Again, the comparison with defamation is instructive. Under the logic of the chilling effect, the expression most likely to be chilled is expression at the margins of protection.¹³² For the defamatory speech governed by *Sullivan*, this marginal speech consists of

128. This is the conclusion that both Alexander and Schauer draw. Alexander argues that the First Amendment cannot require the *Brandenburg* specific-intent standard. Alexander, *Speaker's Intent*, *supra* note 2, at 25. Schauer suggests that the threats test may be mistaken, Schauer, *supra* note 2, at 222-23, and denies that the incitement test involves specific intent at all, *id.* at 219. From their perspective, the implication of the mismatch is that specific-intent requirements are not justified. From mine, the implication is that the chilling effect is an inadequate justification for this aspect of existing law.

129. *See supra* note 38 and accompanying text.

130. *See supra* notes 40-41 and accompanying text.

131. Compare *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (contending that actual malice requires actual notice of a high risk of falsity), with *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (maintaining that the state's mens rea default rule of recklessness was sufficient), and *Ginsberg v. New York*, 390 U.S. 629, 643-44 (1968) (holding that a distributor of obscenity must have "reason to know" of the contents of the materials to be held guilty).

132. *See, e.g.*, Schauer, *supra* note 9, at 696 ("[I]t is this 'marginal' conduct that is most likely to be erroneously adjudged unlawful, and consequently the degree of fear will be greatest where such borderline activities are involved." (footnote omitted)).

possibly false but ultimately true information about public figures regarding a matter of public concern.¹³³ It is clear why such speech would contribute to the features that give protected expression affirmative value.

It is less clear, however, why the Court would insist on the same solicitude for borderline obscenity or child pornography.¹³⁴ At first glance, such expression seems to have few of the features that give protected speech affirmative value. Under Farber's view, for example, expression should be promoted because otherwise important information is underproduced.¹³⁵ Near-obscene material hardly supplies the sort of information Farber has in mind. Even if it did, Farber says that the market for pornography is so robust that it is not a public good and thus does not require special protection from chilling.¹³⁶ Schauer's view similarly invokes the importance of free expression "for the uninhibited exchange of information, the active search for truth and the open criticism of government."¹³⁷ The near-obscene, again, seems rather far afield from this mission.

On these terms, a stronger argument for protection existed when there was a danger that a film adaptation of *Lady Chatterley's Lover* could be censored—that is, when *Smith v. California* was decided.¹³⁸ But this is only to say that the chilling effect may have been an acceptable justification at the time of *Smith*, not that it remains one. As early as the mid-1960s, when the Court was writing approvingly of *Smith* in its defamation jurisprudence, obscenity was

133. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-57 (1985) (plurality opinion); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-81 (1964).

134. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("[A]ny chilled references to excretory and sexual material surely lie at the periphery of First Amendment concern." (internal quotation marks omitted)); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) ("[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.").

135. See Farber, *supra* note 89, at 569-70.

136. See *id.* at 565.

137. Schauer, *supra* note 9, at 693.

138. See *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959). Neither the Supreme Court nor the New York Court of Appeals thought the film was obscene per se, but the latter court opined that nonobscene material could be restricted for tending toward immoral ideas, a contention that the Supreme Court rejected. *Id.* at 686-89.

already a much narrower category.¹³⁹ Since then, the *Miller* test¹⁴⁰ has still defined the category quite narrowly.¹⁴¹ And to the extent that some valuable expression still falls at the margins, it is likely dwarfed by less valuable marginal expression.

The case for child pornography is worse. To apply chilling effect reasoning to child pornography is to claim that sexually explicit materials depicting people who appear to be minors not only should be protected but should be affirmatively insulated from the incidental effects of regulation.¹⁴²

This is not to say that there are *no* views under which these materials might merit special protection. One might take the view that sexual speech is vitally important and that its restriction is likely to rest on flawed views of sexuality generally, or female sexuality in particular.¹⁴³ Those valuing expression for autonomy-based reasons might view it as facilitating self-expression or self-development.¹⁴⁴ One might argue that, to the extent that sexual speech seeks to influence social mores, it belongs to the political sphere.¹⁴⁵ More broadly, under many First Amendment theories, one could find it

139. See, e.g., *Redrup v. New York*, 386 U.S. 767, 770 (1967) (per curiam) (holding that written materials are constitutionally protected); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion) (defining obscenity as "patently offensive" and "utterly without redeeming social value").

140. *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the current test for obscenity).

141. Cf. *Jenkins v. Georgia*, 418 U.S. 153, 153-55 (1974) (holding that the film *Carnal Knowledge* was protected expression under the *Miller* test).

142. One can always hypothesize, in the manner of overbreadth reasoning, a valuable instance of expression that may or may not depict minors. But for the most part, the definition of child pornography takes care of this problem: the materials must consist of "sexual acts or lewd exhibitions of genitalia." *New York v. Ferber*, 458 U.S. 747, 753 (1982). Any instances of high-value expression captured by this definition are likely to be swamped by material that illustrates the reasons for the existence of the category. One would have to contend that promoting those few instances was reason enough to protect all the others. See *id.* at 762-63 (rejecting an overbreadth argument on the ground that instances of educationally or artistically valuable child pornography are likely rare).

143. See, e.g., Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1140 (2005) (analyzing the Supreme Court's nude dancing jurisprudence as a reflection of cultural tropes portraying female sexuality as dangerous).

144. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 637 (1982).

145. See, e.g., T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 545 (1979).

either imperative or expedient to resist value hierarchies and to hold all protected expression deserving of equal treatment.¹⁴⁶

These approaches, while possible as a matter of normative justification, are not available as long as our mission is to account for the doctrine as it exists. The Supreme Court has quite clearly endorsed some degree of value hierarchy for speech.¹⁴⁷ Most importantly for present purposes, it has said that political speech—of the type protected in *Sullivan*—is at the “core” of First Amendment protection,¹⁴⁸ and that sexual content—of the type chilled by obscenity and child pornography laws—is at the periphery.¹⁴⁹ Indeed, the Court has recently rejected claims about the chilling of sexual content because of its allegedly minimal value.¹⁵⁰ Under a hierarchical approach, protections for marginal speech in the *Sullivan* context should look quite different from protections for borderline obscenity and child pornography.

The picture grows even more puzzling if one recalls that defamatory statements about private figures regarding matters of public concern are protected by a negligence standard, not actual malice.¹⁵¹ Thus, borderline obscenity and child pornography actually receive *more* protection against chilling than certain possibly false, but ultimately true statements pertaining to matters of public concern.

146. See, e.g., Alexander, *Low Value Speech*, *supra* note 2, at 547-48 (criticizing the speech-value hierarchy).

147. See, e.g., *Connick v. Myers*, 461 U.S. 138, 145 (1983) (suggesting the existence of a speech “hierarchy”).

148. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999) (asserting that “core political speech” finds First Amendment protection “at its zenith”); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (identifying the circulation of a petition as “core political speech”).

149. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”); cf. *Miller v. California*, 413 U.S. 15, 34 (1973) (“[I]n our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”).

150. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (“[A]ny chilled references to excretory and sexual material ‘surely lie at the periphery of First Amendment concern.’” (quoting *FCC v. Pacific Found.*, 438 U.S. 726, 743 (1978))).

151. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). *Gertz* used the term “fault,” typically understood as negligence, and in any case a “lesser” intent requirement than actual malice.

One might justify this result through a conception of free expression that provides a great deal of privacy protection, but the Supreme Court generally places a premium on the production of public information and tips the balance in favor of this imperative.¹⁵² The fact that sexual speech receives more protection than production of some public information makes it all the more difficult to rationalize the existing intent requirements in terms of the chilling effect.

Thus, the chilling effect account of existing intent requirements seems overinclusive in important respects. Some might argue that protecting more speech than necessary is not a serious fault for a First Amendment system. One need not take issue with this statement as a general matter to conclude that, as applied to the chilling effect, it is an unavailing dodge. All laws have incidental effects on expression.¹⁵³ The goal of the chilling effect is to identify when these incidental effects are out of range and to readjust them through appropriate remedies. If there is no such thing as too much protection, then many more laws should come under scrutiny. As we shall see in the next Section, there is already a good case that, under existing standards, many more laws should do just that. But the chilling effect cannot be a one-way ratchet without opening all laws up to serious question. It must help to decide when special solicitude against deterrent effects is appropriate.

B. Underinclusiveness

As suggested earlier, the *Sullivan* actual malice standard—unlike the specific-intent requirements of incitement and threats—has some intuitive plausibility as a remedy for chilling.¹⁵⁴ Even here, however, the chilling effect proves unsatisfactory. First, it is not clear that an intent requirement for defamation reduces chilling. Second, other aspects of defamation law seem equally reasonable candidates for chilling analysis. Finally, acceptance of the chilling

152. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1217-18 (2011) (foreclosing a private figure's claim of intentional infliction of emotional distress when caused by public picketing on a matter of public concern); cf. *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying actual malice standard to an invasion-of-privacy claim for a fictionalized account of a crime perpetrated against a private individual, who thereby became involuntarily newsworthy).

153. See, e.g., ALEXANDER, *supra* note 1, at 17.

154. See *supra* Part II.A.1.

rationale here conflicts with the fundamental First Amendment distinction between content-based and content-neutral laws.

1. The Underinclusiveness of an Intent Requirement

Though the chilling effect may plausibly capture a problem with the common law of defamation, intent requirements may not be an effective answer to this problem. In the defamation context, chilling largely occurs through the mechanism of financial cost.¹⁵⁵ Legal liability costs defendants money, which they do not wish to pay. Their desire to avoid the costs of liability prompts them to avoid making statements the truth of which is uncertain. This, at least, is the hypothesis of the chilling effect.

But intent requirements may do very little to change the costs of libel for potential defendants.¹⁵⁶ First, the actual malice standard does not assure correct outcomes, as *Sullivan* itself illustrates. The Court in *Sullivan* was so concerned that an Alabama jury would misapply the actual malice standard on remand that, in extremely pointed dictum, it reviewed the evidence itself and concluded that it would not meet the newly established standard.¹⁵⁷ Given that the Supreme Court cannot review every case, *Sullivan* left a risk of error for subsequent cases.

Even if *Sullivan* materially reduces the likelihood of adverse judgments, these are not the only costs of litigation. Defense costs can far outweigh the costs of a judgment, and even when the likelihood of an adverse outcome is low, litigation costs can remain

155. In the criminal libel context, of course, other costs figure in. Even in the civil context, other costs exist, such as damage to journalistic reputation. But for large-scale media defendants, most of the costs of libel will consist of or be translated into financial costs.

156. See, e.g., David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 (1991) (arguing that additional constitutional safeguards were necessary in subsequent cases because “[t]he actual malice rule of *New York Times v. Sullivan* does not adequately protect the press” (footnote omitted)).

157. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-88 (1964). Justice Brennan’s papers reveal that Justice Harlan proposed reversal rather than remand, but Brennan pointed out that there was no precedent for such a maneuver. See LEWIS, *supra* note 27, at 174. They eventually settled on Brennan’s original solution, which is reflected in Part III of the opinion. See *id.* at 173-76. Twenty years after *Sullivan*, the problem of erroneous jury findings on the actual malice question eventually gave rise to a rule of independent appellate review of the record in defamation cases. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

high.¹⁵⁸ Intent requirements do little to address these costs because they “operate[] at the wrong end of the litigation.”¹⁵⁹ They may increase the defendant’s prospect of victory, but this alteration may do very little to affect the likelihood of suit or the costs of a defense.¹⁶⁰ True, the prospect of having to establish knowledge or recklessness may deter some would-be plaintiffs, but it may be hard for plaintiffs to estimate their likelihood of showing actual malice in advance of discovery.¹⁶¹ In addition, some may sue, not strictly for the prospect of victory, but because suing is its own form of vindication.¹⁶² These suits will occur despite the legal standard, and they will still be quite costly to defend. This line of argument receives support from the number of jurisdictions that have supplemented the constitutional rules with other protections, most notably anti-SLAPP provisions against strategic lawsuits.¹⁶³ On one view, then, intent requirements are not sufficient to address the problem of chilling.

On an even darker view, intent requirements may actually exacerbate the problem.¹⁶⁴ Post-*Sullivan*, the defendant’s state of mind is a central legal question in any defamation case. This is a question of fact, which justifies exhaustive discovery into what information

158. See, e.g., Anderson, *supra* note 87, at 436.

159. *Id.* at 437.

160. *Id.* at 424 (“The *Times* privilege has failed to prevent self-censorship primarily because it does little to reduce the cost of defending against libel claims.”).

161. Anderson, *supra* note 156, at 536 (“In cases in which actual malice is an issue, plaintiffs often have no way of knowing whether they have any chance of succeeding until discovery is completed. They must therefore put themselves and defendants to considerable expense and inconvenience *before* they have the information needed to make rational litigation decisions.”).

162. Anderson, *supra* note 87, at 435.

163. See, e.g., *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (last updated Feb. 4, 2013) (identifying twenty-eight states that have anti-SLAPP statutes, and others that have similar common law protections).

164. See, e.g., Benjamin Barron, *A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 84-85 (2007); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, in *THE COST OF LIBEL* 121, 143 (Everette E. Dennis & Eli M. Noam eds., 1989) (“[T]here is simply more to litigate once actual malice is critical to liability.”); Weaver & Bennett, *supra* note 110, at 1154-55 (noting that growing litigation costs are “due, in part, to the fact that the actual malice standard encourages plaintiffs to seek extensive discovery”).

the defendant had and what she did with it.¹⁶⁵ In addition, as the Supreme Court has recognized, courts may be unwilling to answer this question as a matter of law, such that a trial is necessary.¹⁶⁶ Thus, *Sullivan* interposed an extremely fact-intensive, discovery-intensive—which is to say, very costly—standard into defamation litigation. Although this standard may reduce the likelihood of an adverse judgment, it may increase litigation costs, as the Supreme Court has admitted.¹⁶⁷ Because financial cost is the primary mechanism through which libel laws exert a chill on media defendants, such a rule could actually chill *more* expression than the regime it was designed to remedy.

2. *The Case of Litigation Costs*

In the 1970s and 1980s, these concerns led some scholars to worry that the actual malice standard had not lessened chilling but may have worsened it.¹⁶⁸ They identified increased litigation costs as a primary culprit. One response was to argue that litigation costs also should be of constitutional concern.¹⁶⁹ On precisely this basis, some

165. See Anderson, *supra* note 156, at 511 (arguing that state of mind is “a complex factual issue that normally cannot be resolved without discovery, sometimes in prodigious quantities”); Weaver & Bennett, *supra* note 110, at 1155 (“[D]iscovery ... is the only way to determine whether a defendant acted knowingly or recklessly.”).

166. See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (“The proof of ‘actual malice’ calls a defendant’s state of mind into question, ... and does not readily lend itself to summary disposition.” (internal citation omitted)); see also Anderson, *supra* note 156, at 510 (“The actual malice requirement introduces into every public-plaintiff case a difficult issue that does not lend itself to preliminary disposition. Indeed, the issue does not readily lend itself to disposition at all. Cases that turn on actual malice sometimes continue for ten or fifteen years.” (footnotes omitted)).

167. *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (observing that as compared with the common law regime, “[t]he plaintiff’s burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants”); see also *id.* at 176 n.25 (“It is noted that Lando’s deposition alone continued intermittently for over a year and filled 26 volumes containing nearly 3,000 pages and 240 exhibits.”).

168. See, e.g., Anderson, *supra* note 87, at 424; Epstein, *supra* note 164, at 138-45. See generally the essays collected in *THE COST OF LIBEL*, *supra* note 164.

169. See, e.g., Anderson, *supra* note 87, at 468 (arguing that summary judgment should be more readily available in the defamation context).

lower courts in the wake of *Sullivan* approved defamation-specific modifications to procedural rules that were perceived as costly.¹⁷⁰ The Supreme Court, however, roundly rejected such modifications to jurisdictional rules,¹⁷¹ summary judgment rules,¹⁷² and discovery procedures.¹⁷³

On the logic of the chilling effect, however, the proposed modifications were quite plausible. Rules deter expression when they threaten to impose financial cost. In *Sullivan*, the substantive legal standard threatened to cost money through adverse judgments.¹⁷⁴ Therefore the legal standard had to be changed. But like adverse judgments, litigation expenses also cost potential defendants money. Thus, legal rules that contribute to litigation costs should also be modified.

One response is that the constitutional standards in *Sullivan* and *Gertz* had already figured in the costs of procedural rules. This is the argument the Supreme Court made in *Calder v. Jones*.¹⁷⁵ In declining to modify jurisdictional rules in the defamation context, the Court said that it had already made a comprehensive chilling assessment in the earlier cases, and “[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting.”¹⁷⁶

On the evidence, however, this seems far-fetched. First, the Court made no mention of the costs of jurisdictional rules in announcing its standards in *Sullivan* or *Gertz*. Second, the Court’s claim that it did account for them simply grants the premise that these costs

170. See Schauer, *supra* note 9, at 710 (collecting cases).

171. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (rejecting chilling effect argument in applying a regular jurisdictional standard).

172. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (applying regular summary judgment rules); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (suggesting that no special rules apply to summary judgment in defamation suits); see also *Anderson*, *supra* note 156, at 498 (“The Court has never endorsed the view of some lower courts that summary judgment should be a preferred remedy in defamation cases to protect the press from the chilling effect of extended litigation.”).

173. *Herbert v. Lando*, 441 U.S. 153, 176 (1979) (explaining that discovery costs do not trigger worries about a chilling effect).

174. See *supra* Part II.B.1.

175. *Calder*, 465 U.S. at 790; see also Schauer, *supra* note 9, at 711 (noting that lower court cases approving litigation-costs arguments “seem to have underestimated the extent to which *New York Times* and its progeny have already accounted for that effect”).

176. *Calder*, 465 U.S. at 790.

should figure into the chilling effect calculation.¹⁷⁷ Once that premise is granted, it becomes implausible that the Court should not have to revisit this calculation. To think otherwise demands that both the pertinent rules and the costs of compliance remain fairly constant. The first of these is a reasonable assumption—and, in any case, easy to verify—but the second is not at all assured. Compliance costs could have changed drastically in the twenty years between *Sullivan* and *Calder*. On the Court's own logic, then, it had a responsibility to ask whether changed circumstances warranted reconsideration of its rule.

The double-counting argument fares even worse when one considers litigation costs arising from discovery. In rejecting a chilling effect claim as to discovery costs in *Herbert v. Lando*, the Court, perhaps wisely, did not say that it had already budgeted for these costs.¹⁷⁸ If it had, it could hardly have escaped doing the calculation again, as it described pretrial discovery costs as “mushrooming” and cited numerous opinions and other works by Supreme Court Justices—all from the five years between *Gertz* and *Herbert*—bemoaning a growing litigation-costs crisis.¹⁷⁹ If, as the double-counting argument grants, the costs of procedural rules may cause a chilling effect, a litigation-costs explosion would necessarily prompt a recalculation. Because the costs of rules change, claims that they need modification cannot be dismissed out of hand as double counting.

Rather, the Court's stance in *Herbert* was, fairly clearly, that it had *not* budgeted for “mushrooming” litigation costs, but because such costs were “not peculiar to the libel and slander area,” the solution had to await a general change in the Federal Rules.¹⁸⁰ Until then, defendants were to rely on the discretion of district court judges to contain discovery.¹⁸¹ This rationale has some appeal—perhaps it is preferable to effect defamation-specific change through defamation-specific rules, rather than through exceptions to general

177. See Schauer, *supra* note 9, at 711 (arguing that lower court cases accepting litigation-costs arguments “are clearly correct in their prediction of a chilling effect”).

178. *Herbert*, 441 U.S. at 176-77.

179. *Id.* at 176-77 & n.26.

180. *Id.*

181. *Id.* at 177.

rules¹⁸²—and yet it can only go so far. An underlying premise of the First Amendment is that it requires exceptions to general rules. These are usually substantive rules, but it is not clear why they could not be procedural.¹⁸³ The chilling rationale should recognize a constitutional problem in any legal rule that has a substantial deterrent effect on protected expression. If the Court was serious about the chilling effect in *Sullivan*, its response in *Herbert* left a grave constitutional harm unanswered.

Thus, even in the defamation context, where the chilling effect may plausibly explain the existence of intent requirements, it does so awkwardly. The Court has adopted intent requirements that may have a minimal, even adverse, impact on chilling while leaving untouched legal features that have clear deterrent potential. The chilling effect cannot explain why the Court would single out the question of the speaker's state of mind while ignoring these other aspects of the law.

3. *The Chilling Effect and Content-Neutral Laws*

The broader picture of First Amendment law also suggests that chilling is, at best, an intermittent concern. The primary example is the approach to content-neutral laws. A central tenet of modern First Amendment law is that laws restricting expression on the basis of its message are highly suspect.¹⁸⁴ The corollary is that laws that do not regulate on this basis are less suspect. In fact, such "content-neutral" laws receive extremely lenient treatment, under which they are routinely upheld against the most cursory scrutiny.¹⁸⁵

Given that the doctrine upholds content-neutral laws with little to no concern about their effects, any number of neutral legal rules may work to suppress expression, with no constitutional ramifica-

182. See Schauer, *supra* note 9, at 711.

183. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984) (mandating independent appellate review of the record in defamation cases).

184. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

185. See, e.g., Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 788 (1985) ("In practice, the application of the lower track of this analysis, although open linguistically to the possibility of some bite, has resembled rational basis review.").

tions.¹⁸⁶ Regulations of activities such as leafleting, handbilling, parading, protesting, and demonstrating reduce the visibility and immediacy of certain messages and may prevent some members of society from reaching a wide audience altogether.¹⁸⁷ Noise ordinances affect the number of people a particular message may reach. Conduct regulations affect the efficiency and impact of many messages—consider sit-ins and draft-card burning.¹⁸⁸ The detrimental incidental effects of these laws are obvious—at least, they are as obvious as the detrimental effect of common law libel rules.¹⁸⁹

One potential objection is that in calling this problem a chilling effect, I am misusing that term. Chilling denotes the deterrence of protected expression in the course of targeting unprotected expression.¹⁹⁰ Content-neutral laws do not present this problem because they directly regulate expression that the law can regulate. The state can regulate expression such as leafleting, or conduct that may be expressive, so long as it does so for the right reasons. A consequent reduction in these activities does not constitute a chill.

One response is that this is just a problem of how the language of chilling maps onto the government-purpose-based conception of the First Amendment embodied in the content-neutral principle. The more apt formulation is that chilling occurs when, in the course of pursuing legitimate purposes, a law incidentally deters protected expression. Thus, a chilling effect arises when, in the course of targeting unprotected false and defamatory speech—a constitutionally valid purpose—a law incidentally deters protected true speech. A

186. See, e.g., Kendrick, *supra* note 1, at 289-90 (arguing that the content-neutral doctrine shows minimal interest in the effects of regulation); Redish, *supra* note 1, at 113-14 (criticizing the content-neutral doctrine for its insensitivity to incidental effects on expression); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 617 (1991) (same); see also Kagan, *supra* note 1, at 446 (emphasizing that content-neutral laws may distort speech as much as content-based laws); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 199 (1988) (same).

187. See, e.g., Williams, *supra* note 186, at 637 (discussing the potentially devastating impact of format-related regulations).

188. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (upholding the prohibition on draft-card burning as justified by administrative interests); Williams, *supra* note 186, at 661-62 (analyzing the impact of content-neutral regulations on symbolic speech).

189. See Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 946-47 (1987) (criticizing the Supreme Court for failing to consider the chilling effect of content-neutral laws).

190. See *supra* note 74 and accompanying text.

chilling effect also arises when, in the course of targeting litter—a constitutionally valid purpose—a law incidentally deters protected expression. If the incidental effect is impermissible in the former context, it should be so in the latter.

Another response is that, however the chilling effect is described, its underlying concern is with the incidental effects of regulation on protected expression. If free speech is an affirmative value, then we should care when protected expression is hindered, whether by content-based or content-neutral laws.

Rather than objecting, a defender of the chilling rationale could accept the underinclusiveness argument and conclude that the content-discrimination principle should be modified. This, however, would mean abandoning a central principle of modern First Amendment law and conceding that the chilling effect cannot justify the law as it currently exists.¹⁹¹

Even as a matter of rough empirical judgment, the chilling effect account of speaker's intent fails to persuade. It does not explain specific-intent requirements for incitement and threats. It does not explain why the law would single out sexually explicit speech for protection when such speech may be particularly resistant to chill and not particularly deserving of special solicitude. It does not explain why the law would tinker with intent requirements in the defamation context when such modifications do not change, and may exacerbate, costly features of the law. It does not explain why the Court ignores costly features, such as the expense of litigation. And it does not explain why a network of intent requirements in certain speech categories would exist alongside a general indifference to the incidental effects of all content-neutral regulation. In short, the chilling effect is not a persuasive justification for existing standards of speaker's intent.

191. Others have raised underinclusiveness objections to other aspects of chilling effect doctrine. For example, the Court made commercial speech a separate category in part because of its judgment that such speech is less likely to be chilled than other speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). Many commentators have argued that this assumption is unfounded, if not precisely backwards. See, e.g., Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 15-16 (1992); Redish, *supra* note 144, at 633; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1218 (1983).

III. A QUESTION OF POLICY: THE EMPIRICAL CHILLING EFFECT

Perhaps treating the chilling effect as the Supreme Court treats it—as a matter of speculative empirical judgment—is the wrong approach. Conceivably, courts are better than regular individuals at judging the effects of legal rules. If so, then more sophisticated empirical analysis might reveal that the Court’s judgments are on the whole quite sound. Perhaps, then, a better response is to expose the Court’s judgments to more thorough empirical inquiry.

Ultimately, however, this approach seems similarly unavailing. Of all the First Amendment intent requirements, only the *Sullivan* actual malice standard has undergone significant empirical investigation.¹⁹² This investigation gives some reason to believe that the standard is misguided. More importantly, it illustrates the difficulties of using empirical analysis to corroborate a choice as nuanced as that between one intent requirement and another. This Part examines the empirical literature on actual malice before focusing on possible limits to courts’ abilities to improve chilling effect analysis by investing in more empirical approaches.

A. *Empirical Accounts of the Chilling Effect*

It is difficult to establish either the presence or the absence of a chilling effect, let alone to measure the extent of such an effect.¹⁹³ The available empirical studies illustrate the difficulties. The studies of speaker’s intent have dealt almost entirely with defamation, and primarily with the actual malice standard. For the most part, they are unable to demonstrate a connection between a chosen legal standard and a reduction of chilling at the level of nuance required to justify the selection of one intent requirement over another.

192. See *infra* Part III.A.4.

193. See Schauer, *supra* note 9, at 730 (arguing that the chilling effect’s predictions about human behavior are “most likely unprovable”).

1. *Litigation Data*

Some commentators rely on litigation data to assess chilling.¹⁹⁴ This is not a particularly reliable approach: the number of cases filed may bear little relation to the amount of speech that is actually chilled—that is, to the cases that are *not* filed because the speech is never spoken.¹⁹⁵ A low amount of litigation could signal a very clear but repressive speech rule, rather than a permissive one.¹⁹⁶

In reality, of course, the American defamation regime is the most protective in the world. Some commentators have concluded, partly on the basis of litigation data, that American defamation rules do

194. See, e.g., ERIC BARENDT ET AL., *LIBEL AND THE MEDIA: THE CHILLING EFFECT* 31-32 (1997) (analyzing the chilling effect of English libel rules by tracking legal filings and conducting interviews); David A. Logan, Essay, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 511 (2001) (relying on data on litigation rates, as well as anecdotal evidence, to conclude that chilling is not a serious problem for American media).

Recent litigation data on actions involving media defendants are available from the Media Law Resource Center (MLRC). According to MLRC, from 1980 to 2006 media defendants faced 557 trials nationwide involving defamation, privacy, and related claims. *2008 Report on Trials and Damages*, 2008 MEDIA L. RESOURCE CENTER BULL. No. 1, Feb. 2008, at 3. Media defendants won 41.1 percent of trial verdicts. *Id.* When broken down by decade, this number shows improving rates of success by defendants, with defense verdicts in 54.5 percent of cases in the 2000s. *Id.* at 4. From 1980 to 2006, after all appeals, defendants paid no damages in 55.9 percent of cases. *Id.* The average award at trial was \$2.8 million; the average award after postverdict motions and appeals was \$556,000. *Id.* The median after trial was \$295,000; after appeals it was \$100,000. *Id.* In 2007, six trials took place nationwide. *Id.*

Out of 1616 reported summary judgment decisions from 1980 to 2006, defendants won 78.3 percent outright. *2007 Summary Judgment Study*, 2007 MEDIA L. RESOURCE CENTER BULL. No. 2 Part B, Sept. 2007, at 15. MLRC notes, however, that it does not count unreported decisions, and that reported summary judgment decisions may skew in favor of defendants. *Id.* at 1.

195. See, e.g., BARENDT ET AL., *supra* note 194, at 32 (noting that incidence of legal filings is not representative, and that the biggest impact of the chilling effect is in what does not get published). Another problem is that litigation data becomes more comprehensive as cases move toward trial, but—to the questionable extent that litigation data reveals anything about chilling—it is the pretrial stage that matters most to the cost and efficacy of defamation rules. F. Dennis Hale, *Impact Analysis of the Law Concerning Freedom of Expression*, 8 COMM. & L. 35, 49 (1986).

196. In a similar vein, low litigation rates could say little about the legal regime and much about potential defendants' skill at navigating that regime. As repeat players advised by sophisticated and risk-averse legal counsel, the institutional media could be quite adept at strategic self-censorship. See BARENDT ET AL., *supra* note 194, at 32 (noting that because the press is skilled at predicting the risk of suit, English libel rules may deter expression about powerful or wealthy individuals more than expression about others).

not chill the media to any serious degree.¹⁹⁷ But if litigation rates do reflect an absence of chilling, they cannot show how, if at all, the constitutional intent standards contribute to that reality. First, it is impossible to say whether the constitutional standards reduced chilling without knowing what levels of chilling predated them. Second, the Supreme Court has refined and clarified defamation standards over the course of more than twenty-five cases in which it constitutionalized many other rules, including a heightened burden of proof, a shift of that burden to the plaintiff, independent appellate review of the record, and various requirements that the false statement be credible and have caused damage beyond what a true statement would have caused.¹⁹⁸ Nonconstitutional obstacles such as state anti-SLAPP laws and the federal Communications Decency Act also protect speakers and distributors from liability.¹⁹⁹ It is not clear how much this combination of factors has reduced chilling, and it is impossible to isolate the role of intent requirements.

2. Quantitative Empirical Comparisons

Quantitative empirical studies face these and other problems, with the result that studies of the chilling effect are rare.²⁰⁰ It is

197. See Logan, *supra* note 194, at 520 (“One could say that the *New York Times/Gertz* constitutional regime has provided the media with something approaching an absolute privilege to defame; a reasonable publisher should worry about having to pay substantial libel damages as much as she worries about being struck by lightning.”); see also David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1049-50 (2006) (“As a source of litigation, there is little left of the law of defamation.”). For recent litigation data, see *supra* note 194.

198. See Anderson, *supra* note 156, at 488 & n.2 (arguing that “[t]he actual malice rule of *New York Times v. Sullivan* does not adequately protect the press,” and noting that the Supreme Court elaborated on libel standards in twenty-seven cases between 1964 and 1991); Anderson, *supra* note 197, at 1050-51 (cataloguing rules and characterizing them as “[m]ore important” than the actual malice standard).

199. See 47 U.S.C. § 230(e)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”); Anderson, *supra* note 197, at 1051; *Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, *supra* note 163 (noting that twenty-eight states have anti-SLAPP statutes, while others have similar common law protections).

200. See, e.g., Chris Dent & Andrew T. Kenyon, *Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and U.S. Newspapers*, 9 MEDIA & ARTS L. REV. 89, 90 (2004) (“Very little work has examined media product in order to consider the existence

difficult, if not impossible, to find two defamation regimes to compare whose only difference is their intent requirement.²⁰¹ Even the shift from the common law to *Sullivan* in 1964 would not isolate this variable, because *Sullivan* also began the work of shifting the burden of proof to the plaintiff and imposing a clear and convincing evidence standard.²⁰²

Even if a comparison were able to isolate the role of speaker's intent, the problem would remain of how to measure expression. The chilling effect encompasses not only outright suppression of speech but also subtle modification.²⁰³ Media defendants might be more likely to respond to a repressive defamation regime not by ignoring newsworthy events, but by modifying their coverage.²⁰⁴ Counting up speech quantities will therefore provide only a crude proxy for chilling.²⁰⁵ Given these difficulties, it is not surprising that

of any chilling effect.”); Piero Stanig, *Regulation of Speech and Media Coverage of Corruption: An Empirical Analysis of the Mexican Press* 6 (London Sch. of Econ., Working Paper, 2010), available at http://www.hertie-school.org/fileadmin/images/Downloads/research_projects/StanigMexPress.pdf (“[W]hile the chilling effect is taken for granted, only very few studies try to systematically show its existence and rigorously quantify the magnitude of the effect of legal regulation on coverage.”).

201. This factor complicates comparisons across countries, as does the general problem of omitted variable bias. And of course the uniform constitutional standard in the United States eliminates domestic opportunities for natural experiments. See Stanig, *supra* note 200 (analyzing press coverage of corruption across Mexican states with different criminal libel regimes).

202. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (holding that plaintiff must prove actual malice with “convincing clarity”). Later cases confirmed and clarified this shift. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986) (holding that heightened standard applies at summary judgment stage); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (holding that the plaintiff bears the burden of proof).

203. See, e.g., Weaver & Bennett, *supra* note 110, at 1173 (counting modifications to stories as instances of chilling).

204. See BARENDT ET AL., *supra* note 194, at 194 (speculating that one effect of English libel law may be to encourage a more opinion-based, less fact-intensive brand of journalism).

205. An instructive comparison may be drawn with the chilling effect of the fairness doctrine. To the extent that we care only about the quantity of references to public issues in broadcast media, data from before and after the repeal of the fairness doctrine can give us a good sense of its chilling effect. See, e.g., Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (finding a chilling effect by comparing radio industry data on subject matter before and after the repeal of the fairness doctrine); Christopher Weare, Titus Levi & Jordan Raphael, *Media Convergence and the Chilling Effect of Broadcast Licensing*, 6 HARV. INT'L J. PRESS/POL. 47 (2001) (analyzing 469 newspaper editorials on State of the Union addresses from 1970 to 1995 to test for chilling as to owners that also owned broadcast outlets). To the extent that we care about the quality of coverage of public issues, however,

there have been few empirical studies of the actual malice standard, let alone other First Amendment intent requirements.

3. Interviews and Surveys

The most frequent research methods are interviews or surveys.²⁰⁶ Some of these employ tested surveys and econometric tools,²⁰⁷ most employ a more casual approach.²⁰⁸ In their conclusions on chilling, such studies have varied.²⁰⁹ As reliable assessment tools, they have drawbacks. For instance, they pose risks of self-reporting bias.²¹⁰ Survey subjects may not recall or report all relevant information. Even if they do, their presentation may be biased toward their self-interest.²¹¹ For instance, media participants may be unwilling to admit that they sacrificed journalistic principles out of fear of litigation, or they may be willing to exaggerate the chilling effect of the law in order to downplay other considerations that informed a decision to kill or revise a story.²¹²

these studies are less helpful.

206. See Hale, *supra* note 195, at 49 (surveying types of data available and stating that surveys are “[t]he most frequently used research method for measuring the impact of media law”); see also BARENDT ET AL., *supra* note 194, at 35-36 (employing various interview methods); Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV., May-June 1985, at 31 (relying upon around 150 interviews with editors and attorneys); Stephen M. Renas et al., *An Empirical Analysis of the Chilling Effect*, in THE COST OF LIBEL, *supra* note 164, at 41, 45 (relying upon survey sent to managing editors of U.S. daily newspapers).

207. See Renas et al., *supra* note 206, at 41, 45 (sending newspaper managing editors a tested survey about their hypothetical decisions on four stories under three legal rules).

208. See, e.g., Massing, *supra* note 206, at 31 (relying on interviews with editors and attorneys); Weaver & Bennett, *supra* note 110, at 1157 (relying on interviews with American and British lawyers, editors, reporters, and other media players). For a hybrid approach, see BARENDT ET AL., *supra* note 194, at 35 (sending questionnaires, conducting “one-off” interviews, and conducting a series of interviews with defamation attorneys, as well as relying on litigation data).

209. Compare Weaver & Bennett, *supra* note 110, at 1182-83 (observing that virtually all interview subjects claimed libel law had no influence on editorial decisions), with David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CALIF. L. REV. 847, 860 (1986) (noting that many media participants claimed to experience a chilling effect).

210. See Hale, *supra* note 195, at 38, 41 (asserting that survey responses by media participants and attorneys are biased).

211. *Id.* at 41.

212. Experiments are another potential source of data, which seem to be utilized infrequently. But see Jeremy Cohen et al., *Perceived Impact of Defamation: An Experiment on Third-Person Effects*, 52 PUB. OPINION Q. 161, 161 (1988) (finding that tested students

4. *Economic Models*

One method that has addressed the intent question directly is theoretical economic modeling. The economic tradition of questioning the actual malice standard goes back many decades. Richard Epstein argued in the 1980s that *Sullivan* was wrongly decided;²¹³ his work was part of a wider debate about whether the informational and litigation costs of actual malice meant that the standard was inefficient, perhaps even inferior to the common law.²¹⁴

Since that time, some economists have used theoretical models to consider the relative efficiency of possible libel regimes. Some have argued that strict liability may be preferable to both negligence and actual malice, largely because of the information costs associated with the latter standards.²¹⁵ Some argue that strict liability is too exacting, actual malice is too permissive, and the first-best standard may lie in between.²¹⁶ In making this argument, moreover, some studies have said that the difference between a negligence standard and an actual malice standard is insignificant, thus suggesting that the choice between the two cannot be justified in economic terms.²¹⁷ Finally, many studies agree that limiting damages is likely superior to adjusting intent requirements and is in any case a necessary step for efficient outcomes.²¹⁸

believed others would be more affected by defamatory statements than they themselves would); Renas et al., *supra* note 206, at 45 (asking newspaper managing editors about their hypothetical decisions on four stories under three legal rules).

213. Epstein, *supra* note 164, at 151.

214. See generally the essays collected in *THE COST OF LIBEL*, *supra* note 164.

215. See Manoj Dalvi & James F. Refalo, *An Economic Analysis of Libel Law*, 34 E. ECON. J. 74 (2008); Epstein, *supra* note 164, at 148; Gary L. Lee, Comment, *Strict Liability Versus Negligence: An Economic Analysis of the Law of Libel*, 1981 BYU L. REV. 398, 404-05 (arguing that if information costs are low, negligence is likely superior to strict liability). On the information costs associated with actual malice, see *supra* Part II.B.

216. See, e.g., Charles J. Hartmann et al., *Relaxed Liability: A Proposed New Standard for Defamation by the Press*, 22 AM. BUS. L.J. 93, 106 (1984) (arguing that the optimal standard of "relaxed" liability lies in between strict liability and negligence); Stephen M. Renas et al., *Toward an Economic Theory of Defamation, Liability, and the Press*, 50 S. ECON. J. 451, 451 (1983) (same); Alain Sheer & Asghar Zardkoohi, *Is the Law of Defamation as It Relates to Public Officials and Public Figures Economically Efficient?*, in *THE COST OF LIBEL*, *supra* note 164, at 207, 223-24 ("[T]he new law of defamation probably substitutes an imbalance in favor of publication for an imbalance in favor of reputation.").

217. See Hartmann et al., *supra* note 216, at 106; Renas et al., *supra* note 216, at 459.

218. See, e.g., Oren Bar-Gill & Assaf Hamdani, Contribution Article, *Optimal Liability for*

My purpose is not to offer an exhaustive analysis of this literature, still less to criticize the methods of particular studies. It is, instead, to observe that these various empirical investigations fail to confirm the wisdom of the actual malice standard. If anything, some of them, particularly the theoretical economic studies, suggest that the actual malice standard may not be the best tool for addressing chilling. And insofar as the studies suggest the difficulty of isolating the role of intent, they offer little reason to conclude that intent is the most effective tool to alleviate chilling—let alone that one intent requirement is more effective than all other intent requirements and all other legal tools.

B. The Chilling Effect and the Limits of Empirical Inquiry

But the fact that existing empirical inquiries have not made much headway does not mean that further inquiry could not shed more light. On one view, the empirical difficulties of law making should lead courts and scholars to invest further in answering the hard questions courts face.²¹⁹

Given the pervasive empirical bent in judicial decision making, this is a worthy goal. As applied to the chilling effect account of speaker's intent, however, it is not entirely promising. The empirical studies just surveyed underscore the difficulty of the questions that the Court has set for itself. As it turns out, the existence of a chilling effect—let alone its appropriate remedy—is very difficult to establish, even with the aid of a variety of sophisticated empirical tools.

Although courts routinely address complex empirical questions, for a court to identify and remedy a chilling effect involves multiple and varied empirical questions, most of which are counterfactual.

Libel, 2 B.E. J. ECON. ANALYSIS & POL'Y, no. 1, 2003; Dalvi & Refalo, *supra* note 215, at 87; Epstein, *supra* note 164, at 148; Nuno Garoupa, *The Economics of Political Dishonesty and Defamation*, 19 INT'L REV. L. & ECON. 167, 178 (1999); Hartmann et al., *supra* note 216, at 106; Renas et al., *supra* note 216, at 459.

219. See, e.g., Schauer, *supra* note 2, at 292-94. On the judicial side, Justice Breyer's approach is emblematic. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2768-70 (2011) (Breyer, J., dissenting) (relying on empirical studies, attached in appendices, to argue for upholding state restriction on sale of violent video games to minors); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 807-23 (2007) (Breyer, J., dissenting) (relying upon numerous sources, catalogued in an appendix, in bringing historical facts to bear on the constitutionality of public schools' student assignment plans).

The success of a court's response to these questions is difficult enough to judge *ex post* and essentially impossible to judge *ex ante*.

First, the identification of a chilling effect implies a judgment that a given legal rule will overdeter protected speech as compared with its deterrence of unprotected speech and furtherance of other legitimate governmental interests. In essence, the court performs a type of cost-benefit analysis reminiscent of the Hand formula, in which it compares the benefits of a rule against the probability that protected speech will be chilled, with the protected speech being given appropriate weight as an affirmative and preferred value.²²⁰ Second, to arrive at a remedy, the court must consider the cost-benefit profiles of possible alternative rules and select the one that provides the optimal balance of reducing chilling and still furthering legitimate goals. Multiple assessments go into both of these endeavors.

To assess the benefits of the challenged rule, the court needs to know how much unprotected speech it deters and the extent to which it advances other legitimate interests. To know this, the court must either make assumptions about the law's deterrent effect—a potentially risky approach²²¹—or attempt to measure the effectiveness of the rule in actually deterring unprotected speech—a complex inquiry that depends on some knowledge of the risk profile of the affected speakers.

On the other side of the equation, the court must assess the value of the protected speech that may be put at risk. It is not enough to say that some speech of some kind is probably deterred. Because all laws have incidental effects on expression, this standard would render many rules unconstitutional. The court must have a sense of how much speech is at risk, and of what kind. The court thus faces the difficult, if not impossible, task of knowing the quantity and

220. Ultimately, the court is comparing the marginal risk of chill—that is, the difference between the chill of this rule and the next most effective rule—to the cost of trading the rule out for the next most effective rule. This formulation simply conflates the steps that I break apart here: assessing the cost-benefit profile of the existing rule, and then comparing it with that of other rules. Whichever approach one takes involves the same steps and the same assessments.

221. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951-52 (2003) (arguing that criminal law assumptions about deterrence are mistaken).

value of expression that does not exist because it is not being produced.²²²

At the same time, the court must assess the probability that this speech will actually be chilled. This requires knowledge of the costs and benefits to speakers of producing that speech. It is not sufficient to consider the cost side of the equation. For one thing, all laws impose incidental costs on expression, and thus cost imposition alone cannot make a law unconstitutional. For another, the concern of chilling effect doctrine is not with risk imposition per se, but with how much speech actually gets produced. Speech will be chilled only if its costs to the speaker outweigh its benefits.²²³ This determination necessarily entails identifying potential speakers and assessing their subjective risk aversion.²²⁴

The court must then compare the two sides of the equation. Courts do not always make this step explicit, but it undoubtedly exists.²²⁵ Speech may be a preferred value, but it is not absolutely preferred. If the existence of chilling always trumped other legitimate governmental interests, then all laws would be invalid.²²⁶ Inevitably, then, the finding of a chilling effect implies that the benefits of the challenged rule are outweighed by the cost to free expression.

Having identified an unacceptable chilling effect, the court must remedy it through an alternative rule. To do this, it must perform

222. See ALEXANDER, *supra* note 1, at 24-26 (asserting that it is impossible to value information without being in possession of the information one is valuing).

223. See, e.g., Schauer, *supra* note 9, at 698. Thus, for example, the Court has rejected chilling arguments as applied to commercial speech because it believes that the incentives for commercial actors to speak outweigh the risks imposed by imprecise regulations. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980).

224. See Schauer, *supra* note 110, at 286 (arguing that the actual malice standard was the product of “speculation, not about the law itself, but about the newspaper industry, its organization, and the incentives of its inhabitants”).

225. See Ely, *supra* note 1, at 1485 n.16 (rejecting the Court’s occasional suggestion that “less drastic means analysis involves no balancing of interests whatever, but rather an almost mechanical pruning of superfluous restraints.... That is good propaganda, but it does not accurately reflect what was going on Of course the balancing is ‘at the margin,’ comparing the incremental promotion of the interest on which the government relies with the incremental threat to free expression.” (citations omitted)).

226. See Schauer, *supra* note 9, at 701 (“What we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments.”).

the cost-benefit analysis described above on a set of possible rules. The court must then compare the outcomes for each rule and select the one that strikes the optimal balance between alleviating chilling and achieving other interests.

It is not sufficient to find that one alternative performs marginally better than the challenged rule. The logic of the chilling effect is that, if any alternative rule achieves a better balance than the rule at hand, then that alternative must be chosen. To select a sub-optimal rule only leaves that new rule open to challenge. The implication is that the court should perform cost-benefit assessments for all possible alternatives. The selection of a particular intent requirement implies that it is the best remedy as compared not only with the challenged rule but with all other possible rules.

Chilling effect analysis thus requires courts to make a great number of empirical assessments. Some of these are about the subjective risk profiles of all affected speakers. Some are about what speech would be chilled by a challenged rule or by any number of possible alternatives. These counterfactual undertakings are staggering, to say the least.²²⁷

Although courts routinely address difficult empirical questions, those raised by the chilling effect may be particularly intractable. Further investment in answering these questions may have limited returns, particularly in terms of persuasive justifications for particular legal rules.

To summarize, the Supreme Court has founded the chilling effect on nothing more than unpersuasive empirical guesswork. The existing empirical literature casts further doubt on the Court's conclusions and, more importantly, illustrates the severe difficulties that chilling effect inquiries present. To the extent that the chilling effect is its only acceptable defense, the doctrinal importance of speaker's intent still lacks persuasive justification.

IV. A QUESTION OF PRINCIPLE: BEYOND THE CHILLING EFFECT

We are left, then, with a dilemma. On one hand, the chilling effect is the only legitimate justification for speaker's intent require-

227. See ALEXANDER, *supra* note 1, at 24-26 (arguing that measuring a law's effects on expression is impossible).

ments.²²⁸ On the other hand, the empirical difficulties of the chilling effect make it an implausible justification for the choice of a particular legal rule.²²⁹ The chilling effect must justify intent requirements, yet it cannot.

This problem is just one manifestation of the “dilemma of ignorance”: courts must judge the effects of regulation, but they are not equipped to do so.²³⁰ The dilemma has a number of potential responses.²³¹ One is to conclude that because something cannot be measured, it should be ignored, at least in the construction of legal doctrines and rules.²³² This, however, would be a mistake. The fact

228. See Alexander, *Speaker's Intent*, *supra* note 2, at 25; Alexander, *Low Value Speech*, *supra* note 2, at 548; Schauer, *supra* note 2, at 217-23.

229. See, e.g., ALEXANDER, *supra* note 1, at 21-26; Schauer, *supra* note 110, at 286.

It will be noted that the same scholars who argue that the chilling effect is the only legitimate justification for speaker's intent are some of the most prominent critics of the empirical basis of the chilling effect. These views are not necessarily inconsistent. For Schauer's part, although he has frankly acknowledged the shortcomings of judicial empirical assessment, he has also advocated measures to increase judicial competence. See *id.* at 292-94. For him, the chilling effect is the only possible legitimate justification for speaker's intent requirements, and any decision based on the chilling effect may require more effort than the Supreme Court has historically given it. It follows that some existing intent requirements may not be justified, but the problem going forward is not insurmountable.

Alexander's position is more puzzling. He argues that speaker's intent may only be used prophylactically, to prevent chilling of protected speech. Alexander, *Speaker's Intent*, *supra* note 2, at 25. At the same time, however, he has argued forcefully that the types of counterfactuals involved in such assessments are impossible. See ALEXANDER, *supra* note 1, at 21-26, 188-90. Ultimately, Alexander concludes that, despite the empirical difficulties, we may be suspicious of the chilling effects of content-based regulations, *id.* at 191-92, but we are not equipped to forecast the incidental effects of other types of laws, *id.* at 188-90. This resolution would allow reliance on the chilling effect to evaluate laws targeting unprotected speech but would foreclose scrutiny of the incidental effects of content-neutral laws. It is not clear that this dichotomous approach squares with Alexander's insistence elsewhere that speech effects are incalculable. See Alexander, *Speaker's Intent*, *supra* note 2, at 21-26. Alexander justifies evaluation of content-based laws on the grounds that the government may well overuse content-based regulation and underestimate its impact on protected speech. ALEXANDER, *supra* note 1, at 191-92. But it is not clear why the government would not be biased in the same ways elsewhere. The government might also overestimate the importance of other regulatory objectives. And whether or not it does so, if it systematically underestimates effects on protected expression in one context, it is not clear why it would not do so in another.

230. Schauer, *supra* note 110, at 268-69; see also *supra* note 124 and accompanying text.

231. See, e.g., Schauer, *supra* note 110, at 288-95 (discussing possible responses to the empirical dilemma); see also Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 778 n.53 (2010) (same).

232. Cf. Schauer, *supra* note 110, at 289-90 (explaining Justice Scalia's view that the Court should not involve itself in areas in which it has little expertise).

that we cannot measure chilling effects accurately does not mean that they do not exist. Nor does it mean that we should not care about them. Under any theory holding that speech facilitates important individual or social values, chilling should be a constitutional concern. To ignore chilling is to reject as a noninterest something that under many First Amendment theories should count as an imperative. The fact that we can fulfill such commitments only imperfectly is not a good reason to deny them outright.²³³

Rather than ignoring chilling altogether, we might take other approaches. First, legal observers and adjudicators might put their rough empirical judgments to careful, pragmatic use.²³⁴ If, for instance, the choice is between guessing that prohibiting murder will deter murder and having no law against murder, we should take the guess. For some laws, the risk of chilling might be so great and so apparent that it is better to subject them to scrutiny on the basis of rough empirical judgment than to leave them alone. Such review is most salutary when accompanied by a candid recognition of its epistemic limitations.²³⁵

Second, we might search for tools to help answer empirical questions, and courts might invest in such tools.²³⁶ This approach might incorporate the views of experts, such as quantitative empirical scholars or, in cases like *Sullivan*, people who understand the incen-

233. See *TRIBE*, *supra* note 1, § 16-20, at 1510-12 (arguing that the Supreme Court's institutional objections to intrusive remedies should not be articulated as a rejection of a conception of equality that considers the effects of laws); Leslie Kendrick, *Disclosure and Its Discontents*, 27 *J.L. & POL.* 575, 576-77 (2012) (arguing that the difficulty of measuring effects on speech should not foreclose efforts to do so); Schauer, *supra* note 231, at 778 n.53.

234. *But see* Schauer, *supra* note 231, at 778 n.53 (expressing doubts about relying on "hunches as intuition" as compared with second-best empirical findings); Schauer, *supra* note 110, at 288.

235. *Cf.* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 259 (2002) (Thomas, J., concurring in judgment) (arguing that if new information demonstrates a link between virtual child pornography and difficulties in prosecuting actual child pornography distributors, then the Court's judgment should be revisited); Kendrick, *supra* note 233, at 595 (arguing for candor when institutional limitations prevent courts from assessing speech effects).

236. See Schauer, *supra* note 110, at 292-95; Schauer, *supra* note 231, at 778 n.53.

tives of the affected speakers.²³⁷ When empirical information later shows that judgments were inaccurate, they should be revised.

Either of these approaches is superior to ignoring a problem entirely, but each has its shortcomings. Rough empirical judgments offer only soft justifications for particular legal rules.²³⁸ Useful empirical information is not always available, whether because certain questions resist empirical methods or because detailed empirical work is unlikely to keep pace with the demands placed on the legal system.²³⁹ Both approaches are superior to ignoring constitutional imperatives, but that hardly makes them ideal.

This Article has borne witness to their shortcomings in the case of speaker's intent. The first strategy was to accept existing judicial limitations and analyze the chilling effect for consistency as a matter of rough judgment. The results did not inspire confidence in the chilling effect as a justification.²⁴⁰ The second strategy was to turn to more thorough empirical investigations. This effort failed to justify existing intent requirements and generally cast doubt on the ability of empirical methods to set such requirements with precision and accuracy.²⁴¹

There is one last alternative: we might return to the original premise, that the chilling effect is the only acceptable reason for intent requirements. Perhaps this premise was unjustified. To the extent that an interest in speaker's intent seems correct, perhaps the proper conclusion to draw from the inadequacy of the chilling effect is that some other concern, or set of concerns, must explain this interest. If, for instance, we think that strict liability for false statements is intuitively wrong, perhaps this intuition is being

237. See Schauer, *supra* note 110, at 292-93. Schauer favorably distinguishes the possibility of obtaining the views of experts not hired by the parties from the regular use of experts in litigation. *Id.*

Yet another approach would involve deference to experts in a different vein: courts could decide that thorny empirical questions are best left to legislators and defer to their judgments. This approach may be a variant of the first approach mentioned above, wherein courts choose to ignore empirical questions as a matter of judicial review. If a court's conception of the First Amendment demands a concern with chilling, this deferential stance might not be justified, nor in the case of chilling is it obvious that legislators would be any better situated than courts.

238. See *supra* Part II.

239. See *supra* Part III.B.

240. See *supra* Part II.

241. See *supra* Part III.

driven not by a sense of the effects of strict liability on defense costs—about which we know little—but by concerns other than chilling.

If the pattern of Supreme Court decisions is any indication, perhaps the same is true for the Court as well. In addressing chilling in the defamation context, the Court has relied primarily on intent requirements.²⁴² As we have seen, however, if chilling is the sole concern, damages rules and other legal tools are arguably better at addressing it.²⁴³ Meanwhile, the Court has disregarded other, equally plausible instances of chilling, including the effects of its own defamation remedy.²⁴⁴ One explanation for this pattern is that the Court has intuitions more about the rightness of intent requirements than about the wrongness of chilling.

Such a pattern could arise, for example, out of substantive moral considerations. In the case of defamation, we might think it wrong to penalize a speaker for false statements made in good faith, not (or not only) because penalizing him might chill other speakers but because it seems unfair to the speaker at hand. Perhaps we have an intuition that speakers who lack culpability for the harmful aspect of their message ought not to face penalties for expression. Although the Court never explicitly relied on such a view in *Sullivan*, it might explain the doctrine better than the chilling rationale on which the Court did rely.²⁴⁵

242. See *supra* notes 27-31 and accompanying text.

243. See *supra* Part I.B.2.

244. See *supra* notes 156-67 and accompanying text.

245. This interpretation of Supreme Court doctrine gains some support from the fact that the Court began inquiring into speaker's intent in the early incitement and subversive advocacy cases long before it began to invoke chilling effect arguments. See, e.g., *De Jonge v. Oregon*, 299 U.S. 353, 362-66 (1937) (invalidating a conviction when the defendant was not proved to have subversive purpose); *Herndon v. Lowry*, 301 U.S. 242, 258-59, 263-64 (1937) (same); *Fiske v. Kansas*, 274 U.S. 380, 386 (1927) (same); *Abrams v. United States*, 250 U.S. 616, 626 (1919) (Holmes, J., dissenting) (considering intent relevant to the question of constitutional protection); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (same).

This focus on speaker's intent began in Holmes's discussion of criminal attempt in *Schenck*. See *id.* For Holmes's reliance on criminal attempt in his approach to subversive advocacy, see, for example, Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1128 (1989); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1271-73 (1983); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 414-19, 435-36 (1992).

Holmes's change of heart on subversive advocacy between *Schenck* and *Abrams* is well documented. See generally Gunther, *supra* note 34; Rabban, *supra*; White, *supra*. His ultimate

The final response, therefore, is to turn from questions of policy—such as the deterrent and protective aspects of rules—to questions of principle.²⁴⁶ If the chilling effect does not offer a satisfactory account of speaker's intent, and if we nevertheless find intent requirements an intuitive aspect of law, then it is worth considering whether we might construct an account by which intent matters in its own right. It is quite possible, of course, that no account can justify all existing intent requirements, given the inconsistencies that bedeviled the chilling effect account in Part II. But before rejecting intent requirements as unjustified, we might see whether a different set of arguments can do a better job—perhaps even an affirmatively good job—of explaining them.²⁴⁷

This principled approach will not eliminate questions of policy. But given the difficulty of such questions, we might begin with matters of principle and see how far they might resolve legal quandaries.²⁴⁸ Given such priority, the principled approach is not an outright replacement for the policy response but a privileged counterpart to it.²⁴⁹ Such a pluralistic approach may take account of

position on intent is more contested. See Gunther, *supra* note 34, at 737 (“What ‘intent’ had to do with a constitutional test purportedly focusing on the consequences of speech was never made clear, here [in *Abrams*] or in later cases.”). Compare Bloustein, *supra*, at 1143-45 (arguing that *Abrams* best articulated Holmes’s view of criminal attempt from *The Common Law*), with Rabban, *supra*, at 1306 (arguing that the earlier cases reflected Holmes’s view of criminal attempt, from which *Abrams* was a departure). In any case, it seems clear that the Court’s original interest in intent had its roots, if not its ultimate justification, in an analogy to liability for attempt in criminal law.

246. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 33-103 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-88 (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY] (arguing that policy questions are better suited for majoritarian bodies, whereas courts find their proper role in determining matters of principle); see also Schauer, *supra* note 110, at 290-91 (discussing Dworkin’s view).

247. Alexander and Schauer obviously had reasons for concluding that intent can only function prophylactically. See Alexander, *Speaker’s Intent*, *supra* note 2, at 23-25; Schauer, *supra* note 2, at 217-21; see also *supra* Part I. I do not imagine that redoubled efforts on the substantive side would persuade them that their conclusions were amiss. What this Article has attempted to emphasize, however, is that such conclusions are inherently relative: the chilling effect may be a better account in their views, but it has its own problems. For other scholars, these problems may be extensive enough to warrant new efforts toward a substantive account.

248. See Kendrick, *supra* note 233, at 595 (questions of principle should take priority over epistemic problem of measuring speech effects).

249. But see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 246, at 82-85 (arguing that courts should act primarily on the basis of principle). Dworkin’s view stems largely from a

both moral commitments and deterrence values.²⁵⁰ Many First Amendment theories explicitly rely on both.²⁵¹ For instance, an autonomy perspective might understand free speech values as both respecting and facilitating our capacities as autonomous moral agents. A democratic self-governance theory might oppose those restrictions that show disregard for our role as citizens and those that impede the democratic process. Such theories will regard some restrictions as impermissible as a matter of principle and others suspect as a matter of policy. Where, as here, policy analysis fails to justify existing doctrine, we must ask whether a principled account would do. In this case, this approach may point toward the construction of an alternative account of speaker's intent.²⁵²

CONCLUSION

In this Article, I have argued that the chilling effect, as it currently exists, provides an inadequate answer to the question of speaker's intent. In doing so, I have identified problems that may beset other empirical judgments in law making. I have argued that

conviction that the countermajoritarian nature of courts makes them inappropriate policymakers. This approach risks overemphasizing the countermajoritarian aspect of courts at the expense of a number of realities: the facts that many legal standards require courts to traffic in policy questions, that they otherwise may not be any worse equipped for some such questions than legislatures, and that they have in any case been deciding many of them for quite some time. *Cf.* Schauer, *supra* note 110, at 295-97 (arguing against allowing the countermajoritarian difficulty to overwhelm other aspects of institutional design).

250. Pluralistic approaches are also common, if controversial, in other areas, such as tort and criminal law. For example, Kenneth Abraham has argued that deterrence and fairness values constrain each other in negligence law. *See* Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 273-74 (2012). Douglas Laycock has offered a pluralistic description of the doctrine of undue hardship. *See* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L., no. 3, 2012, at 1, 35 ("The doctrine in this area suggests that the judges care about righting wrongs and they also care about instrumental values."). Paul Robinson has argued that pursuit of deterrence goals in criminal law may be constrained by individuals' sense of the law and, hence, of justice. *See, e.g.*, Robinson & Darley, *supra* note 221, at 983-87.

251. *See, e.g.*, ALEXANDER, *supra* note 1, at 127-46 (discussing various justifications for freedom of speech).

252. *See, e.g.*, Kamisar, *supra* note 18, at 597-606 (noting the weaknesses of the deterrence-based account of the exclusionary rule and attempting a more principled justification); *cf.* Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2002-03 (2007) (arguing that the deterrence-based account fails to make sense of many features of negligence law and accordingly offering an alternative account).

the best response to these problems is a pluralistic one, in which we seek both to improve our understanding of the relevant empirical claims and to consider accounts based on principle.

With regard to the problem of speaker's intent, this latter response suggests that we might consider justifications focused on the culpability of speakers, rather than the chilling of their speech. This approach may have its own difficulties, but given the weakness of the chilling effect, and the persistence of speaker's intent as a feature of the law, it is at least worth the attempt.