

FREE SPEECH AND SPEAKER’S INTENT:  
A REPLY TO KENDRICK

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*Response to: Leslie Kendrick, Free Speech and Guilty Minds, 114 Colum. L. Rev. 1255 (2014).*

I have argued that a speaker’s mental state with respect to whether her words will cause harms that the government can legitimately seek to prevent should be immaterial to whether her speech is protected by the First Amendment—except to the extent her mental state bears on whether sanctioning her will chill others’ protectable speech.<sup>1</sup> Recently, Professor Leslie Kendrick has taken issue with my position and the similar position of others.<sup>2</sup> She argues that the speaker’s mens rea regarding the harmfulness of her speech affects the First Amendment protectability of her speech apart from chilling-effect concerns. The speaker’s mental state matters, not only for purposes of criminal law and tort law, but for free-speech law as well, and intrinsically rather than instrumentally. Although I accept the compliment of serving as one of her principal foils, I nonetheless continue to disagree with Professor Kendrick’s position.

My case against her position can be illustrated very simply by examples in which neither criminal nor tort liability of the speaker is an issue. Take, for example, cases in which the identity of the speaker is unknown

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1. See, e.g., Larry Alexander, *Is There a Right of Freedom of Expression?* 9–10, 76 (2005) (providing examples demonstrating immateriality of intent and presenting reasons why *Brandenburg* test’s consideration of intent is unsatisfying); Larry Alexander, *Free Speech and Speaker’s Intent*, 12 *Const. Comment.* 21, 21–22 (1995) (“I [argue] against locating the ‘value’ of speech in the intentions of its authors . . . . Whatever the author intends to communicate by her speech, it is always possible and indeed highly likely that the ideas the audience receives will be different.”); Larry Alexander, *Low Value Speech*, 83 *Nw. U. L. Rev.* 547, 548 (1989) (“The problem with focusing on the speaker’s intent . . . is that under the most plausible theories regarding the justification of freedom of speech, the ‘value’ of speech resides in the derivation of meaning by its audience and not in the intended meaning, *if any*, of the speaker.”); Larry Alexander, *Redish on Freedom of Speech*, 107 *Nw. U. L. Rev.* 593, 596 (2013) (arguing Professor Redish rightfully rejects element of *Brandenburg* test requiring mens rea of intent, which “serves no obvious free speech value”).

2. Leslie Kendrick, *Free Speech and Guilty Minds*, 114 *Colum. L. Rev.* 1255 (2014). In that essay, Professor Kendrick lists Frederick Schauer and Martin Redish as my partners in crime. See *id.* at 1258 n.9. I hereby absolve them of any guilt in connection with this analysis and defense of the position Professor Kendrick attacks.

and therefore her mental state is unknown. A poster appears in a public location with language that the government believes is likely to incite immediate violence. Who put the poster up and her intentions and beliefs are unknown.<sup>3</sup> Should the government's constitutional entitlement to take down the poster turn on the identity and mental state of the unknown speaker? Or suppose an anonymous flyer contains language that defames a public figure. Should the government's constitutional entitlement to confiscate the flyer turn on whether the anonymous author knew or recklessly disregarded the truth of the flyer's allegations?

Or consider a case where the government knows who the speaker is but acts, not to punish the speaker or hold her liable in tort, but to prevent the speaker from communicating with her audience. For example, suppose the government knows the content of what the speaker proposes to say, believes it will be inciting or defamatory, and physically prevents the speaker from speaking or drowns out her speech or in some other way keeps the audience from hearing or reading it. The government does not, however, subject the speaker to any criminal or civil sanction. It seems odd to think that whether the government has violated the First Amendment depends on the speaker's mental state.

Such examples can be multiplied. What they do is pry apart the message and its likely effects from what we know or do not know about the speaker and her knowledge and attitude regarding those effects. In so doing, they demonstrate that only the effects seem to matter for free-speech purposes. The true free-speech issue is whether the government should be able to interdict the communication and prevent its being received by an audience. The question of what, if any, tort or criminal

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3. Although I am a proponent of seeking the speaker's intended meaning when it comes to statutory and constitutional interpretation, that is so because in those contexts, one is trying to ascertain the norms promulgated by those with the authority to choose the norms that govern us, and the authorities' intended meanings of the promulgating texts constitute the norms they have chosen. See, e.g., Larry Alexander, *Originalism, the Why and the What*, 82 *Fordham L. Rev.* 539, 540 (2013) ("Whether we are talking about a constitutional provision, a statute, an administrative rule, an executive order, or a judicially promulgated rule, its meaning, *for purposes of the legal enterprise*, is its authorially intended meaning—in Gricean terms, its speaker's meaning."). In the free-speech domain, the government's interest is in the harms the communications might cause, and those harms will stem from how the audience will interpret and react to the communication, even if the audience's "interpretation" mischaracterizes the speaker's intended meaning. The latter may bear on the speaker's culpability or responsibility for the harms and thus on potential criminal or civil liability, but it is separate from whether the audience's anticipated reaction should make the communication suppressible as a matter of freedom of speech. For example, whether the "speaker" is even intending to send a message by burning an American flag, as in *Spence v. Washington*, 418 U.S. 405 (1974), or is just trying to keep warm should be immaterial, despite what the Court suggests, see *id.* at 410–11, if the government's ban is to prevent the audience from deriving an objectionable message, whether or not intended, from the "speaker's" act.

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liability the speaker should incur seems, as a matter of free-speech law, to be of secondary and derivative importance. For free-speech law should be equipped to deal with examples where the speaker is not criminally or civilly sanctioned or is anonymous, dead, or foreign and thus beyond the jurisdiction of our criminal and civil laws.

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