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The First Amendment and the New Civil Liability

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BOOK REVIEW

THE FIRST AMENDMENT AND NEW FORMS OF CIVIL LIABILITY

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The First Amendment and Civil Liability. By Robert M. O'Neil. Bloomington: Indiana University Press. 2001.

IN his book, *The First Amendment and Civil Liability*,[1] Professor Robert O'Neil, a distinguished First Amendment scholar and American educator,[2] surveys the landscape of contemporary civil litigation seeking to impose civil liability for injuries allegedly caused by speech. In a graceful narrative that is at once thoughtful and thought-provoking, Professor O'Neil dissects the newest generation of cases involving libel, invasion of privacy, and liability for physical harm, extrapolating from them a broad commentary on the First Amendment values that, in his view, ought to govern resolution of such conflicts. The book is exceptionally rich in the sheer number and variety of cases presented, and it is unusually helpful in inviting us to explore the contrasts and similarities they pose, the stresses they place on received wisdoms, and their compatible legal doctrines.

In offering this gentle critique of Professor O'Neil's own critique of the vast array of cases he sets before us, I take up as my theme a fundamental threshold question conjured in the very title of Pro-

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[1] Robert O'Neil, The First Amendment and Civil Liability (2001) [hereinafter O'Neil].

[2] Robert O'Neil is currently Director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia and University Professor of Law at the University of Virginia. Among his many distinguished academic positions, he served as President of the University of Wisconsin and President of the University of Virginia. Throughout his career he has been a passionate advocate for civil rights and civil liberties, especially First Amendment freedoms. See, e.g, Robert O'Neil, Classrooms in the Crossfire (1981); Robert O'Neil, Discriminating Against Discrimination (1976); Robert O'Neil, Free Speech in the College Community (1997); Robert O'Neil, Free Speech: Responsible Communication Under Law (1972).

fessor O'Neil's book, *The First Amendment and Civil Liability*. It is upon the term "civil" that I set focus. The issue is easily stated: In dealing with First Amendment conflicts, should it matter whether the attempt to impose some form of legal responsibility on those who have allegedly caused harm through the exercise of free expression is in the form of *civil* liability rather than *criminal* prosecution?

Following the lead of Justice William J. Brennan, Jr. in *New York Times Co. v. Sullivan*,[3] Professor O'Neil's answer to this question is that it should not matter. Criminal liability and civil liability are equivalents for Professor O'Neil as far as the First Amendment is concerned, and whatever substantive standards properly apply in one regime ought to apply in precisely the same form in the other.[4] Thus, the First Amendment doctrines for libel are the First Amendment doctrines for libel, and it matters not a hoot whether the case is civil libel or criminal libel. So too, any attempt to impose legal responsibility for injuries caused by an incitement to violence ought to be governed by the First Amendment standard in the famous *Brandenburg v. Ohio*[5] decision, whether the attempt is through criminal prosecution (as in *Brandenburg* itself) or through a civil suit.[6]

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[3] 376 U.S. 254 (1964).

[4] O'Neil, supra note 1, at 13–14.

[5] 395 U.S. 444 (1969).

[6] *Brandenburg* arose out of a Ku Klux Klan rally conducted on a farm in Hamilton County, Ohio, outside Cincinnati. A local Cincinnati television station reporter had been invited to witness the rally, and he and a cameraman filmed the event, portions of which were later broadcast on the Cincinnati station and a national network. The film footage is filled with vile, incendiary racist bile. Klan members pronounced that "the nigger should be returned to Africa, the Jew returned to Israel," and "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." Id. at 446–47. The state of Ohio prosecuted Brandenburg, the leader of the Klan group, under the Ohio "Criminal Syndicalism" law making it illegal to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," or to assemble "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Id. at 444–45. Brandenburg was convicted, fined $1,000, and sentenced to one to ten years in prison. The Supreme Court held the Ohio law unconstitutional. No one was present at the Klan rally except the Klan members themselves, the television reporter, and his cameraman. Nothing in the record indicated that the racist messages of the Klansman at the rally posed any immediate physical threat to anyone. In these circumstances, the Court said, the Klan was guilty

This position is elegantly symmetrical, seductively simple, and has been the essentially unchallenged orthodoxy in First Amendment law, at least since 1964. With the imprimatur of scholars as estimable as Professor O'Neil and jurists as influential as Justice Brennan, it is no wonder why.[7] If the equation of criminal and civil liability has a strong and famous pedigree, however, it does not have any similarly strong or famous explanation. There was a decidedly hurried quality to Justice Brennan's original announcement of the proposition,[8] and Professor O'Neil, in his reliance on Justice Breiman, also does not linger long.[9] But in the leisure of this review, I shall.

To supply grist for the mill, consider a sampling of several of the cases Professor O'Neil presents in his delightful book. There are literally scores of delectables from which we might choose, but there are a half-dozen cases with particularly striking facts: (1) The "*Hit Man*" case, *Rice v. Paladin Enterprises*,[10] involving an attempt to impose civil liability on the publisher of a murder instruction book for murders allegedly perpetrated by a paid killer who followed the instructions in the book; (2) the "Nuremberg Files" case, *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*,[11] involving an attempt to impose civil

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only of the "abstract teaching" of the "moral propriety" of racist violence. Id. at 448. "[T]he constitutional guarantees of free speech and free press," according to the Court, "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447.

[7] It is worth observing here that Professor O'Neil was a law clerk to Justice Brennan in 1962–63. In this book, as well as in Professor O'Neil's many other influential writings and in his celebrated professional career, it is easy to discern much of the influence of Justice Brennan. They are *simpatico* in their jurisprudence, in their compassionate dedication to civil rights and civil liberties, and in their special reverence for the First Amendment.

[8] Justice Brennan merely announced the proposition in a single confident sentence: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co.*, 376 U.S. at 277.

[9] O'Neil, supra note 1, at 13–14.

[10] 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998). I represented the plaintiffs in this litigation. See infra notes 24–25, 67–70 and accompanying text.

[11] 244 F.3d 1007 (9th Cir. 2001), reh'g en banc granted, 268 F.3d 908 (9th Cir. 2001). See infra notes 26–29, 72–82 and accompanying text. The panel opinion in the Ninth Circuit was written by Judge Alex Kozinski. As of this writing, the case was pending in that court en banc.

liability for threats allegedly made by anti-abortion activists against abortion providers accusing the providers of Nuremberg-like crimes against humanity;[12] (3) the *"Natural Born Killers"* case, *Byers v. Edmondson*,[13] involving an attempt to impose civil liability on the makers of a film for a violent shooting spree in which the perpetrator was allegedly emulating behavior depicted in the movie; (4) the "Slayer" case, *Pahler v. Slayer*,[14] involving an attempt to impose civil liability against a rock group for deaths allegedly caused by the group's violent, depressing, and death-ridden lyrics; (5) the *"Jenny Jones Show"* case,[15] involving an attempt to impose civil liability on the producers of the Jenny Jones "surprise television" show when a male guest was allegedly so disturbed by the surprise revelation that he had a secret admirer who was another male that, after the show, he went out and tracked down his gay admirer and shot him dead;[16] (6) the Paducah, Kentucky school murder case, *James v. Meow Media*,[17] involving an attempt to impose civil liability on the producers of violent video games, various internet sites, and the violent film *Basketball Diaries*, on the theory that the adolescents who engaged in the massacre of fellow students at a Kentucky high school had been influenced by the games, websites, and film.[18]

All these cases are cutting edge. It is intriguing to consider how their edges would be cut if the First Amendment played no role in the tailoring. Imagine that American society was not organized in a federal system with a federal constitution containing a free speech guarantee binding on the states, but was instead a looser confederation in which states were not restricted by a federal free speech clause. Imagine, if you will, state tort and criminal law unencum-

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[12] See generally Steven Gey, The Nuremberg Files and the First Amendment Value of Threats, 78 Tex. L. Rev. 541 (2000); Melanie C. Hagan, The Freedom of Access to Clinic Entrances Act and The Nuremberg Files Website, 51 Hastings L.J. 411 (2000).

[13] 712 So. 2d 681 (La. Ct. App. 1998), cert. denied, 526 U.S. 1005 (1999). See infra notes 30–34 and accompanying text.

[14] No. CV 79356 (Cal. Super. Ct., San Luis Obispo County Oct. 29, 2001), available at 2001 WL 1736476. See O'Neil, supra note 1 at 163–64; infra notes 35–37 and accompanying text.

[15] Paul Farhi, 'Jenny Jones' Show Found Negligent in Murder Case, Wash. Post, May 8, 1999, at A1.

[16] O'Neil, supra note 1, at 1–3. See infra notes 38–42 and accompanying text.

[17] 90 F. Supp. 2d 798 (W.D. Ky. 2000).

[18] See O'Neil, supra note 1, at 108–09; infra notes 43–47 and accompanying text.

bered by the Bill of Rights, as it was before the passage of the Fourteenth Amendment and the inception of the incorporation doctrine.[19] In such a society, the resolution of the cases described by Professor O'Neil would be left entirely to the criminal law and tort law systems of the states. Would we, in such a world, expect a state's criminal justice system to resolve these conflicts in precisely the same manner as its tort system? Not necessarily.

Looking at the question as a legal realist might, one can easily see that criminal prosecution in any of these cases might well be deemed far more problematic to many astute prosecutors than a suit for civil liability might be deemed to many enterprising plaintiff's lawyers. Consider the questions that a typical prosecutor would likely ask before commencing a criminal case against any of these defendants, and compare those questions to the ones a typical plaintiff's attorney would likely ask. Let us posit that our prosecutor is zealous, committed, diligent, highly competent, and ethical.

The prosecutor would first have to find an appropriate crime. Murder? Manslaughter? Reckless endangerment? In none of these cases is the putative defendant a direct perpetrator of violence. We are not talking about fingering the trigger-man. Thus, the prosecutor must look to the classic avenues presented by criminal law for widening the scope of liability, such as notions of conspiracy, solicitation, aiding and abetting, and accessory. Whatever the formal substantive theory of wrong (the crime), and whatever the defendant's alleged role in the wrong (aider and abettor, conspirator, accessory), the prosecutor will know that certain elements of the case are hard-wired into the law and must be proved. Criminal law will require criminal intent. The criminal law recognizes gradations, to be sure, but on the whole it is relatively uncompromising. It demands a form of mens rea or scienter in which subjective motivation to cause harm or highly culpable reckless disregard of

[19] Prior to the enactment of the Fourteenth Amendment, the Bill of Rights did not bind state governments. See Barron v. The Mayor and City Council of Balt., 32 U.S. (7 Pet.) 243 (1833). After passage of the Fourteenth Amendment, the incorporation doctrine evolved, under which some, but not all, Bill of Rights guarantees were deemed binding on the states. The First Amendment was "incorporated" against the states in *Gitlow v. New York*, 268 U.S. 652 (1925).

probable harm must be demonstrated.[20] Criminal law will require criminal proof. By tradition, every element of the case must be proven beyond a reasonable doubt.[21] Lastly, our realistic criminal prosecutor will factor in the human and cultural aspects of the case. Wholly aside from the formal doctrinal elements and burdens of

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[20] It is not my purpose here to delve into a long discourse on the intricacies of intent and complicity in criminal law, but only to note that the pursuit of criminal prosecution against any of the various media defendants in the scenarios being discussed here would be problematic. Take, for example, the notion of aiding and abetting liability. There is a split among states as to the degree of knowledge and intent an aider and abettor must have; some require mere "knowledge" of the principal's purpose, and others impose (as the federal system now imposes) a stronger element of subjective intent to assist in the purpose. See, e.g., United States v. Fountain, 768 F.2d 790, 797–98 (7th Cir. 1985) (describing the division and collecting cases); Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (endorsing the test of Judge Learned Hand, requiring that the aider and abettor "'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'" (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938))).

[21] On this score, the mental exercise gets a bit tricky. Current federal constitutional law requires proof beyond a reasonable doubt for all elements of a crime, a requirement that is understood to emanate from the Fourteenth Amendment's Due Process Clause. See In re Winship, 397 U.S. 358, 363–64 (1970) ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."). In this exercise, we are imagining state criminal and tort law as they would exist without the restrictions of the First Amendment. One might object that, to be consistent, we should also imagine that state criminal and tort law operate free of the federal Due Process Clause, including the reasonable doubt standard. There are two ways to respond to this quibble. Technically, one might take the position that our federal system could plausibly be imagined without an incorporation doctrine, so that the First Amendment would not be binding on the states, but the Fourteenth Amendment and *its* Due Process Clause would. Less technically, one might observe that we are merely predicting the likely responses of the state criminal and tort systems if left to their own devices. Since the reasonable doubt standard has long been embedded in American criminal law, even before the principle was formally "constitutionalized," one might predict it would be an element of any criminal prosecution in any of these scenarios. This point is not trivial—for one of the principal insights of this exercise (demonstrated in the paragraphs that soon follow) is the recognition that the federal Constitution has historically been much *less* of a force in "bending" traditional state criminal law doctrines than the federal Constitution has been in "bending" corresponding state tort law doctrines. See infra notes 48–52 and accompanying text.

proof, the prosecutor knows that the biases and inclinations of juries must enter the mix. Some jurors will undoubtedly be inclined to believe that criminal responsibility should rest primarily, and perhaps even exclusively, on those who participate in some direct and conscious way in the criminal enterprise. If some jurors will harbor the reflexive bias that guns don't kill, people do, even more jurors will likely harbor the bias that movies, books, and rock music don't kill either.

Taking all of these matters into consideration, it is a fair judgment that, to our ordinary reasonable prosecutor, criminal prosecution in any of these fact patterns, while perhaps not impossible, is certainly not inviting. And there may be some proof in the pudding here: In none of these incidents were any criminal prosecutions pursued.

Now compare this with our civil case. Again, let us posit that our plaintiff's lawyer, like our prosecutor, is zealous, committed, diligent, highly competent, and ethical. Imagine these fact patterns from the mind-set of the legal realist and from the point-of-view of an energetic and creative plaintiff's attorney that is well-tuned to the currents of modern tort theory, doctrine, and practice. It is a very different picture now.

Whereas the criminal prosecutor had the awkward discomfiture of trying to stretch classic crimes beyond their conventional state-of-play, the tort lawyer grooves comfortably. These cases are the stuff of modern tort practice, mega-verdicts waiting to happen. Remember now, there is no First Amendment in the picture. Let us give our enterprising plaintiff's counsel a chance at it.

Finding suitable causes of action will be no problem. If anything, there is an embarrassment of riches. A straightforward claim sounding in negligence is perhaps the simplest and most appealing option. The issues in the negligence action are routine and familiar: Did the defendants owe a duty of care to the plaintiffs? Did the defendants act with ordinary reasonable care under the circumstances? Did the conduct of the defendants in fact cause the injuries? Was the conduct the proximate cause of the injuries? Was the harm foreseeable? Did the intentionally wrongful or even criminal act of another party constitute a superseding intervening cause that ought to operate to interdict the chain of causation and relieve the defendant of responsibility? Or was the intentionally

wrongful act of the intervening party among the foreseeable risks that rendered the defendant's conduct unreasonable in the first instance and thus not properly viewed as a superseding cause?[22]

As Professor O'Neil cogently documents, we might also expect our enterprising tort lawyer to invoke, in at least some of these cases, other more creative theories of tort liability.[23] One obvious nominee is products liability theory. A book, a video game, a compact disc, or a movie sold or rented on VHS tape or DVD might be thought of as a product. When the product results in death, it might be argued that it is defectively designed or, even more boldly, that it is *effectively* designed, and that the risk of harm it imposes cannot be justified by the social utility it generates.[24]

One may easily see how an accomplished plaintiff's lawyer, operating in a First Amendment-free environment, might well feel optimistic about the answers to these questions likely to emerge from the crucible of litigation. Consider the six examples we are sampling from Professor O'Neil's book, and quickly crunch the numbers.

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[22] Again, the point here is not to lay out the law of torts like the oracle William Prosser. See G. Edward White, Tort Law in America: An Intellectual History (1980). Rather, the point is merely to demonstrate the greater pliability of modern tort principles and practice. See, e.g., Jutzi-Johnson v. United States, 263 F.3d 763, 755 (7th Cir. 2001) ("A person is not liable for such improbable consequences of negligent activity as could hardly figure in his deciding how careful he should be. Liability in such circumstances would serve no deterrent, no regulatory purpose; it would not alter behavior and increase safety. Nothing would be gained by imposing liability in such a case but compensation, and compensation can be obtained more cheaply by insurance. But by the same token the doctrine of supervening cause is not applicable when the duty of care claimed to have been violated is precisely a duty to protect against ordinarily unforeseeable conduct. A risk unforeseeable to an ordinary person is foreseeable to a specialist who assumes a duty to prevent the risk from materializing. The duty is a recognition that the unforeseeable has become foreseeable to the relevant community.").

[23] O'Neil, supra note 1, at 110–12.

[24] See George Conk, Is There a Design Defect in the *Restatement (Third) of Torts: Products Liability?*, 109 Yale L.J. 1087 (2000). In the case of the *Hit Man* murder manual, for example, if one were to conceive of the *Hit Man* murder instruction manual as a mere product (remembering, once again, that we are conducting this exercise under the supposition that there is no First Amendment), it would seem a relatively easy matter to prove that the lethal potential of the book substantially outweighs any social utility that might plausibly be imputed to it.

In the "*Hit Man*" case,[25] the core of the plaintiffs' claim was that the publisher of the murder manual *Hit Man: A Technical Manual for Independent Contractors* had aided and abetted murder when the instructions in that manual were used by a contract murderer as the blueprint for three murders. The plaintiffs claimed that the publisher had marketed the manual to attract and assist criminals, and that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings. If these allegations were proven at trial, almost certainly the defendants would have faced a substantial damages verdict.[26]

In the "Nuremberg Files" case,[27] the plaintiffs, who were principally providers of abortion services or entities providing counseling regarding abortion services, brought a suit for civil liability against anti-abortion activists who engaged in a range of virulent expression against abortion providers. In posters, pamphlets, and internet postings, the activists accused abortion providers of "crimes against humanity" and offered money to persons who could provide information leading to the revocation of the providers' medical licenses or to anyone who could persuade them to cease performing abortions.[28] The activists, however, went beyond these forms of expression, making their attacks more personalized. In one poster, a specific abortion provider, Dr. Robert Christ, was featured by

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[25] Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998).

[26] The defendants in the *Rice* litigation stipulated, for purposes of contesting a motion for summary judgment, that in publishing the murder manual they had in fact acted with knowledge and intent that it would be used by real killers and would-be killers to plan and execute murders. The parties further stipulated that the manual was marketed to readers who were not killers or would-be killers, including law enforcement officers, writers of novels and plays seeking technical details to give their narratives greater verisimilitude, and fantasizers who obtained a thrill from imagining themselves as contract assassins but were not likely to act out those fantasies. Had the case proceeded to a jury trial, these issues would have been contested. The case was settled on the eve of the trial. No one knows whether a jury would or would not have found that the publisher in fact acted with the knowledge and intent alleged. It is the view of this author, however, that a jury would indeed have found that such intent existed and that such a finding would have been sustained on appeal—which is why the defendants settled the case. See Rodney Smolla, Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book 264–72 (1999).

[27] Planned Parenthood of the Columbia/Wilamette v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001), reh'g en banc granted, 268 F.3d 908 (9th Cir. 2001).

[28] Id. at 1012.

name, along with his photograph and his work and home addresses. The activists began to assemble dossiers on various abortion providers, judges, and political leaders deemed supportive of abortion rights. The dossiers were dubbed the "Nuremberg Files." A web page included the names and addresses of doctors who performed abortions and invited others to contribute additional names. The website marked the names of those already victimized by anti-abortion terrorists, striking through the names of those who had been murdered and graying out the names of the wounded.[29]

Neither the posters nor the website contained any explicit threats against the doctors, but the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, the plaintiffs argued, the defendants robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them. The doctors responded to this unwelcome attention by donning bulletproof vests, drawing the curtains on the windows of their homes, and accepting the protection of United States Marshals. A group of doctors also sued the activists under a variety of state and federal laws. At the heart of all their causes of action, however, was the common supposition that the actions of the activists constituted threats against their lives. A jury agreed and awarded the doctors $107 million in damages.[30]

In the "*Natural Born Killers*" case,[31] the Louisiana Court of Appeal held that the victims of a convenience store shooting could sue the producers of the film *Natural Born Killers*, including Time Warner Entertainment and Oliver Stone, on the grounds that the perpetrators of the shooting had gone on a crime and shooting

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[29] Id. at 1012–13.

[30] Id. at 1013. The verdict was sustained by the Oregon District Court but overturned by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's views are discussed subsequently in this article; the point at this juncture is simply that a federal trial jury and a federal judge found the conduct of the defendants actionable and worthy of a monumental damages award. This award was rendered *with* First Amendment protections included in the instructions given the jury. Whether the verdict was or was not consistent with sound First Amendment principles, the saga illustrates how such a fact pattern is likely to play out at the trial stage in the hands of capable plaintiff's lawyers. See infra notes 72–82 and accompanying text.

[31] Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998), cert. denied, 526 U.S. 1005 (1999).

spree after seeing the film. The suit alleged that the producers of *Natural Born Killers* were liable to the victims for distributing a film that they knew or should have known would cause and inspire people to acts of violence, by glorifying such violence and presenting individuals who commit such violence as celebrities and heroes.[32] The suit was championed and financed in part by the highly successful writer of legal fiction, John Grisham, who publicly excoriated Oliver Stone for producing the movie and observed that it would take only one large verdict against a movie producer such as Stone to end the production of such films in Hollywood.[33] A key piece of evidence in the case was a boast made by Oliver Stone following the premiere of the movie, in which he stated: "The most pacifist people in the world said they came out of this movie and wanted to kill somebody."[34] The court reasoned that if it could be established that the makers of the film had actually intended to provoke susceptible moviegoers into committing violent acts such as those glamorized in the film, liability could ensue.[35]

In the "Slayer" case, the "death metal" music group Slayer was alleged to have caused the death of an innocent tenth-grader murdered by three young killers.[36] The killers were allegedly enraptured by the messages of Slayer songs and moved by those songs to abduct, torture, and murder the young woman as part of a satanic sacrifice ritual. In this case, the clever plaintiffs' lawyers added a new twist, focusing heavily on the advertising of the Slayer albums (such as *Show No Mercy*, *Hell Awaits*, and *Reign in Blood*) and relying heavily on statements made by the three actual murderers,

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[32] See O'Neil, supra note 1, at 137–38.

[33] Id. at 156.

[34] Id. at 157.

[35] It seems almost impossible that such an intent could ever be proven. Despite the hubris of his boast, the notion that Oliver Stone actually wanted people to go out and start killing after seeing his movie appears manifestly absurd. Indeed, in March 2001, when the case returned to the trial court on remand, claims against Stone and most of the others directly connected to the making of the film were dismissed by the court on the grounds that such intent could not be established with proof sufficient to withstand First Amendment requirements. Id. at 138. Once again, the salient point, however, is that in a system with *no* First Amendment restrictions, it is quite plausible that Oliver Stone *would* have been held liable, as John Grisham suggested, by a jury wanting to send Hollywood a message.

[36] Pahler v. Slayer, No. CV 79356 (Cal. Super. Ct., San Luis Obispo County Oct. 29, 2001), available at 2001 WL 1736476; O'Neil, supra note 1, at 163.

who stated explicitly that they were following the instructions in such Slayer songs as "Altar of Sacrifice," "Kill Again," and "Necrophiliac."[37] Although the original suit was dismissed by the California Superior Court, the plaintiffs' lawyers have resubmitted the claim.[38]

On May 7, 1999, a Michigan jury awarded $25 million to the family of a gay man murdered by a fellow guest on the *Jenny Jones* television program.[39] Jonathan Schmitz admitted the killing, but his second-degree murder conviction was overturned on procedural grounds.[40] The popular, nationally-syndicated talk program typically confronts guests with embarrassing personal revelations, such as extramarital affairs.[41] The lawsuit arose from a program on secret admirers that featured Scott Amedure, a thirty-two-year-old gay man, who revealed a crush on Schmitz. The show was taped in March 1995, but it never aired, except as part of news stories on the ensuing trials. Schmitz, who later said he was heterosexual, was apparently embarrassed by Amedure's revelation. Three days after the taping, he drove to Amedure's home in Oakland County, outside Detroit, and killed him with a shotgun blast. Amedure's family later sued the show's distributor, Warner Brothers, and the show's producer, Telepictures Productions, both owned by Time Warner, arguing that the producers were partly responsible for Amedure's death. They sought $71.5 million in damages. After seven hours of deliberation, the jury found the show liable and ordered the defendant companies to pay $5 million for pain and suffering, $20 million for the loss of Amedure's companionship to his family, and $6,500 for funeral expenses. Jones, who was not a defendant, testified for three days at the trial, stating that her program was "'a very lighthearted talk show. . . . I think the audience relates to it. I think most everybody at some point have [sic] had crushes in our lives. Some people choose to reveal the crush on TV.'"[42] The program's attorneys argued that Schmitz had agreed to come on the show,

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[37] O'Neil, supra note 1, at 163–64.

[38] Id. at 165.

[39] Paul Farhi, 'Jenny Jones' Show Found Negligent in Murder Case, Wash. Post, May 8, 1999, at A1.

[40] Id. The following facts surrounding the show and the trials were taken from this article. See id. As of this writing, the case is on appeal.

[41] Id.

[42] Id.

even after being told in advance that his secret admirer could be a man or a woman. They argued that the producers could not have known about Schmitz's history of mental problems, alcoholism, or his thyroid condition—any of which could have caused him to react violently to Amedure's revelation. The family's lawyer, Geoffrey Fieger, however, argued that Jones and Warner were motivated solely by ratings and cared nothing about the welfare of their guests. In addition, he rebuffed the argument that Schmitz killed Amedure because of a sexual encounter between the two of them.[43]

Looking at these matters purely from a plaintiff's lawyer's perspective operating in a world with no First Amendment, only one of the half-dozen examples being considered here, the Kentucky school murder case,[44] seems to cut decidedly against the plaintiffs. The case arose from horrible murders committed by a fourteen-year-old named Michael Carneal. In 1997, Carneal took six guns to Heath High School in Paducah, Kentucky. Carneal waited for a daily voluntary student prayer session to end, and then opened fire, killing three students from the prayer group and wounding five others. In investigating Carneal, the police seized his computer. Carneal was an obsessive computer user and internet surfer, who regularly accessed materials on-line that were obscene and violent.[45] Carneal was also engrossed by the movie *The Basketball Diaries*, a film in which a student graphically massacres his classmates with a shotgun, and with various violent video games, including the game *Doom*. An adolescent psychiatrist who examined Carneal concluded that he had been profoundly influenced by his exposure to these various violent and pornographic media and that the depictions of violence in them had influenced Carneal to think of violence as an appropriate means of resolving conflict and to glorify and condone such violence.[46] The families of the massacred children sued the various makers of the film, the video games, and web pages, claiming that they were partly responsible for the deaths. In addition to a straightforward negligence claim, the plain-

[43] Id.
[44] James v. Meow Media, 900 F. Supp. 2d 798 (W.D. Ky. 2000).
[45] Id. at 800.
[46] Id.

tiffs in the Kentucky case invoked products liability law and anti-racketeering claims.[47]

The trial court dismissed all the causes of action, finding that mainstay tort doctrines such as causation, foreseeability, and superseding cause precluded liability. Without even reaching the First Amendment issues, the court found that the attempt to impose liability at large against a host of media defendants for, in effect, creating a violent culture that in some generalized way may have influenced Corneal stretched concepts of duty, causation, and foreseeability beyond the traditional understandings of tort law.[48]

Return now to the threshold question suggested in the title of Professor Robert O'Neil's book, *The First Amendment and Civil Liability*, and run through the exercise a second time. There *is* a First Amendment, and it *is* binding on the states. Should it operate as a criminal-civil equalizer? Should it be understood to force the criminal justice system and the tort system to treat these various fact patterns in parity? Is the First Amendment the great leveler?

Starting with the widest-angle lens, it is initially worth observing that Bill of Rights guarantees often do not apply to criminal and civil matters in the same way, either by their terms or through interpretative gloss. There is no federal constitutional right to jury trial in civil cases because the Seventh Amendment is not deemed sufficiently "fundamental" to be incorporated into the Fourteenth Amendment's Due Process Clause and to bind the states.[49] The Eighth Amendment's Cruel and Unusual Punishment Clause has been interpreted as applicable only to criminal penalties, not civil sanctions.[50] Even the general procedural norms of the Due Process Clause have quite different meanings when applied to criminal trials than they have in non-criminal contexts. Proof beyond a reasonable doubt is required in criminal cases but is not required in administrative or civil litigation proceedings, and the methodology of modern procedural due process jurisprudence grants ample latitude for the government to apply relatively relaxed procedural

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[47] Id. at 801.

[48] Id. at 803–05.

[49] The Seventh Amendment is binding only in the federal system and only to actions at "law." See, e.g., Curtis v. Loether, 415 U.S. 189, 198 (1974); Dairy Queen v. Wood, 369 U.S. 469, 471–72 (1962).

[50] See Browning-Ferris Indus. of Vt. v. Kelco Disposal, 492 U.S. 257 (1989).

norms in a variety of settings outside the criminal justice system.[51] Of course, there is also an array of explicit procedural protections (such as the right to the effective assistance of counsel[52] and the rights guaranteed in the Confrontation Clause[53]) that by their explicit terms apply only to the criminal process.

These other examples, however, seem largely, if not entirely, procedural. The First Amendment is a substantive constitutional guarantee, securing a substantive liberty. While many First Amendment protections may in fact be procedural in one sense or another,[54] the core of the right is a tangible guarantee of freedom from governmental interference with expression based on its content or viewpoint. In our constitutional tradition, the free speech guarantee of the First Amendment is widely regarded as a transcendent and fundamental right, a constitutional prime.[55] If the right is substantive, what in turn matters *is* the substance, not the packaging. The point of the First Amendment is supposed to be protection of expression against governmental abridgment or even significant chill. If so, the argument goes, then abridgement is abridgement, and chill is chill, whether cast in terms criminal or civil.

From a pragmatic perspective, indeed, the potential chill on expression posed by civil liability may in some instances far exceed any parallel threat imposed by criminal prosecution. The half-million dollar verdict in contest in *New York Times v. Sullivan* was heavily chilling in 1964, and the hundred million dollar verdict against anti-abortion protestors in *Planned Parenthood* is undoubtedly chilling today.

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[51] See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547–48 (1985) (holding that a dismissed employee's due process rights were satisfied by a pretermination opportunity to respond and post-termination administrative proceedings, as provided by state statute); Bd. of Regents v. Roth, 408 U.S. 564, 578–79 (1972) (holding that a decision not to rehire a professor at a state-run university did not require due process proceedings).

[52] See Gideon v. Wainwright, 372 U.S. 335 (1963).

[53] See Washington v. Texas, 388 U.S. 14, 23 (1987) (holding that a defendant has a right to call and present witnesses in his favor); John Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191 (1999).

[54] See Henry Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 518 (1970).

[55] See Rodney Smolla, Free Speech in an Open Society 43–65 (1992).

There are, however, intriguing competing considerations. Ponder first the rococo architecture of modern First Amendment law itself. In the context of a criminal prosecution of speech that allegedly caused or was calculated to cause violence, the orthodoxy is that the standard of *Brandenburg v. Ohio*[56] must be applied.[57] This is sensible enough—*Brandenburg* was itself a criminal prosecution. Yet the scope and reach of *Brandenburg* is neither self-evident nor self-defining. Even within its settled parameters—even when dealing with a criminal prosecution for a crime such as "incitement"—the basic division it draws between "abstract advocacy" and speech directed to the incitement of imminent lawless action and likely to produce such action is a division not always easy to apply and perhaps subject to influence by context. The terrorist attacks of September 11, 2001, for example, may have altered our attitudes about what is abstract and what is "immediate" or "likely."

When we move outside the settled parameters of *Brandenburg*, when the attempt is made to impose civil liability for the harms caused by expression in contexts that seem quite dramatically removed from criminal prosecution for incitement, very serious doubts arise as to whether the *Brandenburg* standard was ever intended to be stretched to cover such cases or whether it is especially coherent as a legal test for dealing with them. *Brandenburg*'s requirement that the speech be "directed to" the incitement of imminent lawless action appears to impose a standard of subjective intent. This intent standard is strong medicine, and, if imported wholesale into tort law, will go a long way toward accomplishing a leveling of the criminal and civil playing fields. An intent standard would seem to eliminate liability in all so-called "copycat" scenarios, in which material presented for artistic, entertainment, or educational purposes depicts activity that is dangerous or violent, and someone exposed to the depiction, often a child, adolescent, or person with some history of psychological instability, engages in behavior emulating the dangerous activity, resulting in injury or

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[56] 395 U.S. 444 (1969).

[57] NAACP v. Claiborne Hardware, 458 U.S. 886, 927–28 (1982) (applying *Brandenburg* to criminal prosecution arising from civil rights boycott); Hess v. Indiana, 414 U.S. 105, 108 (1973) (applying *Brandenburg* to criminal prosecution arising from anti-Vietnam War protest).

death. Courts have consistently rejected liability in such cases.[88] Some of these decisions have relied on First Amendment principles, some merely on general tort rationales. Whatever the formal basis for the ruling, in these paradigmatic copycat cases one thing is certain: It cannot be maintained that the defendants "intended" the harm, at least not in the normal sense in which we customarily use the term "intent." Concomitantly, no convincing case can likely be made that the defendants "incited" the ensuing violence, or in the parlance of *Brandenburg*, were engaged in expressive activity "directed to inciting or producing" such violence.

Not all of the fact patterns being tested here, however, fall comfortably within the "copycat" paradigm. A contract killer who follows the instructions and exhortations of a murder instruction book is more than a mere "copycat" emulating some description of violent behavior presented to entertain. So too, it is not beyond the pale to suppose that the real purpose of the information and rhetoric expressed by radical anti-abortion activists in the "Nuremberg Files" case was to exhort and assist other radical activists in per-

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[88] See, e.g., Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (rejecting argument that television violence caused minor to become addicted and desensitized to violent behavior, resulting in the minor killing an eighty-three-year-old woman); McCollum v. CBS, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (rejecting claim brought by parents of teenager who shot and killed himself while listening to a record by the musician Ozzy Osbourne in suit against the performer and his record company); Bill v. Superior Court of the City & County of S.F., 187 Cal. Rptr. 625 (Cal. Ct. App. 1982) (dismissing plaintiff's claim that the producer of a gang violence film was liable for the shooting of plaintiff's daughter by a third party shortly after both saw the film); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888 (Cal. Ct. App. 1982) (rejecting claim when minors acted out a scene from a television movie and "artificially raped" a nine-year-old boy in same manner shown in movie); Sakon v. Pepsico, 553 So. 2d 163 (Fla. 1989) (rejecting liability arising from advertisement for Mountain Dew showing kids riding up a ramp and landing their bicycles in the water, in claim brought by fourteen-year-old boy who attempted the stunt and broke his neck); Walt Disney Prods. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (rejecting attempt to impose liability when eleven-year-old was injured while attempting to reproduce sound effect from Mickey Mouse Club on television); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (dismissing plaintiff's claim that the producer of a gang violence film was liable for the murder of plaintiff's son who had viewed the film); DeFilippo v. Nat'l Broad. Co., 446 A.2d 1036 (R.I. 1982) (rejecting claim arising from stunt on the Tonight Show in which Johnny Carson was "hanged" by a professional stuntman and not injured, when thirteen-year-old boy, emulating the stunt, hanged himself); Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. Ct. App. 1993) (dismissing plaintiff's claims against the magazine publisher of a firearm advertisement that allegedly caused a fatal firearm injury to plaintiff's son).

forming bombings of abortion clinics and assassinations of abortion providers. Thus, in both the "*Hit Man*" and the "Nuremberg Files" cases, one could construct a plausible theory of subjective intent. Particularly when one recalls that, in the "Nuremberg Files" case, the gravamen of the action was the communication of a "threat," it does not stretch credulity to surmise that, at the very least, the radical anti-abortion activists in that case subjectively intended to threaten abortion providers with the proposition that they should stop performing abortions or face possible death. Likewise, in the "*Hit Man*" case, it does not stretch credulity to surmise that the publisher subjectively intended to provide the necessary training to people desiring to commit murder, though this may have been only one of multiple intents.

Beyond these two examples, judging the state of mind of movie producers, surprise television show hosts, rock group members, or video game creators is far murkier. Sadly, we know that there are terrorists in the world for whom no thought now seems unthinkable, no act beyond commission. But terrorists do not occupy the production studios of the American entertainment industry. It is just beyond common sense and experience to believe that the members of a heavy death and destruction rock group, the manufacturers of a violent video game, the producers of a surprise television show, or the makers of a graphically violent movie really *want* people to die from what they do. If this is not our common intuition today, then society has become far more terrifying than most people of good will would ever want to believe.

Admittedly, some cynics might find these judgments naively innocent. Some might imagine, for example, that a rock group might have members so convinced of their own satanic mission that they *do* subjectively desire, in doing their devil's work, that some impressionable fans will go out and kill because of their records. The tragedy might even improve record sales. I for one am not so cynical and prefer to keep my innocence and faith in the essential decency of most fellow human beings. To find such dark motives, I would need hard evidence.

So let us assume that these instincts of elemental human decency and social responsibility are valid and that virtually all rockers, video game programmers, television producers, and film makers do not *want* death to come of their efforts, even though the material

they produce may be filled with violent messages and images. Let us assume the likely—that they are not terrorists.

If terrorists do not occupy positions of influence in the American entertainment and media industries, what about nihilists? Is it possible that there are pivotal decisionmakers in the industry who do subjectively believe that violence is *likely* to ensue, perhaps sporadically and perhaps seldom, but nonetheless, from time-to-time, *likely*, as a "result" of the material they disseminate? Is it possible they believe that occasionally there will be teenage boys who in fact do form satanic cults and murder teenage girls because they are conditioned by the music of "death metal" groups to believe this destructive behavior is desirable? Is it possible that they believe that some films or some video games will, on rare occasion, produce similar responses? Is it possible that, *indifferent* to these risks, they market their products anyway, because they are just so damn profitable?

I would like to think that there are not any such nihilists making these key decisions. I would like to think that the video game, film, and record company executives just do not *believe* that their products ever cause violent consequences. They might be wrong or right in that belief, but at least in this belief their actions would be morally comprehensible. I thus would like to believe that the corporate executives making decisions in the power echelons of the mainstream entertainment industry are different in kind from those who made the key decisions for Paladin Press, the publisher of the *Hit Man* murder instruction manual. In that case, as the underlying facts were revealed through discovery, it seems quite possible that (at the very least) such nihilism *did* fairly characterize the actions of the publisher.[59]

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[59] The reader may wish to discount this opinion, of course, given my personal proximity to the litigation. See supra note 10. Judge Michael Luttig's decision in the *Rice* case, which held that intent might be found by a reasonable jury from the unvarnished content of *Hit Man* alone, however, would certainly support my claim here. See Rice v. Paladin Enters., 128 F.3d 233, 253 (4th Cir. 1997) ("First, the declared purpose of *Hit Man* itself is to facilitate murder. Consistent with its declared purpose, the book is subtitled *A Technical Manual for Independent Contractors*, and it unabashedly describes itself as 'an instruction book on murder,' *Hit Man* at ix. A jury need not, but plainly could, conclude from such prominent and unequivocal statements of criminal purpose that the publisher who disseminated the book intended to assist in the achievement of that purpose. Second, the book's extensive,

But what if, even in the corridors of mainstream media power, such nihilism does occasionally creep into the mix? What if the occasional producer of videos, television programs, movies, or compact discs in fact does possess a *subjective* awareness that violent tragedies will from time-to-time be precipitated by what the producer produces and, anxious to make a buck, keeps on producing? What should society make of *this* possibility under the First Amendment? If we identified someone who seemed guilty of this type of behavior, would civil liability be appropriate, even though we might be heavily wary about imposing a criminal sanction?

At this point in the analysis, the meaning of the "likelihood" prong of the *Brandenburg* standard also comes into play. Whether or not violence is deemed "likely" depends on how the calculation is conceptualized. In a traditional criminal prosecution arising from the exercise of expression, the focus is narrow, and there is a unity of time, place, and players. The typical focus is on whether *this* speech spoken on *this* day was likely to cause *this* violence. When we consider "likelihood" in torts, however, we usually have in mind a far broader concept of probabilities. While it may well be that *as to any one consumer*, the probability of violent behavior is low, when one looks at the entire *market*, the picture is different. Most video game players, for example, will not be moved to violence by repeatedly playing a graphically violent video game any more than most readers of a murder manual will be moved by their reading of it to commit murder. But as experience now teaches us that *some* number of these video and murder manual consumers *will* react and act out, what should be our response to this knowledge? Assessing probabilities and assigning responsibilities in a more aggregate sense is not an unfamiliar exercise in tort law, especially in products liability cases.[60] It is difficult to see why *Brandenburg* and the First Amendment should be understood to prohibit resort

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decided, and pointed promotion of murder is highly probative of the publisher's intent, and may be considered as such, whether or not that promotion, standing alone, could serve as the basis for liability consistent with the First Amendment.").

[60] An example is the notion of "enterprise liability." See Hall v. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (sustaining cause of action in a case in which thirteen children sued six blasting cap manufacturers alleging injury from explosions of the caps; while the six defendants were not the only possible sources of blasting caps, they did comprise virtually the entire blasting cap industry in this country); Sindell v. Abbott Labs., 607 P.2d 924, 935–37 (Cal. 1980) (sustaining use of a market-share formula to assess liability for injuries caused by a generic drug).

to such wider-angle conceptions of liability in media violence cases, *at least* when intent, or a degree of nihilism in which there is a high degree of subjective awareness of the risk and brazen indifference to it, is demonstrated. Certainly the mere fact that speech disseminated with the intent of facilitating violence happens to be disseminated through channels of mass communication to a wide audience ought not, standing alone, to insulate the disseminator for liability merely because only a small percentage of the recipients of the speech will actually perpetrate such violence.[61]

Another difficult issue posed by the cases Professor O'Neil discusses is the appropriate role of the imminence requirement emanating from *Brandenburg*. If "imminent" is understood as meaning "immediate," then plaintiffs will have an almost insurmountable burden. But imminence is *not* a doctrinal requirement in most areas of First Amendment law outside the *Brandenburg* line. Today, First Amendment law is a maze of specific formulas employing various multi-prong standards that have been tailored to particular topics of speech, modes of legal liability, and social contexts.[62]

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[61] See Rice v. Paladin Enters., 128 F.3d 233, 247–48 (4th Cir. 1997) ("That is, in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose. Where it is necessary, such a limitation would meet the quite legitimate, if not compelling, concern of those who publish, broadcast, or distribute to large, undifferentiated audiences, that the exposure to suit under lesser standards would be intolerable .... At the same time, it would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment. Like our sister circuits, at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience.").

[62] See, e.g., Fla. Star v. B.J.F., 491 U.S. 524 (1989) (applying "strict scrutiny" standard to privacy suit); Hazelwood Sch. Bd. v. Kuhlmeier, 484 U.S. 260 (1988) (establishing balancing test deferential to school officials for evaluating speech rights of students in public schools); Connick v. Meyers, 461 U.S. 138 (1983) (establishing "issues of public concern" standard and balancing test for government employee speech claims); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm., 447 U.S. 557 (1980) (creating four-part test for commercial speech); Miller v. California, 413 U.S. 15 (1973) (creating three-prong test for obscenity); Branzburg v. Hayes, 408 U.S. 665 (1972) (establishing balancing test for reporter's privilege); Red Lion Broad. Co. v.

Brandenburg and its imminence requirement evolved from the "clear and present danger" strain of First Amendment law, in which cases invariably arose from the advocacy of violence or illegal activity in the context of discourse on political or social issues.[63] The *Brandenburg* test, created to preserve the right of dissenters to advocate in the abstract the desirability of violence as a method of social and political change, does not bear any striking contextual link to violent video games, movies, compact discs, or television shows. This does not mean that the doctrinal elements of *Brandenburg* or the free speech values that animated that decision ought to play no role in the conversation about civil liability in such cases, but it does mean that a doctrinal standard formulated to prevent prosecution for mere violent rhetoric uttered in the course of political and social dissent ought not to be mechanically and blindly transferred over to a context presenting a very different set of competing social values.

One might, for example, look for analytic analogs in an entirely different branch of First Amendment law, the line of decisions emanating from *New York Times Co. v. Sullivan*.[64] The *New York Times* standard is a plausible nominee here because it is, after all, the standard first adopted by the Supreme Court to "correct" what appeared to be the overly generous and pro-plaintiff-biased doctrines of the common law of libel, bringing those doctrines into better synch with the values of the First Amendment. The *New York Times* case is famous for its holding that a public official (and as later expanded, a public figure) may not prevail in a libel suit arising from allegedly defamatory statements on issues of public concern in the absence of clear and convincing proof that the de-

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FCC, 395 U.S. 367 (1969) (establishing "intermediate scrutiny" standard for broadcast regulation); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing knowing or reckless disregard for truth or falsity standard for libel of public officials).

[63] See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (flag burning to protest Republican Party policies); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (civil rights boycott); Hess v. Indiana, 414 U.S. 105 (1973) (Vietnam protest); Cohen v. California, 403 U.S. 15 (1971) (vulgar anti-draft message); Bond v. Floyd, 385 U.S. 116 (1966) (Vietnam protest); Dennis v. United States, 341 U.S. 494 (1951) (communist party materials); Herndon v. Lowry, 301 U.S. 242 (1937) (civil rights/communist party materials); Whitney v. California, 274 U.S. 357 (1927) (communist labor party convention); Abrams v. United States, 250 U.S. 616 (1919) (World War I protest); Schenck v. United States, 249 U.S. 47 (1919) (World War I protest).

[64] 376 U.S. 254 (1964).

fendant published the material with knowledge of falsity or reckless disregard for truth or falsity.[65]

The *New York Times* standard is demanding, but it falls short of requiring subjective intent. The standard allows liability to be predicated on something less than conscious desire to injure reputation through publication of a falsehood, instead permitting liability for mere "reckless disregard" of the risk. If something less than conscious intent will suffice to support liability when all that society is attempting to accomplish is to repair a damaged reputation, on what logic would a higher standard of fault be imposed when society seeks to provide recompense for physical injury or death?[66] It is illuminating that no strong reasons leap to mind.

The missions of the criminal justice system and the tort system are different. Correspondingly, the threats to freedom of speech posed by the criminal justice system and the tort system are different. Criminal prosecutions are brought in the name of the state, and when those prosecutions are predicated on speech deemed seditious or inciting, there is an inherent danger that censorship is the real agenda. When the government prosecutes communists, antiwar activists, or the Ku Klux Klan, there is an intrinsic menace to freedom of expression and a concern that the defendants are being prosecuted not for the dangers they pose but for the creeds they avow.[67] The threat of censorship is less direct in tort cases. While some tort suits seeking to impose civil liability may have an ideological edge in which recompense for actual harm is subordinate to

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[65] Id. at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[66] This argument was advanced by the plaintiffs in the "*Hit Man*" case, and, while the opinion of the Fourth Circuit did not focus heavily upon the argument, the court did, in passing, appear to acknowledge its plausibility, if not endorse it. See Rice v. Paladin Enters., 128 F.3d 233, 248 (4th Cir. 1997) ("In fact, this conclusion would seem to follow *a fortiori* from the Supreme Court's holding in *New York Times* . . . allowing the imposition of civil tort liability on a media defendant for reputational injury caused by mere reckless disregard of the truth of its published statements.") (citation omitted).

[67] See Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (stating that "the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow").

another agenda (such as punishing a political adversary), many tort suits arising from violent incidents are more ideologically neutral.

In the *New York Times* case itself, there was an obvious ideological agenda.[68] The advertisement that gave rise to the suit, a fundraising effort by a committee supporting Dr. Martin Luther King, Jr., accused officials in the South of obstructing the civil rights of blacks and civil rights advocates. This was not the sort of claim that would hurt a white Alabama politician in the early 1960s, and it was beyond belief that the advertisement did any actual reputational harm to the plaintiff in the case, Montgomery City Commissioner L.B. Sullivan. Sullivan's motive in suing was to punish King's supporters, including *The New York Times*. Justifiably, in this context, notions of seditious libel played a prominent role in Justice Brennan's opinion for the Court. In *New York Times*, the law of libel was being put quite directly to the service of censorship.

In contrast, the *"Hit Man"* case seems far less ideologically tinged. The point of imposing liability was to compensate the victims for the harm caused by a book—a harm that was entirely real, not concocted as in *New York Times*, and that seemed to arise less from any *ideological* element of the murder manual than from its *functional* purpose: to train persons to kill. This distinction between teaching theory and teaching technique is important because the censorship of theory strikes at the core of First Amendment values in a way that holding people responsible for instruction in technique does not. As Justice William Orville Douglas observed in his dissenting opinion in *Dennis v. United States*,[69] in which he objected to the Court's decision sustaining the convictions of communists, he would not have found matters so troubling if the case had involved instruction in killing methods:

> If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to

[68] See Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 9–22 (1991); Rodney Smolla, Suing the Press 26–52 (1986).

[69] 341 U.S. 494, 581 (1951).

> speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale . . . .[70]

It was exactly this theme that seemed to resonate with the Fourth Circuit in the *"Hit Man"* case, when the court proclaimed:

> Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and amici contend.[71]

The distinction between teaching technique and abstract advocacy also has ramifications for the "immediacy" component of *Brandenburg*. One of the reasons immediacy of harm is emphasized in the typical criminal prosecution for incitement is that, without such a requirement, there is a serious risk that police will be tempted to squelch vitriolic speech taking place during public demonstrations and protest. Presently, the mere possibility that the speech at issue generally increases the risk of violence at some indefinite future time is not worth the attention, because the element of censorship is so vivid and obvious. Thus we require, properly, proof that silencing the speaker is necessary to avoid some impending physical emergency.[72]

But what if the police do not stop the rally, a bomb explodes in the plaza, killing many, and through careful investigation officials

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[70] Id. (Douglas, J., dissenting).

[71] Rice v. Paladin Enters., 128 F.3d 233, 267 (4th Cir. 1997).

[72] McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1229 (9th Cir. 1992) (Kozinski, J., dissenting from the order rejecting a request for rehearing en banc) ("Public demonstrations often carry with them the risk of violence. A large group of individuals, united by a common cause and motivated by strong emotions, can get out of control, causing property damage or injury. This is a risk we endure as part of life in a free society; it is not a sufficient reason—and I hope it will never become one—to stifle concerted public expression.").

are able to trace the plot back for months? They find that a publisher (an outfit, say, like Paladin Press) prepared terrorist instruction manuals explaining in great technical detail precisely how to build a bomb and place it in a location to achieve the maximum killing impact and find further that the plotters used the instruction manual and followed it to a tee in pulling off the terrorist crime. Does it make sense, in *this* setting, to prevent the families of the victims of the bombings from recovering in tort because the *Brandenburg* immediacy requirement does not appear to have been satisfied?

In my view, it makes no sense. The whole point of a terrorist instruction manual is to teach the terrorist to plot and plan carefully, taking the time to do the job right. That there may be a significant temporal interlude between the instruction and the deadly event does not make the instruction less lethal. Society has the most to fear from well-trained terrorists who have the patience to plan.

The "Nuremberg Files"[73] case poses an extremely difficult hybrid. On the one hand, there are elements of the case that resemble the *"Hit Man"* suit and its emphasis on the functional enabling of violence. This was no ordinary exercise in violent and abstract anti-abortion rhetoric. The defendants were giving out names, photographs, addresses, phone numbers, social security numbers, license plate numbers, names of family members, and other concrete information that seemed to serve little ideological purpose but that functioned well to assist bombers and assassins in stalking their prey. On the other hand, it is difficult to imagine a policy debate in America more ideological than abortion, and much of the perceived "threat" posed by the violent rhetoric in the case seemed to come less from the actual words spoken by the defendants than from the larger social context in which those words were spoken. This context included as part of its backdrop numerous prior bombings of abortion clinics and killings of abortion providers. Thus the case seems to fall into that foggy netherland of First Amendment policy in which one can discern viewpoint-neutral justifications for the imposition of liability, yet the milieu lends itself in disturbing ways to the specter of viewpoint-based censorship.[74]

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[73] Planned Parenthood of the Columbia/Wilamette v. Am. Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).

[74] See Madsen v. Women's Health Ctr., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part and dissenting in part) ("The vice of content-based legislation—

In a thoughtful discussion of this problem, the Ninth Circuit, reversing the gargantuan jury verdict in the "Nuremberg Files" case, observed:

> Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.[75]

The whole thrust of the modern First Amendment, however, is to place on the government the burden of proving more than the mere likelihood that in some general sense, particular speech on social or political issues makes society less secure. Showing a bad tendency, in short, has given way to the more palpable requirements of concreteness and immediacy.[76] The court in the "Nuremberg Files" case explored such concepts as "fear" and "intimidation" as they apply to political discourse. There was no doubt, the court conceded, that the speech of the abortion activists frightened the doctors. But the constitutional question, the court held, "turns on the source of their fear."[77] The doctors might have understood the statements as veiled threats that the members of the activist organization would inflict bodily harm on them, unless they stopped

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what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes."); City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (strict scrutiny applies to content-based speech restrictions because such restrictions "are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate").

[75] *Planned Parenthood*, 244 F.3d at 1015.

[76] Id. ("Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party.... It doesn't matter if the speech makes future violence more likely; advocating 'illegal action at some indefinite future time' is protected.... If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely. Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech.") (citations omitted).

[77] Id.

performing abortions. Interpreted in that way, the court reasoned, the statements would have been unprotected by the First Amendment, regardless of whether the activists had the means or intent to carry out the threats.[78] But it was also possible, the court held, that the jury in the case could have understood the trial court's instructions as permitting liability not because the statements of the activists authorized or directly threatened violence "but because they put the doctors in harm's way."[79] The First Amendment, however, "does not permit the imposition of liability on that basis."[80] The statements of the abortion activists in the "Nuremberg Files" case did not overtly threaten or explicitly mention violence at all. If a "threat" was posed by the anti-abortion rhetoric, it was a threat created in some sense by the larger social "context" of the more violent factions of the anti-abortion movement and by the historical context supplied by the events surrounding the activists' speech. The court put the question squarely: "Can context supply the violent message that language alone leaves out? While no case answers this question, we note important theoretical objections to stretching context so far."[81] The court first pointed out that "context" is often not of the speaker's making. The speaker does not either create it or control it. More pointedly, the court argued, were two powerful reasons for distinguishing between statements that might fairly be understood as actual direct threats of violence by the speaker or his associates that are targeted at specific victims and violent statements that in some more amorphous sense are perceived as "threatening" by potential victims.

> First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are gen-

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[78] Id.
[79] Id. at 1017.
[80] Id.
[81] Id. at 1018.

> erally intended, at least in part, to shore up political support for the speaker's position."[82]

Second, the court observed: "speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment."[83]

This discussion in the "Nuremberg Files" case of the role of context is an important insight, one that seems highly germane to many of the close calls illustrated by the cases that Professor O'Neil presents. In a number of the cases, it certainly does appear that the media defendants are being haled into court for violence that may have been precipitated in some sense by their expression but that seemed more heavily influenced by a wider context of violent expression and cultural influences largely out of their direct control. In the "*Hit Man*" case, by contrast (and it must be said, arguably in the "Nuremberg Files" case itself), resorting to broader contexts of violence does not seem required to trace a chain of causal influence to the defendants. Whatever the right answer here, the panel opinion in the "Nuremberg Files" case (which may or may not prove to be the last word in the case) certainly buttresses the arguments advanced by Professor O'Neil throughout his book that seek to draw a distinction between the mere presentation of violent rhetoric and violent images on the one hand and legal responsibility on the other.

Let me end with Shakespeare, who instructs in *Othello*: "Who steals my purse steals trash . . . But he that filches from me my good name / Robs me of that which not enriches him / And makes me poor indeed."[84] Shakespeare put these lines in the mouth of the duplicitous Iago, who in another scene utters quite a different view:

> As I am an honest man, I thought you had received
> some bodily wound; there is more sense in that than
> in reputation. Reputation is an idle and most false

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[82] Id. at 1019.

[83] Id.

[84] William Shakespeare, Othello, act 3, sc. 3, ll. 161–65, *in* The Complete Works of William Shakespeare: The Cambridge Text 937, 956 (William Aldis Wright ed., 1936) (1622).

> imposition; oft got without merit and lost without deserving: you have lost no reputation at all, unless you repute yourself such a loser.[85]

The complexities of these sentiments are fascinating. In them one may vaguely discern a kind of tripartite division, something almost reminiscent of "life, liberty, or property,"[86] in the stealing of purses (a property interest), the filching of good name (a liberty interest), and the infliction of bodily wounds (an interest in life itself).[87] If Shakespeare well-intuited such divisions as life, liberty, and property, he also understood well the power of words, including the power of words to wreak havoc and catastrophe. From medieval times to modern life, men and women have realized that words can and do injure. Words may destroy a reputation, bring down a building, take a life. Or *can* they? What I love about the poetic tension inherent in Iago's duplicitous sentiments is that the

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[85] Id. at Act 2, sc. 3, ll. 260–65.

[86] See U.S. Const. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law"); U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[87] These terms of art, "property interest," "liberty interest," and "life" are borrowed from the parlance of modern procedural due process analysis. See Bd. of Regents v. Roth, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.") (citation omitted). While it is easy enough to see why a purse is "property" and a stab with a sword cuts at "life," admittedly it may seem more of a stretch of standard English to call injury to reputation a deprivation of "liberty." At one point in its history, however, the Supreme Court seemed willing to take this step. See Wisconsin v. Constantineau, 400 U.S. 433, 436–37 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). The Court would eventually retreat. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court refused to accept the view that the actions of a law enforcement official wrongly defaming a citizen could be fairly characterized as a deprivation of any interest in "liberty" cognizable under the Fourteenth Amendment's Due Process Clause. This led to the so-called "reputation-plus" test, requiring that some interest *other than* mere loss of reputation arise from the challenged government action, such as the loss of one's job, in order to state a claim for deprivation of "liberty" without due process. Id. at 712. It may be more sensible to treat injuries such as damage to reputation as injuries to "relational interests" in order to distinguish them from harms to property or persons. Be that as it may, what remains is that Shakespeare captured wonderfully the three-part division of body, purse, and reputation; the poet may be excused for not perfectly anticipating the precise vocabulary of Fourteenth Amendment jurisprudence.

tension captures a long-standing human conflict about the relationship of words to injury. A part of us believes that words maim and kill. Another part of us insists that sticks and stones may break our bones, but words will never hurt us.

At the heart of the American struggle to reconcile the common intuition that speech is often the agent of injury with the constitutional command that speech should be "free," there resides a collection of deeply vexing questions concerning cause and effect, freedom, and moral responsibility. To the claim that "words can kill," one may thus hear the reply that "words do not kill, people do." This in turn will often trigger a rejoinder that, while it may be true that it is people who kill, ruin reputations, or bring down buildings, words are often the instruments of such destruction, and there are no good reasons, in either our constitutional traditions or sound social policy, for exempting those who utter or publish such words from legal responsibility for the injuries they cause.

We are a long way from resolving these conflicts in our social policy and a long way from resolving them in our evolving notions of constitutional law. A great part of Professor Robert O'Neil's admirable professional life has been selflessly dedicated to thoughtful and constructive leadership in society's engagement of these conflicts. His book *The First Amendment and Civil Liability* is the latest installment, and once again, a most welcome one.

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