

Second Thoughts on the First Amendment

On most days, letters to the editor are probably the section of a daily newspaper least likely to receive close scrutiny from typical readers. Not so, however, for the December 2, 2003, *Tucson Citizen*, the afternoon paper in Arizona's second ranking city. On that day, the Letters page included a startling contribution from one Emory Metz Wright, Jr., expressing very distinctive views about the Middle East conflict and the U.S. role in the rapidly deepening Iraq conflict. The author offered his own solution – a means by which to “stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power.” His preferred response:

“Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Moslems we encounter.”

Lest anyone take this suggestion merely in jest, Wright expressed his conviction that “this is a Holy War, and although such a procedure is not fair or just, it might end the horror.”

Barely had the December 2 *Citizen* hit the streets than complaints from outraged and frightened readers – mainly though not exclusively Muslims – poured in to the newspaper's office. Four days later, hoping to

stem the tide, the paper's editorial page editor published a remarkably contrite response. He acknowledged that "printing [the Wright letter] was a mistake," adding that "the Citizen went beyond the limit, since the letter "was counterproductive, instilled fear in a group of innocent people and the community at large and carried the potential to incite violence."

The editor's profuse apology did not end the controversy. Five weeks later, two Muslim readers filed a suit against the Citizen in state court, claiming that they had been victims of intentional infliction of emotional distress and of verbal assault.¹ The author of the letter was not joined as a defendant, apparently because he could not be located for purposes of service. The trial court soon denied the newspaper's motion to dismiss on both common law tort and First Amendment constitutional grounds. The intermediate appellate court declined to intervene at this early stage in the litigation. The Arizona Supreme Court did, however, grant the Citizen's petition for extraordinary interlocutory review.² The case was argued before that court in the last week of March, and a decision is likely within the next few months.³

¹ Elleithee v. Citizen Publishing Co., No. C20040194, Pima County Superior Court.

² Citizen Publishing Co. v. Miller, Court of Appeals No. 2 CA-SA 20004-0041

³ The oral argument actually occurred at the Arizona State University School of Law in Tempe, this case having been chosen as the vehicle because of its presumed special interest for ASU students.

The case of the deeply offensive letter to the editor poses two major First Amendment issues on which the conventional wisdom is fairly clear, but which merit reconsideration in a new century with conditions quite different from those that shaped twentieth-century precedents. The first question is whether the appropriate standard for judging advocacy in a political context remains that of *Brandenburg v. Ohio*⁴ – or whether the events of September 11, 2001 warrant a different and possibly less protective standard for threatening rhetoric. Second, there is the lingering question whether First Amendment limits on civil and criminal liability are one and the same, as *New York Times v. Sullivan*⁵ declared – or whether important distinctions between the two warrant differential levels of protection. As to both these issues, we may well conclude that the conventional wisdom survives fully intact into the twenty-first century, although it is none too soon to speculate, and the *Tucson Citizen* case seems to present an optimal vehicle for such an inquiry.

I. *Is the First Amendment Less Protective of Political Speech After September 11?*

Whether the plaintiff's claim in the *Citizen* case be viewed as alleging incitement, or threats, or intentional infliction of emotional distress – all

⁴ 395 U.S. 444 (1969).

⁵ 376 U.S. 254 (1964).

three theories are posed and considered in the parties' briefs – a single First Amendment issue transcends the categories. It is, quite simply, whether the ominous and tragic events of September 11, 2001, and the national response to wholly new challenges of the past three and a half years, warrant any relaxation of the protections that courts have consistently and rigorously granted to political advocacy. Curiously, this issue seems not yet to have been presented, even to the lower federal courts, much less to the Supreme Court. Thus, the conventional wisdom that posits the continuing vitality of the “direct incitement” standard of *Brandenburg v. Ohio* has not been undermined, and may not be subject to judicial reassessment for some time.

The failure of courts to address this question results chiefly from the vagaries of litigation. Several times since September 11, charges have been filed against suspected terrorists for activities that would previously have been presumptively protected. Two years ago, seven U.S. citizens of Yemeni ancestry, lifelong residents of Lackawanna, New York, were indicted for alleged terrorist activities. The evidence – at least what was publicly disclosed at the time of the indictment -- consisted of little more than a few visits to Pakistan, where the defendants had apparently attended al Qaeda training camps, at which among other activities they viewed tapes of speeches by Osama bin Laden and other leaders of a group whose terrorist

agenda could hardly have been doubted. While legal scholars and journalists began to ponder the prospect of these charges, the issue became moot when all seven defendants pleaded guilty to a lesser offense.

Had the Lackawanna case gone to trial, the outcome would have been far from clear under the prevailing constitutional standards, which have governed such matters for nearly a half century. There seem to have been no accusations of overt criminal acts. Nor was there evidence of political expression within the United States that would remotely have reached the *Brandenburg* standard, under which provocative speech may be punished only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶ To that rigorous standard, the Court four years later added two other vital free speech safeguards – that the advocacy must have been “directed to a person or persons” and that the action urged must be immediate and not deferred.⁷ The later case also reaffirmed the requirement for proof of specific intent on the speaker’s part. It is small wonder that political speakers have rarely been convicted for advocacy or incitement in the post-*Brandenburg* era, for the level of proof that has governed such cases since the ‘60’s has been a most demanding one.

⁶ 395 U.S. at .

⁷ *Hess v. Indiana*, 414 U.S. 105 (1973)

First Amendment lawyers and scholars are keenly aware that provocative speech has not always been so well protected. The evolution of the current standard reflects four distinct periods, that may be briefly recapped here. The advent of the “clear and present danger” test yielded quite mixed results in the post-World War I era. While the majority gave substantial and growing deference to legislative judgments about such “danger,” Justices Holmes and Brandeis were increasingly troubled about the pliability and uncertainty of a test that had initially seemed adequately protective, but had clearly lost much of its value through the 1920’s. For them, much more should have been required by way both of imminence and intent than seemed to satisfy their less sensitive colleagues.⁸

All that was to change dramatically a decade later, at the hands of a Court not often celebrated for protecting civil rights and liberties. A series of decisions in the mid to late 1930’s established something remarkably close to what would eventually become *Brandenburg*; a clear majority reversed on free speech grounds several convictions of radical labor leaders and agitators.⁹ That highly protective standard endured even into the next decade. On the eve of World War II, the Court would dissolve on First Amendment grounds a contempt imposed on radical labor leader Harry

⁸ E.g., *Abrams v. United States*, 250 U.S. 616, (1919) (Holmes, J., dissenting)

⁹ E.g., *Herndon v. Lowry*, 301 U.S. 242 (1937); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

Bridges for threatening to call a dock strike – untroubled, apparently, by Bridges’ non-citizenship, and thus suggesting that resident aliens enjoy full First Amendment rights.¹⁰ (To what extent non-citizens lawfully resident in the U.S. may claim First Amendment rights is a fascinating issue for another day, also squarely implicated by post-September 11 events, and likely to be resolved quite differently by future rulings.) What is remarkable is how highly protective were these inter-war judgments – continuing to apply the recently diluted “clear and present danger” test, but doing so in a manner that more closely resembled the Holmes-Brandeis interpretation.

The Cold War era was, of course, about to alter dramatically the First Amendment standard for political advocacy. In affirming the convictions of the Communist conspirators in the *Dennis* case, the majority conceded the absence of overt acts or even of direct advocacy likely to produce imminent lawless action. What justified such a departure was the drastically different conditions of the Cold War era – the majority noting that Holmes and Brandeis had been dealing with “a comparatively isolated event, bearing little relation to any substantial threat to the safety of the community.”¹¹ For Justice Jackson, recently returned from his stint as chief prosecutor at the Nuremberg War Crimes Tribunal, the contrast was even sharper: “clear and

¹⁰ *Bridges v. California*, 314 U.S. 252 (1941).

¹¹ *Dennis v. United States*, 341 U.S. 494, (1951)

present danger” might adequately protect society against the words of “a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets,” but was ill adapted to the far graver threat of an international conspiracy of the sort the *Dennis* case presented.¹² Even Justice Douglas, though dissenting from the *Dennis* judgment, cautioned that he would take a less protective view of agitators exploiting different social conditions: “In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents.”¹³

Little happened with regard to advocacy in the eighteen years between *Dennis* and *Brandenburg*. When the issue returned to the Supreme Court in the late 1960’s, conditions were surely not tranquil; this was, after all, the time when anti-Vietnam War protest was reaching its peak. But the circumstances that brought the free speech claim before the Justices differed dramatically both from the Cold War Communist conspiracy on which the *Dennis* majority has focused, and the Depression-era dangers that had worried Justice Douglas. The speaker was a rampant racist who had worked up a sympathetic crowd at a Ku Klux Klan rally on a farm in rural southwest Ohio. He was essentially Justice Jackson’s “street corner hot-head” to

¹² Id at .

¹³ Id at .

whom, even in 1951, the protections of “clear and present danger” would properly have applied as Holmes and Brandeis had refined them. It was under these conditions that the “direct incitement” standard was born – or perhaps more precisely reborn, essentially reviving the highly speech-protective rulings of the late 1930’s and early ‘40’s. Although the *Hess* case, which four years later added stricter intent and imminence standards to *Brandenburg*, did involve an anti-war protestor, the speaker was literally Justice Jackson’s “street corner hot-head,” specifically a young man preaching anti-U.S. rhetoric to a group of students at the major intersection bordering Indiana University’s main campus in Bloomington.

The central issue to which we now return – does *Brandenburg* still apply fully after September 11—may be in the courts before long, despite the guilty pleas of the Lackawanna Yemenis and several other near misses. A case currently pending in federal district court for the Eastern District of Virginia may offer a far more suitable vehicle for these purposes. An Islamic scholar named Ali al Tamimi has been charged with exhorting his followers to fight U.S. troops in Afghanistan. Born in Washington, D.C., his claim of U.S. citizenship and long-term residence in the area is unquestioned. He had once studied under a prominent Saudi cleric who was once close to Osama bin Laden. More recently, he served as an intermediary

between Saudi militants and the Saudi government. His sympathy for the interests of his native land might be seriously questioned; an e-mail which the court declined to suppress proclaimed the Columbia shuttle disaster as a “good omen” for the downfall of western supremacy.¹⁴

The charges that are currently pending in federal court accuse al Tamimi of conspiring to levy war against the United States by inducing others to fight against American troops. Specifically, the indictment charges al Tamimi with counseling young Muslim men who were members of a “Virginia jihad network” to turn against and ultimately to take up arms against the United States. But when opening statements were presented in her courtroom in late March, Judge Leonie Brinkema stressed a key argument of the defense that al Tamimi had engaged only in constitutionally protected speech: “He says that he only counseled the young men at issue to leave the United States and (migrate) to an Islamic country where they could practice their religion freely.”

When the trial began on April 4, sharply contrasting views of al Tamimi and his rhetoric emerged in court. The prosecution portrayed him as a dangerous terrorist organizer, garnering clandestine support for the Taliban and urging his followers to fight American troops. To the defense, by

¹⁴ See “Portraits of Terror Defendant Diverge,” Washington Post, April 5, 2005, B1; “Free Speech Issues Likely in ‘Jihad’ Trial,” www.firstamendmentcenter.org/news.aspx?id=15046 (March 29, 2005).

contrast, he was a concededly sometimes hostile, even intemperate, Islamic scholar who may have engaged in much “hateful speech,” but whose entire course of advocacy and counseling deserved full First Amendment protection under prevailing standards. Presumably both characterizations will be amplified in detail as the evidence unfolds through the coming weeks of a probably protracted trial.

Meanwhile, this case may well turn out to be the one in which the current status and vitality of *Brandenburg* are first tested in court. Several possible outcomes are worth contemplating at this early stage. The evidence to be presented against al Tamimi may, of course, fully meet the strictures of *Brandenburg* and *Hess*. There is, for example, no doubt that he addressed his anti-American message to specific individuals, with evident intent to persuade them to his cause, thus seeming to satisfy in part the *Hess* side of the equation. The harder question will be whether such advocacy could be shown ever to have posed an “imminent” threat of lawless action. It is also problematic whether al Tamami’s counseling was “likely to incite or produce such action” as *Brandenburg* requires. None of his followers ever made it to Afghanistan, and thus never actually took up arms against American troops. Nonetheless, several people who received his message did get to Pakistan, where they received military training from a group called

Lashkar-e-Taiba, apparently with the goal of using that training on behalf of the Taliban. Thus the evidence that will presumably be submitted against al Tamimi could sufficiently satisfy each of *Brandenburg*'s elements to send the issue of his guilt to a jury. Should that happen, and should a conviction result and later be appealed, the Fourth Circuit would then have the first opportunity to appraise the underlying constitutional standard.

If, on the other hand, the charges should be dismissed at the close of the government's case as insufficient to meet the *Brandenburg* standard, a government appeal would be virtually certain. Indeed, whatever may be the outcome in Judge Brinkema's sensitive hands it seems highly probable that the Court of Appeals will be pressed to consider the continuing vitality of *Brandenburg*, and the applicability of its highly speech-protective formula to the starkly different post-September 11 world. The constitutional issue that has been dormant at least since 1969 would now need to be faced. Although the arguments are familiar, the outcome is far from clear or certain.

How likely is it that any reviewing court would apply to this case a First Amendment standard less protective than it would have invoked four or five years ago? The conventional wisdom would insist that *Brandenburg* and *Hess* were not in their inception, nor have they subsequently been, limited to "peacetime" situations that involved rhetorical threats no greater

than the rantings of “street-corner hotheads.” No member of the Court has even hinted that the ghost of *Dennis* might return if conditions changed or if national security encountered new and graver threats. Although then Justice Rehnquist did dissent briefly in *Hess*, joined by Chief Justice Burger and Justice Blackmun, their disagreement with the per curiam majority opinion went no deeper than the scope of review and assessment of the evidence, questioning not in the least the strongly protective First Amendment standards that seemed to reflect a unanimous Court.

Moreover, we should recall that the environment within which those cases arose was anything but “peacetime.” Although *Brandenburg*’s facts were unrelated to the tumult of the Vietnam era, *Hess* involved a classic confrontation between police and anti-war protestors at the height of student unrest over the U.S role in Southeast Asia. And while the nation was not officially at war in the late ‘60’s and early ‘70’s, tensions between the United States and the Soviet Union were near their apogee at the time of these Court rulings. Since that time, no citation of *Brandenburg* and *Hess* has contained any caution about those judgments being time-bound or peacetime-speech oriented. Thus the case for the complete survival of the highly speech-protective standard of *Brandenburg* and *Hess* seems compelling.

Yet we are not quite home free as we await further developments. There is more than superficial force to the view that not only the exigencies of national security, but the appropriate constitutional standard for judging terrorist activity, has changed since September 11. One could hardly question that the nation is today at war, albeit not against an identifiable enemy like the Cold War Communist Conspiracy. The magnitude of the current threat to American interests, at home and abroad, far exceeds anything we have witnessed since the end of the Cold War tensions. The Supreme Court's recent disposition of sensitive national security issues has already reflected its appreciation of such changed conditions. Although the Justices have been less deferential to national security claims in some respects than were their World War II predecessors – notably with regard to U.S. citizens like Messrs Hamdi and Padilla, charged as enemy combatants – the high Court has consistently recognized that conditions are very different, and that the terrorist attacks altered at least some of the rules.

The critical issue of the day is whether a majority of the current Court would be inclined, in an advocacy case such as that now pending against Ali al Tamimi, to relax even slightly the strictures of *Brandenburg* and *Hess*, and if so on what grounds and for how long. To say that three Justices might possibly be willing to do so, and that three others probably would not, only

frames the question, to which an answer will probably come sooner rather than later. Clearly the natural presumption strongly favors the survival and continued vitality of *Brandenburg* and *Hess* as the exclusive measures of criminal liability for terrorist rhetoric. However sharply changed conditions obviously are in the three and a half years since the attacks on the World Trade Center and the Pentagon, there is not yet reason to suppose that the desiderata for political speech have changed. But we are well advised to stay tuned, and to assume as little as possible until that issue has progressed substantially further in court.

II. Are Civil and Criminal Liability to be Judged Alike Under the First Amendment?

The second issue posed by the pending suit against the Tucson Citizen for publishing a letter that deeply offended and frightened readers is whether the same First Amendment standards apply to civil and criminal liability. To that question there seems a simple and arguably dispositive answer: In *New York Times v. Sullivan*,¹⁵ the Supreme Court appeared to settle this issue once and for all, though with remarkably little discussion of, or reasoned support for, a conclusion that was far from obvious. The Alabama public

¹⁵ 376 U.S. 252 (1964).

official libel plaintiffs had argued that the Fourteenth Amendment (including the speech and press protections of the First) “is directed against state action and not private action.” Thus, they reasoned, any constitutional safeguards that curbed criminal prosecutions simply had no bearing upon their civil defamation suit.

For Justice Brennan, the answer was simple and direct: “Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which [the defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action and that it is common law, though supplemented by statute.” Summarizing the point that he had just unambiguously declared, though not amplified, Justice Brennan added: “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.”¹⁶

That view was, of course, wholly consistent with Justice Brennan’s approach to limits on government benefits that potentially curbed First Amendment freedoms; “it is too late in the day,” he had written earlier, “to doubt that liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit.”¹⁷ From this assimilation of civil

¹⁶ 376 U.S. at .

¹⁷ *Sherbert v. Verner*, 374 U.S. 398, (1963)

and criminal sanctions the Court has seldom if ever wavered. In the four decades that have passed since the *Times* ruling, the two spheres have been treated as indistinguishable for First Amendment standards.

Indeed, any lingering doubts about the Court's certainty on the point were allayed by a decision that bears even more closely on the current issue. In reversing a damage award imposed on civil rights demonstrators for economic loss brought about by a consumer boycott they had organized, the Justices not only reaffirmed *Times*' sense of civil-criminal symmetry, but also extended that symmetry to non-libel tort remedies such as the aggrieved merchants' economic loss claims.¹⁸ This ruling thus served substantially to expand the scope of the earlier remedial assimilation, and to signal that any tort claim affecting speech would be properly subject to the same level of First Amendment scrutiny as would its most closely analogous criminal counterpart. For most in the First Amendment community, that was the end of the matter.

Such declared symmetry has not, however, gone unchallenged. Several years ago, Professor (now Dean) Rodney Smolla gently but firmly questioned the soundness of the high Court's casual assimilation of the civil and criminal, though well aware that the rules were not about to change. In

¹⁸ NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

framing his doubts about the basis for this well established equation, Smolla also candidly concedes a premise that was basic to Justice Brennan's *New York Times* opinion: "[T]he potential chill on expression posed by civil liability may in some instances far exceed any parallel threat imposed by criminal prosecution."¹⁹ Nonetheless, the scholarly case for reopening a matter that may seem beyond question involves several points that cannot easily be dismissed by proponents of the conventional view.

Dean Smolla reminds us, for example, that there are critical and possibly confounding differences between the handling of civil and criminal proceedings -- differences that have been neglected by every pertinent ruling from *New York Times* forward. He adds 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." Indeed, Dean Smolla warns of at least one serious potential risk of assimilation: that by treating civil suits and criminal charges as posing indistinguishable threats to free speech in the First Amendment context, the safeguards appropriate to criminal charges could be diluted to make them fit the very different conditions on the civil side.

¹⁹ Rodney A. Smolla, *The First Amendment and New Forms of Civil Liability*, 88 Va. L. Rev. 919 (2002).

Dean Smolla's skepticism deserves closer scrutiny than it has received, either from courts or commentators. A fascinating prelude to modern litigation curiously supports his caution in ways for which he does not claim credit, but which might give pause to champions of the conventional view. Prior to 1964 and the *Times* case, there was virtually no guidance on the whole subject of civil liability for expressive activity; it is a topic with strikingly recent origins. While a few states (notably Kansas) had long recognized a privilege of fair comment on the lives and actions of public officials, such policies were based entirely on tort law, with no First Amendment grounding.

Scholars were as indifferent to this issue as were the pre-*Times* courts. In the first (1920) edition of Professor Zechariah Chafee's seminal *Free Speech in the United States*,²⁰ there was but a single paragraph dealing with civil liability for speech or press in some 566 pages of dense text. Page 548 contains the briefest mention of libel suits as a possible threat to free expression; the entire balance of the volume deals with criminal statutes, administrative regulations, executive decrees, judicial injunctions and other clearly governmental sanctions.

²⁰ Zechariah Chafee, Jr., *Free Speech in the United States* (1920).

A half century later, things had changed little. Professor Thomas Emerson's successor treatise, *The System of Freedom of Expression*,²¹ did devote an entire chapter to defamation, but that was about the limit of any recognition that civil litigation might endanger speech and press. In this respect, then, Dean Smolla rightly suggests that the broad range of *non-libel* civil liability claims against publishers and others arose more or less in a vacuum, lacking judicial antecedents or scholarly anticipation. Thus we should recognize not only the obvious (and neglected) differences between civil and criminal litigation, but also the surprising degree to which the courts were unprepared to address free speech and press claims likely to arise in civil suits. Indeed, when the equation was eventually drawn between civil and criminal liability in the First Amendment context, those who defined that equation really understood only half the formula. That does not, of course, mean they were wrong, but it does mean they were poorly prepared for what they were about to do.

There is another plausible reason for questioning the conventional wisdom. As Dean Smolla gently notes, "there was a decidedly hurried quality to Justice Brennan's original announcement of the proposition." Nor have those of us who uncritically accept on faith the *New York Times* civil-

²¹ Thomas I. Emerson, *The System of Freedom of Expression* (1970).

criminal assimilation ever been disposed to dwell for long upon its logic. It has become the classic *ipse dixit* about which, seemingly, nothing more need be said beyond reaffirming and restating it with conviction. However certain we may be that the conventional wisdom is sound, we need to understand better why some observers harbor misgivings, and what those misgivings tell about the symmetry itself.

The absence of clear precedent and early discussion of the topic is concededly troubling. Not only did scholars like Chafee neglect issues of civil liability in familiar tort law fields like defamation; such neglect simply mirrored the nearly complete absence of cases in which courts ever felt compelled to consider the implications of the civil-criminal relationship. Moreover, the major potential First Amendment implications of less frequently contested tort remedies such as intentional infliction of emotional distress remained obscure until Reverend Jerry Falwell sought redress from *Hustler* publisher Larry Flynt, a full quarter century after the *New York Times* libel decision.²² Even then, the judgment protecting Mr. Flynt and his outrageous Camapri ad parody went no further than highly visible plaintiffs like Rev. Falwell; the Court rightly observed that “generally speaking the law does not regard the intent to inflict emotional distress as one which

²² *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

should receive much solicitude,” noting as “quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently ‘outrageous.’”

Dean Smolla’s misgivings may rest, however, on even firmer ground than the recency of judicial recognition of civil-criminal symmetry. He expresses doubt whether civil remedies, especially for defamation, were ever contemplated within the historic concerns the First Amendment’s Framers harbored about criminal libel and similar sanctions. There is no substantial evidence to the contrary – Chafee’s single paragraph as late as 1920 suggests the framers thought little, if at all, about civil liability. The number of early state constitutions that qualified their free speech/free press guarantees with provisos such as “being responsible for the abuse thereof” seems to reflect a colonial assumption that civil suits would not abridge free expression. And for those who may have considered civil sanctions at all, the potential risks of abusing private litigation would presumably have seemed less alarming than the far more obvious hazards of criminal prosecutions. At that time, even the most contrived libel or slander suit would have appeared not to threaten a circumvention of normal judicial safeguards comparable to a criminal libel or similar prosecution. Once again, there are today and always have been major differences between the two types of sanctions, and those

differences have been undervalued by the conventional assimilation of the two types of remedies.

The critique of the conventional view contains at least one other element. Those who argue (or more commonly just assume) that civil and criminal sanctions pose identical risks to free speech necessarily disregard a host of differences between the nature and content of the two types of cases. “It is initially worth observing,” writes Dean Smolla, “that Bill of Rights guarantees often do not apply to civil and criminal matters in the same way, either by their terms or through interpretative gloss.”²³ Thus to treat the two types of sanctions identically for First Amendment purposes not only disregards such differences, but actually risks making bad law on one side of the equation or both. Though it is unclear whether Dean Smolla and other skeptics believe that civil-criminal assimilation has actually distorted or perverted results on either side of the equation, their critique does not depend upon evidence of such pragmatic consequences. It is enough that treating the two situations exactly alike for free speech and free press purposes does downplay some important differences and their implications.

Finally, critics of the conventional wisdom fault the way in which civil and criminal sanctions were initially brought into line. Dean Smolla

²³ 88 Va. L. Rev. at 932.

politely understates the concern when he notes the “decidedly hurried quality to Justice Brennan’s original announcement of the proposition [in *New York Times v. Sullivan*] With characteristic collegiality, he adds that “Professor O’Neil, in his reliance on Justice Brennan, also does not linger long.”²⁴ At the very least, this telling critique suggests that, after taking the civil-criminal symmetry for granted through four decades of First Amendment litigation, we owe the skeptics a better answer than courts or commentators have ever felt compelled to offer. Even though no court is likely to reopen this seemingly settled issue, the handling of First Amendment defenses to novel civil liability claims calls for a better answer than simply restating a formula.

First and probably foremost in the case for symmetry between remedies is a basic truth that Dean Smolla himself concedes: “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 very case that gave rise to the equation illustrates the point -- not that a half million dollar libel judgment would ever have bankrupted the *New York Times*, though it might have caused the editors to reconsider the benefits of circulating fewer than five hundred daily

²⁴ 88 Va. L. Rev. at 921.

copies in Alabama. The far greater concern for the *Times* majority was the potential impact of such a judgment upon a small or fiscally marginal newspaper or magazine embroiled in the civil rights controversy of the 1960s.

With deference, this parallel seems more than simply pragmatic. A libel suit is not simply a dispute between two private individuals or companies. The role of government, through the courts, is central to every facet of such a case. A civil damage award for defamation reflects the judgment of a court implementing either a statutory or common law policy that a writer or speaker may be compelled to pay damages for having falsely demeaned the reputation of another person. While such a governmental policy, in the abstract, may not inherently abridge free expression, its application to support a damage award inevitably risks such infringement, and thus poses a direct threat to free expression. Precisely the same can be said of any other civil liability claim brought against a speaker or publisher; courts that apply and enforce such policies do create sufficient potential risk to free expression to warrant First Amendment scrutiny. As the Supreme Court restated this principle in the *NAACP* case, nearly two decades after *New York Times*: “Although this is a civil suit by private parties, the application of state rules of law by the Mississippi state courts in a manner

alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.”²⁵

The obvious matter of procedural differences merits attention, as Dean Smolla and other skeptics remind us. Yet it is not clear why the mere existence of these differences should undermine the civil-criminal symmetry. If anything, such differences may actually *reinforce* the assimilation of the two types of sanctions; most of these differences in fact disfavor the civil defendant and favor the criminal defendant, and to that extent warrant at least comparable constitutional scrutiny in the two situations. Such vital elements as the standard of proof and the availability of a jury trial already afford the criminal suspect greater protection than his civil counterpart -- not inappropriately, to be sure, but significantly in view of the currently disputed distinction. The point is not to argue that the civil defendant deserves greater protection or stricter scrutiny at the appellate level, but only that the essentially *de novo* review of First Amendment judgments which the Supreme Court has mandated is not misplaced simply because the civil and criminal proceedings are quite different.

A third element of the critique of civil-criminal symmetry has seldom been addressed, and invites a response. To the extent that Dean Smolla and

²⁵ NAACP v. Claiborne Hardware, 458 U.S. 886, 916 n.15 (1982).

other skeptics argue for uncoupling the treatment of free expression issues in civil and criminal cases, what they do not tell us is just how such differential treatment should play out in practice. Granted that the two contexts are distinguishable in various important respects, simply recognizing those differences offers little guidance in how to handle the two types of cases, if they should be handled differently. To the contrary, the *New York Times* assimilation of civil and criminal threats to free speech and press has the very practical value of giving the courts just such guidance. In most areas where civil precedent is lacking, there is ample experience on the criminal side, to which courts facing novel civil claims can turn. If, however, courts were compelled to differentiate between the civil and criminal, as Dean Smolla seems to suggest, there is no such familiar template.

Thus the best argument for the conventional wisdom may be a quite pragmatic one: It provides answers to novel civil questions through criminal analogues, and that at least beats the alternative. Save for a few unusual situations where the analogy simply does not work or does not exist – where, for example, a dissimilar or unfamiliar civil claim might compel different treatment—most such cases may end up being resolved in similar fashion if only because the criminal context offers the best (if not the only) useful guidance for the civil side.

Finally, let us return to the fascinating case that is now pending in the Arizona Supreme Court. Muslim readers, deeply offended and frightened by one sentence in a published letter, brought suit against the newspaper that ran such a letter containing unconscionably anti-Islamic sentiments. The newspaper sought dismissal of the case by invoking two central First Amendment premises: That the standards governing such claims in a civil suit are the same as those that apply to a criminal prosecution, and that political advocacy is actionable only if it meets the rigorous *Brandenburg-Hess* standard, whether it be characterized as a “threat” or “incitement” or “infliction of emotional distress.”

Although there may be reason to question the continuing vitality of these premises, both seem sound and firmly applicable here. Despite the casual, almost offhand way in which civil and criminal sanctions were assimilated in *New York Times*, and despite obvious and substantial differences between the two types of proceedings, the case for differential treatment founders on grounds that seem both practical and philosophical.

Much the same can be said of the other basic question – whether national security needs have so profoundly changed since September 11 that the highly protective *Brandenburg-Hess* standard no longer applies to what might be deemed “terrorist rhetoric.” None of the factors that might cause a

dilution of this basic First Amendment standard seems yet to have warranted such modification. The obvious differences between a rural Ku Klux Klan rally in 1967 and an urban terrorist indoctrination program may stretch the test, but they do not cause it to snap or break. Cases such as the al Tamimi prosecution and others now working their way through the courts, will test the durability and resiliency of free speech guarantees that were fashioned in simpler, more innocent times than those we have known since September 11. The Framers of the Bill of Rights never promised it would be easy.