

2009

## Free Speech and Civil Liability

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### Repository Citation

Zick, Timothy, "Free Speech and Civil Liability" (2009). *Popular Media*. 138.

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**MONDAY, NOVEMBER 16, 2009**

## **Free Speech and Civil Liability**

Dan Solove and Neil Richards have just published a terrific article, *Rethinking Free Speech and Civil Liability*, 109 Columbia Law Review 1650 (2009) (SSRN version [here](#)). My [response](#) to the article has been posted at the [Columbia Law Review Sidebar](#) site.

Solove and Richards propose a new test for determining when the First Amendment applies to the imposition of civil liability, an issue that has confounded courts and commentators. The issue has not received nearly the attention it deserves. The First Amendment intersects with civil liability in a variety of contexts, including contract (enforcement of confidentiality agreements, speech-restrictive housing covenants, and government contracts), tort (defamation, privacy, and public disclosure), and property (enforcement of civil trespass laws).

Solove and Richards claim that the key to the free speech-civil liability puzzle lies in the type of power the government is exercising. When the state, rather than the parties, defines the content of a mandatory social duty, they claim that the First Amendment applies. The essence of my brief response is that not all mandatory duties pose substantial First Amendment threats. Thus, the nature or character of the social duty is critical to determining whether the First Amendment is imperiled by the imposition of civil liability. I focus on examples from tort liability to make this point.

While I might draw some different boundaries than Solove and Richards, I find much to praise in their approach. Among other things, it avoids getting bogged down in the unhelpful state action doctrine, highlights a distinction between power-as-regulation and power-as-facilitation, reminds us that civil liability can be as dangerously suppressive as other forms of government regulation, and appropriately preserves ample space for speaker autonomy and choice. I enthusiastically recommend the article, in particular to those interested in First Amendment issues but also to anyone who teaches a course in torts, property, or contracts.

Posted by Tim Zick on November 16, 2009 at 09:34 PM in [Daniel Solove](#), [First Amendment](#) | [Permalink](#)