CIVIL LIBERTY VERSUS CIVIL LIABILITY: ROBERT O'NEIL DEFENDS THE FIRST AMENDMENT

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A spectre is haunting First Amendment jurisprudence. It is the spectre of multimillion dollar lawsuits, brought by those who believe themselves to have been harmed by words or pictures, against the makers of those words or pictures. It is a spectre that threatens to result in massive censorship, not by the government (which, as we know, is restrained by the First Amendment), but rather by private individuals using civil courts to secure what they feel is justice. It is a spectre that strikes at the heart of Justice Brennan's admonition that, in regard to restrictions on free expression, "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[1] Writing for the Court in the 1964 case of *New York Times Co. v. Sullivan*, Brennan, referring specifically to an Alabama jury's huge award against the *New York Times* in a libel suit brought by a citizen of that state, noted: "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."[2] He then goes on to stress that in a civil action the defendant does not even enjoy the "ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt."[3] All of this and more lead Justice Brennan, and a majority of his brethren then on the Court, to conclude that Mr. Sullivan could not recover damages from the *New York Times* for an editorial-advertisement it published, even though a jury had determined that the editorial-

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1. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
2. *Id*.
3. *Id*.

advertisement was in part about Mr. Sullivan's job performance, was in part false, and, as such, harmed Mr. Sullivan's reputation.

Sullivan is, of course, still good law. But times have changed. Looking back, it seems as though a more genteel legal ethic prevailed when T. Eric Embry, arguing at the trial court level, unsuccessfully defended the *New York Times* against that famous half-million dollar libel suit. Certainly the sums have changed. Today plaintiffs in civil actions against media organizations routinely sue for amounts one hundred times greater than the amount sought by Sullivan. And perhaps the national media itself enjoys less prestige today than it did in the middle of the last century. For these and other reasons, the protections *Sullivan* affords the makers of words and pictures may simply not be sufficient in today's legal landscape. The spectre of which I have spoken now takes many shapes, and it is adept at using novel legal strategies to pursue its various goals. Its power comes, in part, through the sophistication by which its larger effects on society can often go unnoticed. Thus, it is high time that this spectre be named and analyzed; that its potential impact on freedom of speech and expression be discussed and debated; and that we as a society come to some understanding of the responsibility, if any, to which we want to hold *both* the makers of words and pictures and the consumers of those words and pictures.

The great value of Robert O'Neil's latest book *The First Amendment and Civil Liability* is that it intelligently addresses complex and controversial issues surrounding freedom of expression and individual and corporate responsibility by providing a birds-eye view of recent and not-so-recent civil litigation that directly impacts First Amendment concerns. O'Neil is currently the Director of the Thomas Jefferson Center for the Protection of Free Expression[4] in Charlottesville, Virginia, and a Professor of Law at the University of Virginia School of Law. He is also the former president of the University that Mr. Jefferson founded. If one were forced to attach a label to his books on free speech,[5] one could do worse than say that O'Neil writes from what is today generally considered a "liberal" perspective on the First Amendment. Over the course of the last seventy years or so, this perspective has been carefully developed and cultivated by such First Amendment theorists as Zechariah Chafee Jr., Thomas I. Emerson, Franklyn S. Haiman, and others.[6] This perspective is also as close as one is likely to get today to what could be called an absolutist position on the First Amendment. Certainly it argues for a fairly capacious view of the freedoms guaranteed by that amendment.

4. *See* http://www.tjcenter.org/about.html#director (last visited Feb. 12, 2002).

5. In addition to the book under review, see ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (1997).

6. *See, e.g.*, ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (2d ed. 1942) (1920); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); FRANKLYN S. HAIMAN, SPEECH ACTS AND THE FIRST AMENDMENT (1993).

This liberal perspective can be contrasted, both in its theoretical and practical implications, with that of writers like Walter Berns, Stanley Fish, and Catharine MacKinnon, all of whom, though very different thinkers, adopt in their writings the position that acts of speech or expression ought to be judged, as are all other acts, with a view to whether the consequences of these actions are, on balance, desirable for society.[7] Especially with respect to Fish and MacKinnon, the question is not "What is this particular book, magazine, or movie *saying* to its audience?" The question is rather, "What is this particular book, magazine, or movie *doing* to its audience?" This latter question is very much an ontological inquiry into the nature of human communication.

But for those who adopt O'Neil's position on freedom of expression, neither of these two questions is a proper subject for investigation. The first question is in fact ruled out of bounds because, except in very limited cases, the content of speech cannot matter to the law. The second question is simply taken not to be on point, and perhaps not even to be explicable, since speech is seen not to be a species of action, and thus not really the type of "thing" that causes harm, such as a bullet or a cigarette can obviously cause harm. Much recent work in free speech theory has returned to the question of what type of "thing" speech is, and specifically, if and how speech can be distinguished from action.[8] The plaintiffs in many of the civil cases O'Neil discusses in his book assume, often implicitly, that the particular type of speech or communication at issue in their case *is* action. For this reason, many of these cases turn on some very complex philosophical issues.

For the most part, however, O'Neil does not get too involved in discussing the philosophical issues involved in these cases. His is simply not that kind of a book. To be sure, O'Neil does provide an introductory chapter on "First Principles and Basic Tensions," which provides a brief discussion of what constitutes "speech," and mentions some of the major First Amendment theorists—Chafee, Emerson, Haiman, and others—whom I have also identified. These dozen or so pages are very clearly written, and they provide a good primer for those not too familiar with the field of free speech law. But this is, for the most part, the extent of the "theory" O'Neil provides. The remainder of his book—with but few exceptions—focuses directly on major cases involving the First Amendment and civil liability. O'Neil sketches the particulars of these cases, discusses in nontechnical language the legal issues they raise, and attempts to draw out the political and social consequences that are likely to flow from them. It is important to note that in the context of this exposi-

7. *See, e.g.*, WALTER BERNS, FREEDOM, VIRTUE & THE FIRST AMENDMENT (1957); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

8. *See generally* MACKINNON, *supra* note 7; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

tion, O'Neil is careful to include detailed analyses of emerging communication media, like the Internet, and also extended discussions of newly "re-discovered" values like privacy, that today may be threatened as much by photographers working for tabloids as by operatives working for the government.

It is also important to note that *The First Amendment and Civil Liability* is very much written for an educated *general* audience that is interested in the fate of free expression in a free society. The book is therefore entirely free of legal jargon. It is also conspicuously free of footnotes. O'Neil argues that footnotes would be "incompatible with a book of this sort," which is, I think, something of an overstatement.[9] But he does provide, at the end of the book, a chapter by chapter list of many of the sources he uses. This amounts, in essence, to a kind of annotated biography.[10] It will be very helpful to scholars who wish to follow up on some of O'Neil's arguments.

Overall, I would say that Robert O'Neil has written that rare kind of book—one that presents important legal and political issues involving free expression and civil liability in an erudite and entertaining manner. O'Neil can make this presentation work in part because much of the material he analyzes is drawn from the realm of popular culture and hence lends itself to a certain kind of lively exposition.

Consider, for example, the 1999 civil trial involving the *Jenny Jones Show*—a more or less typical daytime talk show. O'Neil chooses to open his book with a discussion of this trial. It is certainly an appropriate and timely illustration of the threat that O'Neil feels civil litigation poses to free expression. It is also a trial I spend considerable time analyzing in an undergraduate class I teach on legal argumentation. If the decidedly mixed reaction of my students to the show and the trial is at all representative of public opinion in general—and I think that it is—then O'Neil and those who support his view may have a more difficult time than they might imagine in making their case. Granted, I suspect that some of the negative reactions of my students to the claims made by the lawyers for the *Jenny Jones Show* may have less to do with the logical quality of those claims than with the aesthetic quality of the show itself. I also strongly suspect that perhaps relatively few of O'Neil's potential readers would actually admit that they are very familiar with the content of the show. Indeed, O'Neil himself is either too polite, or too much a liberal relativist, to note that, even by the standards of contemporary television programming, the *Jenny Jones Show* is most assuredly low-brow entertainment. Unlike Oprah Winfrey, Jenny Jones—née Jeanina Stronsky—has never shed her working-class roots. As a self-described rock-and-roll band drummer, nightclub comedian, and sometime waitress and secre-

9. *See* ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 173 (2001).
10. *See id*. at 173–80.

tary, Jones, who has a high school education, does not put on airs.[11] And neither does her show. The *Jenny Jones Show* does not even pretend to provide lofty intellectual or philosophical commentary on important political or societal issues. Jones and her producers seem content to leave that job to the often pretentious pundits on the Sunday morning talk shows and, perhaps, to the likes of Winfrey and her guests. Neither does Jones pretend to provide the kind of sophisticated entertainment fare that, in the United States at least, has come to be associated with Public Television broadcasts like Masterpiece Theatre. Instead, the *Jenny Jones Show* features discussions with troubled teenagers who mouth-off to their parents (almost always to their mothers), confessional stories by recovering substance abusers, relationship advice for men and women (the terms "gentlemen" and "ladies" would be inappropriate here), and fashion advice on how to make oneself over by changing one's hair, makeup, or wardrobe (perhaps the most common of the show's topics). Ironically, there may be something refreshing about the simple vacuity of what Jones has to offer her audience.

Be that as it may, Jones and her show became the object of intense philosophical and political debate about some very serious issues of First Amendment law as the result of an episode that was taped in March 1995 but—as O'Neil points out—never actually aired.[12] The episode involved "secret crushes," and was intended, according to trial testimony by Jones, to be "lighthearted and fun."[13] In one segment of the hour-long episode, a man named Jonathan Schmitz was brought on stage and told that someone had a "secret crush" on him. After some playful banter between Schmitz and Jones, the person who held the secret crush was also brought on stage and seated next to Schmitz. The person who held the crush turned out to be another man, Scott Amedure, who knew Schmitz through a mutual friend. As O'Neil notes, once on the show Amedure proceeded to describe a sexual fantasy involving Schmitz.[14] O'Neil himself is perhaps too much of a gentleman to recount in detail the contents of that fantasy. Suffice it to say, as described on the show, Amedure's fantasy involved the act of tying Schmitz to a hammock and then licking whipped cream from his naked body while drinking champagne.[15] This is apparently what passes for entertainment on the *Jenny Jones Show*. But it should be emphasized that in front of Jones and her audience, Amedure's recitation of his fantasy sounded rather more laughable than lurid.

11. This information about Jones's life came out during the civil trial brought by the estate of Scott Amedure against the producers of the *Jenny Jones Show*. *See Jenny Jones Trial: Jenny Jones's Testimony* (Court T.V. television broadcast Apr. 12, 1999) [hereinafter *Jenny Jones's Trial Testimony*] (videotape on file with the author).

12. *See* O'NEIL, *supra* note 9, at 1.

13. *See Jenny Jones's Trial Testimony*, *supra* note 11.

14. *See* O'NEIL, *supra* note 9, at 1.

15. This fantasy is recounted on several occasions during the civil trial by the counsel for the plaintiff. *See, e.g.*, *Jenny Jones's Trial Testimony*, *supra* note 11.

But there was nothing laughable about what happened later. Less than seventy-two hours after the taping of this show, Schmitz showed up at the Michigan home of Amedure. The two men apparently exchanged words, then Schmitz went back to his car, retrieved a loaded shotgun, and killed Amedure. After the killing, Schmitz got back in his car and drove away. But then something curious, and perhaps critical, happened. Within just a few minutes of the killing, Schmitz pulled his car off the road and dialed 911, apparently with the intention of confessing his crime. On the 911 tape, a sobbing and obviously distraught Schmitz can be heard saying that he did indeed shoot Amedure. Apparently in an effort to calm Schmitz, and also undoubtedly in an attempt to keep him on the line until police arrived, the 911 operator asked Schmitz why he did it. Actually, very little of this portion of the tape is audible. But amid all the telephone static, apparent traffic noise, and his own sobs, Schmitz can clearly be heard uttering two words: "Jenny Jones."[16]

As O'Neil notes, Schmitz was eventually convicted of second-degree murder. But the Amedure family, and many others too, apparently thought that Schmitz was not the only person or entity that should bear responsibility for Scott's death. Thus the Amedure family retained the well-known Michigan attorney and certified media personality Geoffrey Fieger, for the purpose of bringing a civil suit against Warner Brothers, the producers of the *Jenny Jones Show*. The suit alleged negligence on the part of Warner Brothers and sought roughly $50 million in damages.[17] As O'Neil explains: "The central claim in this suit was that the producers [of the *Jenny Jones Show*] had negligently caused Amedure's death and should therefore be liable to the victim's family, as would any other commercial entity that had caused the killing of an innocent person."[18]

The civil trial, held during the spring of 1999, lasted more than a month and contained some particularly spicy material of its own, including discussions *ad nauseam* of the sexual fantasy I have already mentioned. Indeed, the high point of the trial (or the low point, depending on your perspective) may have come when Jones took the stand and was questioned by Fieger. O'Neil suggests that Jones's testimony "revealed that she had a surprisingly limited grasp of how the segment [of the show involving Schmitz and Amedure] had been planned and arranged."[19] That might be true; and it might be important as a way of exonerating Jones herself from responsibility for what happened to Amedure. Or it might be the case that Jones's apparently limited knowledge of how her

16. The full 911 tape was played for the jury by Geoffrey Fieger immediately before his closing argument. *See Jenny Jones Trial: Closing Argument of Geoffrey Fieger* (Court T.V. television broadcast May 5, 1999) [hereinafter *Closing Argument of Geoffrey Fieger*] (videotape on file with the author).

17. *Id.*

18. O'NEIL, *supra* note 9, at 1.

19. *Id*.

show worked was itself simply a calculated evasion designed to protect her and perhaps her producers. Fieger surely thought this to be the case. In his closing argument he took something of a gratuitous swipe at Jones, noting that she "knows everything or nothing—depending upon what day it is—about her show."[20]

But regardless of what Jones actually knew of the mechanics of her show, it is evident that her testimony, taken as a whole, revealed a kind of feisty street smarts that one might expect of a person who testified to having supported herself since she was sixteen years old. Indeed, on the critical question of whether a reasonable person would know that discussing explicit sexual fantasies in public might be deeply embarrassing and humiliating, at least to the person who was the object of the fantasy, a coyly evasive Jones responded by echoing the principle at the heart of Justice Harlan's comment that "one man's vulgarity is another's lyric."[21] She suggested that what is embarrassing to one person may be exciting to another and even volunteered that she might become excited if someone were to describe to her a sexual fantasy in which she were tied to a hammock.[22] She also showed that she could adroitly parry Fieger's often arrogant verbal thrusts. In response to a pointed question by Fieger as to whether Amedure's public revelation of his "lurid" fantasy "could" have been embarrassing to Schmitz, a plucky Jones replied, "I'm aware that a person *could* be embarrassed by a sexual fantasy, but I believe that all people have them. I'm sure you do, Mr. Fieger."[23] That answer was, of course, nonresponsive. But it served to throw Fieger off stride. As he stammered on to another line of questioning—in the process proving his own point that mere talk of sexual fantasies is often embarrassing—one could almost sense a kind of impish twinkle in Jones's eye.

Fortunately for the plaintiff, it did not take long for Fieger to regain his composure. Indeed, by the time closing arguments began, roughly three weeks after Jones's testimony, Fieger was his old combative self again. He began his closing argument with a blanket indictment of "those media creatures"—an apparent reference not just to Jones and her producers, but to all who are in any way related to what modern daytime talk shows have become (Winfrey excepted, presumably).[24] Warming to his point, Fieger argued that although Schmitz may have actually pulled the trigger on the gun that killed Amedure, Warner Brothers and the producers of the *Jenny Jones Show* must bear responsibility for the killing because they created a "volatile" situation that lead to the tragedy.[25] *Responsibility is the key here.* Fieger asserted to the jury: "you by

20. *See Closing Argument of Geoffrey Fieger*, *supra* note 16.

21. Cohen v. California, 403 U.S. 15, 25 (1971).

22. For this and other thoughts by Jones on sexual fantasies, see *Jenny Jones's Trial Testimony*, *supra* note 11.

23. *Id*.

24. *See Closing Argument of Geoffrey Fieger*, *supra* note 16.

25. *Id*.

your actions as the judges and the conscience of this community can instill a sense of responsibility in these otherwise apparently lawless people."[26] Again, the reference to "these otherwise apparently lawless people" should be interpreted broadly to encompass all those in the media and entertainment industry who—at least in Fieger's view—lack any sense of propriety or common decency.

Thus, less than fifteen minutes into a closing argument that ran over an hour and a half, the clear implication of Fieger's remarks was that juries in civil cases, acting as the "conscience" of the community, have a responsibility to instill responsibility in those who work in the media and entertainment industry. A bit later in his closing, Fieger was explicit about the national implications of the case at hand, again asserting to the jury: "you, as the conscience of this country, by your verdict, under this system, effect change, effect change."[27]

Interestingly, on several occasions during Fieger's closing, James Feeney, the somewhat beleaguered-looking attorney for Warner Brothers, objected to the contention that, in this case, this jury should be told to think of itself as the conscience of *any* entity. Feeney's objection was perfectly sound.[28] Since, in this case, the jury could not award punitive damages, but was restricted only to considering compensatory damages, it is hard to see how the jury could function as any sort of conscience. The jury's job *in this case,* as Feeney attempted valiantly to point out, had precisely nothing to do with sending a message.[29] The jury was simply to decide what compensatory damages, if any, should be awarded to the plaintiff. Of course, such a decision could (indeed, almost certainly would) send a message. But that should not concern the jury. Even the presiding judge in the case, Judge Gene Schnelz, who himself also looked somewhat beleaguered by the tone of the proceedings, admonished Fieger during closing arguments to "move away from their [the jury] being the conscience" of the community.[30] But the juggernaut that was Fieger ploughed ahead nonetheless, heedless of any admonition. For Fieger, the case at hand was about responsibility and conscience, or it was about nothing at all.

Of course, the reason that the Jenny Jones trial was so important, and the reason that O'Neil opens his book with a discussion of its particulars, is that the trial itself raised in a clear and powerful way the critical First Amendment question of what, if any, connection the law—particularly as it is developed in civil courts—should establish between

26. *Id*.
27. *Id*.
28. *Id.*
29. *See Jenny Jones Trial: Closing Argument of James Feeney* (Court T.V. television broadcast May 5, 1999) (on file with the author).
30. In one exchange with Fieger during his closing, Judge Schnelz does allow that juries can somehow "speak." It is unclear what he means by this. *See Closing Argument of Geoffrey Fieger*, *supra* note 16.

speech and responsibility. In essence, Fieger was arguing for a view of this connection that today might seem quite foreign to most Americans. It is a view that many Americans—and O'Neil himself, I am sure—might think diminishes our cherished freedom of speech. Fieger apparently disagrees. And while I do not want to suggest that Fieger's understanding of the legal or philosophical issues surrounding the First Amendment are on a par with O'Neil's understanding of these same issues, it is certainly true that Fieger's view, as expressed in his closing argument particularly, does have a rather distinguished pedigree, and for that reason alone we might want to take it seriously. It is also true, I think, that Fieger's view is becoming more accepted today, perhaps partly as the result of successful lawsuits like the one brought against the *Jenny Jones Show*.[31] Thus, in a move that is absolutely crucial, Fieger insisted in his closing argument that the producers of the *Jenny Jones Show* should have known—or at least had a responsibility to know—that bringing someone on the show and discussing in his presence a "lurid" sexual fantasy of which he was the object could have caused harm or could have provoked violence. After arguing that the producers should be held to this level of responsibility, Fieger confronts the issue of the freedom of speech squarely. Referring specifically to the producers of the *Jenny Jones Show* he argued that "nobody forced them to do the show. If you're not sure of the risk of violence, then don't do it."[32] He then presented his view of the connection between freedom of speech and responsibility. He argued that the producers of the *Jenny Jones Show*

> have an absolute right under the concept of free speech to do anything they want no matter how obscene, how pornographic. They can decide to do a same-sex secret crush [episode], they can decide to be outrageous. They can decide to do any number of a number of topics. The constitution of the state of Michigan and the United States allows them to do that. However, if you decide to do it and you cause somebody to get hurt and if you are negligent in failing to protect those people, then you may be held responsible under the laws of this state.[33]

Fieger's view here is consonant with the old English common-law view of seditious libel. This view, expressed in the eighteenth century by the famous British jurist and legal scholar Sir William Blackstone, held that the only legitimate threat to freedom of speech was to be found in the act of prior restraint by the government.[34] In this view, which ante-

31. I make this claim based on the comments made by students in my various Media Law and Argumentation classes.

32. *Closing Argument of Geoffrey Fieger*, *supra* note 16.

33. *Id*.

34. Blackstone makes this very clear in his *Commentaries*. He writes, "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published." *See* WILLIAM BLACKSTONE, COMMENTARIES (*151–52), *quoted in* ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 53–54 (1991).

dated Blackstone's writings by more than a century, the only action that the government could *not* take against an author was to prevent the publication of his work or (in what often amounted to the same thing) to require that the work be licensed before it could be published. But freedom for publication emphatically did not mean freedom from the consequences that may have been caused by the publication.

One of the clearest and most forceful expressions of this view in early English law and philosophy can be found, ironically, in John Milton's *Aeropagitica*, a small pamphlet that the future author of *Paradise Lost* published (without a license) in 1644 as an argument against the revival of a parliamentary edict that called for the licensing of books. I say "ironically" because Milton's *Aeropagitica* is often remembered, or rather misremembered, as a ringing endorsement of our modern principle of unfettered freedom of speech. The thinking is that Milton, a great poet, so loved language, and in particular the books that contained it, that he could brook no interference with speaking or writing. Residents of New York City who have only the most casual acquaintance with Milton can perhaps be forgiven for coming away with this view. Above the entrance to the beautifully restored main reading room of the New York Public Library—now called the Rose Reading Room, in honor of Adam Rose, who contributed a significant amount of the restoration money—there is a quotation from Milton that is meant to evoke the importance of books and, by implication at least, the value of free speech in a democratic society. The quotation reads: "A good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life."[35] It must be pointed out that this quotation is the second clause of a sentence that begins, "Many a man lives a burden to the earth; but . . . ."[36] I have often wondered how the *full* sentence from Milton's text would play to the crowds that come for knowledge and perhaps quiet contemplation in the serenity of the reading room. For our present purposes the importance of this quotation can be found in the adjective that modifies "book." Notice that Milton did not say that *all* books are the precious life-blood of a master spirit, nor even that *most* books can make this claim. Indeed, it is probable that he would have reserved this honor to relatively few books. But even if we take a generous view of the number of books that Milton would have thought to be "good," the *distinction* still remains. For Milton, there must be good books and (presumably) bad books. Milton presses this point when he argues that "unless wariness be used, as good almost kill a man as kill a *good* book. Who kills a man kills a reasonable creature, God's image; but he who de-

35. John Milton, *Aeropagitia: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, ¶ 8, *available at* ftp://sailor.gutenberg.org/pub/gutenberg/etext96/areop10.txt (last visited Oct. 1, 2001).

36. *Id*.

stroys a *good* book, kills reason itself, kills the image of God, as it were in the eye."[37]

To be sure, all this talk of "good" books might make liberal First Amendment theorists like O'Neil more than a little nervous. Indeed, I suspect that some readers of this review may have taken umbrage at my earlier characterization of the *Jenny Jones Show* as "low-brow entertainment." For those like O'Neil, the key question in regard to a free expression case is never whether a book, magazine, or movie is good or bad. Rather, the key question is: Who decides whether a book, magazine, or movie is good or bad? Those who adopt what I have called the liberal perspective on free expression insist that the *only* entity that can make this decision is the individual reader or viewer, himself or herself. Fieger (and certainly John Milton) would think otherwise. They would insist that the community can also make this decision, but only *after* the book, magazine, record, video, or movie—the "text" as we say today—has been published. In this view, all texts are, in a manner of speaking, presumed good until proven otherwise. But when a text has been proven to be "bad" because of its bad effects, the maker of the text can be held responsible.

This seems to be the reasoning of the jury in the Jenny Jones trial. After listening to both Fieger and Feeney discuss at length the issue of speech and responsibility, the jury found for the plaintiff and awarded the Amedure family roughly $25 million in damages. As O'Neil notes, "The judgment immediately evoked intense controversy."[38] Some saw the award as a victory for common sense and decency. Others saw it as an obvious "chill" on free expression. But both sides seemed to agree that the victory or the chill directly followed from the jury's decision to hold the producers of the *Jenny Jones Show* responsible for the "speech" they created on their show. Referring specifically to the Amedure killing and to other killings that some allege have been caused by talk shows like the *Jenny Jones Show*, O'Neil frames the essence of his book thusly:

> The central question for us . . . is who (if anyone) other than the killer bears legal responsibility for such tragic events. Two sets of legal principles converge uncomfortably in such a situation. On the one hand, when the actions of a commercial entity cause injury or death to an innocent person, we usually assume that such an entity may be held liable for damages if the victim seeks such redress. On the other hand, when literary or artistic expression leads to harmful results, we tend to believe that creative persons, including authors, editors, publishers, and producers, should be immune because they are engaged in a highly valued calling for which civil liability would be wholly inappropriate.[39]

37. *Id*. (emphasis added).
38. O'NEIL, *supra* note 9, at 1.
39. *Id*. at 3.

Here O'Neil sets forth what he sees as the obvious tension between free speech and civil liability. This tension explicitly informs his entire book. But I want to suggest that this passage evidences another, more sophisticated and subtle, tension—a tension that also runs throughout O'Neil's book and that bedevils many liberal First Amendment theorists. This second tension centers on the reason that we "tend to believe" that only certain creative people—those who create texts—ought to be "immune" from civil liability. O'Neil suggests that we believe this because these creative people "are engaged in a highly valued calling." This is certainly a view held by many liberal First Amendment theorists. It suggests not only that those who create texts ought to be immune from civil liability, but also that they ought really to be immune from any form of censorship whatsoever—either censorship in the form of prior restraint, or the after-the-fact censorship of civil or criminal liability. In essence, this view suggests that those who create texts must be completely free to create because, on balance, we as a society would be worse off without their creations. Their calling is that valuable. Edward de Grazia, very much a liberal First Amendment theorist, makes this point forcefully and at length in *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*, a book that details the harm that roughly the last hundred years of obscenity law has (he claims) posed to such classic works as Joyce's *Ulysses* and Dreiser's *An American Tragedy*.[40] The title of de Grazia's book is taken from a particularly erotic—or maybe neurotic—passage in *Ulysses*. But it is the subtitle of the book—particularly the last four words of the subtitle—that reflects his argument and perhaps his greatest fear. Surely we would be a much poorer society if the assault on the works of James Joyce, Theodore Dreiser, Henry Miller, Vladimir Nabokov, and other geniuses were allowed to prevail, either through the use of civil or criminal penalties.[41]

This is, I think, at least the implicit argument O'Neil makes when he speaks of the "highly valued calling" of those who create texts. But the problem with this argument is painfully obvious. One only need ask, are the producers of the *Jenny Jones Show* geniuses? Is Larry Flynt, publisher of *Hustler* magazine, a genius? If not, then assaults on the producers of the *Jenny Jones Show* or on Flynt pose no real threat to those who practice the "highly valued calling" to which O'Neil refers. If so, then the line between genius and nongenius evaporates, and with it goes the "highly valued calling" of those who create texts. But if we let go of the idea that those who create texts are involved in a "highly valued calling," we seem to be left without a reason to hold these individuals immune from responsibility for what they create. In response to this argument, it does no good to suggest that the producers of the *Jenny Jones Show* and

40. *See generally* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992).

41. *See id.* at 679–88.

Larry Flynt really are geniuses—but only of the *marketing* as opposed to the *artistic* variety. This position only concedes to the Philistines their point that there really is no distinction between high and low culture, and thus again that there really is no "highly valued calling" that needs protection. Real literary types cannot live in a world without this distinction. This may explain why apparently more than a few literary authors actually may not want their novels to be seen as the kind of fare that appeals to the millions of members of Oprah's Book Club.[42]

Thus, liberal First Amendment theorists find themselves caught in the horns of a dilemma. Either they must seem to abandon their broad liberal commitment to "relativism" (something they are loathe to do), or they must abandon the notion that artists are engaged in a "highly valued calling" (and thus be left without a reason to protect the works of these creative people). The way out of—or perhaps more accurately, around—this dilemma for most liberal First Amendment theorists is to insist, as I think O'Neil implicitly does, that no one who creates a text really *causes* anything by that creation. O'Neil gives the game away, so to speak, when he juxtaposes the "actions of a commercial entity" that "*cause* injury or death," with "literary or artistic expression" that "*leads to* harmful results . . . ."[43] With this shift in phrasing the dance begins. Recall my earlier assertion that to those like O'Neil, speech is seen not to be a species of action, and thus not really the type of "thing" that causes harm, as a bullet or a cigarette can obviously cause harm. Fieger, however, will not let the opposition get away with framing the issue in those terms. Recall his argument to the Jenny Jones jury that if you as the producer of a television show decide to do a "same-sex secret crush" episode, and if "you *cause* somebody to get hurt," then "you may be held responsible." So the legal issue involved here comes back finally to rest on whether there is a distinction between speech and action, or perhaps more specifically, if and how speech should be understood as *causing* action. This is a question, as Stanley Fish might say, about how words do their work in the world.[44] Fish, as I noted, is very much not a liberal First Amendment theorist. He, Fieger, and many others, seem to believe that, even with respect to artistic creations and television talk shows, speech causes action in a fairly direct manner. I wish that O'Neil would have spent a little more time in his book discussing the issues related to the word "cause" as it is used in the context of the law surrounding free expression. These

42. One such author may be Jonathan Franzen, who came under intense criticism in October 2001 after his latest novel, *The Corrections*, was selected by Oprah Winfrey to be in her "book club." Franzen apparently did not think the selection much of an honor. Quite the contrary, he publicly suggested that being associated with Winfrey's audience might harm his place in the "high-art literary tradition." There are apparently several novelists who feel about Winfrey's book club the way Franzen does, although they may not like to say so as publicly. *See* David D. Kirkpatrick, *"Oprah" Gaffe by Franzen Draws Ire and Sales*, N.Y. TIMES, Oct. 29, 2001, at E1.

43. O'NEIL, *supra* note 9, at 3.

44. *See, e.g.*, FISH, *supra* note 7, at 141–79.

issues are absolutely central to every case he analyzes—although their centrality is often complex. Nonetheless, at the risk of imposing a topical order on O'Neil's book that the text itself does not display, I think that one can fruitfully divide the case law on free speech and civil liability into three broad categories. Each of these categories implicates the same two questions regarding speech. The first question asks whether the speech itself can be said to have caused—either directly or through the actions of another—the harm in question. The second question asks how the speech at issued caused the harm (if it did, in fact, cause harm). For each of the three categories I have in mind, the answers to these questions will differ. These answers have the potential, I think, of helping us better to determine a sensible and consistent approach to civil litigation involving issues of free expression. Let me, therefore, discuss these categories, remembering that all the cases I will discuss are also discussed at length by O'Neil, and remembering also that this entire discussion is intended as a way of explaining, as best I can, the broad concerns of O'Neil's book.

The first of these categories contains cases in which, oddly, speech itself cannot be said to have caused any harm—either directly or though the actions of another. The reason that these cases are analyzed in the context of discussions on free speech and civil liability is simply because the agent who caused the harm did so while attempting to "create" some speech.

Consider the case of *Food Lion v. ABC*.[45] O'Neil explains the facts surrounding the case this way:

> ABC Television's *PrimeTime Live* set out in 1992 to verify a report of certain unsanitary practices in Food Lion stores. An undercover investigation seemed the best (indeed, probably the only) means of obtaining the information essential to such an exposé. Two ABC reporters, with the approval of their superiors, applied for jobs at a North Carolina Food Lion store. Their applications not only contained false information about prior employment but also notably omitted any mention of the applicants' day jobs with the network. When they were hired at the supermarket, both reporters took with them and used extensively in the store tiny cameras and microphones. What they found, and filmed, turned out to be deeply embarrassing for Food Lion—outdated chicken that had been "revived" with barbecue sauce and artificial coloring and then moved to the gourmet section, expired beef that was reground and repackaged with fresh beef, fish that was repackaged and kept for sale after its expiration date, and cheese with rodent teeth marks that were removed before the cheese was repackaged and reshelved.[46]

As O'Neil notes, "The impact of the *PrimeTime Live* broadcast was devastating for Food Lion—not only in terms of retail sales, which

45. *See* Food Lion, Inc. v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999).
46. O'NEIL, *supra* note 9, at 94.

slumped for a time, but also on its stock price, employee morale, and other facets of the business."[47] Food Lion sued in federal court. Interestingly, one of the initial grounds for the suit included the claim of libel. But as O'Neil notes, that claim was soon dropped by Food Lion, "since it was the very accuracy of the broadcast footage that caused Food Lion's problems."[48] Food Lion had more success claiming both "breach of employee duty" and "trespass." A jury awarded Food Lion $5.5 million. Although the Fourth Circuit Court reduced the amount of the damages considerably, it did side with the plaintiff in ruling that the ABC and its reporters had breached a "duty of loyalty" which, under North Carolina state law, is due employers from employees. The court also upheld the trespass claim. The idea here is that even though Food Lion opens its doors for persons to come inside and shop for food, there is no implied agreement in so doing that individuals can bring with them into the store hidden cameras which they use to film store operations.

Other cases in this category, also discussed by O'Neil, would include instances in which news reporters or members of the "paparazzi" invade a person's privacy, either by taping conversations between a patient and a healthcare worker without the patient's consent,[49] or by "riding along" with police (and filming their activities) as they enter a private house to serve an arrest warrant.[50] Again, in these cases the harm is caused by the invasion of privacy itself. To be sure, there are important First Amendment interests implicated in these cases. And these interests certainly need not conflict with the interests of the broader community. Indeed, although the Supreme Court found this argument unpersuasive, one might still contend that the practice of having news reporters "ride along" with police serves the very important societal interest of helping to keep the police honest.[51] But the dispositive point for the courts has consistently been whether news reporters or members of the paparazzi enjoy a special "privilege" which exempts them from complying with the law, or which immunizes them from civil suits, when such compliance or the lack of such immunization would hamper the ability of the news reporters or of the members of the paparazzi to gather news or other in-

47. *Id*.

48. *Id*.

49. *See, e.g*., Shulman v. Group W. Prods., Inc., 955 P.2d 469 (Cal. 1998). In this case, a film crew working for a company called Group W. Productions filmed an individual named Ruth Shulman as her life was literally bleeding-out after a car accident. They also taped conversations between her and a nurse at the hospital to which she was taken. All of this was done without Shulman's permission. *Id.* O'Neil uses this as an example of how far the media will go to get an intense story. *See* O'NEIL, *supra* note 9, at 74–75.

50. *See* Wilson v. Layne, 526 U.S. 603 (1999). In this case, police officers in Maryland actually invited news reporters and camera crews along with them as they executed an arrest warrant in a private home. The owners of the home sued the police for invasion of privacy, and the Supreme Court ruled that the Fourth Amendment forbids these types of "ride alongs." *Id.*

51. *See id*. As O'Neil notes, the Court dismisses the argument that the presence of the media might enhance police operations. *See* O'NEIL, *supra* note 9, at 80.

formation. As O'Neil notes, the courts have never recognized such a special privilege for news reporters or members of the paparazzi.[52]

While it seems, on my reading at least, that O'Neil would wish to extend to news reporters and to the media in general at least some privileges that the general public does not enjoy—specifically, some measure of immunity from civil litigation arising out of media related activities—I tend to think that the courts have made the correct decision in refusing to draw a line between reporters and the general public. At least this is a workable approach. Consider that in this age of the Internet anyone with a website can persuasively claim to be a reporter or a publisher. Thus, special privileges for "reporters" would almost certainly become unmanageable today. I am also less convinced than O'Neil appears to be about the damage that these kinds of cases pose to the media in general. Indeed, by holding journalists and other members of the media to the same standards that apply to the general public, these cases may (paradoxically) help the media do its job better, by enhancing the media's reputation for responsibility among the general public, and thus, ultimately, enhancing the media's credibility.

The second broad category into which the case law on free speech and civil liability might be divided would include those cases in which speech itself can be said to have caused a harm, and in which the harm that was caused came about directly through the speech in question, rather than through the actions of another. Now, one may legitimately wonder just how speech itself could ever cause anything, since, as I have said, speech is not an entity like a bullet or a cigarette. The point here is that for speech to have any effect in the "real" world it must go through some human mind. Thus, its effects, if any, will always be, in a sense, indirect.

I am in fact very much persuaded by this view. It is one that I have developed at length elsewhere,[53] and one that I shall return to shortly. But I can perhaps think of one way in which speech itself could have a direct effect on someone. Speech may be the direct cause of emotional distress. This directness will come from the fact one cannot not choose to be effected by the speech in question. If someone insults my mother, for example, I cannot choose not to be emotionally upset by the insult, although I can certainly choose not to act on the basis of that emotion.

As it happens, there is a case that is directly on point here, and one I wish O'Neil would have spent more time discussing. The case, which is

52. *See* O'NEIL, *supra* note 9, at 98–99. As O'Neil notes, about the closest the Court has come to recognizing a media right of access to information is in holding that criminal trials must be open to the public. But, as O'Neil emphasizes, although the media may benefit from this ruling, the Court clearly held that this right belonged to the general public, not just to the media. *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that the First Amendment does not guarantee special press access to trial, but that the Sixth Amendment gives defendants the right to a public trial).

53. *See, e.g.*, ERIC M. GANDER, THE LAST CONCEPTUAL REVOLUTION: A CRITIQUE OF RICHARD RORTY'S POLITICAL PHILOSOPHY (1999).

the subject of an interesting article by Stanley Fish entitled *Jerry Falwell's Mother, or, What's the Harm*, involved an advertisement parody.[54] In the 1980s, the manufactures of Campari Liqueur ran a series of magazine advertisements featuring the picture of one of several celebrities. The text that was included with the picture appeared to be the musings of the celebrity as he recounted his "first time." As one read further, one understood that the celebrity was referring to the first time he tried Campari Liqueur.[55] The racy double entendre in the advertisement was presumably intended to foster an association in the reader's mind between Campari Liqueur and sexual intercourse—a common advertising strategy for any number of products. This particular advertising campaign worked—at least in the sense that it became well known enough to be the subject of parody. Thus, in a 1983 issue of *Hustler* magazine, publisher Larry Flynt ran a "story" that copied the format of the Campari Liqueur advertisements but included, as the featured celebrity, a picture of Jerry Falwell, the then leader of the Moral Majority. In the text that accompanied the picture, Falwell appears to be talking about the first time he had sexual intercourse. According to the *Hustler* magazine parody, Falwell describes his first sexual encounter as having taken place with his mother, in an outhouse, while they were both drunk. It should be noted that at the bottom of the page the following line was printed: "ad parody—not to be taken seriously."[56]

Nonetheless, Falwell sued Flynt and *Hustler* magazine. The suit sought damages for invasion of privacy, defamation, and intentional infliction of emotional distress. The privacy claim was dismissed almost immediately. The other two claims went to a jury. On the defamation claim, the jury found for Flynt, reasoning, quite correctly, that since no one could possibly believe the truth of the statements attributed to Falwell, the *Hustler* magazine story must be what it in fact claimed to be: a parody. But on the claim of intentional infliction of emotional distress the jury found for Falwell and awarded a substantial sum for damages. The jury apparently concluded that even though this was a parody, it was so outrageous that a reasonable person would know that it would cause emotional distress.

On appeal, the case went to the Supreme Court. As O'Neil notes, "[t]o the surprise of most observers" the Court unanimously reversed the decision of the lower court.[57] Critically, the Supreme Court found that,

54. *See* FISH, *supra* note 7, at 120–33. The major case to which Fish refers in his article involved a suit brought by Jerry Falwell against Larry Flynt and *Hustler* magazine. The case went all the way to the Supreme Court. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

55. *See Hustler Magazine*, 485 U.S. at 48.

56. The Supreme Court thought it important to note that this sentence appeared in "small print" at the bottom of the page. *See id.*

57. *See* O'NEIL, *supra* note 9, at 34. O'Neil emphasizes that the Court found itself unable to distinguish the *Hustler* parody at issue from the sometimes caustic political cartoons that have been a staple of American politics for centuries. Fish, however, very much disagrees, and thinks that the *Hus-*

as a matter of law, Flynt's conduct in running the *parody* could *never* be found to constitute "actual malice."[58] Thus, even by the standard set forth in *New York Times v. Sullivan*—a standard that *allows* for damages on a showing of actual malice—Flynt would still prevail. Looking at this case as a whole, O'Neil concludes:

> What the Court seemed to be saying through so decisive and unanimous a ruling is that when the front door of defamation is barred, as it was here by the non-factual nature of the statements, back or side doors such as intentional infliction of emotional distress are if anything less accessible on First Amendment grounds.[59]

O'Neil's point here is well taken. Indeed, although I suggested earlier that O'Neil may have wanted to spend more time discussing the *Hustler* magazine case, the simple fact is that as a society we tend to dismiss the direct harm caused by words or pictures that are insults. We tend to believe, as does O'Neil, that hurt feelings are the price we must pay for our generous First Amendment freedoms. The irony here is that cases like *Hustler Magazine v. Falwell* represent the only category of cases in which the harm done by speech is direct. Thus, in these cases, speech is most like a bullet or a cigarette; it is most like action. Hence, these cases present the best rationale for regulation since the traditional remedy for bad speech—more good speech—seems to work least effectively if at all in these cases. Unfortunately for Jerry Falwell, this point seems to have been lost on the Supreme Court.

The third and final category into which the case law on free speech and civil liability might be divided would include those cases in which speech itself can be said to have caused a harm, but in which the harm that was caused came about *indirectly* through the secondary actions of one who "received" the speech in question and then processed it in his or her mind. This category can be distinguished from the second category above, insofar as the insulting speech that was received by Falwell and processed in his mind did not trigger a secondary action. The speech itself just was the injury or harm. By contrast, consider the case of *Byers v. Edmondson*—what has come to be called the *Natural Born Killers* case.[60] O'Neil spends considerable time discussing this case and the entire category of cases to which it belongs—and with good reason. Today this is where the action is in civil liability cases that implicate speech.

The case itself arose out of a convenience store robbery in which Patsy Ann Byers, a checkout clerk, was shot and seriously injured, result-

tler parody can be distinguished. *See* FISH, *supra* note 7, at 121. I think Fish is wrong, but I might side with Falwell for other reasons.

58. *See Hustler Magazine*, 485 U.S. at 56–57. The key point for the Court is that any "actual malice" must pertain to a false statement of fact. But because no one could have believed that there were any statements of fact in this parody, there could be no false statements of fact, and thus there could be no actual malice.

59. O'NEIL, *supra* note 9, at 34.

60. *See* Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998).

ing in her becoming a paraplegic. The robbery and attendant shooting spree were carried out by two teenagers, Sarah Edmondson and Benjamin Darrus. As O'Neil notes, "During the trial of Edmondson and Darrus, it became clear that they had been obsessed by a recently released motion picture, *Natural Born Killers*. One scene of the film portrays the armed robbery of a store and the fatal shooting of several people in that store."[61]

For the reader who is unfamiliar with *Natural Born Killers* a quick review might be in order. The movie, directed by Oliver Stone, tells the story of two particularly dysfunctional young adults who hook up with one another and then, to put it bluntly, find enjoyment and even a degree of fulfillment by going on a killing spree across America. As one would expect, the movie is "intense" and "graphic"—to use the modern terminology. But Oliver Stone is nothing if not a preacher. Hence there is something of a "twist" to the movie. It becomes apparent that the two dysfunctional killers are motivated as much by their "natural" desire to kill as by the media attention that their killings draw. Those who would defend *Natural Born Killers* as art—recall the earlier discussion of that "highly valued calling"—thus point out the central irony of the movie's message: although we as a society appear to be repulsed by serial killers, we often tend to make celebrities of those very killers.

As one might now expect, the family of Patsy Byers (who died of cancer after the shooting) filed a civil suit in Louisiana, not just against the individuals who shot Patsy, but also against Time Warner, the producer of *Natural Born Killers*, and, later, Oliver Stone himself. Like others of its kind, the suit alleged that the defendants were liable for producing a film that they knew or should have known would—according to O'Neil, who quotes from the plaintiff's filing—"cause and inspire people such as . . . Edmondson and . . . Darrus, to commit crimes such as the shooting of Patsy Ann Byers."[62]

Notice the precise claim being made here. The claim is not that speech has caused harm, but, rather, that speech has caused someone to cause harm. If one accepts that words can "work" this way, then there is potentially no end to civil liability cases against the producers of words and pictures. Not only movies, but also books, magazines, video games, CDs, television programs, and advertisements, to name just the obvious media, would feel the "chill" of civil liability suits. In the face of such a threat to freedom of expression, liberal First Amendment theorists like O'Neil often respond that the creators of words and pictures must be free to create. But this is then taken by society at large to mean that these creators of words and pictures must be free from the consequences that could flow from their creations. This in turn casts the creators—the artists and producers—in the role of irresponsible people (a role that some

61. O'NEIL, *supra* note 9, at 137.
62. *See id*.

artists may well cultivate), and it casts liberal First Amendment theorists in the role of defenders of irresponsible people. In a different time, this may have been a role one could abide. Today, however, when we are rediscovering the value of responsibility, to be cast in the role of a defender of the irresponsible needlessly handicaps one's own argumentative position.

I think that liberal First Amendment theorists can present a slightly better—or perhaps fuller—argument for their position than the one they usually provide. Indeed, I would argue that what is needed in our contemporary discourse about freedom of expression and civil liability is a more detailed discussion of precisely how speech and responsibility are causally related. As I have said, O'Neil does not really provide such a discussion. I want to end this review by opening such a discussion. In the process, I think that I can point the way toward a fairly compelling defense of free expression in the face of civil liability suits.

As a way into this discussion, I want to focus on Stanley Fish—whom I have identified as one who is very much *not* a liberal First Amendment theorist—and in particular on one of his articles, provocatively entitled *There's No Such Thing As Free Speech, and It's a Good Thing, Too*.[63] In this article, Fish brings together the concepts of speech, action, and responsibility in a way that he feels demonstrates the importance of speech, and thus the reason that speech is not and cannot be "free." He begins by claiming that, insofar as every action which is meaningful is consequential, speech which is completely separate from any consequence, would indeed be free, but also, by definition, *inconsequential*, hence, ultimately meaningless. In other words, if we attempt to protect the speech of artists and producers by saying that their speech does not have any consequences, then we are actually devaluing that speech. But since we do not want to see speech (certainly our own speech) as meaningless and without value, we must view it as consequential, and hence, not free. So, there is no such thing as free speech. This is a good thing, of course, because it means that all speech matters. This is how Fish puts the point, at the conclusion of his essay:

> [T]he thesis that there is no such thing as free speech . . . is not, after all, a thesis as startling or corrosive as may first have seemed. It merely says that there is no class of utterances separable from the world of conduct and that therefore the identification of some utterances as members of that nonexistent class will always be evidence that a political line has been drawn rather than a line that denies politics entry into the forum of public discourse. . . . The good news is that precisely *because* speech is never "free" in the two senses required—free of consequences and free from state pressure—speech always matters, is always doing work; because everything we say impinges on

63. This is the article from which the title of Fish's book is taken. *See* FISH, *supra* note 7, at 102–19.

> the world in ways indistinguishable from the effects of physical action, we must take responsibility for our verbal performances—*all* of them—and not assume that they are being taken cares [sic] of by a clause in the Constitution.[64]

The essence of Fish's argument is that since all meaningful speech must be consequential, we can draw no real distinction between speech and action, hence there is no such thing as free speech. But since one cannot protect what does not exist, those like O'Neil who say they are simply protecting free speech must really be doing something else—something political and unprincipled—even though they may not realize it.

Liberal First Amendment theorists need a response to this argument. The best response, I think, is to point out that Fish simply reasons invalidly from the premise that all meaningful speech must (in some way) be consequential, to the conclusion that we can make no principled distinction (at all) between speech and physical action which is not speech. And let there be no mistake, this is exactly what Fish concludes. Recall his assertion that "*everything* we say impinges on the world in ways *indistinguishable* from the effects of physical action."[65] But if this were so, there would, quite literally, be no place for any concept of free will or moral responsibility in the world. Every human action would be reduced to physical motion, and there would be no place in the world for a distinction between persuasion and physical force. This is scientific reductionism with a vengeance. It is frankly odd, and flatly self-contradictory, for Fish to adopt this position, since he goes out of his way to argue that we should hold persons—the creators of speech—responsible for their actions.

Ironically, in Fish's world there really would be no such thing as free speech, not because all speech would have consequences, but rather because there would be no such thing as freedom. Simply put, a world in which one cannot conceive of a meaningful distinction between persuasion and physical force is a world in which one cannot conceive of a meaningful notion of human freedom. The twentieth-century rhetorical theorist Kenneth Burke puts this point succinctly when he writes: "Persuasion involves choice, will; it is directed to a man only insofar as he is *free*."[66]

If, then, we conclude that in order to preserve a meaningful notion of human freedom, we must preserve a meaningful distinction between persuasion and physical force, how can we square this conclusion with Fish's quite justifiable assertion that all meaningful speech must have consequences? We can do so by seeing that meaningful speech, as distinguished from other forms of physical action, is associated with its

64. *Id*. at 114.
65. *Id.* (emphasis added).
66. KENNETH BURKE, A RHETORIC OF MOTIVES 50 (1969).

"consequences" only in a *mediated* way. In other words, when I speak meaningfully, my words will have consequences (some intentioned, some not intentioned, some predictable, some not predictable, and so forth) precisely because these words are received and then "processed" in the mind of another in myriad, complex, never completely explainable, ways. This, at least, is a point upon which liberal First Amendment theorists like O'Neil must insist. They must insist that Fish is wrong in asserting that everything we *say* operates in the world in ways indistinguishable from everything we *do*. For if this were true, then there would be no difference between character assassination and real assassination; no difference between libeling the President and shooting him. Liberal First Amendment theorists must insist that there is a difference *just because* we can distinguish words from acts; and we can do this *just because* we can distinguish humans from trained animals or machines. So, when Catharine MacKinnon argues that pornography should be censored in part because it *causes* men to rape women, and then draws an analogy by asking, "[W]hich is saying 'kill' to a trained guard dog, a word or an act?" liberal First Amendment theorists need to insist that there is a meaningful difference between guard dogs and humans.[67] In sum, liberal First Amendment theorists need to insist that, as inducements to action (or sometimes inaction) symbols (i.e., speech, writing, visual images, and so forth) can be resisted in a way that a bullet, for example, cannot.

Granted, the extent to which symbols as inducements for action can be resisted will depend on one's view of the nature of the self. From his writings, I take it that Fish views the self as a relatively powerless entity—bent this way and that; a weak reed in the onrushing current of speech. In many ways this view of the relationship between the self and language is typical of modern literary theory, which has all but dispensed with notions of authors and readers, in favor of the all-powerful text. To those like Fish, language has an almost magical power to cast a spell over individuals and "cause" them to act in various ways.

But we need to resist this view of language and the self if we as a society are to hold on to any viable concept of responsibility. Instead, we need to embrace a view that—first and foremost—holds individuals responsible for their physical actions not including speech, but that also seeks to influence the entire range of human action, including speech, not by denying individual's the opportunity to hear "bad" speech, but, rather, by affording all individuals the opportunity to hear "good" speech. When we do this we must then have faith—a faith that clearly eludes Fish—in the wisdom of Justice Brandeis's advice that "the fitting remedy for evil counsels is good ones."[68] Thus, there is a place in America for those like William Bennett, who publicly denounce the bad speech produced by the media and enter-

67. MACKINNON, *supra* note 7, at 156.
68. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

tainment industry. But there is no place in America for those like Fieger, who seek to use the civil courts to, in essence, ban this bad speech.

That, in a nutshell, is the best argument that can be made for O'Neil's position. It is an argument that will need to be made forcefully and often in the coming years, as we can see by returning to *Byers v. Edmondson*, the *Natural Born Killers* case. As O'Neil informs us, the Louisiana Court of Appeals recently ruled that the Byers' suit against Warner Brothers and Oliver Stone could go forward.[69] The Louisiana Court relied heavily on the Fourth Circuit Court's ruling in *Rice v. Paladin*.[70] In that case, the Fourth Circuit Court ruled that the family of individuals killed by a professional hit man, James Perry, could sue Paladin Press, a book publisher, after it was learned that Perry had purchased and used a copy of a Paladin Press book, *Hit-Man Manual*, to help him commit his crimes. O'Neil finds it remarkable, and ominous, that the Louisiana court could not seem to distinguish *Byers v. Edmondson* from *Rice v. Paladin*. But this is exactly how one ends up at the bottom of a slippery slope. Thus, commenting on these two cases and the future they portend, O'Neil concludes,

> Now, suddenly, the ground rules are very different for those who create and disseminate material that might lead someone, however deranged, to commit mayhem. Though it is too early to tell how far these early precedents may extend, and what other expressive conduct they might possibly reach, it is none too soon to appraise the sea change that has occurred.[71]

O'Neil is not being hyperbolic. As more and more plaintiffs file civil suits against the makers of words and pictures, alleging harm by those words and pictures, there will surely be rough waters ahead for the First Amendment. Fortunately, O'Neil helps us to navigate those waters intelligently and fairly.

69. But, as O'Neil also notes, when the case was returned to the trial court, the claims against Warner Brothers were again dismissed. This is where the matter stood as of mid-March 2001. *See* O'NEIL, *supra* note 9, at 138.

70. *See, e.g.*, Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997).

71. O'NEIL, *supra* note 9, at 142.