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Book Review: Robert M. O’Neil, *The First Amendment and Civil Liability*, Indiana University Press, 2001 (xii, 184 pages) \$29.95

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Reviewed by Michael L. Richmond*

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I. INTRODUCTION

Richard Jewell lived a relatively quiet life until an explosion in the Olympic Park at the 1996 Atlanta Games culminated in the press magnifying rumors, and ultimately trumpeting Jewell as “the prime suspect in the bombing. His life became a nightmare, to the point where his attire, his weight, and even his treatment of a pet dog became fodder for gossip columns and talk shows.”¹ Later cleared of any complicity in the bombing, Jewell found, to his dismay, that the courts would refuse to entertain his libel action against the media that had figuratively drawn and quartered him.²

A young Florida woman, B.J.F., reported her rape to the local police department.³ A representative of the department placed the woman’s name in the police blotter.⁴ A reporter for the local paper, having seen the blotter,

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1. ROBERT M. O’NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 19 (2001).
2. *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001). The appellate decision was handed down after Professor O’Neil had completed his book.
3. *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989).
4. *Id.*

wrote a story on the rape and included the young woman's name.⁵ Despite the paper's internal policy (and a state statute)⁶ against publishing the names of rape victims, the paper printed the name.⁷ The young woman, suffering shame and humiliation from the disclosure of her ordeal, found little solace in the judicial system when the system found the paper had not acted improperly since it received its information from public record.⁸

William James Sidis, a child prodigy in mathematics, suffered a nervous breakdown due to living in the public eye. Several years later, one of the leading lights in American journalism found him living the life of a recluse and wrote an article mercilessly exposing the former prodigy's sheltered and unremarkable lifestyle.⁹ Again, the courts offered no relief when the media had taken a quiet, private person's life and turned it topsy-turvy.¹⁰

All three of these people found themselves sacrificed on the altar of the First Amendment, watching their emotional life's blood stream down its sides. All three had no recourse and had to cope with the psychic and economic consequences of righting their lives, with no assistance from those who had wronged them. Professor Robert M. O'Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, sees little problem with denying their claims. Adopting the role of High Priest to the First Amendment, O'Neil dismisses *Jewell* briefly,¹¹ relegates *B.J.F.* to an endnote,¹² and does not mention *Sidis* at all. One would hypothesize that Professor O'Neil regards the lives destroyed by media attention as little more than the now infamous "collateral damage."¹³

5. *Id.*

6. "No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense . . ." FLA. STAT. § 794.03 (2000).

7. *B.J.F.*, 491 U.S. at 527–28.

8. *Id.* at 538.

9. Later scholars disagree on whether James Thurber actually authored the article, or simply revised it prior to publication. The name attached to the article was "Jared L. Manley," but this might have been a Thurber pseudonym. Whatever the case, Thurber's typewriter figured significantly in producing the article. See *Bent Twig*, Time-Life Books, at <http://www.sidis.net/TimeLife.htm> (last visited June 18, 2002); *Good Will Sidis*, HARVARD MAG., at <http://www.harvard-magazine.com/issues/ma98/pump.html> (May 1998).

10. *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940).

11. O'NEIL, *supra* note 1, at 19–20.

12. *Id.* at 177.

13. Senator Bob Kerrey used the term "collateral damage" to describe children who died at the hands of his American soldiers attacking a village in the Mekong Delta during the

In his recent slim volume, Professor O'Neil points to what he views as potential areas in which future civil litigation may chill freedom of the press.¹⁴ Unfortunately, what could have proved an interesting and significant call to action suffers from maladies that substantially undermine his argument. He therefore does a significant disservice to those seeking to protect the media, a group that undeniably has many proponents and represents a vital position in an ongoing debate of substantial proportions. Most significantly, O'Neil fails to produce adequate evidence to support his sweeping thesis that "by the end of the decade [of the 1990s], there were few places for the news or entertainment media to hide. The First Amendment could no longer be invoked as a secure shield."¹⁵ Second, O'Neil distorts the import and impact of recent cases. Finally, Professor O'Neil commits the cardinal sin for a law professor of giving inadequate footnote references for later authors to utilize his discussion.

II. INCOMPLETE STORIES: MEDIA ETHICS AND UNMENTIONED CASES

In what Professor O'Neil describes as "surely one of the darkest hours of modern journalism,"¹⁶ Arthur Ashe told a shocked world that he had contracted AIDS.¹⁷ Ashe made the announcement under circumstances not his own choosing.¹⁸ Shortly before the announcement, a sportswriter called Ashe. The sportswriter had discovered Ashe's condition and would publish it in national media in a matter of days.¹⁹ Ashe, who made every effort to maintain a private life off the tennis court, had little choice but to make a public statement himself.²⁰ O'Neil uses the Ashe incident to introduce his concern that the continuing development of privacy law will jeopardize the media's protection under the First Amendment.²¹

Vietnam War. Timothy McVeigh was executed for destroying the Alfred P. Murrah Federal Building in Oklahoma City, causing the deaths of 168 people. "Timothy McVeigh appropriated the term collateral damage to describe the nineteen children whom he murdered in Oklahoma City." Lance Morrow, *Bob Kerrey and Collateral Damage*, at <http://www.time.com/time/nation/article/0,8599,108054,00.html> (Apr. 30, 2001).

14. In his preface, O'Neil speaks of "alarm bells" and "ominous portent[s]" which have led to "uncertainty and media anxiety." O'NEIL, *supra* note 1, at x–xi.

15. *Id.* at xi.

16. *Id.* at 83.

17. *Id.* at 78.

18. *Id.*

19. O'NEIL, *supra* note 1, at 78.

20. *Id.*

21. *Id.* at 83.

[I]t is not too early to ask whether the news media should be concerned about publicizing accurate and newsworthy information on . . . [whether a person has contracted AIDS]. Or can they continue to rely comfortably on a First Amendment defense for telling the truth, which would presumably provide a solid shield in any other situation?²²

One would expect Professor O'Neil to mount a thorough argument examining whether the established branch of privacy denominated public disclosure of private facts now threatens to burst the floodgates.²³ In this context, O'Neil argues that an ethical media would not have revealed Ashe's disease, and we should rely on media ethics for protection.²⁴

Should the sportswriter have intruded on Ashe's personal life and threatened to expose Ashe's disease? At the early stages, at least, AIDS would not affect Ashe as a professional tennis player. O'Neil himself acknowledges that: "A responsible student of the mass media would hope that the editor or publisher in sole possession of this news would have found some way not to release it—at least not until Mr. Ashe had time to do so in his own way."²⁵ Now, these noble words might express a valiant hope, but they have little to do with reality. Well before the days of Voltaire, humanity realized that it did not live "in this best of all possible worlds."²⁶ For one thing, even if we could expect *The New York Times* to conceal the story, we would hardly expect that *The National Enquirer* would follow suit.

But of greater significance, particularly in light of O'Neil's comment that we would hope the media would exercise some restraint, members of the media themselves have failed to give any indication that they would respect privacy. Statements of ethics, whether from national organizations or from the organs themselves, fail to reveal any significant concern for the privacy rights of individuals.²⁷ In short, not only could we expect the Ashe story to

22. *Id.*

23. The redoubtable William Prosser established four distinct areas of the privacy tort, among them public disclosure of private facts. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §117, at 809 (4th ed. 1971).

24. *See infra* text accompanying note 27.

25. O'NEIL, *supra* note 1, at 83.

26. FRANÇOIS MARIE AROUET DE VOLTAIRE, *CANDIDE* 4 (Easton Press ed., 1977, Richard Aldington, trans.) (1759).

27. One of the great American papers does protect the privacy of those involved in the news. *The San Francisco Chronicle* specifies: "We treat people with respect. This means having a high regard for personal privacy. Ordinary citizens have a greater right to privacy than public figures." SAN FRANCISCO CHRONICLE, ETHICAL NEWS GATHERING, at <http://www.asne.org/ideas/codes/sanfranciscochronicle.htm> (last updated Feb. 17,

appear in the *Enquirer*, we could also fully expect the *Times* to accord it significant coverage as well.

The American Society of Newspaper Editors (ASNE), in its "Statement of Principles," notes that "[j]ournalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports."²⁸ Yet, such general phrases as "rights of people" and "common standards of decency" hardly give sufficient guidance to editors and reporters in deciding whether to run a story or in what manner to attempt to gather facts. *The New York Times* has published guidelines which fall far short of the ASNE statement, commenting only obliquely in a section dealing with fictionalizing. "If compassion or the unavoidable conditions of reporting require shielding an identity, the preferred solution is to omit the name and explain the omission."²⁹ That small concession, used with the guarded language of "compassion" and confined to concealing an identity, can hardly rise to the level of giving subjects of journalistic inquiry any confidence that their personal lives will not decorate the pages of the *Times*. Similarly, *The Washington Post* offers little solace to the private person. "As a disseminator of the news, the paper shall observe the decencies that are obligatory upon a private gentleman."³⁰ Again, and as the *Post* emphasized following this broad statement, what a private gentleman might do varies with the time and social mores.³¹ The media, both in reporting news and in commentary, themselves create contemporary standards.³² Thus, in

1999). Even the *Chronicle*, however, allows for variations from the general rule when relative to the "relevance to the story." *Id.* On the other hand, the *Chronicle* does acknowledge that even though it may explore the personal conduct of public figures, private facts should appear in the paper with relation to "the degree to which private conduct bears on the discharge of public responsibility." *Id.*

28. AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, Art. VI, at <http://www.asne.org/index.cfm?id=888> (last updated Aug. 28, 2002).

29. THE NEW YORK TIMES, GUIDELINES ON OUR INTEGRITY, at <http://www.asne.org/ideas/codes/newyorktimesintegrity.htm> (last updated Dec. 13, 2000).

30. THE WASHINGTON POST, STANDARDS AND ETHICS, at <http://www.asne.org/ideas/codes/washingtonpost.htm> (last updated Feb. 17, 1999). The *Post* also states that it "respects taste and decency, understanding that society's concepts of taste and decency are constantly changing." *Id.* However, paragraph I relates to the use of language in stories reported by the paper, and not to taste and decency in the manner in which the editors and reporters conduct themselves.

31. *Id.*

32. See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

citing common standards and decencies, the *Times* and the *Post* theoretically say little more than they will adhere to whatever norms they can convince the public to adopt.

A full discussion by Professor O'Neil of the Ashe incident should have at least called into question the possibility that responsible journalists would have delayed running the story of Ashe's disease. Regrettably, little exists in the media's own statements to justify O'Neil's conclusion that we can rely on the media's ethical standards to protect private matters. Undeniably, casting the media in a light other than benign hardly furthers O'Neil's primary argument, for the reader will have less cause to protect media that ride roughshod over individuals in quest of the almighty scoop. Yet, even a first-year law student learns that the effective advocate must forthrightly put forward conflicting arguments and cases, and must distinguish the negative while asserting the positive.³³

Leaving aside the question of whether media ethics would cause at least some editors to eschew reporting that Arthur Ashe had AIDS, there remains the issue of whether contemporary privacy law threatens media independence.³⁴ Consider first the evidence put forward by Professor O'Neil. He points to cases granting equitable relief against paparazzi who hounded Jacqueline Kennedy Onassis and later against others who equally tormented Arnold Schwarzenegger and Maria Shriver.³⁵ These cases, he argues, pose

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.

Id. What Warren and Brandeis wrote over one hundred years ago rings even more loudly today, when the instruments of mass media reach the entire world and immediacy of reporting is measured in fractions of seconds rather than in hours or days.

33. See, e.g., HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 279 (4th ed., 1999).

In the Argument, you develop reasons why your client should prevail in order to convince the court to accept your conclusions In addition, a successful argument requires you to explain away the points against you To ignore the case against you diminishes your credibility and the strength of your argument.

Id.

34. Suffice it to note that Professor Smolla's article elsewhere in this issue suggests that the law of privacy not only has developed minimally, but offers little meaningful opportunity for plaintiffs suing media defendants. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289 (2003).

35. O'NEIL, *supra* note 1, at 88 (citing *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973)). O'Neil offers no citation to the Schwarzenegger case.

needless civil remedies which unduly restrain the newsgathering process. "The familiar existing sanctions against harassment, assault, stalking, and the like should suffice where genuine physical or even emotional harm results from invasive or trespassory image-gathering"³⁶ But again, O'Neil fails to tell the full story. The sanctions to which he refers exist in the sphere of criminal law, where procedural safeguards make successful prosecution far less likely than the successful pursuit of civil remedies in courts of equity.³⁷ Further, we would hardly believe that Professor O'Neil would champion criminal prosecution of over zealous reporters and photographers. Thus, relying on existing criminal remedies would prove an unlikely means of keeping an increasingly intrusive press from exceeding the bounds of decency.

Professor O'Neil points to another case involving paparazzi, this time hounding a more private target than the wife of a former president or two actors.³⁸ A married couple, senior executives of a corporation which had come under media scrutiny, refused to give interviews to the media.³⁹ Reporters and photographers flocked around their home and even followed them when they went on a vacation, renting a boat and using powerful microphones to spy on the couple.⁴⁰ Calling the behavior of the media "harassing, hounding, frightening and terrorizing,"⁴¹ the court enjoined any further intrusive activity.⁴² From these extreme facts, Professor O'Neil fears a flood of cases based on media behavior which might descend as low as mere petty annoyance. "The critical question, which courts have barely begun to address, is where and to what extent reasonable expectations of privacy beyond the home warrant some relief against unwelcome photographic invasions or intrusions."⁴³

Any number of cases have addressed the issue of intrusion on seclusion, creating a solid, accepted body of law that establishes parameters for a

36. *Id.* at 88.

37. The entire nation saw the difference between criminal prosecution and civil tort actions graphically and painfully displayed in the case of O. J. Simpson. Acquitted of the double murders of his ex-wife and her escort, Simpson suffered an economically crushing defeat in a wrongful death action brought by their estates. What the state failed to prove beyond a reasonable doubt, the plaintiffs could prove by a preponderance of the evidence.

38. O'NEIL, *supra* note 1, at 75.

39. *Id.*

40. *Id.*

41. *Id.* at 76 (quoting *Wolfson v. Lewis*, 924 F. Supp. 1423 (E.D. Pa. 1996)).

42. *Id.*

43. O'NEIL, *supra* note 1, at 89.

comfortable balance between reportage and seclusion.⁴⁴ Consider, for example, *Daily Times Democrat v. Graham*,⁴⁵ where a woman, leaving a carnival fun house, stepped on air jets that blew her skirt up over her waist.⁴⁶ An enterprising reporter snapped her photo, which his equally enterprising editor ran without her permission in the next edition of the local paper.⁴⁷ The Alabama Supreme Court affirmed a jury verdict for the woman, stating:

One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place.⁴⁸

The press will incur liability only for excesses that amount to indecency and vulgarity, as stressed by *Daily Times Democrat*.⁴⁹ Similarly, media will escape liability for public disclosure of private facts when reporting a newsworthy matter, unless the facts divulged offend the conscience. For example, the president of the student body of a community college sued a newspaper that accurately reported that she had undergone a sex change operation years earlier.⁵⁰ At trial, a jury found by special verdict that the defendants had disclosed a private fact about the plaintiff which “was *not* newsworthy; the fact was highly offensive to a reasonable person of ordinary sensibilities; defendants disclosed the fact with knowledge that it was highly offensive or with reckless disregard of whether it was highly offensive; and

44. See generally RESTATEMENT (SECOND) OF TORTS § 652B (1976).

45. 162 So. 2d 474 (Ala. 1964).

46. *Id.* at 476.

47. *Id.*

48. *Id.* at 478.

49. *Id.* One should also note that where the media abandons its role in reporting the news and instead engages in an exclusively profit-making enterprise, it might become liable under the rubric of publicity. See, e.g., *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 968 (D.R.I. 1988). The famous “kissing sailor” photograph which signaled the end of the Second World War undeniably retains its newsworthy status even today. *Id.* Yet, when a publisher sought to sell limited edition copies of the photo at \$1600 each, the publisher had to obtain a written license from the sailor in order to publish, as the protection afforded by newsworthiness no longer applied. *Id.*

50. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 766 (Ct. App. 1983).

the disclosure proximately caused injury or damage to [the plaintiff].”⁵¹ Again, liability hinged on the media reporting a fact not only private, but which the community found offensive to its cultural standards.⁵²

As noted earlier, the press itself plays an integral role in shaping contemporary attitudes and in expanding the standards by which the public gauges morality.⁵³ When the media creates the standards, it can hardly complain when it violates its own creation. The law of privacy does little more than allow the media to create the “breathing space” in which it can publish truth.⁵⁴ Who better to gauge the effect of its own articles than the press?

III. DISTORTED IMPACT

In *Rice v. Paladin Enterprises, Inc.*,⁵⁵ the defendant published a book entitled *Hit Man: A Technical Manual for Independent Contractors*.⁵⁶ True to its title, the book provided detailed instructions for any person desiring to pursue a career as a professional assassin.⁵⁷ It came as no surprise to the publishers, then, that a reader of the book followed the instructions faithfully and committed a treble murder for hire.⁵⁸ In the aftermath of these brutal

51. *Id.* (emphasis in original, numbering omitted). Note particularly that *Diaz* shifted the burden of proof on the newsworthiness issue from the defendant to the plaintiff. *Id.* at 769; see also *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998). It is worth noting that although Professor O'Neil criticizes *Shulman* for allowing the case to proceed, he neglects to note that *Shulman* also put a substantial burden on plaintiffs seeking to sue under its rubric. O'NEIL, *supra* note 1, at 74–75, 77. And, let us not forget that plaintiffs suing media defendants for defamatory utterances made in discussion of matters of public concern must now prove falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986). Thus, plaintiffs must now prove the traditional elements of their causes of action, but must also plead and prove the absence of two matters long considered affirmative defenses—newsworthiness and truth. *Id.*

52. Of the four branches of privacy mentioned in the Restatement, only appropriation of name or likeness does not require the plaintiff to demonstrate that the invasion of privacy is “highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS §§ 652B (intrusion on seclusion), 652D (publicity given to private life), 652E (false light) (1976).

53. *Warren & Brandeis*, *supra* note 32, at 196.

54. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

55. 128 F.3d 233 (4th Cir. 1997).

56. At <http://faculty-web.at.nwu.edu/commstud/freespeech/cont/cases/hitman.html> (last updated Jan. 1, 2001).

57. *Rice*, 128 F.3d at 236–41.

58. *Id.* at 240–41.

crimes, the personal representative of the decedents' estates sued the publisher in federal court in a wrongful death action based on state law.⁵⁹ At the summary judgment stage, the publisher argued that the First Amendment to the United States Constitution provided a blanket immunity from suit.⁶⁰ For the purposes of its motion, Paladin Enterprises made some remarkable concessions: 1) that it marketed the book in such a way as to attract criminals; 2) that it intended for and indeed knew that the book would be used by assassins; and 3) that it assisted the assassin in this particular case in committing the murders.⁶¹ Essentially, the defendant conceded that the court should view its publication of the book in the same light as if Paladin had written instructions to carry out the specific murders at the direct request of the assassin.⁶²

The appellate court found little trouble in reversing the district court's granting of the summary judgment motion.⁶³ In so doing, however, it made absolutely clear that its decision rested on the nature of the case as presented to it by the stipulations of fact.⁶⁴ "These stipulations are more than sufficient to foreclose an absolute First Amendment defense to plaintiffs' suit."⁶⁵ Indeed, the court so limited its decision that it felt obligated to criticize many of the *amici curiae* for their expansive view of the nature of the case.⁶⁶

That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin *admits* it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.⁶⁷

Rice hardly serves as precedent for the traditional "copy cat" claim, none of which had survived the preliminary stages of litigation.⁶⁸ Where a

59. *Id.* at 241.

60. *Id.*

61. *Rice*, 128 F.3d at 241–42, n.2.

62. *Id.* at 241.

63. *Id.* at 267.

64. *Id.* at 253.

65. *Id.*

66. *Rice*, 128 F.3d at 265.

67. *Id.*

68. O'Neil himself grudgingly and secondarily acknowledges "the consistent pattern of publisher and producer non-liability for imitative or 'copy cat' crimes." O'NEIL, *supra* note 1, at 179. The acknowledgment, however, only comes in what passes for endnotes.

murderer saw a movie and acted similarly,⁶⁹ or where a child heard a song and committed suicide,⁷⁰ courts readily rejected later causes of action either because the nature of the second act meant it constituted a superceding, intervening cause to the claim of negligence, or because the defendant owed the particular plaintiff no duty. The trifold nature of the admissions in *Rice*—marketing for the purpose of assassination, intent that assassins utilize the book to commit crimes, and abetting the specific crime that caused the demise of plaintiffs' *decedents*—makes the case virtually *sui generis*.

Soon after *Rice*, however, a Louisiana appellate court refused to dismiss a complaint which alleged that the producer of the movie *Natural Born Killers* intended for later copy cat crimes to result from the movie.⁷¹ No other case has since surfaced with a ruling against the defendant at any stage, nor have further developments arisen in the Louisiana case. Still, Professor O'Neil elects to grossly misrepresent the impact of *Rice*. "Thus, within a matter of months, the legal landscape had changed dramatically. The safe harbor that publishers, producers, and distributors had taken for granted for decades had suddenly vanished."⁷² O'Neil seems to back away from this stunning characterization later, when he acknowledges that the intent element sets both *Rice* and *Byers* apart: "Thus, in both cases the defendants were willing to assume that, even if such an intent could be proved (however improbable that may have been), no legal liability could have been imposed."⁷³ But his retrenchment is indeed short-lived, for on the next page he again wrings his hands in anguish over the danger he perceives stemming from these limited cases. "Moreover, once victims' groups and plaintiffs'

69. O'NEIL, *supra* note 1, at 137–8.

70. *Id.* at 153–54 (discussing *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988)).

71. *Byers v. Edmondson*, 712 So. 2d 681, 691 (La. Ct. App. 1998).

72. O'NEIL, *supra* note 1, at 141. Professor O'Neil does not seem to like very much about *Rice* at all. He takes pains to point out that the judge who authored the opinion "was the son of parents who had been brutally murdered two decades earlier under circumstances so close to those of the *Rice v. Paladin* case he had seriously considered recusing himself but in the end decided he could be objective." *Id.* at 140. He somewhat gently chides Rodney A. Smolla for representing the plaintiffs in *Rice*. "[Smolla's] commitment to take on the case . . . seemed a departure from his lifelong defense of expressive and creative interests. Yet he became convinced that one who profited commercially from distributing material such as the *Hit Man Manual* did not merit categorical First Amendment protection." *Id.* at 155–56.

73. *Id.* at 157.

lawyers taste media blood, as now they clearly have, life will never be the same.”⁷⁴

Hit Man proceeded to summary judgment on a rarified issue, and then only at the behest of the defendant. *Byers* survived dismissal of the complaint, to be sure, but the plaintiff faces one of the most daunting proofs in the tort panoply—that the producer knew or was substantially certain others would mimic the crime.⁷⁵ Indeed, to fit within the parameters of *Hit Man* and thus survive summary judgment, the plaintiff would have to prove the producers marketed *Natural Born Killers* to the criminal set, knew assassins would learn their trade from the movie, and perhaps even that they knew the specific assassin would use the movie to commit the crime. In any calling, actors find themselves subject to tort suits. Almost 370 years ago, John Donne wrote: “[L]awyers find out still/Litigious men, which quarrels move.”⁷⁶ Things have not changed much, and the possibility of a civil action

74. *Id.* at 158. Somehow, depicting the media as the Christians and the victims of their intrusiveness as the lions seems at best surreal.

75. “Proof of intent necessary for liability in cases such as the instant one will be remote and even rare . . .” *Byers*, 712 So. 2d at 691. See also *Rice*, 128 F.3d at 265 (“[T]here will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.”). The element of acting with knowledge which surfaced in *Byers* underscores the United States Supreme Court’s solicitousness of the media in another line of cases. Unless the media actually participates in illegal activity in the newsgathering process, the courts will not permit either criminal sanctions or civil liability. The Court made this plain in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where a radio station broadcast recordings of a cellular phone conversation. The tapes of the conversation appeared, infant-like, on the station’s doorstep but plainly came from an illegal interception. The radio station “did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.” *Id.* at 517–18. The Court refused to sanction either civil or criminal liability based on title 18, section 2510-11 of the *United States Code*, making it illegal to intercept or publish intercepted electronic communications. Without actually participating in the illegal acquiring of information, the media will not incur liability. This answered the questions remaining after *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which protected the newspaper that had published the name of a rape victim obtained from official records open to the public. It also reaffirmed those cases holding the media could not trespass on property in the newsgathering process. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). The ABC reporters trespassed in that they gained access to areas of Food Lion stores closed to the public, and did so by misrepresenting their credentials. *Id.* at 510. Thus, the apparent consent of Food Lion to their presence in the meat department was vitiated by the misrepresentation. *Id.* But see O’NEIL, *supra* note 1, at 98. Thus, so long as the media stops short of participating in illegal activity, it may disseminate any material in its possession which is in the public interest.

76. JOHN DONNE, THE CANONIZATION (1633), available at <http://eir.library.utoronto.ca/rpo/display/displaypoem.cfm?poemnum=648>.

exists as a cost of doing business. Only when suits progress beyond the initial stages do they pose a real threat,⁷⁷ and to date none of the small number of copycat suits has made it beyond summary judgment.

IV. ENDNOTE PROBLEMS

[F]ootnotes have three basic functions: (1) they provide authority for assertions, and in so doing, provide a bibliography for further research; (2) they attribute borrowed materials to their sources; and (3) they continue a discussion begun in the text, but along lines somewhat peripheral to the logical development of the primary argument.⁷⁸

The problem with Professor O'Neil's failure to provide precise footnotes should in no way suggest improper attribution; instead, Professor O'Neil has violated the spirit of the first goal of footnotes, and the letter of the third. While not devoid of bibliographic material, O'Neil's book rather includes a scant eight pages of source references without pointing the reader to the specific places in the text (other than a vague chapter-by-chapter listing) to which the sources refer. The author justifies this sparse treatment by stating: "Although detailed footnotes seem incompatible with a book of this sort, familiar though they are to most legal scholars, some references are appropriate and essential."⁷⁹ Readers thus must wonder exactly what "sort" of book they hold in their hands, and unfortunately the pages of the volume fail to reveal how, if at all, *The First Amendment and Civil Liability* differs from any other text or treatise seeking to advance an argument on a point of law. For example, Marshall Shapo's highly regarded *The Duty to Act*⁸⁰ argued for a "fiduciary approach to governmental obligation"⁸¹ and appealed

77. See *Byers*, 712 So. 2d at 691.

Because this case is before us on a peremptory exception pleading the objection of no cause of action, we must accept this allegation [of intent] as true It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment.

Id.

78. ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES, AND LAW REVIEW COMPETITION PAPERS* 106 (2d ed. 2000).

79. O'NEIL, *supra* note 1, at 173.

80. MARSHALL S. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY* (1977).

81. *Id.* at 154.

to a wide audience reaching well beyond the legal community, yet contained thirty-five pages of meticulous notes.⁸²

The sketchy notes occasionally fail to identify sources precisely enough for the reader to track them down without substantial additional work. For the *Jewell* case noted above, Professor O'Neil gives us one sentence of explanation with no specific citation to the actual material on which he relies beyond a simple declaration that the material exists.⁸³ While readers have confidence in the accuracy of the statement, they will face a near impossible task if they wish to pursue the matter further. Plainly, Professor O'Neil had access to the order he mentions, for he gives us some details on the rationale of the court.⁸⁴ Why not share the bibliographic data with his readers? Similarly, citations to treatises in general will not serve the needs of readers looking either for specific guidance or simple overviews. For example, legal scholars regularly refer to both the Sanford and the Smolla treatises on defamation,⁸⁵ but would hardly hand either work to someone seeking basic information without more precise direction. Unfortunately, Professor O'Neil adopts this approach.⁸⁶ Finally, occasionally the reader will need a precise citation to pursue the concepts of other scholars. Professor O'Neil identifies a fascinating quotation from a recent book by Stanley Fish,⁸⁷ but gives readers no ability to find the quote and its related material without massive effort.⁸⁸ The book from which O'Neil took the quotation, *There's No Such*

82. *Id.* at 155–90.

83. “The ruling that Atlanta park guard Richard Jewell was a public figure was that of a Georgia state trial judge; though the decision was appealed, no further proceedings have been reported.” O'NEIL, *supra* note 1, at 174. Basic rules of citation, let alone fairness, require something further. O'Neil tells us only that the ruling occurred sometime in late 1999. *Id.* at 19. Even if the trial court's ruling went unreported, Rule 10.5(b) of *The Bluebook: A Uniform System of Citation* requires an author to “[g]ive the exact date for all unreported cases and for all cases cited to a looseleaf service, a slip opinion, an electronic database, or a newspaper.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.5(b), at 66 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

84. O'NEIL, *supra* note 1, at 19–20.

85. BRUCE W. SANFORD, *SANFORD'S SYNOPSIS OF LIBEL AND PRIVACY* (4th ed. 1991); RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1986).

86. “For a comprehensive and up-to-date overview of the law of libel and slander, one might consult [the Sanford or Smolla treatises] . . .” O'NEIL, *supra* note 1, at 174. One might consult them for an overview, but one would quite likely feel overwhelmed by the thoroughness of either work.

87. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* (1994).

88. O'NEIL, *supra* note 1, at 9. At no point in the book does O'Neil indicate a page for the quotation from Fish.

Thing As Free Speech and It's a Good Thing, Too, contains 348 pages in the paperback edition.⁸⁹ That haystack would daunt legal scholars, let alone laypersons, searching for the quoted needle. Moreover, Professor O'Neil eschews the opportunity to digress or expand on such tantalizing passages as the Fish excerpt—a discussion that although relegated to a footnote would bear great interest for his readers.

In short, while Professor O'Neil makes a stab at including the scholarly apparatus one expects in a volume of legal thought, whether argumentative or scholarly, he falls far short of what the profession finds acceptable. He delineates the sources for his work, true, but fails to give his readers the ability to move further on specific issues.⁹⁰ His explanation for treating sources in this cavalier manner (it is not that kind of a book) fails to provide an acceptable reason for deviating as he has done from the minimum standards of legal practice.⁹¹ While some may regard these objections as idle carping, Professor O'Neil's refusal to properly annotate his book at the very least casts a questionable light on his effort to persuade others of the force of his argument.

V. CONCLUSION

Professor Robert O'Neil has written a seriously flawed book on a subject that deserves a far more balanced and scholarly treatment. Not since Anthony Lewis' excellent revisiting of the importance of *New York Times v. Sullivan*⁹² have we seen a full discussion of the vital importance of freedom of the press in a democratic society.⁹³ Today's world of media, by its sheer scope if nothing else, demands such a book. From the vanishing local daily to the vastness of the Internet, we see media the *New York Times* court could

89. FISH, *supra* note 87.

90. Indeed, even the index (although entirely the responsibility of the editor and not the author) occasionally erroneously refers the reader to pages where the topic is not discussed. See, e.g., the index entry for *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) which does not appear on the cited page 179, but which is found on page 177. O'NEIL, *supra* note 1, at 177.

91. In the movie *Michael*, John Travolta plays the Archangel Michael, who when importuned to perform miracles, responds: "I'm not that kind of angel." MICHAEL (New Line Cinema 1996). Archangels, he quite correctly suggests, exist to perform battle in the name of the Lord. *Id.* When O'Neil baldly asserts he has not written that kind of book, see *supra* text accompanying note 79, we are left to wonder what kind of book he in fact has produced.

92. 376 U.S. 254 (1964).

93. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (First Vintage Books ed. 1992) (1991).

hardly have contemplated, let alone the framers of the First Amendment. Journalism post-Watergate has adopted an aggressive, almost bullying, prying methodology, and, aided by technological advances that make it possible for the media to observe us even through the walls of our own homes, now has the ability to take upon itself a non-governmental Orwellian quality. The competition to control a market, whether by print or broadcast media, leads to a greater quest for a scoop. And all of this takes place in a society less concerned with appropriate conduct than ever, due in substantial part to the media's own creation. The media must also acknowledge and remedy its reluctance to adopt ethical standards of conduct that protect average citizens from prying.⁹⁴ Yet against all of these considerations, a democracy can only survive if its members have access to the information they need to make their decisions. The media must have the "breathing space"⁹⁵ to inform the public. We still need a study that harmonizes our need for a free press while avoiding the harm media can inflict.⁹⁶ What a pity, then, that Professor O'Neil failed to rise to the challenge. *The First Amendment and Civil Liability* promised so much. It delivered so little.

94. O'Neil does throw barbs at the media itself. "To the extent that [news and entertainment media] seek a more favorable reception in the courts of both law and public opinion, they might do well to look more often at their own practices and ask whether pressing free expression to its limits is always helpful." O'NEIL, *supra* note 1, at 170.

95. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

96. Fifty years ago, a prominent American commented:

I, of course, believe in freedom of the press. It might be well, however, to define freedom of the press. I understand freedom of the press to mean freedom to print all of the truth regardless of how pleasant or unpleasant it may be, and regardless of who may be helped or hurt thereby.

JOE MCCARTHY, *MCCARTHYISM: THE FIGHT FOR AMERICA* 91 (Joseph Cellini ed., Ayer Co. 1988) (1952). One suspects that Professor O'Neil would agree with the sentiment, although detest the speaker. These words came from Joseph McCarthy, long reviled as one of the greatest opponents of freedom of speech in our country's history. That the ultimate Red-baiter would so vehemently espouse freedom of the press suggests that we must avoid absolutism in defending the media. McCarthy cared nothing for those he crushed in his fight against Communism—including a substantial number of members of the media. Using the First Amendment as an absolute shield when the media harms either the reputation or the equanimity of persons, whether private or public, perversely recalls the absolutist sword of McCarthyism.