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## The *Sidis* Case and the Origins of Modern Privacy Law

Samantha Barbas\*

In the years before World War I, William James Sidis was widely regarded as the most impressive child prodigy the world had ever seen. Sidis attended Harvard at age eleven, spoke several languages, and was a mathematical genius.<sup>1</sup> By 1909, he was an international celebrity, publicized in media around the world and renowned for his intellectual feats.<sup>2</sup> A *Washington Post* headline pronounced him a “boy wonder.”<sup>3</sup>

Yet as an adult, Sidis’s life took a different turn. He neglected his mathematical talents and entirely retreated from public life.<sup>4</sup> By the age of twenty, Sidis had become a recluse.<sup>5</sup> At thirty-nine, he was an adding-machine operator living alone in a shabby Boston rooming house.<sup>6</sup> Sidis was awkward and unkempt.<sup>7</sup> He devoted his free time to collecting streetcar transfers and trivia about an obscure Native American tribe.<sup>8</sup> *The New Yorker* tracked him down in his apartment, interviewed him, and wrote a story about his failure to live up to his potential.<sup>9</sup> The piece, published in the magazine in 1937, described his personal eccentricities in vivid detail. Humiliated and outraged, Sidis sued under the tort of invasion of privacy by public disclosure of private facts—the original Warren and Brandeis conception of the “right to privacy,” which permits damages to be awarded for the dignitary harms caused by the publication of true but embarrassing private information.<sup>10</sup> Sidis lost; according to the court, he had no right to conceal his private life from a public that was curious about him.<sup>11</sup> “Regrettably or not,” wrote the Second Circuit Court of Appeals in a groundbreaking opinion that celebrated freedom of the press over privacy, “the misfortunes and frailties of neighbors and

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1. Jared L. Manley, *Where are They Now? April Fool!*, NEW YORKER, Aug. 14, 1937, at 22.
2. AMY WALLACE, *THE PRODIGY: A BIOGRAPHY OF WILLIAM J. SIDIS, AMERICA’S GREATEST CHILD PRODIGY* 51–53 (1986).
3. *This Eight Year Old Boy Wonder Finds Mathematics Too Simple*, WASH. POST, Dec. 2, 1906.
4. Manley, *supra* note 1, at 24.
5. *Id.* at 23–4.
6. *Id.* at 25–26.
7. *Id.* at 26.
8. *Id.* at 24–26.
9. See Manley, *supra* note 1.
10. See *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The description of the tort as the tort of “public disclosure of private facts” was coined by William L. Prosser in *Privacy*, 48 CALIF. L. REV. 383, 392 (1960).
11. *Sidis*, 113 F.2d at 809.

‘public figures’” were subjects of interest to the public, “[a]nd when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.”<sup>12</sup>

The American press, it has been said, is freer to invade personal privacy than perhaps any other in the world.<sup>13</sup> The tort law of privacy, as a shield against unwanted media exposure, is very weak.<sup>14</sup> The media in the U.S. have a degree of latitude to report on intimate matters, without the threat of legal liability, that would be unimaginable in many other countries. In England, model Naomi Campbell won damages against a magazine when it published the details of her treatment for drug addiction.<sup>15</sup> Princess Caroline of Monaco obtained a judgment from the European Court of Human Rights preventing the German press from publishing paparazzi photos of her.<sup>16</sup> In the U.S., by contrast, public figures have been held to have almost no legal right to privacy.<sup>17</sup> Courts have considered almost anything that takes place in a public place, or that could be said to shed light on an issue of public curiosity or significance, to be exempt from liability for invasion of privacy.<sup>18</sup> The personal details and photographs of a rape victim, images of the extrication of a woman from a crashed car and a photograph of a soccer player with his genitalia exposed are among the intimacies that have been held to be newsworthy “matters of public interest” and thus nonactionable under privacy law.<sup>19</sup>

The failure of American law to protect personal life from unwanted publicity has been poorly explained. The standard reason given for the weakness of American

12. *Id.*

13. See, e.g., ROBIN BARNES, *OUTRAGEOUS INVASIONS: CELEBRITIES’ PRIVATE LIVES, MEDIA, AND THE LAW* (2010); Brian C. Murchison, *Revisiting the American Action for Public Disclosure of Private Facts*, in *NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 32 (Andrew T. Kenyon & Megan Richardson eds., 2006); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

14. Currently, in most states, it constitutes a tort to publicly disclose “matter concerning the private life of another” if it “would be highly offensive to a reasonable person” and the matter is not “newsworthy,” a matter of “public interest” or “of legitimate concern to the public.” See Jonathan Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Public Domain*, 55 *MD. L. REV.* 425, 426, 436, 441, 442 (1996). Because of the courts’ expansive reading of the newsworthiness or “public interest” privilege, the “public disclosure” tort has been described as effectively “dead.” See *id.*

15. Sarah Hall & Clare Dyer, *Legal Landmark as Naomi Campbell Wins Privacy Case*, *GUARDIAN*, Mar. 28, 2002, at 1.

16. Chris Tryhorn, *Princess Wins Landmark Privacy Ruling*, *GUARDIAN* (June 24, 2004, 10:44 AM), <http://www.guardian.co.uk/media/2004/jun/24/royalsandthemediaprivacy>.

17. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that without a showing of actual malice, a public official cannot recover in a libel action); *Curtis Publ’g v. Butts*, 388 U.S. 130 (1967) (extending the *Sullivan* rule to “public figures,” in this case a football coach).

18. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren & Brandeis’s Privacy Tort*, 68 *CORNELL L. REV.* 291, 353 (1983) (noting that “the vast majority of cases seem to hold that what is printed is by definition of legitimate public interest”); Mintz, *supra* note 14, at 439–40.

19. See *Schuler v. McGraw-Hill Cos.*, 26 *Media L. Rep.* 1604 (10th Cir. 1998); *Ross v. Midwest Commc’ns, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989); *Shulman v. Grp. W Prods.*, 955 P.2d 469 (Cal. 1998); *Pasadena Star News v. Superior Court of L.A.*, 249 *Cal. Rptr.* 729 (Cal. Ct. App. 1988); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 905 (Tex. App. 1991).

privacy law as a bar on the publication of private information is the strong tradition of First Amendment freedom.<sup>20</sup> But freedom of the press alone cannot explain why the right to publish has been interpreted as a right to print truly intimate matters or the right to thrust people into the spotlight against their will. Especially during a time of heightened concerns with privacy and Internet overexposure, we need a better explanation as to why the law has struck the balance between media exposure and privacy in the way that it has. One answer, this Article argues, can be found in the case of William James Sidis.

The 1940 case *Sidis v. F.R. Publishing*, one of the best-known privacy cases in U.S. history, represents a foundational moment in the development of American privacy law.<sup>21</sup> *Sidis* established the normative and doctrinal bases for the tort law of privacy as it currently exists.<sup>22</sup> *Sidis* was the first case since the origin of the privacy tort in the 1890s to address the conflict between the right to privacy and freedom of the press and to come out on the side of free expression.<sup>23</sup> In a conclusion that became the guiding principle of modern privacy doctrine, the Second Circuit held that the loss of Sidis's privacy was an inevitable sacrifice to be made for *The New Yorker's* right to publish freely and the public's "right to know"—its right to access a broad range of information, a domain of knowledge nearly as expansive as its curiosities.<sup>24</sup> In an insight that is now unexceptional but that was forward-looking at the time, the *Sidis* court suggested that the ability to obtain facts of all kinds through the mass media, from serious news to even gossip and trivia, is the right and prerogative of a democratic people.<sup>25</sup>

The *Sidis* case represented a bridge between earlier, nineteenth century views and modern, twentieth century perspectives on the legitimacy and constitutionality of legal restrictions on publishing private information. The court's subordination of Sidis's privacy to freedom of the press revealed the influence of a nascent civil libertarian First Amendment jurisprudence in the 1930s and 1940s, as well as an emerging social philosophy in that era—now common to the discourse on democracy and mass communications—that access to the "news," broadly defined, is a prerequisite to social and political participation in a democratic society.<sup>26</sup> In its

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20. See, e.g., Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 291 (2002); Whitman, *supra* note 13, at 1209; Zimmerman, *supra* note 18, at 293.

21. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 999 (1989); Zimmerman, *supra* note 18, at 323.

22. Whitman, *supra* note 13, at 1209 (explaining that since *Sidis*, "American law began . . . to favor the interests of the press at the cost of almost any claim to privacy").

23. *Id.*; see also WALLACE, *supra* note 2, at 236 ("The article . . . was to become forever celebrated in legal and publishing circles everywhere because of the important precedent established by the courts, affecting all so-called 'right of privacy' cases. . . . The great importance of the Sidis case lies in its having become the principal authority in all similar cases in which the right of privacy is claimed by a person who is, or once was, a notable public figure." (quoting JAMES THURBER, *THE YEARS WITH ROSS* 210–12 (1959))).

24. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) ("Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy.").

25. *Id.*

26. See generally THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS

suggestion that the public's right to learn about the private life of the former genius was more valuable than his right to be let alone, and in its celebration of the free flow of facts, no matter how trivial or banal, the Second Circuit articulated what have, over time, become the ground rules for the modern information society.<sup>27</sup>

The story of the *Sidis* case has something to tell us not only about the development of privacy law but also about the *culture of privacy*, the public attitudes and sensibilities that have framed and shaped the law of privacy. It has often been said that Americans—exhibitionists to the core—do not really want privacy and are indifferent about having their secrets revealed.<sup>28</sup> We are voyeurs who are happy to peer into others' personal lives and care little about the privacy rights of others.<sup>29</sup> The public reaction to the *Sidis* decision belies this conclusion. Despite enthusiasm for the kind of gossip and human interest journalism purveyed by *The New Yorker*, the outcome in *Sidis* was attacked by the public. Critics argued that *The New Yorker* and the courts had deprived Sidis of core personal rights—his right to control his public identity, his right to seek anonymity and his right to be forgotten.<sup>30</sup> The public response to *Sidis* thus illustrates not so much public distaste for privacy, but rather confusion and tension—we want our gossip and our privacy, too.

This Article, then, explores the *Sidis* case as a fundamental and transformative episode in the law and culture of privacy. It turns to the case in an attempt to explain why American privacy law since the 1940s has, in a rather systematic way, vaunted freedom of the press and the public's "right to know" over the individual's right to control her public image and to stay out of the spotlight.<sup>31</sup> Through *Sidis*, this Article also explores the enduring paradox of American privacy—the public's desire to peer into others' private lives, and at the same time, its belief that every person should have a right to control her image and to stay out of the public eye if she truly desires. This Article presents *Sidis* as not only a legal case but a public event—one that garnered substantial public attention and became the focal point of debates over privacy and public exposure. *Sidis* brought the tensions and contradictions around privacy to the forefront of popular consciousness and established the terms of the social dialogue around privacy that would surface in the latter part of the twentieth century.

Part I provides the background to the *Sidis* case. It tells the story of William James Sidis and his rise to fame as a child prodigy in the early twentieth century—a period that saw the emergence of the modern mass media and celebrity culture. The sad story of Sidis, who was thrust into the media spotlight through no fault of his own, was a testament to what many at the time rightly observed to be the

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(1947).

27. *Sidis*, 113 F.2d at 809.

28. See, e.g., JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 202 (2008); Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN (Jan. 10, 2010, 8:58 AM), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>.

29. See ZITTRAIN, *supra* note 28; Johnson, *supra* note 28.

30. See *infra* note 400, 433 and accompanying text.

31. See Post, *supra* note 21, at 1003 (noting that "the development of the law has in general" supported the reasoning in *Sidis*); Whitman, *supra* note 13, at 1209; Zimmerman, *supra* note 18, at 293.

precarious nature of privacy in an age of mass communications. Part II, drawing on previously unexplored archival sources, narrates the largely unknown history of the *Sidis* litigation, a saga involving some of the most esteemed jurists in the country, the most prestigious First Amendment lawyers of the day and an eccentric plaintiff with a personal vendetta against the press. In *Sidis*, the Second Circuit initiated what is still the reigning balancing approach to cases involving invasions of privacy by publication. In each case, the individual's privacy interest is weighed against the public's interest in access to private facts, a balance in which the public interest usually wins.<sup>32</sup> The *Sidis* court also inaugurated what remains the dominant "leave it to the press" approach to determining the important "public figure" and "public interest" privileges to the privacy tort.<sup>33</sup> *The New Yorker* brought *Sidis* into the spotlight, then pointed to the interest it had generated to successfully argue that *Sidis* was a "public figure," thus making the details of his private life a "matter of public interest" and the article exempt from liability for invasion of privacy.<sup>34</sup>

Part III explores the response to *Sidis* as a demonstration of the tension, unease and confusion around privacy that remains a feature of our national psyche and cultural landscape. Though the *New Yorker* article was widely read and apparently enjoyed, at the same time, the public expressed overwhelming sympathy for *Sidis* and vocally questioned the court's conclusion that freedom of the press encompassed a right to publish and consume gossip and the intimate details of personal life.<sup>35</sup> The Conclusion examines the enduring legacy of the case. The *Sidis* Court validated trends in popular publishing that turned personal humiliation into an object of mass consumption, and it paved the legal pathway for increasingly sensationalistic journalism in the postwar era. Most of the post-World War II case law on tort liability for the publication of embarrassing private facts is based on the doctrines and principles articulated in *Sidis*—principles that have gone largely unquestioned, but that perhaps now require reconsideration.<sup>36</sup> The rise of the Internet, with its near-infinite capacity to remember, gives new meaning and salience to *Sidis*'s claim to a legal right to be forgotten.

## I. THE RISE AND FALL OF WILLIAM JAMES SIDIS

### A. THE BOY WONDER

Between 1910 and 1920, William James Sidis was regarded as "one of the most remarkable boy prodigies of whom there is record."<sup>37</sup> Sidis, a self-taught polyglot

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32. See *id.* at 353; see also Whitman, *supra* note 13, at 1209.

33. Zimmerman, *supra* note 18, at 353.

34. See *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 806 (2d Cir. 1940); Brief for Defendant-Appellee at 13–14, 23, *Sidis*, 113 F.2d 806 (No. 400).

35. On circulation of *The New Yorker*, see *infra* notes 109 and accompanying text.

36. See WALLACE, *supra* note 2, at 236; Post, *supra* note 21, at 1003; Whitman, *supra* note 13, at 1209.

37. Frank Fleischman, *A Boy Prodigy and the Fourth Dimension*, HARPER'S WKLY., Jan. 15, 1910, at 9.

and mathematical genius, was celebrated in books, periodicals, songs and art of the era.<sup>38</sup> He could read and spell before the age of three, and, at four, use a typewriter.<sup>39</sup> In grade school his mastery of complex mathematics approached the level of Harvard professors.<sup>40</sup> It was speculated that his IQ was near 250. His feats were written up in the newspapers of the world, and his image graced magazine covers.<sup>41</sup> Sidis's rise to prominence occurred during the early years of modern celebrity culture, when fame and media publicity were often described as the pinnacle of success and prestige.<sup>42</sup> For Sidis, celebrity was not a fantasy but a nightmare. He had no desire to be famous. The "perfect life," he often said, was to live in complete and utter seclusion.<sup>43</sup>

William James Sidis was born to Jewish Ukrainian immigrants on April 1, 1898, in New York.<sup>44</sup> His father, Boris Sidis, had emigrated in 1886 to escape political persecution, and his mother, Sarah Mandelbaum Sidis, had emigrated not long thereafter.<sup>45</sup> Boris Sidis earned his degrees at Harvard and taught there, while performing pioneering work in abnormal psychology.<sup>46</sup> William was named after his godfather, Boris' friend and colleague, the American philosopher William James.<sup>47</sup> Young William became a specimen for Boris' psychological investigations.<sup>48</sup> Boris trained William to spell and read at a very young age. Sidis could read the *New York Times* at 18 months.<sup>49</sup> At five, he composed a treatise on anatomy.<sup>50</sup> When he was eight, he worked out a new system of logarithms based on twelve instead of ten.<sup>51</sup> Boris published several papers in scientific journals describing his son's achievements and a book, *Philistine and Genius*, which used William's success story to praise homeschooling and critique the deficiencies of American public education.<sup>52</sup>

By the time *Philistine and Genius* was published in 1911, William was well known to the American public. William had literally grown up before the media spotlight. When Sidis was three or four, his feats of memory were featured in the popular magazine *North American Review*.<sup>53</sup> At the age of six, he was sent to a

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38. H. Addington Bruce, *Bending the Twig*, AM. MAGAZINE, Mar. 1910, at 692 [hereinafter Bruce, *Bending the Twig*] (explaining that once Sidis' interest was aroused, he was not content until he had learned the exact nature of whatever had excited his curiosity).

39. *Id.*

40. *Id.* at 690–95.

41. WALLACE, *supra* note 2, at 60.

42. On the origins of modern celebrity culture, see generally CHARLES L. PONCE DE LEON, SELF-EXPOSURE: HUMAN INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA, 1890–1940 (2002).

43. WALLACE, *supra* note 2, at 106.

44. WALLACE, *supra* note 2, at 1–20.

45. *Id.* at 2–9.

46. *See id.* at 11–18.

47. Manley, *supra* note 1, at 22.

48. *Id.*

49. WALLACE, *supra* note 2, at 23.

50. Manley, *supra* note 1, at 22.

51. *Id.*

52. WALLACE, *supra* note 2; BORIS SIDIS, *PHILISTINE AND GENIUS* (1911).

53. WALLACE, *supra* note 2, at 27.

Brookline public school and went through seven years of schooling in six months.<sup>54</sup> Accounts of his grammar school days were written up in the *Boston Transcript* and the *Boston Herald*.<sup>55</sup> When he briefly attended high school, he was hounded by reporters. According to Sidis biographer Amy Wallace, “if [reporters] succeeded in finding him alone, one would pounce and hold him while another took his picture.”<sup>56</sup>

What really brought William into the public eye was his enrollment at Harvard at the age of eleven. Sidis set a record in 1909 by becoming the youngest person to enroll at that university in its history. His story was splashed across the front pages of the nation’s newspapers. The press offered predictions for a brilliant future—that the “boyish hand busily writing examination papers today at Harvard may well be ordained to push away the veil from some great fact or some mighty truth for which the world is waiting.”<sup>57</sup> When young Sidis lectured to an audience of professors at the Harvard mathematical club on his theory of four-dimensional bodies, he became a true celebrity. Newspapers across the country assigned reporters to cover “the Sidis case.”<sup>58</sup>

The press was fascinated with the nature-versus-nurture question—was Sidis naturally brilliant, or was his father’s rigorous training behind his success? It was reported that Sidis was a testament to innovative child rearing methods, and that he was a “normal boy trained from his earliest years to think vigorously.”<sup>59</sup> “Young Sidis has not been pushed or forced by a proud family, and he has been educated in a rather special way,” wrote the *New York Times*.<sup>60</sup> “His father has from the earliest years trained the boy to reason . . .”<sup>61</sup> Dozens of newspaper editorials and educational articles between 1910 and 1912 used Sidis as evidence to show that public schools were “wasting time, fostering bad habits and in general doing more harm than good.”<sup>62</sup> The fact that Sidis was able to master such complex topics at a young age “shows too plainly that our methods of education are slipping.”<sup>63</sup>

William’s supporters went to great lengths to demonstrate that despite his genius, he was still a normal child. There were extensive discussions in the press of his personality and home life. Apart from his genius, he was an average boy,

54. Bruce, *Bending the Twig*, *supra* note 38, at 692.

55. WALLACE, *supra* note 2, at 35–38.

56. WALLACE, *supra* note 2, at 44–45; *see also This Eight-Year-Old Boy Wonder Finds Mathematics “Too Simple,”* WASH. POST, Dec. 2, 1906, at A5 (illustrating that reporters hounded Sidis).

57. *A Savant at Thirteen, Young Sidis on Entering Harvard Knows More Than Many on Leaving. A Scholar at Three*, N.Y. TIMES, Oct. 17, 1907, at SM9 [hereinafter *A Savant at Thirteen*]; *see also Boy Mathematician Astounds Educators*, CHI. TRIB., Jan. 7, 1910, at 7; *Sidis Could Read at Two Years Old*, N.Y. TIMES, Oct. 18, 1909, at 7; *Sidis of Harvard*, N.Y. TIMES, Oct. 18, 1909, at 6.

58. WALLACE, *supra* note 2, at 60; *Sidis Is Pythagoras*, L.A. TIMES, June 17, 1910, at 110.

59. *Sidis of Harvard*, *supra* note 57.

60. *A Savant at Thirteen*, *supra* note 57, at SM9.

61. *Id.*

62. *See, e.g.,* H. Addington Bruce, *Intensive Child Culture*, WASH. POST, May 12, 1912, at SM3 [hereinafter Bruce, *Intensive Child Culture*]; Frederic J. Haskin, *New Ideas in Education*, WASH. POST, Feb. 23, 1910, at 4.

63. Bruce, *Intensive Child Culture*, *supra* note 62; Haskin, *supra* note 62.

explained one article.<sup>64</sup> “As a pastime, in order to vary the monotony of studying logarithms and the like, [he] enjoys reading Alice in Wonderland. . . . In the manner of playing games, marbles . . . skipping rope . . . and the like, the boy is perfectly at home, and enjoys a game of ball with boys of his age immensely.”<sup>65</sup> “[T]here is no evidence that his studies have undermined his health. On the contrary, he seems to enjoy enviable bodily vigor.”<sup>66</sup> William was not only brilliant, Boris had written in *Philistine and Genius*, but “healthy, strong, and sturdy,” “brimming over with humor and fun,” and with cheeks that “glow with health.”<sup>67</sup>

Yet others doubted the “rosy cheeks of the little Sidis boy.”<sup>68</sup> While many observers predicted “wonderful achievements in the years to come,” the future mental health of child prodigies was still being debated.<sup>69</sup> Commentators described Sidis as the product of a “scientific forcing experiment.”<sup>70</sup> A 1911 article in *Science Magazine*, titled *Popular Misconceptions Concerning Precocity in Children*, feared that false reports that William was well adjusted and had not been “robbed of [his] childhood” would lead to similar, and ultimately damaging, efforts by parents to home-grow their own geniuses.<sup>71</sup>

These pessimistic assessments were probably more accurate. William James Sidis was not a healthy boy. Even more destructive than the pressure from his father was the constant hounding by the press. Sidis was naturally reclusive.<sup>72</sup> He hated publicity, and he sought refuge from the media attention in his studies.<sup>73</sup> Yet, as his biographer writes, “[t]he more he hungered for privacy, the more famous he became, and the more reporters hounded him.”<sup>74</sup> The result was a nervous breakdown in 1910, not long after the famous Math Club lecture.<sup>75</sup>

The breakdown was widely publicized. Newspapers reported that William was “seriously ill,” and there were rumors that he would never return to Cambridge to complete his studies.<sup>76</sup> Friends of the family asserted that “too great mental

64. See *Harvard's Quartet of Mental Prodigies: Unique Problem for Psychologists in Education of Young Sidis and His Three Companions*, N.Y. TIMES, Jan. 16, 1910, at SM11 [hereinafter *Harvard's Quartet*].

65. *Id.*

66. *The Boy Prodigy of Harvard*, 48 CURRENT LITERATURE 291 (1910); *Wonderful Boys of History*, WASH. POST, Jan. 23, 1910, at M2.

67. SIDIS, *supra* note 52, at 88.

68. See WALLACE, *supra* note 2, at 61.

69. *Harvard's Quartet*, *supra* note 64, at SM11; Hannah Mitchell, *Prodigies Turn Out Well in Later Years, Say Psychologists: Mistake to Think Phenomenons Failures as Grown-Ups Provision Should Be Made for Extra Talented*, N.Y. TRIB., Apr. 3, 1921, at E10.

70. WALLACE, *supra* note 2, at 53.

71. V. O'Shea, *Popular Misconceptions Concerning Precocity in Children*, 34 SCIENCE 666, 667–68 (1911); see also Joseph F. Kett, *Curing the Disease of Precocity*, 84 AM. J. SOC. S183, S206 (1978).

72. See WALLACE, *supra* note 2, at 54.

73. See *id.* at 55.

74. *Id.*

75. *Id.* at 68–71.

76. *Fear is Felt for Sidis*, N.Y. TIMES, Jan. 28, 1910, at 1.

exertion” had a “great deal to do with the boy’s sudden collapse.”<sup>77</sup> His father was running a sanatorium in Portsmouth, New Hampshire at the time, and William was rushed off there. When he finally came back to Harvard, he was retiring and shy. He could not lecture again, and he began to show a marked distrust of people and a fear of responsibility.<sup>78</sup>

But the media interest in Sidis did not relent. Shortly after his graduation from Harvard, he granted an in-depth interview to the *Boston Herald*. The interviewer delved into the subject of sixteen-year-old Sidis’s sex life and got Sidis to explain in detail his “solemn vow of celibacy.”<sup>79</sup> The *New York Times* got hold of the revealing interview, and before long, other media outlets were commenting on his celibacy vows and joking about it.<sup>80</sup> After graduation, Sidis took a graduate student teaching position in mathematics at Rice University in Houston.<sup>81</sup> News of his escapades in Texas—in particular, his social blunders—was channeled back to the major East Coast papers.<sup>82</sup> The *Boston Herald*, *Chicago Journal* and *New York Times*, among other outlets, ran stories about Sidis’s bad manners, his awkwardness with women, and how he was mercilessly teased by his fellow students.<sup>83</sup> Depressed, Sidis was let go from Rice and came back to Boston, where he enrolled at Harvard Law School.<sup>84</sup> For unknown reasons he dropped out during his third year.<sup>85</sup>

He fell out of the media spotlight briefly, until 1919, when he was arrested for participating in a socialist demonstration in which he had carried the hated red flag.<sup>86</sup> “He was sentenced to eighteen months in jail for inciting to riot[] and assault” but was eventually released on 5,000 dollars bail.<sup>87</sup> The media covered the arrest and trial. “Evidently intellectual prodigy,” quipped one journal, “is not always a moral prodigy.” The publicity put Sidis back into his parents’ sanatorium. In his early twenties, he emerged from their care and took up life on his own.<sup>88</sup>

Sidis then “drifted from city to city,” working for subsistence wages as a clerk.<sup>89</sup> In 1924, a reporter found him working in an office on Wall Street for 23 dollars a

77. *Id.*

78. WALLACE, *supra* note 2 at 53.

79. *Id.* at 107.

80. *See id.* at 111; *Harvard’s Prodigy at Figures, Aged 17, Takes Vow of Celibacy*, WASH. POST, Apr. 18, 1915, at 9; *Prodigy of Harvard Vows Not to Wed—He’s Only 17*, CHI. TRIB., Apr. 18, 1915, at 1.

81. WALLACE, *supra* note 2, at 112.

82. *Id.* at 111–15.

83. *Id.* at 111; *see also* LEON GUERARD, PERSONAL EQUATION 220 (1948). At Rice he was “treated like a two-headed calf. His boyish singularities were . . . mercilessly exposed and amplified. Because he blurted out that he had never kissed a girl, he was made the butt of endless practical jokes.” GUERARD, *supra*, at 220.

84. WALLACE, *supra* note 2, at 120, 135.

85. *Id.* at 135.

86. *See Graduate of Harvard, Believer in the Soviet, Given Prison Sentence*, ATLANTA CONST., May 14, 1919, at 20; *Youngest Graduate of Harvard is Sentenced*, N.Y. TRIB., May 14, 1919, at 6.

87. Manley, *supra* note 1, at 23.

88. *See id.* at 25.

89. *Id.* at 24.

week, and the news made headlines.<sup>90</sup> The *New York Herald Tribune* exposed his identity in an article titled *Boy Brain Prodigy of 1909 Now \$23-a-Week Adding Machine Clerk*.<sup>91</sup> The reporter wrote of the “tragedy that young Sidis represents.”<sup>92</sup> The article prompted a snide editorial in the *New York Times* called *Precocity Doesn’t Wear Well*, which stated, “the mental fires that burned so brightly have died down, to all appearances.”<sup>93</sup> One article, *Is It Too Bad If Your Child’s a Prodigy?*, described Sidis’s upbringing as a “sad mistake.”<sup>94</sup> Sidis’s rediscovery, according to the *Educational Review*, led to a “perfect orgy of . . . triumph” by those who had criticized the overambitious parents of precocious children.<sup>95</sup>

After this first “rediscovery,” Sidis plunged back into anonymity. In 1926, he published a book on his hobby of collecting streetcar transfers, titled *Notes on the Collection of Transfers*, under a pseudonym, Frank Folupa.<sup>96</sup> He continued to work as a clerk and boasted of his “ability to operate an adding machine with great speed and accuracy.”<sup>97</sup> He had what biographer Wallace described as a “comfortable existence” out of the spotlight.<sup>98</sup> He studied and wrote on a variety of unusual topics, including the Okamakammeset Indian tribe.<sup>99</sup> From his rented room in a Boston boardinghouse, he gave lectures to friends on his various bizarre interests.<sup>100</sup> He was well liked, though eccentric—unkempt, talkative and graceless.<sup>101</sup> He also demonstrated a resentment of his genius past. When his father died in 1923, he did not attend his funeral.<sup>102</sup> He never stayed long at any one job, because one of his coworkers inevitably found out that he was the famous boy wonder, and he could not tolerate the job after that.<sup>103</sup>

#### B. APRIL FOOL: *THE NEW YORKER* AND REDISCOVERY

In August 1937, Sidis’s carefully built “fortress” of anonymity came under siege when *The New Yorker* magazine published an article about him.<sup>104</sup> The story, titled *Where are They Now? April Fool!*, was presented as an intimate, first-hand account of Sidis as observed by a visitor to his apartment.<sup>105</sup> The article was

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90. *Boy, Once Brain Wonder, Now a New York Clerk*, WASH. POST, Jan. 11, 1924, at 9.

91. WALLACE, *supra* note 2, at 170–71.

92. *Id.*

93. *Precocity Doesn’t Wear Well*, N.Y. TIMES, Jan. 11, 1924, at 16.

94. *Is It Too Bad If Your Child’s a Prodigy?*, ATLANTA CONST., Feb. 17, 1924, at F3.

95. *Pathetic Fiction*, 67 EDUC. REV. 158 (June 1924); *see also Sidis Hated His Father, Feels that He Was Treated Harshly as a Boy*, BOS. DAILY GLOBE, Jan. 11, 1924, at 22A.

96. *See* WALLACE, *supra* note 2, at 181–82.

97. Manley, *supra* note 1, at 25.

98. WALLACE, *supra* note 2, at 166.

99. Manley, *supra* note 1, at 26.

100. *See id.*

101. *See id.* at 25–26.

102. WALLACE, *supra* note 2, at 166–67.

103. *See* Manley, *supra* note 1, at 26.

104. WALLACE, *supra* note 2, at 228.

105. *See id.* at 229.

entertaining, well written and had “considerable popular news interest.”<sup>106</sup> It was also snide, mocking and condescending. But that was par for the course for the magazine, which advertised itself as sophisticated and witty, fashionably avant-garde and “not meant for ‘your old aunt in Dubuque.’”<sup>107</sup>

Started in 1925, *The New Yorker* had become one of the nation’s best-known magazines of literary and feature journalism, with a staff that included some of the most talented writers of the day.<sup>108</sup> Between 1930 and 1940, the magazine was experiencing phenomenal growth. In 1937, its circulation was 133,000; it would gain an additional 15,000 by 1940.<sup>109</sup> As one journalism historian writes, “[n]ot long after its inception . . . , the magazine began to distinguish itself through its . . . profiles,” “long-form literary journalism” and “storytelling reportage.”<sup>110</sup> It was not a highbrow publication by any means, but it was not a tabloid, either; it published material in the grey zone between serious literature, hard news and lightweight feature stories and gossip.<sup>111</sup> In this way, it was very much like other magazines and newspapers of the time, with their focus on “human interest.” Though “human interest” journalism—described by one publisher as “chatty little reports of tragic or comic incidents in the lives of the people”<sup>112</sup>—had originated in the early nineteenth century, it was not until the turn of the century that it became a standard component of daily and weekly periodicals.<sup>113</sup> The distinguishing feature of human interest reporting or “personality journalism,” as it was sometimes called, was its focus on the lifestyles, activities and personal traits of famous and not-so-famous individuals.<sup>114</sup> Unlike “informational” or hard news reporting, the purpose of human interest journalism was to entertain by telling stories about people—a genre that by its very nature ran the risk of invading privacy.<sup>115</sup>

In 1937 the magazine was running a *Where Are they Now?* series, profiles of “once famous front-page figures who had been lost to public view for considerable lengths of time.”<sup>116</sup> The series played on the public’s fascination with has-beens, the casualties of celebrity culture and the fickleness of fame. A *New Yorker* reporter, Barbara Linscott, interviewed Sidis in his apartment.<sup>117</sup> James Thurber,

106. Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940).

107. KATHY ROBERTS FORDE, LITERARY JOURNALISM ON TRIAL 9–10, 40–41 (2008); Wilfred Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713, 718 (July 1948).

108. *See id.*

109. BEN YAGODA, ABOUT TOWN: THE NEW YORKER AND THE WORLD IT MADE 96 (2000); *see also* DAVID E. SUMNER, THE MAGAZINE CENTURY: AMERICAN MAGAZINES SINCE 1900 77 (2010).

110. FORDE, *supra* note 107, at 9–10, 41.

111. *See generally* YAGODA, *supra* note 109.

112. HELEN MACGILL HUGHES, NEWS AND THE HUMAN INTEREST STORY: A STUDY OF POPULAR LITERATURE 13 (1940).

113. Helen MacGill Hughes, *Human Interest Stories and Democracy*, PUB. OPINION Q., Apr. 1937, at 76–78.

114. *Id.*

115. *Id.*

116. JAMES THURBER, THE YEARS WITH ROSS 210 (1959).

117. *See* Letter from Ik Shuman, Editor, *The New Yorker*, to Alexander Lindey, Partner, Greenbaum, Wolff & Ernst (Sept. 6, 1930) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library); Letter from Ik Shuman, Editor, *The New Yorker*, to Alexander Lindey, Partner, Greenbaum, Wolff & Ernst (Aug. 11, 1938) (on file with *The New Yorker* Archives,

the noted cartoonist, humorist, and essayist, did the rewrite, and the article bears his pen name, “Jared L. Manley.”<sup>118</sup> The famed writer and critic A.J. Liebling also contributed to the piece.<sup>119</sup>

“William James Sidis lives today at the age of thirty-nine, in a hall bedroom of Boston’s shabby south end,” Manley wrote.<sup>120</sup> The reporter found him “in a small room papered with a design of huge, pinkish flowers, considerably discolored”.<sup>121</sup>

William Sidis at thirty-nine is a large, heavy man, with a prominent jaw, a thickish neck, and a reddish mustache . . . . He seems to have difficulty in finding the right words to express himself, but when he does, he speaks rapidly, nodding his head jerkily to emphasize his points, gesturing with his left hand, uttering occasionally a curious, gasping laugh. He seems to get a great and ironic enjoyment out of leading a life of wandering irresponsibility after a childhood of scrupulous regimentation. His visitor found in him a certain childlike charm.<sup>122</sup>

The piece noted that Sidis was employed as a clerk and that he sought such menial work because he refused to make use of his talents.<sup>123</sup> “The very sight of a mathematical formula makes me physically ill,” he had reportedly said.<sup>124</sup> “All I want to do is run an adding machine . . . .”<sup>125</sup> He said he did not stay long at one job because one of his fellow employees found that he was the former “boy wonder,” and he became so uncomfortable that he had to leave.<sup>126</sup> When a person asked him “point-blank about his infant precocity, and insisted on a demonstration of his mathematical prowess, Sidis was restrained with difficulty from throwing him out of the room.”<sup>127</sup>

The article also lampooned his obsessions with streetcar transfers and the history of the Okamakammeset tribe.<sup>128</sup> “He has written some booklets on Okamakammeset lore and history, and if properly urged, will recite Okamakammeset poetry and even sing Okamakammeset songs. He admitted that his study of the Okamakammesets is an outgrowth of his interest in Socialism.”<sup>129</sup> The reporter brought up the prediction of a professor of MIT in 1910 that he would be a great mathematician and a famous leader in the world of science.<sup>130</sup> “It’s

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Manuscripts and Archives Div., N.Y. Pub. Library).

118. Letter from Ik Shuman, Editor, *The New Yorker*, to Harriet Pilpel, Partner, Greenbaum, Wolff & Ernst (Aug. 22, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library); Anthony Lewis, *The Right to Be Let Alone*, in *JOURNALISM AND THE DEBATE OVER PRIVACY* 61, 63 (Craig LaMay ed., 2003) (noting that Thurber used the pseudonym Jared Manley in the Sidis article and that Thurber did not interview Sidis).

119. Letter from Ik Shuman to Harriet Pilpel, *supra* note 118.

120. Manley, *supra* note 1, at 25.

121. *Id.*

122. *Id.* at 26.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

strange,” he said with a grin, “but, you know, I was born on April Fools’ Day.”<sup>131</sup>

Thurber claimed that he had wanted to use the article to make a point; he had hoped that “that the piece would help to curb the great American thrusting of talented children into the glare of fame or notoriety, a procedure in so many cases disastrous to the later career and happiness of the exploited youngsters.”<sup>132</sup> And yet the piece did exactly that—it thrust Sidis back into the spotlight and, in the process, set off the fury of a man who thought he had the power to fight back.

Immediately after the article came out, Sidis hired a Boston attorney, William Aronoff, who contacted *The New Yorker* and warned them that Sidis was going to press a libel claim.<sup>133</sup> A meeting was arranged between Aronoff and *The New Yorker*’s counsel.<sup>134</sup> The magazine’s lawyers asked Aronoff to show how the article was false, and he would not. Aronoff left the office with threats of suit.<sup>135</sup> Around the same time Sidis also initiated a libel suit against the newspaper *The Boston American*, which published a piece in late 1938 based on the *New Yorker* article.<sup>136</sup>

Later that year Sidis hired a small New York firm called Green and Russell, and Thomas Green met with lawyers for *The New Yorker* in the summer of 1938.<sup>137</sup> Green insisted that *The New Yorker* had “done a great injustice to Sidis; that it had deliberately and maliciously intruded on Sidis’s right to privacy and had dragged him, against his will, into the cruel glare of publicity.”<sup>138</sup> Shortly afterwards, Sidis filed suit against *The New Yorker* for \$150,000, on two counts of invasion of privacy and one count of libel.<sup>139</sup> He argued that the article had defamed him, and also that *The New Yorker* violated a New York state privacy statute by using his

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131. *Id.*

132. THURBER, *supra* note 116, at 212. Morris Ernst wrote coyly in his autobiography that it was a “tender, sympathetic piece.” MORRIS L. ERNST, *SO FAR SO GOOD* 53 (1948).

133. Letter from *The New Yorker* to Barbara Linscott (Jan. 24, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

134. *Id.*

135. *Id.*

136. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Sept. 14, 1938) (on file with *The New Yorker* Archives, N.Y. Pub. Library). According to Sidis’ biographer, the *Boston Sunday Advertiser* in the same year published an article titled *Sidis, Genius, Discovered Working as a Boston Clerk*, and subtitled *Child Prodigy of 1914 Shuns Publicity*. WALLACE, *supra* note 2, at 225–28. It began: “Genius in a tawdry South End boarding house. Genius driven by some strange mental quirk to seek obscurity in dullness and mediocrity. . . . [Y]esterday the Sunday Advertiser writer found him in a small room, wall-papered and dark, where for the past five years he has lived unknown, unsung, uncaring.” *Id.* The article went on to describe his odd habits, his dull work and his utter rejection of his talents, and it suggested that Sidis suffered from some form of insanity. *Id.* William sued the *Advertiser* for libel, claiming that he had been “held up to ridicule, and had suffered great anguish of mind, and [that] his reputation had been seriously injured.” *Id.*

137. See Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Aug. 17, 1938) [hereinafter Letter from Alexander Lindey to Ik Shuman (Aug. 17, 1938)] (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

138. *Id.*

139. Brief for Defendant-Appellee at 2–3, *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940) (No. 400).

name and image for commercial uses, for the purpose of “trade.”<sup>140</sup> His principal claim was that the article violated the right of privacy in five states where a common law right of privacy had been recognized and the magazine was circulated.<sup>141</sup>

The libel claim was not surprising, particularly in the 1930s, an era that saw an increasing number of libel suits against the popular press.<sup>142</sup> The common law privacy claim, however, was almost entirely unprecedented. Since the origin of the privacy tort in the 1890 Warren and Brandeis *Harvard Law Review* article *The Right to Privacy*, no major media outlet had been sued for publishing private facts as an invasion of privacy.<sup>143</sup> With only one known exception, no case had asked a court to rule on the Warren and Brandeis argument that publishing embarrassing information about a person’s private life should be actionable as a tort.<sup>144</sup> In legal and publishing circles, the case of *Sidis v. F.R. Publishing* was predicted, rightly, to become a turning point in the history of the American law of privacy.

## II. THE *SIDIS* CASE

The privacy tort had been developed precisely for situations like the one that confronted William James Sidis. The tort action for invasion of privacy by publication of embarrassing private facts had originated from a set of circumstances not entirely unlike the one that confronted the hapless former boy genius. In 1890, Samuel Warren and Louis Brandeis published the famous *Harvard Law Review* article, *The Right to Privacy*, generally considered the starting point of the legal history of privacy in the United States.<sup>145</sup> Samuel Warren was a wealthy and prominent Boston lawyer, and Brandeis was Warren’s former law partner.<sup>146</sup> Warren was incensed by finding details of the Warren family’s home life and social affairs spread on the society pages of several newspapers.<sup>147</sup> More generally, the authors were outraged by what was then the new trend of gossip columns and “human interest” journalism in newspapers, and what they considered to be the unwarranted and tasteless depiction of private life in the press.<sup>148</sup>

“The press,” Warren and Brandeis had written,

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140. *Id.* at 2–3, 15.

141. *Id.* at 3; *see also* Letter from Alexander Lindey to Ik Shuman (Aug. 17, 1938), *supra* note 137.

142. NORMAN ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 212–21 (1986).

143. *See supra* note 23 and accompanying text.

144. *See Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929) (holding that publication of a photograph in connection with language attributed to the plaintiff was not an invasion of her right of privacy even though she was incorrectly quoted).

145. *See supra* note 10 and accompanying text.

146. *See* DONALD R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 22 (1973).

147. *See id.* at 23; *see also* Amy Gajda, *What if Samuel D. Warren Hadn’t Married a Senator’s Daughter? Uncovering the Press Coverage That Led to “The Right to Privacy,”* 2008 MICH. ST. L. REV. 35, 55–58 (2008).

148. *See* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 27 (1979).

is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.<sup>149</sup>

“Persons with whose affairs the community has no legitimate concerns,” they lamented, were “being dragged into an undesirable and undesired publicity.”<sup>150</sup> Calling for a legal “right to privacy,” Warren and Brandeis proposed a cause of action that would allow the victims of unwanted media publicity of private facts to sue in tort and recover damages for emotional and dignitary injuries.<sup>151</sup> An invasion of privacy was different from defamation—the law of libel dealt only with falsehoods, and it remedied only insults to reputation, not to one’s feelings. They described the right to privacy not as a proprietary right but as a dignitary or spiritual interest rooted in “an inviolate personality.”<sup>152</sup>

At a time of widespread public criticism of the abuses of scandalous “yellow journalism,” the “right to privacy” was part of a broader effort by social elites to crack down on the popular media.<sup>153</sup> At the turn of the century, there were campaigns for stricter defamation laws, and several states passed statutes that imposed criminal punishment for publishing news of “bloodshed, lust and crime.”<sup>154</sup> The idea of a right to privacy that would saddle the press with civil liability for invading the right of the individual to be let alone—to “pass through this world . . . without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers”—was received with great public enthusiasm.<sup>155</sup>

But the privacy tort did not develop as Warren and Brandeis had envisioned. In the early twentieth century, several cases were brought over the unauthorized use of personal portraits and photographs in ads, on the theory that such uses were an invasion of privacy, but very few lawsuits were brought by the victims of embarrassing newspaper publicity, which had been Warren and Brandeis’ original concern.<sup>156</sup> One explanation is that the highly public nature of a lawsuit threatened to inflict on the plaintiff a punishment greater than the harm it sought to redress. As one legal commentator wrote, “when exposed to public view, [most] simply wriggle away and hope to be forgotten. Before they will bring suit the disturbance

149. Warren & Brandeis, *supra* note 10, at 196.

150. Warren & Brandeis, *supra* note 10, at 214.

151. *Id.* at 213–15; see also Harold R. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553, 553–54 (1960).

152. Warren & Brandeis, *supra* note 10, at 205.

153. Mitchell Dawson, *Law and the Right of Privacy*, 67 AM. MERCURY 397, 399 (1948) [hereinafter Dawson, *Law and the Right of Privacy*].

154. ROSENBERG, *supra* note 142, at 214. The “bloodshed, lust and crime” statutes are summarized in *Winters v. New York*. See 333 U.S. 507, 520–23 & n.2 (1948) (Frankfurter, J., dissenting).

155. Elbridge L. Adams, *The Law of Privacy*, 175 N. AM. REV. 361, 361 (1902).

156. Warren & Brandeis, *supra* note 10, at 196.

must be so terrific that going to court can't make it worse."<sup>157</sup>

This raises the question: Given the publicity that a lawsuit was likely to generate, why did Sidis sue *The New Yorker*? The only answer is that to a man who had for years been wronged by the press, who hated the press, who blamed it for a bitter, stunted childhood, the possibility of vindicating himself in a court of law was worth the publicity he so despised. By his own admission, Sidis wanted to punish *The New Yorker* by forcing it to undertake the burden of a lawsuit and to potentially pay out steep damages. According to his lawyer Thomas Greene, Sidis "wished not only to even the score with *The New Yorker* but to make an example of it, so there would be no further inroads on his private life."<sup>158</sup> Sidis was "prepared to carry the case to the Supreme Court" if necessary.<sup>159</sup> Sidis wanted to demonstrate to the world, in the public forum of a federal courtroom, that the magazine had wronged him, and to have his hurt and outrage validated with the authority of the law.<sup>160</sup> Another reason, to put it bluntly, was likely money. Sidis made minimal wages as an adding machine clerk and was reportedly in debt. He may have seen the lawsuit as a meal ticket—a chance to potentially quit his mundane job and to devote himself full-time to his writing and various hobbies.

*The New Yorker* relied on Greenbaum, Wolff & Ernst, a prestigious, small New York law firm which had become known for handling "famous literary and free expression cases."<sup>161</sup> The firm had been *The New Yorker's* in-house counsel since 1932.<sup>162</sup> Most of its work involved protecting the magazine against libel claims.<sup>163</sup> In response to threatened libel suits, the firm instituted a libel protection process for the magazine's authors and editors to follow.<sup>164</sup> Writers "were to provide editors with a memorandum giving the sources of their information and relevant dates," and the magazine established a highly organized and professional fact-checking department.<sup>165</sup> This did not eliminate libel claims, however. In addition, Greenbaum, Wolff & Ernst developed a standard procedure—to notify the complainant that the magazine had not in fact libeled him, and to refuse to publish a retraction.<sup>166</sup> The lawyers refused to settle, fearing that a reputation for easy settlement would invite all those who had been mocked or criticized by the magazine to bring libel claims.<sup>167</sup> It was a point of pride at *The New Yorker* that it had never once paid out cash to settle a libel suit.<sup>168</sup> In virtually every case, the lawyers had been able to use "explanation or persuasion" to convince complainants

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157. Dawson, *Law and the Right of Privacy*, *supra* note 153, at 404.

158. Letter from Alexander Lindey to Ik Shuman (Aug. 17, 1938), *supra* note 137.

159. *Id.*

160. Randall Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 790–91 (1986) (naming the major motivating factors behind pursuing libel lawsuits as "restoring reputation, correcting what plaintiffs view as falsity, and vengeance").

161. FORDE, *supra* note 107, at 88.

162. *Id.* at 89.

163. *Id.* at 88.

164. *Id.* at 93.

165. *Id.* at 94.

166. *Id.* at 93–94.

167. *Id.* at 94–95.

168. *Id.*

to back down and abandon their claims.<sup>169</sup>

Alexander Lindey was assigned the *Sidis* case.<sup>170</sup> Both Lindey and founding partner Morris Ernst were highly-regarded entertainment and literary lawyers who had been employed by some of the most noted literary figures of the day, including James Joyce and playwright Edna Ferber.<sup>171</sup> They were also famous for their work on high-profile cases involving free speech and civil liberties. Ernst and Lindey were known for their defense of James Joyce in the *Ulysses* obscenity trial in 1933.<sup>172</sup> In a series of landmark cases in the early 1930s, they successfully represented defendants convicted of obscenity for the circulation of birth control information.<sup>173</sup> In the 1940s, Lindey defended *Esquire* magazine in an important free press case that reached the Supreme Court.<sup>174</sup> Ernst was counsel for the American Civil Liberties Union, and Lindey had been counsel for the American Newspaper Guild.<sup>175</sup> As coauthors, they published a treatise against film and literary censorship titled *The Censor Marches On* and a book on libel law called *Hold Your Tongue: Adventures in Libel and Slander*.<sup>176</sup>

From the start, Lindey knew that the battle with this eccentric, litigious and emotionally unstable plaintiff would be difficult and one of a kind. In early 1938, Sidis contacted *The New Yorker* reporter Barbara Linscott and allegedly threatened to do “dire things” to her unless she cooperated with him for the purpose of building up a case.<sup>177</sup> Lindey then dispatched an attorney to Boston to get Sidis to drop the suit in exchange for an “apology and small token payment for expenses incurred.”<sup>178</sup> Sidis rejected the offer and responded in a way that was described as “downright screwy.”<sup>179</sup> He submitted to the lawyer a “written memorandum . . . with a long series of ‘fines’ to be paid” by the magazine if they mentioned his name again.<sup>180</sup> In early 1938, Lindey asked *The New Yorker*’s fact checking department to check the accuracy of every statement in the article and obtained Linscott’s notes.<sup>181</sup> Recognizing that the “litigation may well turn out to be a serious one,”

169. *Id.* at 95.

170. *Id.*

171. *Id.* at 88.

172. *See* United States v. One Book Called “Ulysses,” 5 F. Supp. 182 (S.D.N.Y. 1933).

173. *See* United States v. Dennett, 39 F.2d 564, 567 (2d Cir. 1930); United States v. One Book Entitled “Contraception,” 51 F.2d 525, 526 (S.D.N.Y. 1931).

174. *See* *Esquire, Inc. v. Walker*, 151 F.2d 49 (D.C. Cir. 1945).

175. PAUL BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE 203 (2d ed. 2002); Alexander Lindey, 85, *Lawyer and an Author of Textbooks*, N.Y. TIMES, Nov. 12, 1981, at D23.

176. *See* MORRIS LEOPOLD ERNST & ALEXANDER LINDEY, THE CENSOR MARCHES ON: RECENT MILESTONES IN THE ADMINISTRATION OF THE OBSCENITY LAW IN THE UNITED STATES (1940).

177. Letter from *The New Yorker* to Barbara Linscott, *supra* note 133.

178. Letter from Ik Shuman, Editor, *The New Yorker*, to Alexander Lindey, Partner, Greenbaum, Wolff & Ernst (Oct. 4, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

179. Letter from Ik Shuman, Editor, *The New Yorker*, to Alexander Lindey, Partner, Greenbaum, Wolff & Ernst (Oct. 17 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

180. *Id.*

181. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor,

Lindey wrote his colleagues, it was extremely important that the case be “fully prepared.”<sup>182</sup>

In 1938, Lindey filed a motion to dismiss the privacy claims.<sup>183</sup> Lindey did not file a motion to dismiss the libel complaint, stating that his answer to the libel claim would depend on the disposition of the privacy issue.<sup>184</sup> Lindey probably hoped to defeat the suit on the privacy grounds, as Sidis’s privacy claims were far weaker than his libel claim. Though the piece had been fact-checked, its literary style, with its colorful language and innuendo, made it possible to pull from it potentially defamatory meaning. In the motion to dismiss the common law privacy claim, Lindey invoked the privilege for publications dealing with matters of public interest.<sup>185</sup> In *The Right to Privacy*, Warren and Brandeis had proposed a privilege for publications dealing with “matter[s] of public or general interest,” and the “public interest” privilege had been recognized in a handful of privacy cases since 1890.<sup>186</sup> Sidis’s life was a “matter of public interest,” Lindey argued—the public had a “rightful interest” in him—and thus the article was exempt from liability for invasion of privacy.<sup>187</sup>

When Sidis brought his case, at least fifteen states recognized some version of the privacy tort.<sup>188</sup> Many of the cases in which a right to privacy had been recognized involved the use of names and images in commercial advertising, not the publication of embarrassing private facts.<sup>189</sup> There was virtually no law to guide Sidis and *The New Yorker*’s lawyers as they made their respective claims.

#### A. SIDIS IN DISTRICT COURT

*The New Yorker*’s lawyers argued their motion to dismiss before Judge Henry Goddard in the District Court of the Southern District of New York.<sup>190</sup> Given the dearth of case law on the tort of invasion of privacy by publication of private facts,

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*The New Yorker* (Aug. 9, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

182. *Id.*

183. See *Sidis v. F-R Publ’g Corp.*, 34 F. Supp. 19 (S.D.N.Y. 1938).

184. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Harold W. Ross, Editor, *The New Yorker* (Aug. 9, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

185. See generally *Sidis*, 34 F. Supp. 19 (distinguishing this case from others on the basis of the public interest).

186. Warren & Brandeis, *supra* note 10, at 214; see, e.g., *Jones v. Herald Post*, 18 S.W.2d 972, 973 (Ky. 1929); *Hillman v. Star Publ’g Co.*, 117 P. 594, 596 (Wash. 1911).

187. See generally *Sidis*, 34 F. Supp. 19; see also Brief for Defendant-Appellee at 12, *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940) (No. 400).

188. See Louis Nizer, *The Right of Privacy: A Half Century’s Developments*, 39 MICH. L. REV. 526, 529–30 (1940).

189. *Id.*; see also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Kunz v. Allen*, 172 P. 532, 533 (Kan. 1918); *Foster-Millburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909), *appeal after remand*, 127 S.W. 476 (Ky. 1910); *Munden v. Harris*, 134 S.W. 1076, 1080–81 (Mo. Ct. App. 1911); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907).

190. *Sidis*, 34 F. Supp. 19.

the judge was “deeply interested in the case,” Lindey observed.<sup>191</sup> Recognizing the significance of the issues involved, Goddard “kept the [case] under advisement for over two months” and wrote a lengthy twenty-one page opinion.<sup>192</sup>

Goddard was sympathetic to Sidis’s plight.<sup>193</sup> Yet he concluded that Sidis had not stated a cause of action for invasion of privacy.<sup>194</sup> In his brief, Sidis had cited a series of cases that had recognized a common law right to privacy in Georgia, Kansas, Kentucky and Missouri.<sup>195</sup> Most of them involved advertising uses.<sup>196</sup> Goddard concluded that none of them supported Sidis’s contention that “‘the right of privacy’ [could] be violated by a newspaper or magazine publishing a correct account of one’s life or doings.”<sup>197</sup>

The only case in Sidis’s brief that involved the publication of private facts was *Brents v. Morgan*, a 1927 Kentucky case.<sup>198</sup> *Brents* involved a garage owner who “placed a large sign in [his] front window . . . informing the public that the plaintiff had . . . promised to pay his bill but had not done so and that he would continue to advertise it until it was paid.”<sup>199</sup> The Court of Appeals of Kentucky had allowed a cause of action for invasion of privacy on the grounds that the publicized material was not a matter of public interest.<sup>200</sup> Goddard distinguished *Brents* from *Sidis*, suggesting that while an unpaid debt was not a matter of legitimate public interest, Sidis’s story was.<sup>201</sup> Goddard did not say how he reached this conclusion.

On the New York privacy claim, Goddard held that the statute had not been violated because the *New Yorker* story was not for the purpose of “trade.”<sup>202</sup> The New York privacy statute required a court to determine whether the publication of a person’s image, name or identity was for a commercial or “trade” use.<sup>203</sup> If the publication was not explicitly marked as advertising, it was considered not to be “trade,” but rather news.<sup>204</sup> New York case law had long held that articles in newspapers and magazines would not be considered “trade” despite the fact that the publications were for profit.<sup>205</sup>

Sidis had relied on the 1913 New York case *Binns v. Vitagraph*, involving the fictional presentation in a movie newsreel of the story of a radio operator, Binns,

191. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Oct. 7, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

192. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Dec. 22, 1938) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

193. WALLACE, *supra* note 2, at 235.

194. *See Sidis*, 34 F. Supp. at 25.

195. *See id.* at 21–22 (distinguishing these cases).

196. *See id.*

197. *Id.* at 21.

198. *Id.*; *see Brents v. Morgan*, 299 S.W. 967 (Ky. 1927).

199. *Sidis*, 34 F. Supp. at 21.

200. *Id.*

201. *Id.* at 21, 25.

202. *Id.* at 24.

203. *Id.* at 24; *see* N.Y. CIV. RIGHTS LAW § 50 (McKinney 1903).

204. *Sidis*, 34 F. Supp. at 24.

205. *See, e.g., Colyer v. Richard K. Fox Publ’g Co.*, 146 N.Y.S. 999, 1000–01 (App. Div. 1914).

who had been involved in a noted shipwreck.<sup>206</sup> The radio operator sued, and the court held that the use of his name and image was a prohibited commercial use.<sup>207</sup> Sidis argued that *The New Yorker* sought to profit from his identity in the same way that the newsreel company had exploited Binns.<sup>208</sup> *Binns* was inapplicable, Goddard said.<sup>209</sup> The appropriation of the plaintiff's identity in *Binns* was forbidden because the newsreel was fictionalized and therefore not "news."<sup>210</sup> If a newspaper had published a truthful account of the shipwreck, no statutory violation would have occurred.<sup>211</sup> Goddard likened this hypothetical news publication to the *New Yorker* story, noting that both were matters of great "current interest."<sup>212</sup>

The opinion raised more questions than it answered. Goddard did not explain what he meant by a "matter of public interest." He did not indicate why he thought the *New Yorker* story was material of great "current interest," or how the "public's interest" could be determined. The lower court's decision in *Sidis v. F.R. Publishing* did nothing to clarify the muddled doctrine on the tort of invasion of privacy by publication of private facts.

### B. SIDIS AT THE SECOND CIRCUIT

Undaunted, Sidis promptly appealed to the New York-based Second Circuit Court of Appeals. He changed attorneys and was next represented by a small firm, Sapinsky, Lukas & Santangelo.<sup>213</sup> Lindey again tried to get Sidis to settle but insisted that "any money settlement was out of the question."<sup>214</sup> He proposed that Sidis write a letter presenting his views that would be printed in the magazine's corrections section, or that Sidis write an article for *The New Yorker* on "the collection of streetcar transfers" or "possibly on the subject of the vulnerability of the right of privacy of the individual in modern society."<sup>215</sup> Sidis again refused. Claiming that his \$17 weekly salary as an adding machine clerk made the filing fees prohibitive, Sidis filed a motion to file his papers with the court *in forma pauperis*.<sup>216</sup> Edwin Lukas argued the case before the Second Circuit for Sidis, and *The New Yorker* was represented by Lindey, no stranger to that court.<sup>217</sup>

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206. *Sidis*, 34 F. Supp at 24; see *Binns v. Vitagraph*, 103 N.E. 1108 (N.Y. 1913).

207. *Binns*, 103 N.E. at 1111.

208. *Sidis*, 34 F. Supp at 24.

209. *Id.* at 25.

210. *Id.*

211. *Id.*

212. *Id.*

213. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Nov. 30, 1939) (on file with *The New Yorker* Archives, N.Y. Pub. Library).

214. *Id.*

215. *Id.*

216. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Apr. 6, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library). Lindey noted that the panel of judges "expressed considerable interest in the case." Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Apr. 29, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

217. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 807 (2d Cir. 1940).

The three-judge panel that heard the case consisted of Robert Patterson, Thomas Walter Swan and Charles Edward Clark.<sup>218</sup> Swan and Clark were former deans of the Yale Law School.<sup>219</sup> Clark, who wrote the *Sidis* opinion,<sup>220</sup> had been recently appointed by Franklin Roosevelt, and is widely recognized as being the principal author of the 1938 Federal Rules of Civil Procedure.<sup>221</sup> Prior to taking up work in procedure, as a Yale law professor, Clark had written on constitutional issues and had an interest in freedom of speech.<sup>222</sup>

The *Sidis* case was heard in July 1940.<sup>223</sup> Clark acknowledged that the case raised an important and novel question of law.<sup>224</sup> It was one of the first to bring forward and test the very premise of the hallowed Warren and Brandeis argument that publishing “intimate, revealing or harmful” truths about an individual could be actionable as a tort.<sup>225</sup> This was a daunting task, in light of the fact that “none of the cited rulings goes so far as to prevent a newspaper or magazine from publishing the truth about a person, however intimate, revealing, or harmful the truth may be.”<sup>226</sup> The court “face[d] the unenviable duty of determining the law of five states on a broad and vital public issue which the courts of those states have not even discussed.”<sup>227</sup>

As in the lower court, there was sympathy for *Sidis*.<sup>228</sup> At oral argument, Alexander Lindey maintained that the publication of the story was “fully justified because *Sidis*’s later life was a tragic illustration of the havoc caused by the ruthless parental exploitation of gifted children; and that the public had a legitimate interest in learning the facts about him.”<sup>229</sup> According to Lindey, Judge Patterson brushed aside this argument “rather angrily” and “said that . . . the article was cruel and unjustified.”<sup>230</sup> Judge Clark observed that the article was a “ruthless exposure” and “merciless in its dissection of intimate details of its subject’s personal life . . . and the pitiable lengths to which he has gone in order to avoid public scrutiny.”<sup>231</sup> The panel nonetheless affirmed the district court, holding that the claim under the New York privacy statute failed because the publication was “news” rather than “trade,” and that *Sidis* had not stated a cause of action under the common law right

218. *Id.*

219. Fred Rodell, *For Charles E. Clark A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1324 (1965); Eugene V. Rostow, *Thomas W. Swan, 1877–1975*, 85 YALE L.J. 159, 160 (1975).

220. *Sidis*, 113 F.2d at 806.

221. Michael E. Smith, *Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

222. See *infra* at notes 346–47 and accompanying text.

223. *Sidis*, 113 F. 2d. 806.

224. *Id.* at 808.

225. *Id.*

226. *Id.*

227. *Id.*

228. WALLACE, *supra* note 2, at 235.

229. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Harold Ross, Editor, *The New Yorker* (July 24, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

230. *Id.*

231. *Sidis*, 113 F.2d at 807.

to privacy because he was a public figure and the story was a “matter of public interest.”<sup>232</sup>

### 1. Public Figures

Warren and Brandeis in *The Right to Privacy* had envisioned a privilege for the publication of information about public figures’ private lives.<sup>233</sup> Limited public disclosures of the personal habits and activities of public figures would not be actionable as an invasion of privacy on the theory that public figures, such as politicians and public officials, had willingly put themselves before the public eye and thus “waived” part of their right “to live their lives screened from public observation.”<sup>234</sup> A degree of public scrutiny was the tradeoff for the honor, recognition and power that came with a prominent public position. But the public figure’s waiver of privacy did not warrant unlimited forays into his personal life. According to Warren and Brandeis, only information directly related to his public activities—information “necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks”—was fair game for public consumption.<sup>235</sup> A politician’s romantic affairs, or the details of his home and family life would be off-limits to the public, as they did not shed light on his public role. In contrast to the modern era, when virtually all private conduct would be regarded as bearing on one’s public deeds, there was perceived to be a distinction between “the public side of . . . a public man” and “his whole personality.”<sup>236</sup>

While the public figure waiver had been discussed and theorized by legal commentators, in 1940 its practical application was unclear.<sup>237</sup> When Sidis brought his lawsuit, there were very few recorded court cases involving public figures who sued over the publication of private facts.<sup>238</sup> In these cases, no court was asked to confront the issue of exactly how much of his privacy the public figure waived.<sup>239</sup> A few courts in the 1930s had suggested that if presented with the question, they would construe the waiver more broadly than Warren and Brandeis had.<sup>240</sup> They suggested that given the media’s preoccupation with public figures’ personalities and private lives, public figures assumed the risk of having relatively intimate personal information disclosed in the press when they embarked on a public

232. *Id.* at 809–10.

233. Warren & Brandeis, *supra* note 10, at 215.

234. *Id.*

235. *See id.*; Pavesich v. New Eng. Life Ins., 50 S.E. 68, 72 (Ga. 1905).

236. *Right of Privacy*, 12 VA. L. REG. 91, 97 (1906).

237. *See, e.g.*, Earl Handler, *The Right of Privacy and Some of Its Recent Developments*, 44 DICK. L. REV. 39, 40 (1939); Nizer, *supra* note 188, at 541; John Gilmer Speed, *The Right of Privacy*, 163 N. AM. REV. 64, 73–74 (1896).

238. *Corliss v. E. W. Walker Co.*, 57 F. 434, 435 (D. Mass. 1893); *Jeffries v. N.Y. Evening Journal Publ’g Co.*, 124 N.Y.S. 780, 780 (Sup. Ct. 1910).

239. *Corliss*, 57 F. at 435; *Jeffries*, 124 N.Y.S. at 780.

240. *See, e.g.*, *Paramount Pictures v. Leader Press, Inc.*, 24 F. Supp. 1004, 1007 n.1 (W.D. Okla. 1938), *rev’d*, 106 F.2d 229 (10th Cir. 1939); *Martin v. New Metro. Fiction, Inc.*, 237 A.D. 863 (N.Y. App. Div. 1932); *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Op. 338, 340, 341 (Ct. Com. Pl. 1938).

career.<sup>241</sup> As an Ohio appeals court had noted in 1938, “[the right of privacy] does not exist where the person has become prominent, notorious, or well known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby has waived his right of privacy.”<sup>242</sup> But comments like these were only hints—mere dicta—and at the time of the *Sidis* case the scope of the public figure’s waiver of privacy was very much an open question.

Courts did, however, expand the concept of the “public figure” far beyond what Warren and Brandeis had intended. Reflecting nineteenth century understandings of fame, the Warren and Brandeis definition of the public figure was normative—a public figure was a person who had voluntarily taken up public affairs, such as a government official or civic leader, and fame and publicity were returns for his substantive contributions to public life.<sup>243</sup> By the 1930s, however, courts had begun to define the public figure in largely descriptive terms—a public figure was a person who had been publicized. Thus not only figures like actors, “criminals, prize fighters, [and] fan dancers,” were regarded as public figures, but so were average citizens who happened to get their names or pictures in the press.<sup>244</sup> In *Hillman v. Star Publishing*, the daughter of a man arrested for real estate fraud sued a newspaper for invasion of privacy when it published her picture in conjunction with a story about the crime.<sup>245</sup> A Washington appeals court, holding that no invasion of privacy had occurred, suggested that the girl’s connection to the case, albeit tangential and unwilling, made her a public figure.<sup>246</sup> In 1929, in *Jones v. Herald Post*, the Kentucky Court of Appeals held that a woman who witnessed her husband attacked and killed on the street had no cause of action for invasion of privacy against the local paper when it published a picture of her.<sup>247</sup> The woman became a public figure by becoming involved, though involuntarily, in a “matter of public interest.”<sup>248</sup>

This “involuntary public figure” concept upended the earlier notion that fame and publicity should reflect the individual’s intent to enter public life. It was an apt reflection of the changing nature of fame in the twentieth century, which had become increasingly divorced from achievement.<sup>249</sup> In an age of human interest journalism, when the true stories of everyday people had become a major publishing genre, ordinary people could find themselves thrust before the media

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241. *Martin*, 10 Ohio Op. at 341 (“Persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding stay-at-home citizen.”).

242. *See id.* at 340–41; *see also* RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939) (the public figure “must . . . pay the price of even unwelcome publicity through reports upon his private life and photographic reproductions of himself and his family,” unless . . . defamatory).

243. Warren & Brandeis, *supra* note 10, at 215.

244. *See Nizer*, *supra* note 188, at 540 (discussing criminals, prize fighters and fan dancers).

245. *See Hillman v. Star Publ’g Co.*, 117 P. 594 (Wash. 1911).

246. *See id.* at 596.

247. *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929).

248. *Id.*

249. LEO BRAUDY, *THE FRENZY OF RENOWN: FAME AND ITS HISTORY* 546 (1997); LARY MAY, *SCREENING OUT THE PAST: THE BIRTH OF MASS CULTURE AND THE MOTION PICTURE INDUSTRY* (1980).

spotlight by doing nothing more than piquing public interest or curiosity.<sup>250</sup> “If fate brings [one] tragedy, pain, or even extraordinary luck, his private life will surely be served up hot and steaming,” noted one critic of the 1940s.<sup>251</sup> The papers were filled with “human interest” stories about persons whose connection to important matters was of the slightest.<sup>252</sup>

At the time Sidis brought his case, courts in privacy cases continued to inquire whether a plaintiff had voluntarily put himself in the spotlight and “waived” his right to privacy. Yet the waiver inquiry was beginning to fall out of favor as it came to be recognized that fame was almost entirely a function of the public’s interest or curiosity in a person and the mass media’s ability to generate or further that interest. As a noted privacy lawyer aptly observed in 1940, “public curiosity” had become “a mysterious thing”—one that “frequently concentrates most heavily on those least deserving” of it.<sup>253</sup> The subject’s desire to be famous or to enter the public arena had relatively little to do with it.

This did not mean that a person put before the public against her will had to remain there indefinitely. According to the *Restatement (First) of Torts*, a influential legal treatise published by the American Law Institute in 1939, involuntary public figures, whose rise to public attention was associated with a specific event such as an accident or a crime, should have a right to return to anonymity when the event with which they had been associated had passed, and public interest in them had waned.<sup>254</sup> Referring to those “unjustly charged with crime or the subject of a striking catastrophe,” the *Restatement* observed that such persons were “objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention.”<sup>255</sup> But if their stories were rehashed in the press after they “reverted to the lawful and unexciting life led by the great bulk of the community,” they might have a cause of action for invasion of privacy.<sup>256</sup> In *Mau v. Rio Grande Oil*, a federal district court in California recognized this principle when it rejected the motion to dismiss a privacy claim brought against NBC for broadcasting the story of a robbery a year and a half after it had occurred.<sup>257</sup> When the victim of the holdup heard his story retold on the radio, he was forced to relive the horrible event, causing psychological trauma that led to his unemployment.<sup>258</sup> It was implied in the court’s opinion that reporting on the holdup at the time it occurred would not have been an invasion of privacy, and that the victim, for a period of time after the incident, was legitimately a public figure.<sup>259</sup> But over time he lost his public figure status, and a

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250. See Mitchell Dawson, *Paul Pry and Privacy*, ATLANTIC MONTHLY, Oct. 1932, at 385–86 [hereinafter Dawson, *Paul Pry and Privacy*].

251. Dawson, *Law and the Right of Privacy*, *supra* note 153, at 405.

252. *Id.*

253. Nizer, *supra* note 188, at 540.

254. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

255. *Id.*

256. *Id.*

257. See *Mau v. Rio Grande Oil*, 28 F. Supp. 845 (N.D. Cal. 1939).

258. *Id.* at 845–46.

259. *Id.* at 846–47.

radio broadcast that dredged up the story from the past interfered with his right to revert to anonymity and to be left alone.<sup>260</sup>

There were, however, public figures whose lives commanded deeper and more long-term public interest. These “general interest” public figures became well known not for their association with an isolated or random event, but rather for their accomplishments, talents or interesting lives.<sup>261</sup> General interest public figures were often “voluntary,” in that they had willingly put themselves before the spotlight, but they might also be involuntary. Their defining quality was that they had generated sustained public interest or concern, and in so doing, secured a place in the collective memory. In an early privacy case, *Corliss v. Walker*, a federal district court implied that these sorts of public figures had no legal right to retreat from the public gaze, even after death.<sup>262</sup> In *Corliss*, the wife of a deceased inventor claimed that the author of a biography of her late husband invaded his privacy by describing incidents in his life without his consent.<sup>263</sup> The court held that the celebrated inventor’s life story was a matter of public interest—the common property of the people, “given to the public” for all time—and that his family had no right to complain when others told it.<sup>264</sup>

It was against this backdrop that *Sidis* and *The New Yorker* sparred over whether the reclusive genius was legally a “public figure.” *Sidis* argued that he had been an involuntary public figure, since he had never sought publicity as a child, and that he could not have waived his right of privacy, for he was only a child when his public life began.<sup>265</sup> His fame had been tied to his childhood feats, he argued; with those events long past, he had a right, in the words of the *Restatement*, to revert to the anonymous and “unexciting life led by the great bulk of the community.”<sup>266</sup> *The New Yorker*’s lawyers mocked the notion that a public figure could ever “retire.”<sup>267</sup> “Society has [an interest] in free discussion,” Lindey argued.<sup>268</sup> “[I]t would be an evil day for writers and publishers, and a worse one for the courts,” when a public figure could “of his own volition withdraw from the public scene at any time” then “sue for breach of his right to privacy [when] he is subsequently written up.”<sup>269</sup>

Judge Clark did not say whether he thought *Sidis* was an involuntary public figure. He concluded, nonetheless, that *Sidis* was a general interest public figure because there was great and enduring public interest in him, and as such, he had no

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260. See *id.* at 846–47; see also *Melvin v. Reid*, 297 P. 91, 93 (Cal. App. 1931).

261. This exact term was not actually used in privacy cases; I have adopted it from libel law, which draws distinctions between “limited purpose” public figures—the equivalent of privacy law’s “involuntary public figure”—and “general purpose” public figures. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

262. *Corliss v. E. W. Walker Co.*, 57 F. 434, 435 (D. Mass. 1893).

263. *Id.*

264. *Id.*

265. WALLACE, *supra* note 2, at 264.

266. See *supra* note 256 and accompanying text.

267. Brief for Defendant-Appellee at 14, *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940) (No. 400).

268. *Id.* at 12.

269. *Id.* at 12–14.

right to retreat from the public eye.<sup>270</sup> “William James Sidis was once a public figure,” Clark wrote.<sup>271</sup> “As a child prodigy, he excited both admiration and curiosity. Of him great deeds were expected. In 1910, he was a person about whom the newspapers might display a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity.”<sup>272</sup>

“Since then,” Clark continued, “Sidis has cloaked himself in obscurity.”<sup>273</sup> He had gone to “pitiable lengths” to seclude himself and separate himself from his painful past.<sup>274</sup> He was nonetheless a public figure at the time of the *New Yorker* article because “his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise,” was still a “matter of public concern.”<sup>275</sup>

How did Clark determine that Sidis’s adult life was a “matter of public concern,” or as he later phrased it, a “matter of public interest”? He did not take an opinion poll. He did not stand on the street and ask passersby if they remembered or cared about William James Sidis. Clark appeared to have concluded that Sidis’s story was a “matter of public interest” for no reason other than the fact that it had appeared in a popular magazine.

## 2. The Public’s Interest

Clark confirmed that it was “public concern” or “public interest,” that determined whether or not one was a public figure and how long they were obligated to stay in the spotlight. “Public interest” also determined *how much* of a public figure’s private life could be revealed without legally invading his privacy.

In *The Right to Privacy*, Warren and Brandeis proposed a privilege for publications dealing with “matters of public or general interest.”<sup>276</sup> “Matters of public interest” were topics that served the “public interest,” in the sense of the public welfare or public good, and private facts published in this context were theoretically exempt from liability for invasion of privacy.<sup>277</sup> News about politics, finance and civic affairs were quintessential matters of public interest.<sup>278</sup> A matter of public interest was not merely what the public was interested in.<sup>279</sup> Gossip about private lives published merely for amusement or to satisfy idle curiosities was never a legitimate matter of public interest.<sup>280</sup>

Under the Warren and Brandeis analysis, the details divulged in the *New Yorker*

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270. Sidis v. F-R Publ’g Corp., 113 F.2d 806, 809 (2d Cir. 1940).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 807.

275. *Id.* at 809.

276. Warren & Brandeis, *supra* note 10, at 214–16.

277. *Id.*

278. *Id.*

279. *Id.* at 216.

280. *Id.*

piece would not have been “matters of public interest,” Judge Clark observed.<sup>281</sup> The article revealed “personal details . . . of the sort that Warren and Brandeis believed ‘all men alike are entitled to keep from popular curiosity.’”<sup>282</sup> But, Clark implied, changes in society since the nineteenth century—a reference to the proliferation of private subjects in the mass media—made the “strict” Warren and Brandeis standard no longer applicable.<sup>283</sup> Contemporary social practices and mores permitted more of a “lift[ing] of the veil” around public figures than those authors would have allowed.<sup>284</sup> The boundaries between public and private had shifted, and American culture in the 1930s had come to regard much that would have been off-limits in the 1890s as legitimate matters of public attention.<sup>285</sup>

Clark was not willing to “afford . . . all of the intimate details of private life an absolute immunity from the prying of the press,” or to encourage the press to pander to a “trivial and unseemly curiosity.”<sup>286</sup> He would, however, permit “scrutiny of the ‘private’ life of any person who has achieved, or has had thrust on him the questionable and indefinable status of a ‘public figure.’”<sup>287</sup> The degree of public scrutiny of a public figure’s private life permitted by the law was to be determined by the “public’s interest.” Like Judge Goddard at the district court, Clark offered only a hazy definition of what the “public interest” was and how it would be measured.<sup>288</sup>

The only reported case before *Sidis* in which a media defendant had successfully invoked the public interest privilege was *Jones v. Herald Post*.<sup>289</sup> In that case, the court suggested that news of a man’s assault and murder on the street was a legitimate matter of public interest, and that the publication of a woman’s photograph in conjunction with the crime was privileged.<sup>290</sup> In *Metter v. Los Angeles Examiner*, decided the year before *Sidis*, a California district court of appeal suggested that news of a suicide was a legitimate matter of public interest and that the husband of the victim did not have a cause of action for invasion of privacy when the newspaper published a photograph of the woman’s death.<sup>291</sup> Clark observed that the incidents in *Jones* and *Metter* were “matters of public interest,” in the classic Warren and Brandeis sense.<sup>292</sup> They were “news”—current

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281. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

282. *Id.* at 809.

283. *Id.*

284. *Id.*

285. A writer in 1932 in *The Atlantic* noted: “The pendulum has swung far since the hyper-reticent days of our grandmothers. . . . [T]he majority [has] lost all desire for privacy, either for themselves or for anyone else. They step eagerly into the range of every newspaper and movie camera, and send in their names by the thousand to have them announced over the radio.” See Dawson, *Paul Pry and Privacy*, *supra* note 250, at 387.

286. *Sidis*, 113 F.2d at 809.

287. *Id.*

288. *Id.*

289. See *Jones v. Herald Post Co.*, 18 S.W.2d 972 (Ky. 1929).

290. *Id.* at 973.

291. *Metter v. L.A. Exam’r*, 95 P.2d 491, 496 (Cal. Dist. Ct. App. 1937).

292. See *Sidis*, 113 F.2d at 808 n. 4.

events of great importance and significance to the community.<sup>293</sup>

William James Sidis had been news, too, when he was a child. At that time, stories about his amazing accomplishments sparked a “legitimate intellectual interest,” Clark wrote.<sup>294</sup> But the story of Sidis’s adult life was not a current event. It was not news. Like much of human interest journalism, it straddled the line between news and entertainment. The details presented in the *New Yorker* article were not quintessential “matters of public interest,” Clark admitted.<sup>295</sup> But he was not willing to put *The New Yorker* in with tabloids, scandal publications and pulp magazines that pandered to “unseemly” curiosities.<sup>296</sup> Instead, Clark created a new category of privileged material, one in between matters of public interest that appealed to a “legitimate intellectual interest” and those that played to a “trivial and unseemly curiosity.”<sup>297</sup> This was the category of “popular news interest.”<sup>298</sup> The *New Yorker* article had “popular news interest,” Clark wrote; it held “great reader interest, for it is both amusing and instructive.”<sup>299</sup> Stories about the “misfortunes and frailties of neighbors and ‘public figures,’” he observed, were of “considerable interest . . . to the rest of the population.”<sup>300</sup>

The details about Sidis’s life in the *New Yorker* article were thus a privileged “matter of public interest,” according to Clark, because they interested—that is, titillated and amused—the public. With this, Clark entirely subverted the original meaning of the public interest privilege. The only basis for Clark’s conclusion that the material interested the public was the fact that it appeared in the mainstream press. Clark permitted *The New Yorker* to engage in what one law review writer at the time criticized as a “bootstrap-lifting venture.”<sup>301</sup> *The New Yorker* brought Sidis into the spotlight, then pointed to the interest it had generated to argue that Sidis was a public figure and that the details of his private life were a “matter of public interest.”<sup>302</sup> This impermissibly “elastic interpretation” of the public figure and public interest privileges, critics argued, rendered them “almost meaningless.”<sup>303</sup>

Clark used a similar “leave it to the press” approach when he concluded that the article did not violate community mores. The idea that the privacy tort could be used to punish socially transgressive publications, those that disregarded conventional standards of morality, had been part of the Warren and Brandeis analysis and implicit in subsequent privacy opinions.<sup>304</sup> The *Sidis* court, for the

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293. *Id.*

294. *Id.* at 809.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 807.

300. *Id.* at 809.

301. Recent Cases, *Torts—Right of Privacy—Public Figure Test as Determinative of Right to Recovery*, 8 U. CHI. L. REV. 382, 384 (1941) (internal quotation marks omitted).

302. *Id.*

303. Recent Decision, *Torts—Right of Privacy of Former Child Prodigy*, 29 CALIF. L. REV. 87, 88 (1940).

304. Warren & Brandeis, *supra* note 10, at 196; *see, e.g.*, *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist.

first time, made this standard explicit. The privacy tort tracked community norms, the court suggested, and material that was “so intimate and so unwarranted in the view of the victim’s position” as to offend the “community’s notions of decency” could be liable as an invasion of privacy even if it was a matter of public concern.<sup>305</sup> The Second Circuit did not indicate how a court should determine standards of community decency but claimed that no such violation had occurred in the *Sidis* case. Perhaps, the fact that the material appeared in a popular and reputable publication suggested that it was not offensive; the mainstream press was not likely to publish information that would shock, insult or alienate its paying readership. In looking to media content as the barometer of public morals and public interests,<sup>306</sup> the *Sidis* court gave the press substantial latitude to print private facts without fear of liability for invasion of privacy.

### 3. Freedom of the Press and the Public’s Right to Know

Though Clark did not explicitly use the language of the Constitution, and *The New Yorker* did not raise a formal First Amendment defense, *Sidis* must be viewed as a free press case. The court’s approach to the case was informed by an emerging civil libertarian theory and jurisprudence of freedom of speech and press, and new ideas about why allowing *The New Yorker* to cater to the public’s interests and curiosities was in the public’s best interest. In the 1930s, in the charged political climate of the Great Depression, and with the rise of fascism in Europe, there were heightened concerns with censorship, freedom of expression and belief and the free flow of the news.<sup>307</sup> Impediments to public access to information, and state-enforced standards of taste and morality of the sort that might be imposed by a strict right to privacy, were coming to be viewed as anathema to the ideal of participatory, pluralist democracy.<sup>308</sup>

At the turn of the century, the prevailing position in the legal academy and the courts was that a tort action for invasion of privacy did not conflict with freedom of speech and press.<sup>309</sup> First Amendment law at that time was undeveloped and largely deferential to the state; legislative prohibitions of speech that had a “bad tendency,” speech that was said to offend public sensibilities or morals, were generally considered legitimate exercises of the police powers.<sup>310</sup> The entire entry

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Ct. App. 1931); *Douglas v. Stokes*, 149 S.W.2d 849, 849–50 (Ky. Ct. App. 1912).

305. *Sidis*, 113 F.2d at 809.

306. *See id.*

307. *See* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77 (2000).

308. *See* BOYER, *supra* note 175, at 254–69.

309. *See, e.g.*, W. Archibald McClean, *The Right of Privacy*, 15 GREEN BAG 494, 497 (1903) (arguing that freedom of the press was guaranteed “except so far as it invades and violates the right of privacy”). *But see* Comment, *An Actionable Right of Privacy? Roberson v. Rochester Folding Box Co.*, 12 YALE L.J. 35, 37–38 (1902); S.D.M., Annotation, *Injunctions Against Publications Intruding upon Privacy*, *Corliss v. E. W. Walker Co. United States Circuit Court, District of Massachusetts*, 43 AM. L. REG. 134, 135–36 (1895).

310. STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* 223–24 (2008). The First Amendment was not yet incorporated through the Fourteenth, and the free speech

on freedom of the press in a 1901 encyclopedia stated that it “consists in the right to publish, with impunity, the truth, with good motives and for justifiable ends, whether it respects governments or individuals.”<sup>311</sup> It did not protect publications that “from their blasphemy, obscenity or scandalous character, may be a public offense, or as by their falsehood and malice . . . may injuriously affect the standing, reputation, or pecuniary interests of individuals.”<sup>312</sup> Libels and the publication of humiliating private facts were described as destructive of public morals and thus could be repressed without constitutional difficulty. As the *Virginia Law Register* noted in 1906, “the constitutional prohibition against passing a law abridging freedom of speech or the press, was not intended to confer a license, without any limitation, to override the rights of others,” including the right to be left alone.<sup>313</sup> “The constitutional right to speak and print,” noted the Georgia Supreme Court in 1905, did not carry with it the right to publicize a person’s picture or private life against his will, which represented a grievous affront to the subject’s dignity and liberty.<sup>314</sup>

By the time Sidis brought his case, however, free speech law had been substantially developed and liberalized, throwing this earlier position into doubt. Beginning with *Near v. Minnesota*, in a series of 1930s cases involving criminal punishment of the advocacy of socialists, communists, labor radicals and other dissenters, the Supreme Court rejected the bad tendency rule and initiated the practice of heightened scrutiny of state action abridging speech on politics and public affairs.<sup>315</sup> With the exception of material that posed a “clear and present danger” of imminent violence, prohibitions or impairments of political speech on the basis of disfavored content or viewpoints were presumptively unconstitutional.<sup>316</sup> Under this approach, expression could no longer be suppressed because it was merely distasteful, controversial or unpopular. Because free expression was the cornerstone of democracy—“the matrix, the indispensable condition, of nearly every . . . form of freedom,” as the Court wrote in 1937—freedom of speech occupied a “preferred freedom” position in the scheme of constitutional liberties, and state actions restricting speech could not stand unless justified by a compelling government interest beyond mere disagreement with the views espoused.<sup>317</sup>

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provisions in most state constitutions were written to reflect the “bad tendency” rule. See DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 132, 147 (1997).

311. FELDMAN, *supra* note 310, at 234 (quoting 18 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1125 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1901)).

312. *Id.*

313. *Right of Privacy*, *supra* note 236, at 92.

314. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905).

315. See *Near v. Minnesota*, 283 U.S. 697, 708–22 (1931). In 1941, the Court demarcated the area of protected speech as “matters of public concern,” which it described as “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

316. See, e.g., *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937); *Stromberg v. California*, 283 U.S. 359, 366–69 (1931).

317. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). On the “preferred freedom” theory of the Court in this era, see FELDMAN, *supra* note 310, at 371–72.

The justification for this position was the ideal of participatory democracy. The proper government response to dissenting or discordant thought was tolerance rather than repression—political strife would be resolved with open public debate and “more speech, not enforced silence,” wrote Louis Brandeis, who as a Justice on the United States Supreme Court had become a noted champion of free speech, notwithstanding his support for privacy.<sup>318</sup> Public discussion was the “duty” of every citizen in a democratic society, Brandeis had written in his famous concurrence in *Whitney v. California*, and it was only through disagreement, dialogue and debate that the public could arrive at collective solutions to the issues and problems of the day.<sup>319</sup>

In this emerging view of free expression and democracy, a free press played a crucial role. The Court interpreted freedom of the press not only as the right of the press to publish free from most state-imposed restrictions on content, but the right of the public to have access to a wide range of information about public affairs, the basis of “public discussion.” The Court recognized the importance of the mass media—radio, film, mass-market print publications—as conduits for the dissemination of news to the mass public.<sup>320</sup> In *Near*, which struck down a state law prohibiting the publication of a “scandal sheet,” the Court noted the necessity of the press—even tabloids and scandalous newspapers—as a means of generating public discourse around politics and civic affairs.<sup>321</sup> In *Grosjean v. American Press*, in which the Court invalidated a Louisiana law that imposed a discriminatory tax on high-circulation newspapers, Justice Sutherland observed the significance of a free press in disseminating news and enabling the public to “unite[] for [its] . . . common good” as “members of an organized society.”<sup>322</sup> In *Associated Press v. United States*, upholding the application of antitrust law to the newspaper industry, Justice Black observed that that the First Amendment protected the public’s interest in the “dissemination of news from as many . . . sources, and with as many different facets and colors as is possible,” which was essential to “the vitality of our democratic government.”<sup>323</sup>

During the following decade, the Court took up a series of cases involving the expression of religious minorities and the censorship of entertainment media, in which the Court articulated what has been described as an antipaternalism theory of freedom of speech: the purpose of the constitutional guarantee was to encourage the flourishing of diverse forms of thought, culture and expression free from state interference.<sup>324</sup> The First Amendment prohibited restrictions on speech and publishing based on arbitrary and subjective moral standards. It acted as a shield for “many types of life, character, opinion, and belief [to] develop unmolested and

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318. See *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring).

319. *Id.* at 375 (Brandeis, J., concurring).

320. See *Near*, 283 U.S. at 720.

321. See *id.*

322. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936).

323. See *Associated Press v. United States*, 326 U.S. 1, 28, 29 (1945).

324. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 617 (2004).

unobstructed,” the majority wrote in *Cantwell v. Connecticut*, one of many cases in this period in which the Court protected the free expression rights of Jehovah’s Witnesses.<sup>325</sup> Antipaternalism and anticensorship principles were also behind Supreme Court decisions in the 1940s in cases dealing with content-based restrictions on popular culture and entertainment. As the Court observed in *Hannegan v. Esquire*, reversing an order of the Postmaster General denying the second-class mailing privilege to *Esquire* magazine, “[u]nder our system of government there is an accommodation for the widest variety of tastes and ideas . . . . [A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.”<sup>326</sup> The purpose of the First Amendment was to protect the right of the people to freely “pick and choose” what culture and information to consume “from the multitude of competing offerings,” as “what seems to one to be trash may have for others fleeting or even enduring values.”<sup>327</sup> In *Winters v. New York*, the Court invalidated the conviction of a seller of pulp magazines under a New York statute criminalizing the publication and sale of materials depicting “bloodshed, lust and crime.”<sup>328</sup> “What is one man’s amusement teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines,” the Court concluded, “they are as much entitled to the protection of free speech as the best of literature.”<sup>329</sup>

At the time of the Second Circuit’s decision in *Sidis* in 1940, these principles had yet to become a part of formal constitutional doctrine. They flourished, however, in the popular discourse around freedom of speech. During the Depression and into World War II, free speech issues were the focus of great public interest and attention. The public watched with horror the book burnings and destruction of a free press in fascist Europe, and the suppression of American labor protesters and communists convinced many that state repression of dissent was not foreign to this country.<sup>330</sup> At a time when the censorship of “indecent” or “immoral” literature and film in dozens of states and municipalities around the country was in decline, grassroots anticensorship movements gained an extensive popular following.<sup>331</sup> In writings and protests, they presented censorship of art and culture as no less a free speech issue than the repression of unpopular political views.<sup>332</sup> In the 1930s, Lindey and Ernst were involved in a national campaign to have film censorship declared unconstitutional under the First Amendment; the effort took as its guiding premise the notion that movies were the “people’s

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325. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *see also* *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943).

326. *Hannegan v. Esquire*, 327 U.S. 146, 157–58 (1946).

327. *Id.* at 158.

328. *Winters v. New York*, 333 U.S. 507, 508 (1948).

329. *Id.* at 510.

330. *See* Reuel Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77–78 (2000); BOYER, *supra* note 175, at 265–66.

331. *See, e.g.*, BOYER, *supra* note 175, at 244–49; 265–69 (discussing the decline of vice societies and other censorship movements in the late 1920s and early 1930s and the rise of anticensorship movements).

332. *Id.* at 265–69.

entertainment,” and that censors interfered with the public’s constitutional right to consume the culture, entertainment and information it wished, unfettered by the state.<sup>333</sup>

More expansive views of freedom of speech were also expressed in common law doctrines in this period. State courts offered interpretations of obscenity law that permitted a wider range of expression. In the famed *Ulysses* case, litigated by Ernst and Lindey, the United States District Court for the Southern District of New York in 1933 held that sensual literature is not obscene, and that the judgment as to whether or not material is obscene should be determined according to its effects on the reasonable adult, rather than the vulnerable child, and in light of contemporary community standards.<sup>334</sup> There was also new attention to defamation law’s threat to a free press and public discussion.<sup>335</sup> Several states liberalized libel law by adopting a conditional privilege that would immunize publishers from liability for good faith misstatements of fact about public officials and “matters of public concern.”<sup>336</sup> The public’s right to freely learn about and criticize its leaders, libel law reformers had argued, was the basis of democratic government, protected by the Constitution.<sup>337</sup>

The Supreme Court did not address the potential conflict between the right to privacy and free speech, nor the relationship between the First Amendment and tort liability. In the 1930s, a free speech analysis was nonetheless beginning to influence the discussion around the “public interest” privilege to the privacy tort and the similar “news” privilege under the New York privacy statute. Free speech ideas began to appear in state court opinions in cases involving privacy and the media in the late 1930s. In *Sarat Lahiri v. New York Daily Mirror*, a New York trial court held that a photograph published in a newspaper in conjunction with a feature article about rope tricks was nonactionable because the article was a newsworthy matter “of public interest,” and that a right of privacy that would curtail the publication of “news items and articles of general public interest, educational and informative in character” implicated the rights of a “free press.”<sup>338</sup> In 1939, in *Kline v. Robert M. McBride & Company*, a New York trial court held that a construction of the state privacy statute that would impose liability for the publication of nonfiction works about “persons and concerning things of current interest” violated freedom of speech.<sup>339</sup> In his opinion in the lower court’s decision in *Sidis*, Judge Goddard had similarly suggested that “the right of free speech and freedom of the press” required a decision in favor of *The New Yorker*.<sup>340</sup>

Citing Judge Goddard’s dictum, *The New Yorker* presented the *Sidis* case to the

333. Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665 (2012).

334. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 184–85 (S.D.N.Y. 1933).

335. ROSENBERG, *supra* note 142, at 212–21.

336. *Id.*

337. FREDERICK SEATON SIEBERT, *THE RIGHTS AND PRIVILEGES OF THE PRESS* 332 (1934); Recent Case, *Libel and Slander—Privilege—Libel of Candidate for Public Office—Limits of Fair Comment*, 17 CALIF. L. REV. 693, 695 (1929).

338. *Lahiri v. Daily Mirror, Inc.*, 162 Misc. 776, 782 (N.Y. Sup. Ct. 1937).

339. *Kline v. Robert M. McBride & Co.*, 170 Misc. 974, 978, 981–83 (N.Y. Sup. Ct. 1939).

340. *Sidis v. F-R Publ’g Corp.*, 34 F. Supp. 19, 25 (S.D.N.Y. 1938)

Second Circuit as a battle for free speech.<sup>341</sup> A ruling for Sidis, Lindey argued, would mark the “first time that the courts of this country have upheld the right of a person to prevent the publication of the truth about his life and doings.”<sup>342</sup> If Sidis’s theory were upheld, it would have a chilling effect on the publication of popular literature and journalism, and the “bulk of contemporary nonfiction literature would have to go by the boards.”<sup>343</sup> “Every time a publication printed the name or picture of a living person without his written consent, it would be inviting suit.”<sup>344</sup> “Biographical sketches such as those featured by every magazine of standing” and “discussions of prominent personalities” in the *New York Times* would be written out of existence.<sup>345</sup>

The magazine’s argument appears to have been received favorably by Judge Clark. Though Clark’s position on the First Amendment in 1940 is not known, one can glean some insights into his views on freedom of speech and civil liberties from his earlier and later writings on the topic. As a law professor at Yale in the 1920s, Clark had written articles in the *Yale Law Journal* criticizing Supreme Court decisions that had upheld World War I era convictions for dissident writings under the Espionage and Sedition Acts.<sup>346</sup> The only hope for success of government by and for the people, he had written, was that “beliefs [be] formed without compulsion and as a result of arguments tested by their power to get themselves ‘accepted in the market’”<sup>347</sup> Clark would later write noted dissents in cases involving convictions for refusal to comply with the House Un-American Activities Committee in the post-World War II Red Scare.<sup>348</sup> He condemned attempts to “enforce conformity of political thinking” and to penalize the diversity of thought that makes “democracy grow and flourish.”<sup>349</sup> One biographer described Clark as “instinctive” in his “support of . . . free speech.”<sup>350</sup>

Though Clark did not use constitutional language in *Sidis*, and framed his discussion in terms of the common law “public interest” privilege, the *Sidis* opinion reflected the emerging view of the First Amendment as a guarantee of public access to a broad range of information through the mass media. A right to privacy that permitted public figures to throw a shield around their private lives and immunize themselves from truthful comment on their “dress, speech, habits, and ordinary aspects of personality” violated democratic commitments to political transparency

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341. Brief for Defendant-Appellee at 4–5, *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806 (2d Cir. 1940) (No. 400).

342. *Id.* at 6.

343. *Id.*

344. *Id.*

345. *Id.*

346. C.E.C., *Freedom of Speech—A Note on Professor Corwin’s Article*, 30 YALE L.J. 68, 69–79 (1920).

347. *Id.* at 70.

348. See, e.g., *United States v. Sacher*, 182 F.2d 416, 463–66 (2d Cir.1950), *aff’d*, 343 U.S. 1 (1952); *United States v. Josephson*, 165 F.2d 82, 97 (2d Cir. 1947); see also Rodell, *supra* note 219, at 1328–30.

349. *Josephson*, 165 F.2d at 97.

350. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 108 (Roger K. Newman ed., 2009).

and accountability, Clark suggested.<sup>351</sup> A right to privacy that allowed courts, rather than publishers and consumers, to control what appeared in the media, he implied, violated First Amendment principles.<sup>352</sup> Though the contents of *The New Yorker*, Clark probably recognized, were not a true mirror of the “public’s interests”—the mass media both reflect and create popular interests and tastes—he may well have believed that *The New Yorker*’s editors, whose concerns with profit forced them to stay in step with audience preferences, were better suited to assess popular interests and tastes than federal judges. Presaging later Supreme Court decisions, the *Sidis* opinion suggested that the right of the public to make choices about what culture, media and knowledge to consume—no matter how trivial or banal—was a matter at the heart of freedom of speech.<sup>353</sup> While the *New Yorker* article may have been thoughtless, even crass, it was not the role of the court to enforce good taste. “Regrettably or not,” Clark wrote, “the misfortunes and frailties of neighbors and ‘public figures’” were subjects of interest to the public, “[a]nd when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.”<sup>354</sup> “Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual’s desire for privacy,” he explained.<sup>355</sup>

The Second Circuit panel may have feared that the right to privacy, as *Sidis* construed it, was a “vehicle for the establishment of a judicial censorship of the press.”<sup>356</sup> It was also effectively a prohibition of gossip. The late 1930s and early 1940s saw academic and popular interest in the sociology of gossip, particularly gossip in the mass media.<sup>357</sup> The consumption of gossip columns and human interest journalism was coming to be recast as not merely a frivolous or prurient pastime but as a potentially valuable social ritual. In an academic work published the same year as the *Sidis* decision, the sociologist Helen MacGill Hughes argued that gossip columns and human interest journalism permitted the “sort of intercourse that people formerly carried on at the crossroad stores or back fences.”<sup>358</sup> In an urban, fragmented mass society lacking organic social ties, popular journalism created the “conditions of close communication”—the common interests and shared frames of reference—that bound strangers together as a public.<sup>359</sup> As sociologist Bernard Berelson had discovered in studies of newspaper readership, by giving people something in common to talk about, news and entertainment journalism became the basis of social interaction and connection.<sup>360</sup>

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351. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)

352. *Id.*

353. *See, e.g.*, *Hannegan v. Esquire*, 327 U.S. 146, 157–58 (1946).

354. *Sidis*, 113 F.2d at 809.

355. *Id.*

356. *See Aquino v. Bulletin Co.*, 154 A.2d 422, 425 (Pa. Super. Ct. 1959).

357. *See, e.g.*, HUGHES, *supra* note 112.

358. *Id.*

359. *See generally id.*

360. Bernard Berelson, *What Missing the Newspaper Means*, reprinted in MASS COMMUNICATIONS AND AMERICAN SOCIAL THOUGHT: KEY TEXTS, 1919–1968 254–62 (John Durham Peters & Peter Simonson eds., 2004).

The news media created a “general . . . community of interest . . . sufficient to make [public] discussion possible,” sociologist Robert Park wrote in 1941.<sup>361</sup> Human interest stories of the type that appeared in *The New Yorker* forged a public created through participation in a shared discourse developed and circulated by mass communications.<sup>362</sup>

Under this view, a right to privacy that hindered the publication of popular journalism interfered with not only the people’s right to access information but their ability to constitute themselves as a public. Gossip should not be justiciable, argued a writer in the *New York Law Journal*, praising the *Sidis* decision; a prohibition on “the comment and gossip that circulates about most of us,” whether oral or in print, would not only be a “threat to freedom of thought and expression” but a foolish and futile attempt to quash a benign social practice.<sup>363</sup> The law could not compel people to mind their own business, or to suppress their natural curiosity about their “leaders, heroes, villains, and victims,” in the words of the 1939 *Restatement of Torts*.<sup>364</sup> Judge Clark, with his defense of “community mores” and public discussion of “the misfortunes and frailties of neighbors and ‘public figures,’” may well have agreed.<sup>365</sup>

To the Second Circuit panel, allowing *The New Yorker* to cater to what the public was interested in was in the public’s best interest. A reflection of the political culture of the time and a harbinger of free speech doctrines to come, the *Sidis* opinion defended the right of the public to satisfy its curiosities by learning about and unmasking its “leaders, heroes, villains, and victims.”<sup>366</sup> The opinion established that the scope of the right to privacy was to be determined through the weighing of competing values—a judicial balancing of the individual’s interest in controlling his public image against the public’s right to know—in which the interests of the public would most often win. Though unfortunate, the loss of *Sidis*’s privacy was a necessary price to paid, in the words of *The New Yorker*’s lawyers, for the “circulation of [information] dealing with the world we live in,” and for “the truth [to] be free.”<sup>367</sup>

#### 4. Further Appeals and Settlement

The Second Circuit decision was a major defeat for *Sidis*. A testament to his enduring wrath for *The New Yorker*, he refused to drop the case. After the decision, *Sidis*’s lawyer, Edwin Lukas, wrote a scathing letter to the *New York Law Journal* in which he attacked the court’s conclusion that “the personal right of

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361. Robert E. Park, *News and the Power of the Press*, 47 AM. J. SOC. 1, 6 (1941).

362. HUGHES, *supra* note 112, at 12.

363. Nathan April, Letter to the Editor, N.Y. L.J., Aug. 30, 1940 (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library). “The comment and the gossip which circulates about most of us . . . cannot in any free community be inhibited, either directly or indirectly, by the threat of civil action.” *Id.*

364. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

365. See *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

366. See RESTATEMENT (FIRST) OF TORTS § 867 cmt. c.

367. Brief for Defendant-Appellee at 6, 12, *Sidis*, 113 F.2d 806 (No. 400).

seclusion is held to be subservient to the ‘dominant right’ of the press, in the ‘public interest,’ to disseminate ‘information.’”<sup>368</sup> “Apparently, by reason of the *Sidis* case, once a person has attention thrust upon him . . . his later life, private and deliberately secluded as it may be, for all time and for all purposes, can be exploited and made the subject of ruthless comment, if the truth be told.”<sup>369</sup>

Lukas then met with Alexander Lindey and notified him that Sidis planned to appeal the case to the United States Supreme Court.<sup>370</sup> Morris Ernst and Alexander Lindey prepared a brief, which reiterated the argument in the Second Circuit brief.<sup>371</sup> Although the points in the Supreme Court brief were largely the same as in the Second Circuit brief, as Lindey explained to an associate in 1940, the “argumentative atmosphere had to be toned down.”<sup>372</sup> “We could not make the problem too attractive or intriguing, because we would have then run the risk of the Supreme Court entertaining the writ.”<sup>373</sup> In 1940, the Court denied certiorari.<sup>374</sup>

After the Supreme Court’s denial of certiorari, Sidis announced that he planned to pursue the original libel complaint and to file an amended privacy complaint.<sup>375</sup> In the amended claim, Sidis’ lawyers forwarded a novel interpretation of the privacy tort, suggesting that it covered not only true, embarrassing disclosures of private facts but also untruthful disclosures; the *New Yorker* article, they claimed, was mostly false.<sup>376</sup> “The Boy Wonder is riding again,” Lindey complained to *The New Yorker* editor Ik Shuman.<sup>377</sup> “What Sidis and his lawyers are probably trying to establish is a new cause of action grounded in the twilight region presently existing between breach of the right of privacy and libel.”<sup>378</sup> Sidis’s lawyers filed the new complaint in federal district court in February 1943.<sup>379</sup> Lindey successfully argued that the original dismissal of the privacy counts was a final judgment preventing him from amending the same counts, and in May 1943, the court dismissed the amended complaint.<sup>380</sup> Lindey again tried to persuade Sidis to

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368. Edwin J. Lukas, Letter to the Editor, N.Y. L.J., Aug. 16, 1940 (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

369. *Id.*

370. Letter from Ik Shuman, Editor, *The New Yorker*, to Harold W. Ross, Editor, *The New Yorker* (not dated) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library). Lindey was “hyped” on the privacy claim, Shuman noted, and “this [was] going to be an important damn case if he [went] through with appeal.” *Id.*

371. See Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Dec. 2, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

372. *Id.*

373. *Id.*

374. *Sidis v. F.R. Publ’g Corp.*, 311 U.S. 711 (1940); WALLACE, *supra* note 2, at 236.

375. See Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Feb. 2, 1943) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. See Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (May 6, 1943) (on file with *The New Yorker* Archives, Manuscripts and Archives Div.,

drop the suit by offering him the chance to write several articles for *The New Yorker* for pay, to be published under his real name or a pseudonym.<sup>381</sup> The suggestion, like the previous offers, was turned down.<sup>382</sup>

Sidis then found new counsel and filed another amended complaint for libel, seeking \$10,000 in damages.<sup>383</sup> His new lawyer, Hobart S. Bird, argued that *The New Yorker* had caused the public to believe that Sidis was, among things, “reprehensible,” “[d]isloyal to his country,” “[a] criminal,” “[a] loathsome and filthy person in his personal habits,” “having suffered a mental breakdown,” “being a neurotic person and having a deranged mind,” and “[a]s one pretending extraordinary intellectual attainments and being a genius, yet in fact a fool, incapable of making a decent living and living in misery and poverty.”<sup>384</sup> Sidis was determined to take the libel case to trial. “Certainly any ordinary plaintiff would have been discouraged long before this,” Lindey wrote to T.M. Brassel at *The New Yorker*.<sup>385</sup> “It seems, however, that neither four court defeats nor the passage of time have served to dampen his ardor to press ahead.”<sup>386</sup> Lindey asked Bird what Sidis really wanted, and the response was unexpected. Gone was the language of vindication, dignity and justice—what Sidis wanted was money, “and \$10,000 of it,” Lindey wrote.<sup>387</sup>

On March 24, 1944, the case was put on calendar for trial.<sup>388</sup> On April 3 and 4 of 1944, William was called before Morris Ernst and deposed.<sup>389</sup> In another attempt to get Sidis to settle, Ernst offered Sidis \$1000 for any article he wrote on any subject and promised that he would not have to use his own name. Sidis again declined.<sup>390</sup> Afraid that a jury would find that Sidis had been libeled, *The New Yorker* offered Sidis a settlement in the amount of \$600, which he accepted.<sup>391</sup> It was the first time the magazine made a “straight-money settlement.”<sup>392</sup>

It’s not clear why Sidis finally agreed to *The New Yorker*’s deal. An award of a mere \$600 was a far cry from the substantial sums he had initially hoped to extract from the magazine. By 1944, however, Sidis could take satisfaction in the great cost and hassle *The New Yorker* had endured in the lengthy litigation. Sidis had not only punished the magazine in this way, but had been vindicated in the process. Many observers and commentators were on his side.<sup>393</sup> Though the law was

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N.Y. Pub. Library).

381. See Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to T.M. Brassel, *The New Yorker* (Dec. 21, 1943) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

382. *Id.*

383. *Id.*

384. WALLACE, *supra* note 2, at 265.

385. *Id.*

386. *Id.*

387. *Id.*

388. WALLACE, *supra* note 2, at 266.

389. *Id.*

390. Frances Velie & Caroline Menez, *Twilight of a Genius*, CORONET, Feb. 1945, at 40, 43.

391. WALLACE, *supra* note 2, at 269.

392. FORDE, *supra* note 107, at 100.

393. See *infra* notes 416–18, 430–33, 438, 439 and accompanying text.

formally not in his favor, the judges had been demonstrably sympathetic.<sup>394</sup> As Sidis wrote in an April 1944 letter to Julius Eichel, an acquaintance from his socialist days, the settlement was “at last some sort of victory in my long fight against the principle of personal publicity.”<sup>395</sup> There was another reason for Sidis to settle: he was quite ill, and he needed whatever money he could get.<sup>396</sup> The ongoing lawsuit clearly had taken a serious toll on his emotional and physical health.

*The New Yorker* considered itself victorious, regarding the small payout as negligible.<sup>397</sup> But Sidis felt that he had triumphed in the case. As Sidis’s biographer concluded, it was a sweet victory for William, who “had been libeled from birth.”<sup>398</sup>

### III. THE PARADOX OF PRIVACY

*Sidis v. F.R. Publishing* was not only a landmark legal case but also a public event. Sidis’s legal battles were widely publicized in academic journals, legal publications and the popular media. Despite public interest in the *New Yorker* article and public support for the “right to know,” many believed that the reclusive genius had been wronged.<sup>399</sup> The *New Yorker* article and the Second Circuit decision were criticized for having interfered with what was described as Sidis’s right to self-reinvention and transformation and his right to be forgotten.<sup>400</sup>

The reaction to *Sidis* illustrates what I call the paradox of American privacy—the contradictory attitudes towards privacy and media exposure that have been held by the American public since the earliest days of mass communications. Since the early twentieth century, the public has demonstrated great interest in reading about the private lives of public figures and “involuntary public figures” in the mass media.<sup>401</sup> At the same time, it has loudly protested the media’s threats to privacy.<sup>402</sup> Despite our willingness to peer in on the private lives of others, we

394. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Harold Ross, Editor, *The New Yorker* (July 24, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library) (noting that Judge Patterson brushed aside Lindey’s argument and said that the article was “cruel and unjustified”); Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Harold Ross, Editor, *The New Yorker* (June 21, 1940) (noting that the court was “not too sympathetic” towards *The New Yorker*).

395. WALLACE, *supra* note 2, at 270.

396. *Id.* at 271–72.

397. *Id.* at 269.

398. *Id.*

399. See *infra* 411, 419–21, 433 and accompanying text.

400. See Fred Bartenstein, Jr., Recent Cases, *Right of Privacy—Protection Against the Publication of Newsworthy Information [Federal]*, 2 WASH. & LEE L. REV. 133, 138 (1940–1941) (“[I]t seems hardly reasonable, that a former famous child prodigy who had suffered a breakdown and had long since gone into seclusion would be considered a ‘public figure’ . . .”); see also *infra* 411, 419–21, 433 and accompanying text.

401. See generally SILAS BENT, BALLYHOO: THE VOICE OF THE PRESS (1927).

402. See, e.g., David Lawrence, *The Lost Right of Privacy*, 38 AM. MERCURY 12, 13 (1936); Robert L. Floyd, *Privacy*, CHI. TRIB., Sept. 27, 1925, at 8; Thomas Woodlock, *Thinking it Over*, WALL ST. J., Mar. 13, 1936, at 4.

have vigorously defended a “right to privacy” and have regarded privacy as an important personal interest and prerogative that should be protected by the law.<sup>403</sup> We want our gossip and our privacy, too.

*Sidis* was not the first time that the outcome in a privacy case had generated public criticism. In 1902, in one of the most famous privacy cases in history, a young woman had sought legal action in New York state court to stop the publication of her portrait on posters advertising Franklin Mills Flour, claiming it to be an invasion of privacy.<sup>404</sup> While the court in *Roberson v. Rochester Folding Box* acknowledged that the publication was an assault to the woman’s dignity, the court rejected her claim and refused to recognize a right to privacy, noting that to do so would open the floodgates of litigation and inundate courts with petty claims.<sup>405</sup> *Roberson* was condemned by the public, and for weeks, the *New York Times* ran letters from readers angered by the court’s decision.<sup>406</sup> The outrage led the New York legislature to pass the privacy statute we have seen in the following year.<sup>407</sup>

The public reaction to *Sidis*, though not quite as vehement, had a similar tenor to the outrage around *Roberson*: the law had failed to protect a vulnerable person—one genuinely averse to publicity and deeply wounded by it—from being thrust before the public eye in an embarrassing and undignified manner. This was not the case of a Greta Garbo who pursued a career as a movie star yet claimed that she wanted to be “let alone.”<sup>408</sup> Neither William James Sidis nor Abigail Roberson had assumed the risk of the publicity they received. The public appeared to embrace the “waiver of privacy” doctrine that was coming to be discredited by the courts: that those who had voluntarily put themselves in the public eye surrendered much of their privacy, but that those who did not, average citizens who pursued ordinary lives outside of the public gaze, generally retained the right to control if, when and how they would be known to the public.<sup>409</sup>

While people mocked the hypocrisy of the Garbos of the world, popular opinion seemed to be on the side of Sidis.<sup>410</sup> Though many read the *New Yorker* article and were amused by it, at the same time, a significant portion of the audience, in the words of one commentator, “felt that they were, with the author, intruding inexcusably on Sidis’s privacy.”<sup>411</sup> The public sympathy for Sidis only increased

403. See *supra* notes 28–30 and accompanying text.

404. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 450 (N.Y. 1902).

405. *Id.* at 443.

406. The *Roberson* decision “excited as much amazement among lawyers and jurists as among the . . . lay public,” editorialized the *New York Times*. *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

407. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1903).

408. See JOHN BAINBRIDGE, *THE FAMOUS BIOGRAPHY LAVISHLY ILLUSTRATED: GARBO I* (1975) (quoting Greta Garbo: “I never said, ‘I want to be alone’ . . . I only said, ‘I want to be let alone.’ There is all the difference.”).

409. See *infra* note 418 and accompanying text.

410. See *infra* notes 419–20 and accompanying text.

411. Notes and Comment, *Limitations on the Right of Privacy of a Quondam Public Figure*, 74 N.Y. L. REV. 423, 429 (1940); see also *Former Child Prodigy Fails in Pushing Suit on Magazine*, L. A. TIMES, Dec. 17, 1940, at 11.

after his death, not long after his settlement with the magazine. In 1944, Sidis worked at a series of clerical jobs.<sup>412</sup> In the summer of that year, his landlady found him collapsed in his room.<sup>413</sup> He had suffered a massive brain hemorrhage. Sidis was taken to the hospital and died a few days later.<sup>414</sup> The newspapers and magazines were filled with expressions of pity.<sup>415</sup>

The Sidis saga fed into a burgeoning body of criticism in the 1930s and '40s of the mass media's intrusions into private life. The popular media of the time were filled with articles that attacked what one writer in *The Atlantic Monthly* in 1937 described as "the current doctrine that the greatest good of the greatest number requires the immolation of a daily quota of private lives on the altar of publicity."<sup>416</sup> With the proliferation of "personality journalism," "the art of minding other people's business," a writer lamented in 1932, "has developed into a major industry."<sup>417</sup> While a person may have had privacy in the confines of his home, in public his activities became "fair game for any snooper who thinks him 'newsworthy,'" complained the author of a piece in the popular magazine *The American Mercury*.<sup>418</sup> Yet those very same publications, of course, with their focus on personalities and private lives, were responsible for the privacy problem they so vehemently condemned.

Many were less upset by the initial publicity given to Sidis during his childhood years than by *The New Yorker's* attempt to revive interest in him. The magazine had, in the eyes of many, interfered with society's established customs and practices for putting people on and taking them off the public stage. As one writer noted in 1941, criticizing the decision, "in our modern civilization, many persons, such as criminals, stage and screen stars, and others who were in the public eye in past years are entirely forgotten today."<sup>419</sup> The public's interest was transient and fickle, as evidenced by the often meteoric rise and fall of movie stars. As a historian of fame aptly observed many years later, "public acceptance was not a threshold that once crossed meant you were always inside. It was more like a revolving door."<sup>420</sup> By thrusting Sidis back into the limelight, *The New Yorker* had meddled with what was described as the natural social process of forgetting.

The *New Yorker* article and the Second Circuit decision were also criticized for

412. WALLACE, *supra* note 2, at 272.

413. *Id.* at 272–73.

414. *Id.* at 273–74.

415. See, e.g., *Prodigy's Progress*, WASH. POST, July 23, 1944, at B4 ("[B]right candle that he was, young Sidis was quickly burned out."); *Sidis, a Wonder in Boyhood, Dies*, N.Y. TIMES, July 18, 1944, at 21 ("The one-time 'boy wonder' was found seriously ill and in a coma Thursday night in his room in a Brookline boarding house, apparently destitute."); *Sidis, Noted Prodigy as a Child, Dies in Boston, Obscure*, HARTFORD COURANT, July 18, 1944; *The Hidden Genius*, N.Y. TIMES, July 19, 1944, at 18 ("[H]e was shy, distrustful, adverse to companionship.")

416. See, e.g., Dawson, *Paul Pry and Privacy*, *supra* note 250, at 385; Meyer Berger, *Surrender of Privacy*, SCRIBNER'S MAG., Apr. 1939, at 16.

417. Dawson, *Paul Pry and Privacy*, *supra* note 250, at 385.

418. Dawson, *Law and the Right of Privacy*, *supra* note 153, at 397.

419. *Torts—Right of Privacy—Matters of General or Public Interest*, 39 MICH. L. REV. 501, 503 (1941).

420. BRAUDY, *supra* note 249, at 546.

having interfered with what was described as Sidis's right to reinvent himself. Befitting a nation with substantial opportunities for social and geographic mobility, the American Dream had historically been described as one of second chances—of the prospect of remaking one's public image and starting one's life anew.<sup>421</sup> By the 1930s, it was still possible to move to Texas, change one's name and appearance, and begin an entirely new existence, unencumbered by one's past.<sup>422</sup> Yet as critics in the interwar period began to observe, popular journalism, which had discovered new ways to fill pages by rehashing old news, was creating a world where perhaps nothing could be forgotten. As the popular legal commentator Mitchell Dawson observed in *The American Mercury* in 1948, *Sidis* marked the law's acceptance of this disturbing trend.<sup>423</sup> After *Sidis*, those whose "love affairs, marital troubles, and adventures in court or jail [were] rehashed in the Sunday magazines" could do nothing about it under the law.<sup>424</sup> The moral of the *Sidis* case, he lamented, was that "once news, always news."<sup>425</sup>

The law reviews and legal journals were highly critical of the decision. All recognized the significance of the *Sidis* case as a milestone in the history of privacy law. *Sidis* was one of the first clear judicial statements on the viability of the Warren and Brandeis "right to privacy" as applied to mass media publications. It was the first authoritative ruling on what were "matters of general or public interest" and "how far into [the public figure's] life does th[e public's interest] rightly extend."<sup>426</sup> After the Second Circuit decision, Lindey observed that there was a "tremendous interest in the case on the part of the legal profession" and that he had received "a number of requests for copies of the briefs from lawyers."<sup>427</sup> In 1940, the case was the subject of the moot court at Yale Law School.<sup>428</sup>

Almost all of the law review writers believed that *Sidis* was wrongly decided. *The New Yorker* executive editor Ik Shuman mocked the "dissenting opinions of the law review writers," and Lindey quipped that "it is a lucky thing for us that judges and not law review writers sit on the bench."<sup>429</sup> The academic criticism of *Sidis* focused on the court's interpretation of the public figure and public interest

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421. LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 28–29 (2007) ("In the United States much more than in most other countries in the nineteenth century, a man could leave his old life behind and start a new life.").

422. *Id.*

423. Dawson, *Law and the Right of Privacy*, *supra* note 153, at 401.

424. *Id.*

425. *Id.*

426. Feinberg, *supra* note 107, at 719.

427. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Nov. 18, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

428. *Id.*

429. Letter from Alexander Lindey, Partner, Greenbaum, Wolff & Ernst, to Ik Shuman, Editor, *The New Yorker* (Jan. 20, 1941) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library); Letter from to Ik Shuman, Editor, *The New Yorker*, to Alexander Lindey, Partner, Greenbaum, Wolff & Ernst (Dec. 13, 1940) (on file with *The New Yorker* Archives, Manuscripts and Archives Div., N.Y. Pub. Library).

privileges. The law review writers were particularly opposed to the Second Circuit's conclusion that *Sidis* was a public figure. "[T]he court virtually decides that once a person becomes a public figure he remains a public figure for all time," observed the *Michigan Law Review*.<sup>430</sup> "That *Sidis* was a public figure at the time the article was printed is certainly questionable," opined the *California Law Review*.<sup>431</sup> *Sidis* "was no longer a public figure, unless that distinction, once achieved, is to be deemed a lifelong honor and curse," noted the *New York Law Review*.<sup>432</sup> The court's failure to hold that "after seventeen years of self-imposed obscurity the plaintiff had not regained the right that he, or others for him, had waived when he was a child" "testifies to the cold treatment which, after a half century of evolution, the right of privacy still suffers at the hands of unsympathetic courts, lending an indirect and untimely sanction to some abuses of the press."<sup>433</sup>

Many legal commentators attacked the Second Circuit's interpretation of the "matters of public interest" privilege, which they claimed was so deferential to the press that it was virtually meaningless. As one law review noted: "the news facts occurred thirty years before and the only factor bringing the plaintiff before the public was the 'digging out' of interesting reading matter for an avid public."<sup>434</sup> "According to this view the court looks to what people are 'interested in' in order to determine what can be written about other people's private lives. It hardly takes account of the human frailty to become more interested as the matter becomes more private."<sup>435</sup> "Public interest may attach to an article in the sense that many persons are eager to read it. It will not follow from this that its publication . . . will serve a public interest outweighing the individual distress it may cause," wrote the *New York Law Review*.<sup>436</sup> In sharp contrast to civil libertarian strains of free speech thought, the sentiment from many of the law reviews was that the courts had an affirmative duty to raise the moral standards of the public by imposing content-based limitations on popular literature and journalism. "When the court says that the mores of the times justifies such publication, is it not abdicating from its duty to improve the mores of the times as far as it can by barring the expression of that which caters to and develops the less elevated tendencies of men?"<sup>437</sup> "The courts are the final arbiters of what can be printed in magazines and newspapers," noted one critic.<sup>438</sup> "Will they take upon themselves the burden of raising the standards of journalism and the mores of the community, or will they let the newspapers and magazines, prompted by a willing public curiosity, dictate to them the standards of

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430. *Torts—Right of Privacy—Matters of General or Public Interest*, *supra* note 419, at 503.

431. Recent Decision, *supra* note 303, at 90.

432. Notes and Comment, *supra* note 411, at 429.

433. Recent Cases, *Torts—Privilege of the Press to Describe Present Life of Former Public Figure*, 89 U. PA. L. REV. 251, 254 (1940).

434. Bartenstein, *supra* note 400, at 140.

435. *Id.*

436. Notes and Comment, *supra* note 411, at 430.

437. Recent Decisions, *Torts—Right of Privacy—Biographical Sketch of Former Child Prodigy as a Matter of Public Concern*, 10 FORDHAM L. REV. 108, 110–11 (1941).

438. Bartenstein, *supra* note 400, at 141.

what can be written about other people?”<sup>439</sup>

There were a few expressions of support for the Second Circuit decision. Judge Leon Yankwich, on the District Court for the Southern District of California, described the outcome in *Sidis* as a great advance for participatory democracy that, like contemporaneous developments in libel law, widened the “realm of criticism and comment” of public figures and public officials.<sup>440</sup> The decision was also “celebrated in . . . publishing circles.”<sup>441</sup> Morris Ernst took great satisfaction in the outcome, both on free speech grounds and as a personal matter—he had grown to hate *Sidis*. Reflecting many years later on the case, he wrote that although “[h]uman sympathy was all in *Sidis*’s corner,” it was necessary for the court to “hurt *Sidis*” in the name “of a greater . . . good.”<sup>442</sup>

But these favorable opinions were in the minority. The laws of privacy and public sentiments about privacy were not aligned. Nor were public attitudes towards privacy consistent. While much of the public appeared to embrace liberal trends in free speech doctrine that permitted a wider range of expression, at the same time, many believed that freedom of speech was not a blank check to the press to expose people’s intimacies and humiliate them when they had done nothing to deserve it. The public enjoyed reading about others’ private lives in the media, yet at the same time often felt uneasy and guilty about it. The public reaction to *Sidis* exposed these contradictions. It reaffirmed the public’s commitment to privacy in the midst of a voracious celebrity culture—a culture of exposure.

#### IV. CONCLUSION: THE *SIDIS* LEGACY

The Second Circuit’s decision in *Sidis v. F.R. Publishing* would go down in history as a major victory for the press. It destabilized the conceptual foundations beneath the Warren and Brandeis “right to privacy” and imperiled the viability of the privacy tort as it had been envisioned at the turn of the century. The court defined the public figure and public interest privileges expansively and indicated that anyone could become and remain a public figure so long as the public—or the press—expressed an interest in him. A right to privacy that permitted judges, rather than publishers and media consumers, to determine what material was suitable for public consumption, the court suggested, was anathema to the principles of freedom of choice and access to information protected by freedom of speech.<sup>443</sup> Against the backdrop of widespread concerns with government censorship, political accountability and democratic participation, the Second Circuit concluded that *Sidis*’s loss of privacy was an unfortunate but inevitable

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439. *Id.*

440. Leon Yankwich, *The Protection of Newspaper Comment on Public Men and Public Matters*, 11 LA. L. REV. 327, 342 (1951).

441. WALLACE, *supra* note 2, at 236.

442. MORRIS LEOPOLD ERNST & ALAN U. SCHWARTZ, *THE RIGHT TO BE LET ALONE* 186–87 (1962).

443. *See supra* notes 305, 306, 352, 354, 355 and accompanying text.

casualty of the public's right to learn about and discuss the "misfortunes and frailties of neighbors and 'public figures.'"<sup>444</sup> By offering convincing doctrinal and normative rationales for public exposures of private life, the *Sidis* court paved the legal pathway for the proliferation of increasingly sensationalistic journalism in the subsequent decades.<sup>445</sup>

Immediately after the decision, the decision in *Sidis* was successfully mobilized by media defendants in a series of cases involving magazine articles, news stories and films and radio programs that exposed individuals and their personal affairs to public view. *Sidis* would be cited for the principle that privileged "matters of public interest"—sometimes described as "newsworthy material"—are matters that interest the public, as determined by the press, and that it was in the public's best interests to have its curiosities fulfilled. As the Iowa Supreme Court summarized, *Sidis* stood for the maxim that "in determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community. Courts do not have license to sit as censors."<sup>446</sup> In *Jenkins v. Dell Publishing Co.*, the Third Circuit in 1958, citing *Sidis*, upheld a dismissal on summary judgment of a claim for invasion of privacy in a case involving a lurid article in the pulp magazine *Front Page Detective*, noting that "[s]ome readers are attracted by shocking news. Others are titillated by sex in the news . . . Much news is in various ways amusing and for that reason of special interest to many people."<sup>447</sup> Such material, titillating and amusing as it was, was privileged as a matter of "public interest."<sup>448</sup>

As new trends towards investigative journalism and realism in reporting led to more graphic and sensationalistic publications beginning in the 1950s and 1960s, *Sidis* was used to justify exposures of private and intimate scenarios that were far more disturbing than what appeared in *The New Yorker*. In *Bremmer v. Journal Tribune Publishing Co.*, a newspaper which carried on its front page a large picture of a murdered boy's mutilated and decomposed body was held not to be liable to the boy's parents for invasion of privacy.<sup>449</sup> The court, referencing *Sidis*, held that the boy, though unwillingly, became part of a newsworthy matter of "public interest"—a matter that the public was curious about—and that the public had a right to know about the "misfortunes and frailties" of its leaders, heroes, and victims.<sup>450</sup> On the same theory, items that have been held to be privileged "matters of public interest" in more recent years have included the death of a child in an unlocked refrigerator; mistaken interpretations of pap smear tests; the birth of a baby to a twelve-year-old girl; and the specifics of a man's violent attack by his

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444. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

445. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1231 (1993) (Judge Richard Posner noting that *Sidis* was "more consonant with modern thinking about the proper balance between the right of privacy and freedom of the press").

446. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 302 (Iowa 1979).

447. See *Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 451 (3d Cir. 1958).

448. *Id.*

449. See *Bremmer v. Journal-Tribune Publ'g Co.*, 76 N.W.2d 762 (Iowa 1956).

450. *Id.* at 765, 767, 768.

former lover, among other intimate and personal details.<sup>451</sup> The “leave it to the press” method remains the dominant approach to determining the scope of the “public interest” privilege, and the courts continue to regard media content as the expression of popular interests.<sup>452</sup> As the *Restatement (Second) of Torts* summarized, the courts have essentially permitted publishers and broadcasters to define what is “newsworthy” and “a matter of public interest.”<sup>453</sup>

Despite the absence of a definitive Supreme Court ruling on whether there are First Amendment limitations on the privacy tort, courts in public disclosure of private facts cases involving the mass media have, since the 1940s, described the broad “public interest” privilege as mandated by freedom of speech and press—as protecting the constitutional “right of the public to be informed”—whether the information was material about a politician’s home and family life, an article about a homicide in *Official Detective Stories* magazine, or an article about pedestrian safety that included a photo of a child lying on the street after being hit by a car.<sup>454</sup> As the Supreme Court of California summarized in 1952, “[t]he right of privacy does undoubtedly infringe upon absolute freedom of speech and of the press, and it also clashes with the interest of the public in having a free dissemination of news and information.”<sup>455</sup> Although the Supreme Court has never declared a First Amendment “right to know,” since *Sidis*, the capacious “public interest” standard has been framed in terms of freedom of the press, the public good and the public’s constitutional right to access the news.

*Sidis* also stands for the principle that the public figure’s “waiver” of privacy is potentially indefinite. In 1949, in *Cohen v. Marx*, a California appeals court granted a motion to dismiss a claim brought by a professional boxer, Canvasback Cohen, whose name and story had been broadcasted on NBC long after he had retired from the ring.<sup>456</sup> The court held that as a professional boxer he had permanently waived his right to privacy and “could not at his will and whim draw

451. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806 (9th Cir. 2002); *Costlow v. Cusimano*, 34 A.D.2d 196 (N.Y. App. Div. 1970); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956); *Wavell v. Caller-Times Publ’g Co.*, 809 S.W.2d 633 (Tex. App. 1991).

452. See RESTATEMENT (SECOND) OF TORTS § 652D (1977); see also *Heath v. Playboy Enter., Inc.*, 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990) (“[W]hat is newsworthy is primarily a function of the publisher, not the courts.”); *Rawlins v. Hutchinson Publ’g Co.*, 543 P.2d 988, 996 (Kan. 1975) (“A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”).

In a similar vein, the Oregon Supreme Court in 1986 observed that regardless of whether the press caters to the public’s preexisting tastes or “creates the demand for shocking, scandalous, pathetic, or titillating ‘human interest’ news by providing a supply,” the fact remains that people avidly consume the media, and therefore publishers must be addressing at least some portion of the public’s interests. *Anderson v. Fisher Broad. Co.*, 712 P.2d 803, 809 (Ore. 1986).

453. RESTATEMENT (SECOND) OF TORTS § 652D.

454. *Leverton v. Curtis Publ’g Co.*, 192 F.2d 974, 977–78 (3d Cir. 1951); *Kapellas v. Kofman*, 459 P.2d 912, 923–24 (Cal. 1969); *Blount v. T.D. Publ’g Corp.*, 423 P.2d 421, 423 (N.M. 1966).

455. *Gill v. Curtis Publ’g Co.*, 239 P.2d 630, 633 (Cal. 1952). The “broad privilege cloaking the truthful publication of all newsworthy matters” was necessary to prevent the privacy tort’s “potential encroachment on the freedoms of speech and the press,” noted the California Supreme Court in 1969. *Kapellas*, 459 P.2d at 922; see also *Uranga v. Federated Publ’ns*, 67 P.3d 29 (Idaho 2003).

456. See *Cohen v. Marx*, 211 P.2d 320 (Cal. Dist. Ct. App. 1949).

himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself in the public eye.<sup>457</sup> In *Hazlitt v. Fawcett Publications*, a federal district court, citing *Sidis*, held that it was not actionable to publish in a magazine two years after the fact an account of the plaintiff's involvement in a homicide, since the plaintiff, a stunt driver, was a public figure, and "incident[s] in the private life of a public figure" were almost always matters of "legitimate public interest," no matter when they occurred.<sup>458</sup> In *Smith v. National Broadcasting*, a California appeals court summarized the *Sidis* principle when it observed that it was "characteristic of . . . our contemporary world" that events and people "which have caught the popular imagination have been frequently revived long after their occurrence in . . . literature [and] journalism . . ."<sup>459</sup> Therefore, the "mere passage of time" did not preclude "the publication of incidents from the life of one formerly in the public eye."<sup>460</sup>

In an unusual decision in 1971, the Supreme Court of California held that a man, Marvin Briscoe, whose criminal activity had been reported in the *Reader's Digest* eleven years after it occurred, had stated a cause of action for invasion of privacy, observing that,

just as the risk of exposure is a concomitant of urban life, so too is the expectation of anonymity regained. It would be a crass legal fiction to assert that a matter once public never becomes private again. Human forgetfulness over time puts today's 'hot' news in tomorrow's dusty archives. In a nation of 200 million people there is ample opportunity for all but the most infamous to begin a new life.<sup>461</sup>

Yet *Briscoe v. Reader's Digest Association* was overturned in a 2004 case involving a similar factual scenario, *Gates v. Discovery Communications*, on the authority of intervening United States Supreme Court cases that held that except under extreme circumstances, the imposition of liability for the publication of truthful material that was lawfully obtained violated the First Amendment.<sup>462</sup> The Court's decisions in *Cox Broadcasting Corporation v. Cohn* and *Smith v. Daily Mail Publishing Company* formalized the intuition of *Sidis* and its progeny that freedom of speech discourages, if not substantially prohibits, a right to keep one's private affairs out of the media spotlight.<sup>463</sup>

The legacy of William James Sidis and the *Sidis* case has been kept alive in privacy case law, popular culture and the ongoing paradox of privacy: the public's penchant for protesting the media's invasions of privacy while at the same time enjoying peering into other people's private lives.<sup>464</sup> While the public can be

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457. *Id.* at 320.

458. *See Hazlitt v. Fawcett Publ'ns, Inc.*, 116 F. Supp. 538, 545 (D. Conn. 1953).

459. *Smith v. Nat'l Broad.*, 292 P.2d 600, 604 (Cal. Ct. App. 1956).

460. *Id.*; *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993).

461. *See Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 41 (Cal. 1971).

462. *See Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552 (Cal. 2004).

463. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

464. As demonstrated, *Sidis* is a staple of privacy and media law casebooks, and the life story of

callous when it comes to invading the privacy of public figures, especially entertainment stars, it continues to demonstrate genuine sympathy for Sidis-like figures—tragic, vulnerable individuals exploited by the media’s hunger for the intimate details of personal life—and to protest when it thinks the media have gone too far. There was an outcry over the media treatment of Princess Diana, whose pursuit by paparazzi led to her death.<sup>465</sup> The press was highly criticized when it related the story of tennis star Arthur Ashe’s AIDS.<sup>466</sup> When a California newspaper published a photograph of a five-year-old drowning victim, readers and media critics charged the paper with invading privacy and showing a “callous disrespect of the victim.”<sup>467</sup> Our attitudes towards privacy, publicity and “the right to know” remain contradictory and inconsistent.

*Sidis* also remains vivid in academic discussions of privacy and its legal protection. The scholarly debate continues over whether the Second Circuit wrote into the law an important theory of “public accountability,” or whether the court devalued privacy and the injuries inflicted by unwanted public exposure.<sup>468</sup> It is beyond the scope of this article to weigh in on this ongoing dispute; instead, I want to briefly mention one argument for reconsidering Sidis’s claim—the way in which new technologies have altered the nature of public memory and the dynamics of remembering and forgetting. Despite the media’s fascination with “has-beens” and its penchant for rehashing old news, before the late twentieth century, it was still possible for a William James Sidis or a Canvasback Cohen or Marvin Briscoe to one day slip away from the public gaze. The public attention span is generally short-lived, and unless continually prodded, people will eventually forget. Unless another media outlet revived interest in the Sidis story after the *New Yorker* debacle, it is quite possible that William, had he lived longer, could have enjoyed a quiet old age in solitude. The law’s failure to recognize a right to revert to anonymity did not mean, as a practical matter, that one’s private life would forever remain in the public eye.

The Internet has changed that. In our Web-based culture, virtually everything is recorded, and information is stored permanently on computer servers and accessible to the public in an instant. The personal and social implications of this transformation are immense. The Internet poses a profound, even “existential” threat to “our ability to control our identities; to preserve the option of reinventing ourselves and starting anew; to overcome our checkered pasts,” writes legal

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William James Sidis is memorialized in popular culture. For example, the 1998 film *Good Will Hunting* is said to have been based on his life. See *Good Will Sidis*, HARV. MAG., Mar. 1998, available at <http://harvardmagazine.com/1998/03/pump.html>.

465. See Jacqueline Sharkey, *The Diana Aftermath*, AM. JOURNALISM REV., Nov. 1997, at 18.

466. Fred Bruning, *How a Private Citizen Lost His Privacy Rights*, MACLEAN’S, May 4, 1992, at 13.

467. Candace Cummins Gauthier, *Understanding and Respecting Privacy*, in JOURNALISM ETHICS: A PHILOSOPHICAL APPROACH 227 (Christopher Meyers ed., 2010).

468. See, e.g., Post, *supra* note 21, at 1001; see also SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 250–58 (1982); KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 216–17 (1988); Emile Karafiol, *The Right to Privacy and the Sidis Case*, 12 GA. L. REV. 513 (1978).

commentator Jeffrey Rosen.<sup>469</sup> A world with a perfect memory, technology scholar Viktor Mayer-Schoenberger has argued, is a world without the learning, forgiveness and growth that comes from forgetting and renewal.<sup>470</sup> Would a modern day Sidis have a right to legal recourse if his story was circulated to the world on the Web or if a blog post from his youth was rediscovered and publicized two decades later? Probably not; since the era of *Sidis*, the law has embraced a commitment to the free flow of news as the paramount virtue of the information society, where participation in politics and public life is seen as a function of open access to facts. But in a networked world where there is a surfeit of information—much of it intimate and personal—in public circulation, and where new technologies prohibit the kind of natural fading away that could happen in the age of traditional media, there may be reason to consider a place for the law in policing the boundaries of the collective memory. The twenty-first century revolution in information brings new meaning and salience to Sidis’s claim to a legal right to be forgotten.

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469. Jeffrey Rosen, *The End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at 12.

470. VIKTOR MAYER-SCHOENBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).