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Privacy and Civilization, An Essay

Anthony Lewis*

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Privacy and Civilization, an Essay by Anthony Lewis*

Jan Prochazka was a leading dissident during the totalitarian Communist regime in Czechoslovakia. He liked to meet and talk with another dissident friend. The police secretly recorded their conversations. One day, amazingly, the police began broadcasting the tapes on the radio. It was a move to discredit Prochazka. According to the great Czech writer, Milan Kundera, the tactic nearly succeeded. People were shocked because “in private a person says all sorts of things, uses coarse language, acts silly, tells dirty jokes . . . floats heretical ideas he’d never admit in public and so forth.”¹ But gradually, people realized

[t]hat the real scandal was not Prochazka’s daring talk but the rape of his life; they realized, as if by electric shock, that private and public are two essentially different worlds and that respect for that difference is the indispensable condition, the sine qua non, for a

* Anthony Lewis was a columnist for *The New York Times* from 1969 to 2001. He twice won the Pulitzer Prize. He was born in New York City and attended the Horace Mann School in New York and Harvard College, receiving a Bachelor of Arts in 1948. From 1948 to 1952, he was a deskman in the Sunday Department of *The Times*. In 1952 he became a reporter for *The Washington Daily News*. In 1955 he won a Pulitzer Prize for national reporting for a series of articles in *The News* on the dismissal of a Navy employee as a security risk—dismissal without telling the employee the sources or nature of the charges against him. The articles led to the employee’s reinstatement.

In 1955 Lewis joined the Washington Bureau of *The New York Times*. In 1956–57 he was a Nieman Fellow; he spent the academic year studying at Harvard Law School. On his return to Washington he covered the Supreme Court, the Justice Department, and other legal matters, including the government’s handling of the civil rights movement. He won a Pulitzer Prize for his coverage of the Supreme Court in 1963.

He is author of three books: *Gideon’s Trumpet*, about a landmark Supreme Court case; *Portrait of a Decade*, about the great changes in American race relations, and *Make No Law: The Sullivan Case and the First Amendment*.

Lewis was for fifteen years a Lecturer on Law at the Harvard Law School, teaching a course on The Constitution and the Press. He has taught at a number of other universities as a visitor, among them the Universities of California, Illinois, Oregon, and Arizona. Since 1983, he has held the James Madison Visiting Professorship at Columbia University.

1. MILAN KUNDERA, *TESTAMENTS BETRAYED: AN ESSAY IN NINE PARTS* (Linda Asher, trans., Harper Collins, 1995).

man to live free; that the curtain separating these two worlds is not to be tampered with, and that curtain-rippers are criminals.²

In time, Kundera managed to leave Czechoslovakia for France. There Kundera saw a magazine cover of Jacques Brel, the singer, hiding his face from photographers who had ambushed him in front of a hospital where he was being treated for advanced cancer.³ “And suddenly,” Kundera wrote, “I felt I was encountering the very same evil that had made me flee my country; broadcasting Prochazka’s conversations and photographing a dying singer seemed to me to belong to the same world.”⁴

The reason I have begun by describing these two experiences of Milan Kundera’s is that they provide the setting, and the insight he drew, for one of the most compelling modern statements in support of privacy as a humane value. Kundera said in 1985,

For me, indiscretion is a capital sin. Anyone who reveals someone else’s intimate life deserves to be whipped. We live in an age when private life is being destroyed. The police destroy it in Communist countries, journalists threaten it in democratic countries, and little by little the people themselves lose their taste for private life and their sense of it. Life when one can’t hide from the eyes of others—that is hell. Those who have lived in totalitarian countries know it, but that system only brings out, like a magnifying glass, the tendencies of all modern society Without secrecy, nothing is possible—not love, not friendship.⁵

Kundera saw journalists as the destroyers of privacy in democratic countries, the equivalent of the secret police. And he has a point. He gave a French example. Britain, home of the world’s sleaziest tabloids, is even worse. American supermarket tabloids are ruthless in their exposure of the famous, and latterly their tittle-tattle has often been copied by mainstream newspapers and broadcasters. But the most striking development of recent years in America has been the use of the legal process to expose the inner life of individuals. Kenneth Starr, the independent counsel who tried to drive President Clinton from office, used his menacing power to obtain from Monica Lewinsky’s personal computer her unsent love letters and personal jottings; he printed them out and included them in the report he sent to the

2. *Id.*

3. *Id.*

4. *Id.*

5. *A Talk With Milan Kundera*, N.Y. TIMES, May 19, 1985 (Magazine), at 85.

House of Representatives. He also included, despite her anguished plea, computer messages from a friend of Ms. Lewinsky's in Japan telling about conflict with her husband.

Ms. Lewinsky especially resented a Starr subpoena demanding that a Washington bookstore produce a record of all the books she had bought there. "I felt like I wasn't a citizen of this country any more," she said.⁶ But Starr said courts had upheld a subpoena for records of books read by Timothy McVeigh, the Oklahoma City bomber, so they should do the same for him. That a prosecutor would advance so absurd an analogy shows how the interest of privacy has been devalued in the legal mind.

Jeffrey Rosen's recent book, *The Unwanted Gaze*,⁷ compellingly describes what Rosen subtitles the book, *The Destruction of Privacy in America*. He cites the lawsuit by Paula Jones as an example of how sexual harassment law has been perverted into a destroyer of privacy.⁸ By accusing President Clinton of an offensive sexual advance years before, Jones was able to compel him, and others, to describe their consensual, private sexual activities in testimony that inevitably became public.⁹ Monica Lewinsky was asked by Jones's lawyers to hand over her diaries, address books, letters, notes and so on.¹⁰ Rosen asks, "[H]ow could the law permit such unreasonable searches, in which the investigation of the offense seemed more invasive than the offense itself?"¹¹

We have come a long way in this country, a prurient way, from the modest indignity that helped to provoke Louis D. Brandeis' great defense of privacy: the use of pictures of his law partner's wife, without her consent, in newspapers. Brandeis and his law partner, Samuel D. Warren, invented a legal theory for the protection of privacy in their 1890 article in the Harvard Law Review, *The Right to Privacy*.¹² They used a phrase that rings for us still, "the right to be let alone."¹³

Brandeis was a man of strong and lasting convictions. Thirty-eight years later he used that phrase again, dissenting from the decision of a majority of his Supreme Court colleagues that wiretapping was not a search

6. ANDREW MORTON, *MONICA'S STORY* 215 (1999).

7. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. *Id.*

subject to the restraints of the Fourth Amendment to the Constitution.¹⁴ He wrote:

The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹⁵

The wiretapping decision from which Brandeis dissented has been overruled by the Supreme Court.¹⁶ Tapping of telephones by government agents is now subject to the Fourth Amendment's bar on "unreasonable searches," though that gives the government a good deal of room to define what is reasonable. But otherwise, the interest of privacy has not fared well in the United States. What Kundera described as the curtain between every individual's public and private life is well and truly ripped.

The odd thing is that privacy has suffered despite the adoption of law designed to protect it. For the Brandeis-Warren article has had more effect on law, in all likelihood, than anything else ever written for a law review. Legislatures and courts in most states have made invasion of privacy a tort, just as Brandeis and Warren proposed. Treatises have identified four varieties of the tort: 1) appropriation of a person's name or likeness, like Mrs. Warren's; 2) invasion of one's personal space, as by a concealed microphone in a medical rescue helicopter; 3) a depiction that puts a person in a false light; and 4) disclosure of truthful but embarrassing private facts about a person.¹⁷

But despite all those legal trappings, those grounds for recovery of damages, lawsuits for violation of the right to privacy have not often proved fruitful. In significant cases, judges have found the interest in privacy outweighed by other interests. One of the earliest of those cases, and to me one of the most tormenting, is *Sidis v. F-R Publishing Corp.*,¹⁸ decided in 1940.

14. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

15. *Id.* (Brandeis, J., dissenting).

16. *Katz v. United States*, 389 U.S. 347, 353 (1967).

17. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON TORTS, § 117 (5th ed. 1984).

18. 113 F.2d 806 (2d Cir. 1940).

William James Sidis, born in 1898, was a boy genius.¹⁹ His father, Boris, a psychologist, set out almost from birth to develop the boy's faculties.²⁰ William was said to be reading *The New York Times* by the age of 18 months.²¹ By the time he started school, he knew not only English but was studying Latin and French.²² Boris trained him relentlessly, issuing bulletins on William's progress to the press.²³

At the age of eleven, William entered Harvard, and *The New York Times* described him as the "wonderfully successful result of a scientific forcing experiment."²⁴ But, as anyone might have predicted, William did not enjoy the life forced upon him. After college and incomplete attempts at graduate school, he sought obscurity.²⁵ Working variously as a clerk and a translator, Sidis dropped out of the public eye until 1937, when *The New Yorker* published an article about him by Jared L. Manley.²⁶ The headline was "Where Are They Now?" Under that was the line "April Fool," a play on the fact that Sidis was born on April 1.²⁷ The article described him as living a lonely life in "a hall bedroom in Boston's shabby south end."²⁸ It spoke of his "curious . . . laugh," his collection of streetcar transfers and his interest in the lore of the Okamakamesset Indians.²⁹ It was, as a judge said, a "merciless" exposure of a man who desperately desired to be let alone.³⁰

Sidis sued under state law for violation of his right to privacy.³¹ Because he and the company that published *The New Yorker* were from different states, the case was brought in federal court.³² It was decided in 1940 by the United States Court of Appeals for the Second Circuit, in an opinion by a particularly thoughtful judge, Charles Clark, a former dean of the Yale Law School.³³ Judge Clark expressed sympathy for the plaintiff.³⁴

19. Jared L. Manley, *Where Are They Now*, THE NEW YORKER, Aug. 14, 1937, at 22, as discussed in *Sidis*, 113 F.2d at 807.

20. *Sidis Could Read at Two Years Old*, N.Y. TIMES, Oct. 18, 1909, at 7.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

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

26. *Manley*, *supra* note 19, at 22.

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

28. *Id.*

29. *Id.*

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

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 807, 809.

Sidis claimed that *The New Yorker* article had held him up to “public scorn, ridicule and contempt,” causing him “grievous mental anguish [and] humiliation.”³⁵ There was no reason to doubt the truth of those assertions.³⁶ But Judge Clark found for the defendants, the publishers.³⁷ He did not find them protected by the First Amendment. Indeed, he did not mention the First Amendment, for the Supreme Court had not yet brought libel and privacy within its ambit. He simply balanced the interests—Sidis’s in privacy, the society’s in freedom of comment—and said the court was not disposed “to afford to all the intimate details of private life an absolute immunity from the prying of the press.”³⁸ Brandeis to the contrary notwithstanding, Judge Clark said, he would allow “limited scrutiny of the ‘private’ life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a ‘public figure.’”³⁹

“Thrust upon him,” that phrase of Judge Clark’s, is what lost the case for Sidis. To many it may seem unfair—it does to me—that Sidis was more vulnerable to public mocking for the rest of his life because of the fame his father forced upon him. But I suppose it would be strange, in a country as devoted to freedom of expression as this one, to bar the press and the public from taking a continuing interest in someone who had been a publicized boy genius. More recent interpretation of the First Amendment has made that side of the balance even weightier.

Whatever the legal balance should have been when Sidis sued, there are questions of journalistic decision-making. Was the Jared Manley article good journalism? Should *The New Yorker* have printed it? Was it ethical to do so? When I teach the *Sidis* case, I ask my students what other works by Jared Manley they have read. It is a trick question, because Manley did not exist. The name was a pseudonym used by the real author of the Sidis article, who was James Thurber. Another thing: Thurber evidently did not meet Sidis. The article said a woman, unnamed, had “recently succeeded in interviewing him.”⁴⁰ Did she disclose her purpose? Or did she pose as a new friend of the lonely man so that she was invited to visit his hall bedroom and inspect his collection of streetcar transfers? There is a smell of tabloid journalism here that one does not usually associate with *The New Yorker*. Publishing a story that pries brutally into someone’s private life may not give

35. SISSELA BOK, SECRETS 251 (1984).

36. *Id.*

37. *Id.* at 811.

38. *Id.* at 809.

39. *Id.*

40. Manley, *supra* note 19.

the victim a right to damages, but it may nonetheless violate the standards of decent journalism. William James Sidis lived just four years after the Second Circuit decision. Unemployed and destitute, he died of a cerebral hemorrhage.⁴¹

The interest of privacy was first authoritatively weighed against the First Amendment's protection of freedom to publish in a Supreme Court case called *Time, Inc. v. Hill*.⁴² James Hill, his wife, and five children lived in a suburb of Philadelphia.⁴³ In 1952, three escaped convicts took over their home.⁴⁴ The Hills were held hostage for nineteen hours, but were treated respectfully by the convicts, who left and ten days later were caught.⁴⁵ The press covered the story intensely, to the distress of the family and especially of Mrs. Hill, who was a very private person.⁴⁶ To escape from the glare of publicity, the Hills moved to Connecticut and sought obscurity.

Two years later a play called *The Desperate Hours* opened on Broadway. It depicted a two-day reign of terror by escaped convicts who held a family hostage: brutality, sexual threats, and general menace. The play was set in Indianapolis. But *Life* magazine, doing a feature on the opening, photographed the actors in the former home of the Hills near Philadelphia and described the play, with all its terror, as a reenactment of what had happened to the Hills.⁴⁷ The *Life* story was devastating to the Hill family.⁴⁸ Mrs. Hill suffered a psychiatric breakdown.⁴⁹ Mr. Hill said he could not understand how *Life* could publish such a story without at least telephoning him to check the facts.⁵⁰ "It was just like we didn't exist," he said, "like we were dirt."⁵¹

41. See generally Jim Morton, *Peridromophilia Unbound: William James Sidis*, at <http://members.aol.com/popvoid/sidis.html>; John H. Lienhard, *Engines of Our Ingenuity No. 969: William James Sidis*, at <http://www.uh.edu/engines/epi969.htm>.

42. 385 U.S. 374 (1967).

43. *Id.* at 378.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Time, Inc. v. Hill*, 385 U.S. 374, 377–78 (1967).

48. *Id.*

49. *Id.*

50. BERNARD SCHWARTZ, *Unpublished Opinions of the Warren Court* 242, 249–50 (Oxford Univ. Press 1985). See also Leonard Garment, *Annals of Law: The Hill Case*, THE NEW YORKER, Apr. 17, 1989, at 90, 109.

51. SCHWARTZ, *supra* note 50, at 249.

Mr. Hill sued Time, Inc., the publishers of *Life*, for violation of the New York privacy statute.⁵² By associating his family with horrors that it had not in fact experienced, he said, the article put the family in a false light.⁵³ In the New York courts, he won damages of \$30,000.⁵⁴ But Time, Inc. took the case on to the United States Supreme Court, where Mr. Hill was represented by Richard M. Nixon.⁵⁵ After hearing argument on April 27, 1966, the justices voted 6-3 to affirm the Hills' modest judgment.⁵⁶

The opinion was assigned to Justice Abe Fortas.⁵⁷ He began with a stinging attack on *Life's* handling of the story.⁵⁸ "Needless, heedless, wanton and deliberate injury of the sort inflicted by *Life's* picture story," he wrote, "is not an essential instrument of responsible journalism. Magazine writers and editors are not, by reason of their high office, relieved of the common obligation to avoid inflicting wanton and unnecessary injury. The prerogatives of the press—essential to our liberty—do not preclude reasonable care and avoidance of casual infliction of injury They do not confer a license for pointless assault."⁵⁹

Justice Fortas went on to speak, eloquently, of the meaning of privacy and its place in a civilized society.

[I]t is of constitutional stature. . . . [I]t is not only the right to be secure in one's person, house, papers and effects, except as permitted by law; it embraces the right to be free from coercion, however subtle, to incriminate oneself; it is different from, but akin to the right to select and freely practice one's religion and the right to freedom of speech; it is more than the specific right to be secure against the Peeping Tom or the intrusion of electronic espionage devices and wiretapping. All of these are aspects of the right to privacy; but the right of privacy reaches beyond any of its specifics. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law.⁶⁰

52. *Time*, 385 U.S. at 374.

53. *Id.*

54. *Id.* at 379.

55. *Id.* at 375.

56. SCHWARTZ, *supra* note 50 at 242.

57. *Id.*

58. *Id.*

59. *Id.* at 243.

60. *Id.*

Powerful words, but you will not find them in the reports of Supreme Court decisions. At the passionate urging of Justice Hugo L. Black, the Supreme Court set the case down for reargument the following fall.⁶¹ And then, by a vote of 5-4, it reversed the judgment for Mr. Hill.⁶² What had happened? Justice Black was the most committed advocate of free expression on the Supreme Court at that time, and very likely at any time in the Court's history. Just before the *Hill* case was reargued, in October, he circulated among his colleagues a biting memorandum on the case.⁶³ "After mature reflection," he wrote, "I am unable to recall any prior case in this Court that offers a greater threat to freedom of speech and press than this one does."⁶⁴ His point was that the press, imperfect as it inevitably is, would be devastated if it were subject to damages for non-defamatory mistakes.

Two members of the Court changed their votes, and in January 1967, a 5-4 majority set aside Mr. Hill's judgment.⁶⁵ Justice William J. Brennan, Jr. wrote the opinion of the Court.⁶⁶ He had written the landmark libel opinion three years earlier in *New York Times Co. v. Sullivan*.⁶⁷ That decision held that, because "the central meaning of the First Amendment" was the right to criticize government and its officials, someone who published such criticism could not be made to pay damages for mistakes unless such mistakes were knowing or reckless falsifications.⁶⁸ Now, Justice Brennan applied the same formula to the *Hill* case.⁶⁹ *Life's* falsifying of the Hill family's story had not been proved to be knowing or reckless, so it was entitled to a new trial at which that question could be decided by a jury.⁷⁰ "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs,"⁷¹ Justice Brennan wrote, "essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized commu-

61. SCHWARTZ, *supra* note 50, at 301.

62. *Time, Inc. v. Hill*, 385 U.S. 374, 397-401 (1966).

63. SCHWARTZ, *supra* note 50, at 299.

64. *Id.* at 301.

65. *Time*, 385 U.S. at 397-401.

66. *Id.* at 376.

67. 376 U.S. 254 (1964).

68. *Id.* at 273.

69. *See generally Time*, 385 U.S. 374 (1967).

70. *Id.*

71. *Id.* at 388.

nity. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."⁷²

Milan Kundera, with his powerful feelings about the need for privacy, would surely shudder at Justice Brennan's statement that "[e]xposure of the self to others . . . is a concomitant of life in a civilized community."⁷³ The Kundera and Brennan views define the ultimate issue on this subject, the conflicting claims of privacy and free expression. Each effectively dismisses the prime value of the other.

Justice Fortas, joined by two other members of the Court, dissented.⁷⁴ His opinion lacked most of the bitter rhetoric that was in his earlier draft of a majority opinion. But he did say that a state should have "the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal."⁷⁵ Reading the record differently from the majority, he said the jury had found *Life* reckless.⁷⁶

The fourth dissenter, Justice John Marshall Harlan, took a position that I find convincing.⁷⁷ Because this case did not involve an official or famous person, he said, the "marketplace" of free speech in which contesting ideas are supposed to wrestle in First Amendment theory would not work.⁷⁸ Mr. Hill could not command an audience to answer *Life's* distortions.⁷⁹ So, there was a danger, Justice Harlan said, of "unchallengeable untruth."⁸⁰ Accordingly, he would have required Mr. Hill to prove only that *Life's* editors had been negligent in making their mistakes, rather than what is harder to prove, that they were deliberate or reckless in their falsification.⁸¹

One thing more must be said about the troubling case of *Time, Inc.*⁸² When details of the shifting votes inside the Court were made public in Bernard Schwartz's *The Unpublished Opinions of the Warren Court*,⁸³ in 1986, former President Nixon, who had argued the case twice for Mr. Hill,

72. *Id.*

73. *Id.*

74. *Id.* at 411 (Fortas, C.J., & Clark, J., dissenting).

75. *Time*, 385 U.S. at 415 (Fortas, C.J., & Clark, J., dissenting).

76. *Id.* (Fortas, C.J., & Clark, J., dissenting).

77. *Id.* at 402 (Harlan, J., dissenting).

78. *Id.* (Harlan, J., dissenting).

79. *Id.* (Harlan, J., dissenting).

80. *Time*, 385 U.S. at 408 (Harlan, J., dissenting).

81. *Id.* (Harlan, J., dissenting).

82. 385 U.S. 374 (1967).

83. See generally SCHWARTZ, *supra* note 50.

asked his former counsel and law partner, Leo Garment, to look into it.⁸⁴ Mr. Garment wrote an article for *The New Yorker*.⁸⁵ He noted a statement by Justice Harlan that publicity carried a “severe risk of irremediable harm . . . [to] individuals involuntarily exposed to it and powerless to protect themselves against it.”⁸⁶ Mr. Garment said there had been testimony at the trial that the *Life* article had caused “lasting emotional injury” to Mrs. Hill. Then he wrote:

Two eminent psychiatrists had explained the causal dynamics of the trauma inflicted on her. Both said she had come through the original hostage incident well but had fallen apart when the *Life* article brought back her memories transformed into her worst nightmares and presented them to the world as reality. Both said she was and would for an indefinite time remain a psychological tinderbox. In August, 1971, Mrs. Hill took her life.⁸⁷

Justice Brennan was a great figure on the Supreme Court: *Sullivan*⁸⁸ in particular was a transforming victory for freedom of expression. But I think the principle was pressed too far in *Time, Inc. v. Hill*.⁸⁹ James Hill was not a public person of the kind for whom the *Sullivan*⁹⁰ rule was imposed, someone who should have stayed out of the kitchen if he could not stand the heat. Nor was Mrs. Hill. I do not think the Hills of this world should have to jump such high hurdles in order to make a modest legal point about their privacy.

Then think of the *Hill*⁹¹ case in terms not of law, but of journalistic ethics. Justice Fortas’s original criticism of *Life*—“needless, heedless, wanton”⁹²—was hyperbolic. But did he not have a point in suggesting that responsible journalists have a duty of reasonable care, especially toward powerless private individuals like the Hill family? Neither William Sidis nor James Hill had sought public position or prominence; fame was thrust upon them. But what of those who put themselves in the public eye, the politicians

84. Garment, *supra* note 50, at 90.

85. Garment, *supra* note 50.

86. *Id.* at 109.

87. *Id.*

88. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

89. 385 U.S. 374 (1967).

90. *Sullivan*, 376 U.S. at 254.

91. 385 U.S. 374 (1967).

92. SCHWARTZ, *supra* note 50, at 251.

and celebrities who dominate today's publications and broadcasts? Do they have any right to privacy at all?

Press attitudes on that question have changed drastically. When Franklin D. Roosevelt was president, reporters and photographers effectively hid from the public the fact that he spent most of his time in a wheelchair.⁹³ When a photographer new to the White House took a picture of the president in his wheelchair, colleagues removed the film from his camera. Judge Charles Clark, in the opinion rejecting Sidis's lawsuit, said that he could imagine situations in which "public characters," as he called them, could protect their privacy by law.⁹⁴ "Revelations," he said, "may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."⁹⁵

Nowadays it is hard to imagine any revelation so intimate that it would offend the public's sense of decency, or that the press would consider too invasive to publish. Anything that shows a politician in a bad light, especially a president, is fair game. And, of course, sex is best of all. We can date the end of press inhibitions to the moment a reporter asked Senator Gary Hart at a press conference, "Senator, have you ever committed adultery?"⁹⁶

We are obsessed with the sex lives of politicians. When editors are criticized for focusing on that subject, they often justify their choice by arguing that sexual behavior bears on a politician's fitness for office. Yet, I have never seen any evidence that sexual purity assures wise leadership. When a Linda Tripp comes along with her tales and her tapes, I think a mainstream newspaper editor or broadcaster should tell her to peddle them to a supermarket tabloid. That is what a French editor would surely do, but the French equivalent of a supermarket tabloid would not be interested either. Sex? What else is new? Only in the United States and Britain does the press go mad over straying politicians. Why? Is it something about the Anglo-Saxons, as the French call us? Or, is it a result of increasing competition for readers and viewers? If we do not publish it, that is, some bottom-dwelling slug will put it on his website. So in this view the news business is experiencing something like Gresham's law, with the vulgar and sleazy tending to drive out serious news. After September 11, 2001, newspapers and broadcasters did turn more serious. But after a time, analysts have

93. *FDR and Polio—A 'Splendid Deception'*, at <http://www.feri.org/archives/polio/deception.cfm>.

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

95. *Id.* at 809.

96. See N.Y. TIMES, May 7, 1987, at A1.

found, many reverted to a search for the tawdry. Celebrity gossip is the staple of much of the magazine and tabloid newspaper world. The vicious gossip-monger who was the fictional antihero of *Sweet Smell of Success*⁹⁷ is not fictional any longer. But you do not have to be a celebrity to be a victim of today's intrusive journalism.

Ruth Shulman was driving on a California highway when her car was hit by another and rolled down an embankment.⁹⁸ She was gravely hurt, ending up as a paraplegic.⁹⁹ A rescue helicopter came to the scene of the accident and flew Ms. Shulman to a hospital.¹⁰⁰ What she did not know was that the nurse in the helicopter had a wireless microphone, and someone else had a video camera, filming her in agony.¹⁰¹ It all became part of a program that was really not news but a debased form of entertainment.¹⁰² Ms. Shulman sued for invasion of her privacy.¹⁰³ The Supreme Court of California ruled that she could have no legal objection to filming at the scene of the accident, but she was entitled to an expectation of privacy in the helicopter and could recover damages for the intrusion by the broadcast company into that privacy.¹⁰⁴

Or, think about Charles and Geraldine Wilson of Rockville, Maryland. Early one morning, while they were still in bed, their nine-year-old granddaughter was up and waiting for a school bus. They heard her open the door to someone.¹⁰⁵ Mr. Wilson, wearing only briefs, went out to see who it was.¹⁰⁶ Three policemen with guns drawn ordered him to the floor.¹⁰⁷ A photographer who was also there took a picture of him with an officer's knee on his back and a gun at his head.¹⁰⁸ The photographer worked for *The Washington Post*, as did the reporter who was there with him.¹⁰⁹ They were on what is called a "ride-along," accompanying the police in "Operation Gunsmoke," a search for wanted felons.¹¹⁰ The Wilsons' adult son was

97. Ernest Lehman & Clifford Odets, *Sweet Smell of Success* (1957 screenplay).

98. *Shulman v. Group W. Prod., Inc.*, 955 P.2d 469, 475 (Cal. 1998).

99. *Id.* at 476.

100. *Id.* at 475.

101. *Id.*

102. *Id.*

103. *Shulman*, 955 P.2d at 476.

104. *Id.* at 477.

105. *Wilson v. Layne*, 526 U.S. 603, 607 (1999).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* 526 U.S. at 607.

110. *Wilson*, 526 U.S. at 606–07.

wanted on charges of violating probation and was a target of Operation Gunsmoke.¹¹¹ He was not there, and in due course the police left.¹¹² The Wilsons sued the officers for violation of their Fourth Amendment protection against unreasonable searches and the case went to the United States Supreme Court.¹¹³

Some leading press organizations, including *The New York Times*, filed a brief defending such press ride-alongs as legitimate under the Fourth Amendment.¹¹⁴ “The news media afford the public,” the brief said, “a unique window through which to observe the conduct of those officials . . . and the social conditions they confront.”¹¹⁵ Does that persuade you? Not me. I do not think we need to find out about social conditions by having reporters and photographers burst into private homes with armed policemen. And it did not persuade the Supreme Court. It held that bringing the press into the Wilsons’ home violated the Fourth Amendment.¹¹⁶

I spent fifty years as a newspaper reporter and columnist, and I believe with all my heart in the First Amendment. If the press is to do its job, it must look into some closed areas of government and society. It could hardly be effective in holding power accountable if it had to ask the permission of those who have power before looking into their activities. But, it is not inconsistent with the great function of the press in keeping power accountable to have some concern for the feelings of those who have not sought power, for William Sidis or Ruth Shulman, for example. Or, for Oliver W. Sipple, who had fame thrust upon him in an extraordinary way. On September 22, 1975, President Gerald R. Ford was visiting San Francisco.¹¹⁷ As he walked out of the St. Francis Hotel, a woman in the crowd, Sara Jane Moore, raised a gun and aimed it at the President.¹¹⁸ As she fired, Oliver Sipple, a former Marine, struck her arm.¹¹⁹ The shot missed Ford; Sipple may have saved his life.¹²⁰

Two days later Herb Caen, a columnist in *The San Francisco Chronicle*, carried an item suggesting that Sipple was gay and was a hero

111. *Id.* at 606.

112. *Id.* at 607.

113. *Id.* at 608.

114. Brief of Amici Curiae of ABC, Inc. et al. at *1, *Wilson v. Layne*, 526 U.S. 603 (1999) (Nos. 97-1927, 98-83).

115. Brief of Amici Curiae of ABC, Inc. et al. at *2, *Wilson* (Nos. 97-1927, 98-83).

116. *Wilson v. Layne*, 526 U.S. 603, 614.

117. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 666 (Ct. App. 1984).

118. *Id.*

119. *Id.*

120. *Id.*

especially in the gay community of San Francisco.¹²¹ Other newspapers copied the story, and across the country Sipple was identified as gay.¹²² He sued for invasion of privacy, arguing that he was indeed homosexual but that he was entitled to damages for publication of private facts that would embarrass him.¹²³ The California courts ruled against him, finding that his sexual orientation was known to many before the Caen column so it was not legally “private.”¹²⁴

Decades ago the California courts held that publication of embarrassing facts that had been known to the public years before could be penalized by damages.¹²⁵ The case involved a former prostitute who had been accused of murder but acquitted.¹²⁶ In the following years, she had reformed, married and become a respected member of the town where she lived.¹²⁷ Then a movie was made about her life, *The Red Kimono*.¹²⁸ This had an adverse effect on her social position, and she sued for violation of her privacy. An appellate court said she was entitled to sue, but recent privacy decisions by the Supreme Court of California indicated that that precedent might no longer be followed.¹²⁹ Thus, the outcome of Oliver Sipple’s lawsuit seemed inevitable. The American legal culture, as it is today, would not accept a prohibition on publication of facts already widely known.

Other societies take a different view. Britain, which has never had a privacy tort, is developing one now after incorporation into domestic law of the European Covenant on Human Rights, which protects the right to respect for private and family life.¹³⁰ Early cases suggest that British courts may embrace the French concept of the “right to rehabilitation”—the right for past sins to be forgotten and an acknowledgment that information may be legally “private” even though it is known to friends of the offended plaintiff.¹³¹

The first important British decision expounding what we would call the law of privacy was handed down in March 2002 by the Court of Appeal.

121. *Id.*

122. *Sipple*, 201 Cal. Rptr. at 666.

123. *Id.* at 667.

124. *Id.* at 668.

125. *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).

126. *Id.* at 91.

127. *Id.*

128. *Id.*

129. *See e.g.*, *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998).

130. International Covenant on Civil and Political Rights, Dec. 16, 1966, Part III, Art. 17, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

131. *See A v. B Plc*, 2 All E.R. 545 (C.A. 2002) available at 2002 WL 230787.

The case was *A v. B Plc.*¹³² Lord Chief Justice Woolf delivered the judgment for a three-judge panel.¹³³ “A” was a leading British football/soccer player who had had extramarital sexual relations with two women, “C” and “D.”¹³⁴ “C” told her story to a tabloid Sunday newspaper, “B.”¹³⁵ “A” obtained an injunction from a high court judge forbidding the newspaper and the women to publish his, or anyone’s, name.¹³⁶ Lord Woolf set aside that restraint, giving what was an extraordinary victory to the interest of freedom of expression—extraordinary because British judges in the past have issued injunctions freely in disregard of that interest.¹³⁷ Judge Woolf wrote:

Even trivial facts relating to a public figure can be of great interest to readers Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure The public have an understandable and so a legitimate interest in being told the information The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.¹³⁸

Lord Woolf made two other points that advanced the interest of free expression in privacy matters. First, he said, “[r]elationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when other parties to the relationships do not want them to remain confidential.”¹³⁹ In other words, a public figure—even one as fleeting as a football player—must bear the risk that the other party to a sexual relationship may kiss and tell.¹⁴⁰ Second, Woolf said that courts “should not act as censors or arbiters of taste.”¹⁴¹ It must leave that to the ethics of journalism, policed in Britain to a certain extent by a body called the “Press Complaints Commission.”¹⁴² “[T]he fact that a more lurid

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *A v. B Plc*, 2 All E.R. 545, available at 2002 WL 237087.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *A v. B Plc*, 2 All E.R. 545 (C.A. 2002) available at 2002 WL 237087.

142. *Id.*

approach will be adopted by the publication than the court would regard as acceptable is not relevant."¹⁴³

British tabloids are notoriously tasteless. But judges must not be swayed by that, Lord Woolf was saying.¹⁴⁴ Unless a judge weighing the interest in privacy finds it distinctly more compelling than that of publication, the nature of the publication does not matter. With that, the British press took a significant step toward the freedom its American colleagues have enjoyed.

The American press has largely been triumphant in its resistance to the law of privacy. It challenges the very constitutional premise of the true Brandeisian legal action for deprivation of privacy: the idea that publication of private facts, however embarrassing or even antisocial the publication may be, can be penalized. The press argues that, under the First Amendment, truth can never be penalized. The United States Supreme Court has carefully avoided deciding that question, avoiding it, for example, when a television station used the name of a victim of rape and murder when a state law prohibited disclosure.¹⁴⁵ The Court held that the station could not be penalized because a court official had inadvertently given it the victim's name.¹⁴⁶

But the press should not be too comfortable—too arrogant, I might better say—in its court victories against privacy claims. The public, coarse as its tastes have become, may react against disclosure for disclosure's sake if pressed too far against the powerless. There may still be, that is, what Judge Clark in the *Sidis* case called "the community's notions of decency."¹⁴⁷ And, too, the public may react against developments in technology that strip us, unaware, of privacy, like a Microsoft Media Player that keeps a log stored on the user's own computer of all the movies he plays.

Government in this country has accumulated powers more intrusive than Justice Brandeis could have imagined. We need a press to watch it: "[a] cantankerous press, an obstinate press, a ubiquitous press," as Judge Murray Gurfein put it in the Pentagon Papers case.¹⁴⁸ But "the right to know," that phrase chanted by some editors as if it were a magic incantation, is not the only value in a democratic society, not even one as committed to the freedom of expression as ours. Privacy is also a crucial value, for

143. *Id.*

144. *See id.*

145. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

146. *Id.* at 496–97.

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

148. *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

reasons powerfully expressed a few years ago by Professor Thomas Nagel of New York University:

The distinction between what an individual exposes to public view and what he conceals or exposes only to intimates is essential to permit creatures as complex as ourselves to interact without constant social breakdown. Each of our inner lives is such a jungle of thoughts, feelings, fantasies and impulses that civilization would be impossible if we expressed them all Sex is an important part of what must be managed in this way, if a civilized human being is to be constructed on the ever-present animal foundation, but aggression, fear, envy, self-absorption and vanity all form part of the task. . . . Just as social life would be impossible if we expressed all our lustful, aggressive, greedy, anxious or self-obsessed feelings in ordinary public encounters, so would inner life be impossible if we tried to become wholly persons whose thoughts, feelings, and private behavior could be safely exposed to public view.¹⁴⁹

We are in the age of exposure now—self-exposure on Oprah Winfrey and the like, exposure of others by the press. Secrecy is a red flag to journalists, rightly so. Governments use it to hide corruption and incompetence, and to increase their unaccountable power. But in another sense—the sense articulated by Thomas Nagel and Milan Kundera—secrecy is an essential component of a civilized life.

149. Thomas Nagel, *The Shredding of Public Privacy: Reflections on Recent Events in Washington*, Times Literary Supp., Aug. 14, 1998, available at <http://www.geocities.com/Capitol Hill/Senate/9634/tlsnagel.html> (last visited Nov. 3, 2002).