Articles

The Death of the Public Disclosure Tort: A Historical Perspective

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In 1890, Samuel Warren and Louis Brandeis, in their famous Harvard Law Review article *The Right to Privacy*, called for a new legal right that would allow the victims of truthful but embarrassing press publicity to sue in tort and recover damages for emotional harm.[1] Currently, in most states, it constitutes a tort if the disclosure of "matter concerning the private life of another" would be highly offensive to a reasonable person and the matter is not "of legitimate concern to the public." If the disclosed subject matter is of legitimate public concern, the newsworthiness privilege immunizes the disclosure.[2]

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1. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This piece is generally regarded as one of the most influential law review articles in American history (it "did nothing less than add a chapter to our law," in the words of Roscoe Pound). Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

2. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

However, for all intents and purposes, the public disclosure of private facts tort—one of the four branches of the privacy tort,[3] the "mass communication tort of privacy"[4]—is generally regarded as "dead."[5] "Stunted," an "anachronism," and "surprisingly weak," at best.[6] Scholars have urged that its "remains" be formally "interred."[7]

The standard response given in the scholarly literature for the "death" is the broad definition of newsworthiness. Because courts generally consider virtually everything that appears in the news media to be newsworthy, or of "legitimate public concern," it has become nearly impossible to win a public disclosure suit. But why did newsworthiness, in the words of Harry Kalven, Jr., become "so overpowering as to virtually swallow the tort"?[8] The literature is largely silent on this question, pointing only to courts' historical resistance to restrictions on the publication of truthful information[9] and to the infamous *Sidis* case from 1941, which employed an expansive understanding of newsworthiness roughly synonymous with public curiosity.[10]

There is more to the story than this, and that is what this Article

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3. The four branches are intrusion upon the seclusion of another, unreasonable publicity given to another's private life, appropriation of another's name and likeness, and publicity that unreasonably places another in a false light before the public. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

4. Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 329 (1966).

5. Jonathan Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Public Domain*, 55 MD. L. REV. 425, 426 (1996) ("[O]ne third of the Supreme Court and most of privacy academics have pronounced dead the more than century-old tort of public disclosure of private facts.") In *Florida Star v. BJF*, 491 U.S. 524 (1989), where the Court held that liability cannot result from the disclosure of private facts already in public records, Justice White's dissent states that the majority had "obliterated one of the most noteworthy legal inventions of the twentieth century." *Id.* at 553.

6. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 290 (2002).

7. *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to* Warren & Brandeis*'s Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (arguing that the privacy tort cannot be reconciled with freedom of speech); Randall P. Bezanson, The Right to Privacy *Revisited: Privacy, News and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1177 (1992) (asking that the tort be "formally interred").

8. Kalven, *supra* note 4, at 336 ("There is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness. The cases admittedly do not go quite this far, but they go far enough to decimate the tort."). *See* Linda Woito & Patrick McNulty, *The Privacy Disclosure Tort: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 195-6; Zimmerman, *supra* note 7, at 353; Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 342 (1979); *see also* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976); Everette E. Dennis, *The Press and the Public: A Definitional Dilemma*, 23 DEPAUL L. REV. 937 (1973);.Theodore L. Glasser, *Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense*, 4 COMM. & L. 23, 24 (Spring 1982).

9. Zimmerman, *supra* note 7, at 311 ("[T]he historical evidence suggests that the framers of the First Amendment would have viewed restraints imposed by tort law on accurate speech . . . as inappropriate.").

10. Sidis v. F-R. Publ'g Corp., 113 F.2d 806 (2d Cir. 1940). *See* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1209 (2004); Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 999-1003 (1989).

explains. The moribund tort has generated a surprisingly vast body of scholarly literature. Virtually none of it, however, offers anything in the way of a historical or sociological analysis of the tort's demise and the development of the broad newsworthiness standard. A more comprehensive explanation could be achieved by understanding privacy as a historically contingent construct. At any given time, a society calls on privacy law to do certain kinds of work—to validate particular social structures, practices, and ethics.[11] To understand it, we need to look deeply into the social tensions we are asking it to ameliorate at any given moment.[12] This paper contextualizes and historicizes the "death" of the legal action for public disclosure of private facts and suggests that history may help us understand some of the tensions that lie beneath our current debates over mass media and privacy.

I trace the privacy tort's death to the period between roughly 1920 and 1940, an era that saw the rapid growth and transformation of both old and new media, including newspapers, magazines, radio, and motion pictures. It was a time of "dramatic tensions" that shaped American culture,[13] marked by a national focus on the issue of culture and communications.[14] Two broad cultural shifts in this period undermined the public disclosure tort. One was a cultural devaluation of privacy, in the sense of concealing one's private self from public view. By the 1930s, a certain degree of public self-exposure was not only considered desirable but inevitable. The other change was an expansion of the definition of "the news" to encompass a wide variety of information, including private facts, and a reassessment of the significance of the news media to modern social life. We see the emergence of the concept of "the public's right to know" about the world through the news media, and the idea that the purpose of the news is not only to inform citizens about the complex workings of modern society but to generate public discourse. For the news media to achieve this function, there must be robust legal and constitutional protection for a free press, and news content must be "as extensive as the range of (the public's) interests and concerns."[15]

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11. Privacy law is a "way of organizing society." J. Hirshleifer, *Privacy: Its Origin, Function, and Future*, 9 J. LEGAL. STUD. 649 (1980).

12. As Jane Gaines writes, from a sociological perspective, lawsuits represent trouble spots. Where social norms do not function effectively, the law must perform ameliorative functions. JANE GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 11 (1991).

13. WARREN SUSMAN, CULTURE AS HISTORY 268 (1984).

14. *Id.* at 260 ("There is a sharpening and a focusing on the issue of culture and communications. . . . all agreed that there was a new world and that communications in large part had helped make it.").

15. This phrase was used in the 1947 Report of the Hutchins Commission on Freedom of the Press, a report by a group of philosophers, historians, and law professors organized to study the press in America. A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES AND BOOKS (1947).

The public disclosure tort cases of this era validated and furthered these trends, bringing the force of law to bear on changing social conditions and norms. In many of these cases, judges expressed an idea that Justice Brennan would neatly summarize many years later: that "exposure of the self to others in varying degrees is a concomitant of life in a civilized community."[16] Addressing First Amendment concerns both explicitly and implicitly, the courts described a right of the press to publish on public affairs, a category that included "personalities" and "private social affairs and prevailing fashions involving individuals who make no bid for publicity."[17] The public disclosure cases aired ideas about the social functions of the news media and the dynamics of media consumption that both tracked and foreshadowed the Supreme Court's analysis in its cases expanding constitutional protection under the First Amendment to publish truthful material on matters of public concern. The saga of the death of the public disclosure tort is part of the story of how we made the historic decision to begin to legitimize, and even endorse mass media's steady expansion of the scope of public discourse.

Even though the public disclosure tort may no longer be effective as a legal remedy against media disclosures, it has remained a live topic of interest among legal academics. Scholars have defended the public disclosure tort, citing the negative social and personal effects of unwanted media publicity and the failure of social norms and structures to adequately protect privacy and reputation. They point out that humiliating publicity not only damages individual dignity but impedes the formation of authentic relationships and dissuades people from participating in public life.[18] Privacy, they argue, is essential to the same goals that we seek to safeguard through the First Amendment—individual autonomy and participatory democracy.[19]

In calling for greater legal protection for the disclosure of private facts

16. Time v. Hill, 385 U.S. 374, 388 (1974).

17. Martin v. New Metropolitan Fiction, 139 Misc. 290, 292 (1931).

18. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 2003 DUKE L.J .967, 1040, 1048 (2003) ("disclosure protections are justified . . . because private information will lead to judging out of context . . . the bright spotlight of the media can deter capable people from seeking public office or speaking publicly about important issues."). *See also* Daniel J. Solove, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007). Thomas Emerson, one of the most distinguished First Amendment scholars, wrote that privacy and the law of freedom of press are "mutually supportive," and both "vital features of the basic system of individual rights." Emerson, *supra* note 8. On privacy, or freedom from unwanted exposure, as a fundamental right, see Edward J. Bloustein, *The First Amendment and Privacy: The Supreme* Court *Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY.

19. *See, inter alia*, Ruth Gavison, *Too Early for a Requiem:* Warren & Brandeis *on Privacy versus Free Speech*, 43 S.C. L. REV. 437 (1991); Sean Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996); Peter L. Felcher and Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Peter Edelman, *Free Press v. Privacy, Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1210 (1990).

and proposing ways that such protection might be made consistent with the First Amendment, defenders of the public disclosure tort contradict the historical movement in the United States towards broader speech rights and diminishing social inhibitions on self-exposure.[20] That historical movement began in the interwar period, when the culture, driven by economic, technological, intellectual, and demographic shifts, began to articulate a collective commitment to the public's "right to know" that placed free speech values over privacy.

Part IA. turns back to the origins of the privacy tort in the Victorian era. It explains why Warren and Brandeis assigned great importance to the concealment of the private self, why private facts had no place in their imagined universe of public discourse, and why they were profoundly threatened by journalism that appeared to usurp what they perceived as the individual's right to autonomous public self-presentation. Part IB. then looks at the destruction of this ethos with the rise of a "culture of self-exposure," which prized the public display of inner traits and feelings, and a modern regime of media surveillance where private citizens assumed the risk of publicity outside the home. Courts in the 1920s and 30s often ignored the pleas of privacy plaintiffs, recognizing not only the potential prestige of media publicity but the practical impossibility of complete control over self-presentation and privacy in public.

Part II looks at the rise of the newsworthiness concept and the social attitudes that informed it. I explore four different social and legal conversations in the interwar period where the definition of the news, and the question of the relationship between the news, public curiosity, open debate, and the public good, were debated and articulated. These overlapping discourses expressed similar perspectives on the social virtues of a free flow of information on matters of public concern, a domain that extended in some cases to the far reaches of popular publishing. This idea was also encapsulated in the "right to know," a phrase which began to be articulated widely in the World War II period.[21] The "right to know," and the social and constitutional significance of speech on "matters of public concern," have been key concepts in the evolution of freedom of speech and press in America, yet their historical origins have not been analyzed. I illustrate that these ideas were developed, in part, in public disclosure cases involving the newsworthiness defense in the 1930s and 40s. As such, these "newsworthiness cases" are an important but unacknowledged

20. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000) (on the chilling effect of the tort and its incompatibility with First Amendment values).

21. Associated Press director Kent Cooper was credited with originating the phrase in 1945. *See* Kiyul Uhm, *The Cold War Communication Crisis: The Right to Know Movement*, JOURNALISM & MASS COMM. Q., 82:1 (Spring 2005), 131-47.

source of modern legal thought on the subject of freedom of speech and press in this era.[22]

Central to the paper is an analysis of several significant appellate cases involving media publicity of private facts and images between 1890 and the 1950s. Although the focus is on the public disclosure tort, I also examine cases that would be considered, under Prosser's well-known four-part division of the tort,[23] to be "false light" cases (involving the publication of true facts that present a person in an unflattering light) and "appropriation" cases (actions for the dignitary harm stemming from the unauthorized commercial use of a person's image), which in this period drew on similar understandings of privacy as the right to determine one's own public image.[24] I situate these cases in their historical context by examining other contemporary sources—popular culture, legal scholarship, academic criticism—with which they entered into dialogue.[25] Using popular texts that are routinely drawn on by cultural historians, I demonstrate that legal doctrines of tort were informed by the consumption of popular culture, and modern free speech doctrine emerged from, among sources, tabloids and celebrity journalism.

While the public disclosure tort was viable in the late nineteenth century when Warren and Brandeis wrote, its social and legal meanings shifted when the Victorian values that rationalized the tort were reworked in the modern era. Through the chronicling of the rise and fall of the Warren and Brandeis invention, this Article tells a story about how America became a modern mass-mediated society, and how that process was intertwined with social and legal debates over privacy and the media. There was a sea change in the social experience of privacy and publicity in the period I describe, and tort doctrines of privacy played an unacknowledged role in facilitating that shift, one that in turn shaped the contours of the law.

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22. In general, historians of free speech in America have tended to overlook the interwar period, although these years saw the foundations of the civil libertarian position on the First Amendment. For work on this period, see STEPHEN FELDMAN, FREEDOM OF EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008); and MARK GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991). Freedom of speech was embedded in the "collective consciousness" of this period, yet the development of the law governing speech and press is often explained as if the broader "social milieu never existed." *See* Bradley Bobertz, *The Brandeis Gambit: The Making of America's First Freedom*, 1909-1931, 40 WM. & MARY L. REV. 557 (1998).

23. Prosser, *supra* note 3, at 389.

24. Prosser defined the appropriation tort as protecting the commercial value of personal image. This is generally now designated as the "right of publicity." *See* Prosser, *supra* note 3, at 401. However, as I discuss, appropriation was originally based on dignitary, not economic harm. *See* Robert Post, *Rereading* Warren & Brandeis*: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 671 (1990).

25. As Jane Gaines writes, judicial opinions help us understand the consciousness that is dominant at any given time in history because they support the function of institutional justification. "The significance of studying judicial opinions as cultural texts is that . . . we see how a sphere of activity other than the law makes its inconsistencies felt in legal doctrine." GAINES, *supra* note 12, at 11.

PART I

A. The origins of the right to privacy

In 1890, Samuel Warren was a wealthy and prominent Boston lawyer, and Louis Brandeis, the future Supreme Court justice, was Warren's former Harvard classmate and law partner. That year, they wrote the "Right to Privacy," allegedly because of Warren's outrage over an item concerning the marriage of his niece that appeared in a Boston society column.[26] The article targeted what the authors believed to be one of the most offensive aspects of contemporary journalism—the publishing of private facts in the form of gossip and "personality journalism."[27] This section discusses the assumptions about self and society that undergirded the creation of the public disclosure tort and the nineteenth century culture of self-concealment. Over time, as those background norms shifted, the culture of restraint collided with, and ultimately yielded a brash new, modern ethos of self-exposure.

Before the 1830s, newspapers had been affiliated with the major political parties and predominantly geared towards a readership of educated men. However, in that decade the American newspaper as we know it– a publication devoted to current happenings and "public affairs" –developed through "penny papers." Pitched at a working class audience, these papers printed "human interest journalism," presenting the news so that it read like entertainment.[28] The term "human interest stories" was first used in the offices of the New York Sun in the 1830s to designate the "chatty little reports of tragic or comic incidents in the lives of the people."[29] As advertising became the primary means of subsidizing newspaper publishing, the human interest approach became a way to attract readers and sell those readers to advertisers. Human interest journalism publicized material from the dark recesses of life: crime reports, gossip, trivia, and other pieces of fact (or as the case may be, fiction) formerly considered too mundane, lurid, or private to be published.[30] After the Civil War, most of the papers ran gossip columns,

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26. *See* James H. Barron, Warren & Brandeis, The Right to Privacy, *4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U.L. REV. 875 (1979); DONALD PEMBER, PRIVACY AND THE PRESS (1972); Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 25-27 (1979).

27. *See generally* CHARLES PONCE DE LEON, SELF-EXPOSURE: HUMAN INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA, 1890-1940, at 54 (2001).

28. SILAS BENT, BALLYHOO: THE VOICE OF THE PRESS 400 (1927).

29. HELEN MCGILL HUGHES, THE HUMAN INTEREST STORY 13 (1940).

30. *See* DE LEON, *supra* note 27, at 54; MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 89 (1981); *see also* GERALD BALDASTY, THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY (1992); HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH CENTURY AMERICA (1989).

and some of the larger papers had separate columns dealing with politicians, businessmen, society figures, writers, and athletes.[31]

The last quarter of the nineteenth century saw the rise of yellow journalism, the highly sensationalistic news reporting pioneered by publishers Joseph Pulitzer and William Randolph Hearst.[32] Hearst "came to reject all news stories which did not contain the thrill of sensation loved by the man on the street and the woman in the kitchen."[33] The newspaper tabloid originated in the 1880s with the New York Daily Graphic, a picture-laden sheet that carried the motto "great crimes, the terrific accidents, the society shaking scandals must be illustrated."[34] One of the New York newspapers employed a photographer to stand in the street and take snapshots of every person who appeared to possibly be important.[35] Between 1870 and 1900, as a result of technology and a growing urban population, the readership of daily urban newspapers increased 400%.[36] These papers, which attracted a wide working and middle class audience, made reading a pastime of the masses.[37]

Social elites were disgusted and threatened by the popular press, and a battle over journalism ensued—a "proxy for class conflict," in the words of journalism historian Michael Schudson.[38] The last quarter of the nineteenth century was a time of social upheaval that saw the first glimmerings that "that the social reality preserving the formal order was beginning to crack", according to historian Lary May.[39] New channels of communication and transportation—telephones, telegraphs, mass-circulation publications, railroads—condensed time and space. Industrialization and corporatization undermined the fabled economic individualism of the frontier era, and small towns and communities were being subsumed by impersonal national bureaucracies.[40]

The conservative backlash against these changes is well-known: anti-immigration laws, crackdowns against labor, and numerous attempts to control the flow of information through censorship and press regulation. Criticism of the popular press became so voluminous that it could almost

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31. DE LEON, *supra* note 27, at 52.

32. *See* DAVID RALPH SPENCER, THE YELLOW JOURNALISM: THE PRESS AND AMERICA'S EMERGENCE AS A WORLD POWER 16 (2007).

33. LEONARD TEEL, THE PUBLIC PRESS, 1900-1945, at 7 (2006).

34. *See* SIMON BESSIE, JAZZ JOURNALISM: THE STORY OF THE TABLOID NEWSPAPERS 56 (1969).

35. *The Right of Privacy*, N. Y. TIMES, July 19, 1896.

36. PEMBER, *supra* note 26, at 10.

37. TOM LEONARD, NEWS FOR ALL 92 (1995).

38. SCHUDSON, *supra* note 30.

39. LARY MAY, SCREENING OUT THE PAST: THE BIRTH OF MASS CULTURE AND THE MOTION PICTURE INDUSTRY 64 (1980).

40. By the 1870s, as historian Robert Wiebe summarized, "citizens in towns and cities across the land sensed that something fundamental was happening in their lives." ROBERT WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 44 (1968).

be called a "counter-industry," one historian writes.[41] The upper class, which prided itself on its order and rationality, saw the sensationalistic press as a reflection of the chaotic and disordered lives of the working classes. The elite vision of the news was exemplified by the *New York Times*, which presented serious financial and political news in a drily factual and allegedly accurate manner.[42] In an era when elites began to bifurcate culture into "highbrow" and "lowbrow," the news media were also subjected to this division.[43]

Between 1880 and 1890, in response to yellow journalism, reformers throughout the country pressed for the passage of state laws to ban sensationalistic newspapers and magazines.[44] One California law banned the publication of pictures or caricatures of any living person unless the press obtained prior permission. Another law in that state required authors to sign all potentially defamatory articles or editorials.[45] These laws posed little conflict with dominant judicial interpretations of the First Amendment and state constitutional free speech provisions.[46] Although prior restraints were proscribed, subsequent punishment of speech that had a "bad tendency," that threatened public safety or morals, was seen a legitimate exercise of the state's police powers.[47]

The greatest offense of the new journalism, according to elites, was that it corrupted the public sphere with private information. Trivial and frivolous facts about "personalities" cheapened the tone of public discourse and cluttered readers' minds, causing them to lose their sense of proportion and discrimination.[48] When the press displayed the details of

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41. NORMAN ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 190 (1990).

42. On the clash between entertainment and informational journalism in the 1890s, see Schudson, *supra* note 30, at 89-120.

43. *See* LAWRENCE LEVINE, HIGHBROW LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA (1988).

44. During that decade, Connecticut, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, Colorado, and Indiana all passed laws that criminally punished the printing, publishing, and selling of publications principally devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures or stories or deeds of bloodshed, lust, or crime." These were described in the Supreme Court case *Winters v. New York*, 333 U.S. 507, 522 (1948).

45. *See* LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES 65-67 (1993). Congress also controlled the press through postal regulations. The Comstock Law of 1873 made it illegal to send "obscene, lewd, and/or lascivious" material through the mails, including information about contraception. In 1868 and 1872 Congress banned lotteries from the mails, and also defamatory materials on envelopes and postcards. The Postal Act of 1872 granted the second-class postal rate to periodical materials "originated and published for the dissemination of information of a public character"; however, postal officials had tremendous discretion to deny second-class mailing rates. *See* JAMES PAUL AND MURRAY SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 31-37 (1961).

46. *See* Feldman, *supra* note 22, at 223. On the "bad tendency" standard in this era, see also DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

47. *Id.*

48. For a good discussion of these critiques, see ROCHELLE GURSTEIN, THE REPEAL OF

private affairs before a public audience, it blurred the boundaries between the public and private, destroying the sacred quality of intimate life. As Warren and Brandeis wrote:

> The press is overstepping in every direction the obvious bounds of propriety and 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.[49]

"[P]ersons with whose affairs the community has no legitimate concerns" were "being dragged into an undesirable and undesired publicity."[50] This inflicted on the victim "mental pain and distress, far greater than could be inflicted by mere bodily injury."[51] Gossip harmed society by "lowering. . .social standards and morality."[52] When gossip appeared in the press, it focused public attention on trivial matters and usurped "the place of interest in brains capable of other things."[53]

Arguing that it was the function and duty of the common law to protect against injuries to the person caused by new social circumstances, Warren and Brandeis called for a "right to privacy" that would allow the victims of unwanted publicity to sue in tort and recover damages for emotional harm that came from having one's image or private affairs displayed in public. At the time, there were no legal remedies available for unwanted, truthful publication of private facts in the press. The law of libel dealt only with false facts, and it remedied only damages to reputation. The harm that the Warren and Brandeis tort would redress was not a material assault to one's standing in the community, as in libel, but hurt feelings. Warren and Brandeis justified their proposed privacy right by linking it to opinions holding that individuals have property rights and contractual claims to their private letters and personal photographs. Therefore, one would also have a legal right to exclusive possession and control of one's public persona. Pointing to a general trend in the law towards protection of human emotions, not merely property and the body, they described the right to privacy not as a proprietary right like reputation but a spiritual

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RETICENCE (1996).

49. Warren & Brandeis, *supra* note 1, at 196.

50. *Id.* at 214.

51. *Id.* at 196.

52. *Id.*

53. *Id.*

interest rooted in "personality."[54] The right to privacy protected individuals against public disclosure and therefore would shield only private facts communicated in a mass medium. The tort would not punish publications for printing information about aspects of public figures' private lives related to their public accomplishments, a distinction drawn from the "fair comment" privilege in libel law.

As city living brought urbanites into close and often uncomfortable proximity with one another, the last quarter of the nineteenth century saw widely articulated concerns with physical privacy. Like privacy in personal affairs, private space, a symbol of wealth and gentility, was a distinctly upper class fetish.[55] Urban life inevitably blurs public and private. Although city dwellers were strangers to one another, they were increasingly dependent on one another and affected by each other's private behavior.[56] Commentators noted that "the man of today lives much more in the open than the man of a century ago."[57] The rise of mass communications also gave people the sense of being in an open network. To elites, these developments made protection of physical privacy more urgent. Warren and Brandeis had lamented that the privacy of the home was no longer sacred. They claimed that reporters eavesdropped and burst through closed doors, and that "instantaneous photographs and newspaper enterprises" had "invaded the sacred precincts of private and domestic life."[58]

And yet the "privacy" that Warren and Brandeis sought to protect was not primarily about physical seclusion or secrecy, contrary to what some scholars have suggested.[59] It was, at its core, about control over private information -specifically, the means by which individuals communicated

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54. Warren & Brandeis, *supra* note 1, at 205.

55. *See* Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281 (1966); *see also* Robert F. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 AM. J. JURIS. 87, 88 (1989).

56. *See* DAVID PAUL NORD, COMMUNITIES OF JOURNALISM: A HISTORY OF AMERICAN NEWSPAPERS AND THEIR READERS 127 (2001); ALAN WESTIN, PRIVACY AND FREEDOM 8-22 (1967).

57. *The Right of Privacy*, N. Y. TIMES, July 28, 1904.

58. Warren & Brandeis, *supra* note 1, at 195; *see also* Robert Mensel, *Kodakers Lying in Wait: Amateur Photography and the Right of Privacy in New York, 1885-1915*, AM. Q. 24-25 (1991).

59. In 1940, Louis Nizer, in an influential article, argued that Warren & Brandeis called for legal protection of the right "to live a life of seclusion and anonymity" and enjoy the "dignity of solitude." Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 528 (1940).

As Thomas Emerson notes, there is no "unified theory" or definition of privacy. Emerson, *The Right of Privacy and the Freedom of the Press*, *supra* note 8, at 340. Zimmerman also notes that "the commentators are in considerable disagreement over how to describe the purposes of this tort." Zimmerman, *Requiem for a Heavyweight*, *supra* note 7, at 321. *See also* Robert Post, *Three Conceptions of Privacy* 89 GEO. L.J. 2087 (2000) ("[P]rivacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."); William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253 (1966) ("Even the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right."); Richard Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974).

their identities to others. To Warren and Brandeis, "privacy" was the individual's "right of determining . . . to what extent (one's) thoughts, sentiments, and emotions shall be communicated to others,"[60] or in the words of E.L. Godkin, a "right to decide how much knowledge of ... personal thought and feeling. . .how much knowledge . . . of his tastes and habits, of his own private doings and affairs . . . the public at large shall have."[61] The authors feared that mass media would undermine traditional rituals of public self-presentation, rituals that were constitutive of personal identity and an essential part of the socialization processes that formed the basis of community. By rupturing these established modes of self-presentation, the "new" journalism threatened both the viability of the community and the integrity of the private self.

1. Concealment and Exposure

To understand why Warren and Brandeis had such deep investment in control over private information and public self-presentation, we need to understand something about the Victorian vision of the public sphere and the social meaning of the self-presentation rituals followed by the elite at that time. In that era, presentation of the self in public was, compared to modern standards, a relatively formal, plotted event governed by established codes of etiquette. Elites viewed etiquette as a set of hard, coercive rules not unlike formal law; it complemented legal codes or in some cases, took up the slack when the law failed. As one late nineteenth century writer noted, "etiquette" is "to society what civil law is to a country"; it "is the barrier which society draws around itself as a protection against offenses the 'law' cannot touch."[62]

The primary goal of self-presentation was the concealment of the private self in public. One created a public mask or façade that reflected not so much who one really was, but the dignified, controlled self one hoped to display before others. The necessity of creating a public "front" was a response to what sociologist Richard Sennett has described as the "audience problem"[63]—the problem of creating a reputation in a city where no one knows you. This dilemma surfaced in the period between 1820 and 1860, which saw the fastest rate of urban growth in American history. In the city, people judged each other largely on surface appearances, so first impressions were important.[64]

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60. Warren & Brandeis, *supra* note 1, at 198.

61. E.L. Godkin, *The Rights of the Citizen to His Own Reputation*, SCRIBNER'S MAG. 65 (July 1890).

62. JOHN KASSON, RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 61 (1991).

63. RICHARD SENNETT, THE FALL OF PUBLIC MAN 86 (1989)

64. Schudson, *supra* note 30, at 59-60. On the importance of reputation in cities, see LAWRENCE

Away from the small town communities they came from, men and women who migrated to cities often tried to conceal their backgrounds and remake themselves socially. To succeed in the city, one had to dissemble to a certain degree, yet to win the trust of others, one needed also to convey an image of sincerity. This was not easy. Because it was generally believed that one's private inner self, or "personality," manifested immediately in one's appearance—in one's dress, demeanor, and gestures—the concealment of one's true feelings and intentions required careful attention to self-presentation.[65] In general, self-control—mastery over desire—was the hallmark of the Victorian ethos and a natural outgrowth of a society that stressed producer values and a stringent work ethic. A model of self-presentation that stressed self-concealment and the suppression of spontaneous emotion externalized inner virtue, bridging the social and the moral.

The social fiction that enabled the controlled public performance was the construct of "separate spheres," the public and the private. The line between the two was one in which civility—epitomized by cosmopolitan, public behavior—was separated from nature, represented by the family.[66] The private sphere, governed by women and feminine sensibilities, was the domestic realm of emotion and intimate relationships; the public sphere, the male domain of competitive commercial relations.[67] The private, where true emotions and impulses flourished, served as the backstage to one's public performance. An individual "performed" a restrained identity in the public realm, but in private he dropped his front, stepped out of character, and revealed his true self.[68] As sociologist Erving Goffman noted in his famous study *The Presentation of Self in Everyday Life*, recourse to the back regions enabled the perfect expressive control demanded in the front regions.[69] Advice books portrayed the middle-class home as both a protected setting for personal interaction and a place where inhabitants rehearsed the roles they would perform in public life.[70] Genteel audiences followed established codes of reception—"laws of tact" that

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FRIEDMAN, GUARDING LIFE'S DARK SECRETS 27 (2005).

65. As Sennett writes, in the nineteenth century, "people . . . were disposed to make more and more of differences in the immediate impressions they made upon each other, to see these differences, indeed, as the very basis of social existence." The immediate impressions different people made were taken to be their "personalities." SENNETT, *supra* note 63, at 151-2.

66. SENNETT, *supra* note 63, at 18.

67. The classic piece on gender and the public-private distinction is Barbara Welter, *The Cult of True Womanhood, 1820-1860*, 18 AM. Q. 151-174 (1966).

68. *See* KAREN HALTUNNEN, CONFIDENCE MEN AND PAINTED WOMEN 104 (1982); KASSON, RUDENESS AND CIVILITY, *supra* note 58, at 61, 116 (1991); ERVING GOFFMAN, THE PRESENTATION OF SELF IN DAILY LIFE (1959).

69. GOFFMAN, *supra* note 68.

70. KASSON *supra* note 62, at 165.

called on them to ignore the flaws in other people's social performances.[71]

The rituals of self-presentation protected reputations, which had both economic and moral value. Occurring in intimate contexts mediated by shared values, they were also constitutive of community. In upholding these codes of self-performance and reception, communities enforced and policed social norms.[72] Oral gossip also maintained community—participants affirmed social values by criticizing those who transgressed them—but printed gossip did not: private facts that appeared in the press, by removing the practice of gossip from the community, negated its socializing functions. This is why the right to privacy would punish written but not oral gossip.[73]

Defamation law had long recognized the particular social and reputational harms posed by false statements in print. Plaintiffs suing for defamatory oral statements, for slander, had to plead special damages, but in the law of libel damages were presumed, because of the wide audience and permanency of the communication. In a geographically bounded community, a slander victim could confront one's accusers or rehabilitate one's image through counter speech, but there was little recourse when the material was spread to a wide audience in permanent written form.[74] When libelous or embarrassing information about an individual was disseminated through mass media, the victim lost his cooperative audience and control over the way his image would be received; readers and viewers would interpret it without the interpretive codes and background facts available to members of the community.

Between 1890 and 1910, men and women throughout the country brought "invasion of privacy" claims that implicated these concerns with unwanted exposure of the vulnerable private self, the inappropriate blurring of public and private, and loss of control over public image. By 1910, eight states had recognized a right to privacy—five at common law and four by statute.[75] Several other states that did not officially recognize a

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71. HALTUNNEN *supra* note 68, at 107; *see* GOFFMAN, *supra* note 68, at 234.

72. Post, *Social Foundations*, *supra* note 10, at 1008 ("[P]rivacy is simply a label that we use to identify one aspect of the many forms of respect by which we maintain a community."); Lawrence Lessig, *Post-Constitutionalism*, 94 MICH. L. REV. 1421, 1450 (1996) ("[A] community is a form of life in part constituted by a structure of sanctions.").

73. As Robert Post writes, "the contemporary media separate gossip as a noun from gossip as a verb – we can read gossip but not partake in it. So gossip does not enforce community boundaries and threatens community values." *The Legal Regulation of Gossip*, *in* GOOD GOSSIP 66 (Robert Goodman & Aaron Ben-Ze'ev eds., 1994).

74. *See* Post, *The Legal Regulation of Gossip*, *in* GOOD GOSSIP, *supra* note 73, at 67 (arguing that "defamation conveyed by slander, because of its contextualization in oral conversation" can serve purposes of upholding community norms of civil speech, whereas defamation by written communication cannot.").

75. At common law: Pavesich v. New England Life Insurance, 50 S.E. 68 (Ga. 1905); Pritchett v. Knox County Bd. of Comm'rs, 42 Ind. App. 3 (1908); Foster-Millburn Co. v. Chinn, 134 Ky. 424 (1909); Schulman v. Whitaker, 17 La. 704 (1906); Vanderbilt v. Mitchell, 72 N.J. Eq. 910 (1907). By

tort action for invasion of privacy nonetheless granted recovery on other grounds, such as breach of contract and unjust enrichment, often citing the Warren and Brandeis article approvingly.[76] In these cases, a person whose private facts or picture appeared in the press sought damages both for humiliation and injured reputation among her peers. Privacy claims were often brought together with libel claims, with libel addressing loss of reputation and privacy redressing the emotional and dignitary harm that occurred from loss of control over self-presentation.[77]

Press exposure removed the processes of individual image-making from the community, yet the sting of the misrepresentation was often felt intimately. In a 1909 Rhode Island case involving claims for both privacy and libel, *Henry v. Cherry & Webb*, the plaintiff appeared in an automobile ad that was printed in the *Providence Evening Bulletin*. The picture was "easily recognized by his friends and acquaintances," who made him "the object of much ridicule, scoff, and gibes," apparently believing that he had willingly posed for the advertisement and endorsed the cars.[78] In a 1911 Missouri case, *Munden v. Harris*, the picture of a young boy was used without authorization in an advertisement for a jewelry store. Holding that the boy had a cause of action for invasion of privacy, the court noted that both the association with jewelry and the public display of his image would be deeply embarrassing for a five-year-old child, because "it does not require any imagination to realize what a suggestive handle it would give to the teasing propensities of his fellows."[79] In *Foster Millburn Co. v. Chinn*, a Kentucky court in 1909 held that a Senator whose name had been falsely used in an advertisement for patent medicine had a cause of action for invasion of privacy. The advertisement, which circulated in a pamphlet, caused him to be "ridiculed and laughed at by his friends and acquaintances."[80]

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statute: New York, 1903, N.Y. CIV. RIGHTS Law; Utah, 1909, UTAH CODE ANN. §§ 76-4-8 and 76-4-9; Virginia, 1904, VA. CODE ANN.§ 8-650.

76. *See, e.g.*, Schuyler v. Curtis, 19 N.Y.S. 264 (1892); Marks v. Jaffa, 26 N.Y. Supp. 908 (1893). Both suits were clearly suggested by *The Right to Privacy*, and the courts based their decisions on Warren & Brandeis's theories. *See also* Ben Bratman, *Brandeis & Warren's Right to Privacy and the Birth of a Right to Privacy*, 69 TENN. L. REV. 623 (2002).

77. In many ways, privacy claims were really another route to a defamation claim, yet judges often regarded them separately—the indignity that flowed from losing the ability to present one's own public "front" as one wished was considered substantial enough to merit an independent cause of action. That legal actions for invasions of privacy had in many cases become another route to defamation claims was noted by a newspaper editor in a 1915 book called *The Coming Newspaper*, in which he observed that most states had made their libel laws stricter "as a response to intrusive journalism." Quoted in GURSTEIN, *supra* at note 48, at 171.

78. Henry v. Cherry & Webb 73 Atl. 97, 98 (1909). The court stated that the right of privacy did not exist in natural or in constitutional law, and it had neither the desire nor the power to create precedent.

79. 134 S.W. 1076, 1079 (1911).

80. 134 Ky. 424, 430 (1909). The Supreme Court was asked to, but did not address the public disclosure tort in the case *Peck v. Tribune Co.*, from 1909. In that case a plaintiff brought privacy and

As these cases suggest, the usual privacy claim in this period involved the unauthorized publishing of a person's photograph. Given contemporary perspectives on photography, thought to manifest the innermost identity of the person, it is not surprising that photographic appropriation would be viewed as deeply injurious to the individual's dignity and perceived right to autonomous self-presentation. As historian Alan Trachtenberg has written, the aim of nineteenth century portrait photographers was to "capture the soul," and professional photographers "developed a rationale which held that the photographer looked through surfaces to depths [and] treated the exterior surface of persons as signs or expressions of inner truths, of interior reality."[81] The turn of the century saw a massive social outcry over the burgeoning paparazzi, which led states and municipalities to enact anti-paparazzi laws.[82] Even though the face of a person in a public setting was technically not "private," circulating a photograph of it was considered an invasion of privacy because of the photo's inherently personal nature.

The famous privacy case of *Pavesich v. New England Life Insurance Co.*,[83] in which Georgia in 1905 became the first state to recognize the privacy tort, is a classic encapsulation of the Victorian perspective on the relation between the public and private and the connection of the photographic image to the inner self. The photo of an artist, Pavesich, had appeared in an insurance company's advertisement that was published in the *Atlanta Constitution*. Pavesich had posed for the photo but did not authorize its use in the ad. The Georgia Supreme Court overruled the lower court and held that he had a cause of action for invasion of privacy. Pavesich had lost the ability to give his own public performance; to "choose the times, places, and manner in which and at which [he] will submit himself to the public gaze,"[84] "to exhibit himself to the public at all

libel claims against the *Chicago Sunday Tribune*, which had published her image in a whiskey ad. In the ad, the plaintiff, Mrs. Peck, had been described as a nurse named Mrs. Schuman. Mrs. Peck was not a nurse, and she was an abstainer. The Court reversed the Seventh Circuit's decision to uphold the trial court's directed verdict for the defendant, stating that there was a jury question as to whether the ad was libelous and would hurt her reputation as a respectable woman with a "serious and respectable class in the community." The Court did not reach the invasion of privacy claim, suggesting that to do so it would need to consider whether privacy should be recognized an independent tort, which was more than the case required. "It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtlety is needed to state the wrong than is needed here." 214 U.S. 185 (1909).

81. ALAN TRACHTENBERG, READING AMERICAN PHOTOGRAPHS, 26, 27 (1989).

82. In Chicago in 1905, the city council took action against paparazzi. President Theodore Roosevelt led his own anti-paparazzi campaign when he instructed his secret servicemen to confiscate cameras and, after several newspapers had published a story about his private Thanksgiving dinner, publicly declared that his domestic affairs were "sacred" and his family would not be "made the victims of idle gossip." *The Right to Privacy*, CHI. TRIB., Dec. 6, 1905, at 10; *Home is Sacred, Says Roosevelt*, CHI. TRIB., Dec. 4, 1904, at 1.

83. 122 Ga. 190; 50 S.E. 68 (1905).

84. 50 S.E. 68, 70 (1905).

proper times, in all proper places, and in a proper manner,"[85] and "to withdraw from the public gaze at such times as [he] may see fit."[86] The loss of this prerogative was considered such a grievous violation of personal dignity that the judge characterized it as an assault to "personal liberty."[87]

Displayed far beyond the boundaries of any given locality, to audiences who lacked background facts, context, and shared interpretive codes, Pavesich's decontextualized, disembodied image was now thrown open to the interpretive anarchy of the masses. Viewers would make crude and unwarranted assumptions about his respectability, assaulting his dignity and reputation.[88] Pavesich's image could now appear "upon the streets"— "it may ornament the bar of the saloon keeper or decorate the walls of a brothel" and be displayed in disreputable places "where he would never go to be gazed upon," according to the court.[89] The last quarter of the nineteenth century saw the rise of a mass market for consumer goods, a consumer culture, and the beginning of the heavy use of visual images in advertisements.[90] Like the icons that had come to grace ads and packages of cereals, soaps, and patent medicines, Pavesich's face had become a fungible commodity, and his right to have his public reputation negotiated by the community had been usurped by the market.[91]

Privacy, reputation, and the codes of public performance were highly gendered. Women were thought to be private beings, and modesty was the female ideal. Women who openly displayed their emotion in public or who sought attention from others were not considered respectable.[92]

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85. *Id.*

86. *Id.*

87. *Id.* at 80.

88. Among legal scholars, there has been much debate over the interest that the court sought to protect in the *Pavesich* case. Prosser argued that it was primarily a proprietary one, and that the court recognized Pavesich as having unwillingly surrendered pecuniary and property interests in his image. Bloustein and Kahn read the court's concerns as mainly with dignitary harm— that the unwanted commercialization of his image humiliated and degraded him. *See* Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 984 (1964); Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of* Identity, 17 CARDOZO L. REV. 213, 222 (1999). Robert Post similarly writes that Judge Cobb's statement "conceives of commercial appropriation of a person's image as violative of essential norms of respect and hence as destructive of personality." Post, *Rereading* Warren & Brandeis: *Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 671 (1990).

89. 50 S.E. 68, 80.

90. Between the end of the Civil War and 1900, total advertising expenditure increased tenfold. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 156 (1992).

91. As legal scholar Jonathan Kahn has noted, the right to privacy intended to "create a legally sanctioned space beyond the reach of market forces" at a time when there was fear about the commodification of everyday life. Commodification denied "the conditions of individuation necessary to the proper respect for and development of one's personhood" by rendering the individual as a "fungible commodity." Kahn, *supra* note 88, at 221.

92. On modesty and gender, see Anita Allen & Erin Mack, *How Privacy Got its Gender*, 10 N. ILL. U. L. REV. 441 (1989-1990).

Although the turn of the century saw the first widespread uses of women's images in commercial advertisements, women's appearance in public, particularly in commercial contexts, signified sexual license and lower-class status.[93] For this reason, the unauthorized public display of women's photographs, especially in advertising, was considered by courts to be particularly reprehensible. In a case from 1918, *Kunz v. Allen*,[94] a Kansas appellate court held that a woman who had been filmed while shopping, and the image used in a newsreel advertisement for a dry goods store, had a cause of action for invasion of privacy. The ad conveyed the impression that the plaintiff was a disreputable professional actress or model, causing her extreme distress.[95]

A similar scenario confronted the Court of Appeals of New York in 1902 in the famous case of *Roberson v. Rochester Folding Box Company*.[96] This case is notable, in part, because of the extraordinary and revealing public reaction it spawned. A young girl, Abigail Roberson, sought legal action to stop the publication of her portrait on posters advertising Franklin Mills Flour. Even though Roberson's photograph was flattering, the court acknowledged that its display in such crass commercial settings as "stores, warehouses, and saloons," far outside the communities and contexts where Robertson herself would choose to appear, would reasonably subject a woman of modest sensibilities to "mortifying notoriety."[97] Over a strong dissent, the court rejected her claim, stating that there was no legal right to privacy and that recognizing one would open the floodgates of litigation.[98]

What followed was a testament to the widespread appeal of the Warren and Brandeis critique. Throughout the country, critics of the decision mobilized to defend Roberson's right to self-concealment.[99] Within weeks,

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93. As Anita Allen and Erin Mack note, "women appear in the Warren & Brandeis article as seduced wives and daughters." The rhetorical force of the article stems from the authors' "skillful exploitation of social attitude about gender." Allen & Mack, *supra* note 92, at 458.
Defamation was also a gendered offense – for men, the most damaging attacks on their reputation impugned their honesty and trustworthiness; for women, their reputation for chastity. *See* Lisa Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401 (2004). On the image of women in advertising, see CAROLYN KITSCH, THE GIRL ON THE MAGAZINE COVER (2001).

94. 102 Kan. 883 (1918).

95. *Id.*

96. 64 N.E. 442 (N.Y. 1902).

97. *Id.* at 442.

98. *Id.* at 450; *see also* SAMUEL H. HOFSTADTER, THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK 10 (1954).

99. Criticizing the decision, they lamented the failure of the law to police the boundaries of public discourse and to protect innocent citizens "who do not care to be made notorious," especially "the average good home-keeping wife, mother, or daughter," for whom "the thought she is likely to get her name in the papers is appalling and enough to bring on a fainting fit." *The Right of Privacy*, N.Y. TIMES, July 13, 1902. *Harper's* wrote that the dissent was "marching more closely in step with the general notion of the duty of the courts." HARPER'S WEEKLY 984 (1902).
Pavesich was decided after *Robertson*, and throughout the country papers praised the decision,

there was a public campaign demanding that the New York state legislature enact a statute that would legally protect individuals from unauthorized commercial appropriation of their names, private facts, and visual images.[100] The legislature responded with Civil Rights Law Sections 50-51, which made it both a misdemeanor and tort to make use of the name, portrait, private facts, or picture of any person for "advertising purposes or for the purpose of trade without his written consent."[101] The forces of concealment had won, and the norms of etiquette had been joined by the force of law.

Plaintiffs continued to bring these sorts of "privacy" claims in the early twentieth century, but by the 1920s there was a change in the judicial and public reactions to them. In the span of roughly two decades, American culture witnessed a significant transformation in norms of privacy and publicity. When the goal of self-presentation shifted from self-concealment to self-exposure, the very concept of an "invasion of privacy" changed. That an individual might bring the coercive force of the state to bear on the errant columnist, the ambitious press photographer, or appropriating adman seemed too much in an era when the pinnacle of social achievement was, in many ways, to be recognized by others for one's "inner" self.

B. The Personality Ideal

In 1897, the *New York Times* ran a baccalaureate speech by the president of Vassar College in which he lamented what he saw as a growing lust for fame among average people. "Influenced by . . . the love of notoriety, men have opened the secrets of their homes, their social entertainments and aspirations to the world."[102] Knowing that the papers would publicize anything amusing or titillating, everyday people revealed their private quirks and peccadilloes to reporters in the hopes of becoming famous.[103] The genteel person, by contrast, sought "modest privacy," shrank from notoriety, and was "pained and distressed by anything

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contrasting it to *Robertson*. The *New York Times* said that the Georgia Supreme Court had shown itself a "more trustworthy organ of civilization" than the New York Court of Appeals. *The Right to Privacy*, Apr. 23, 1905. *See also The Right of Privacy*, L.A. TIMES, Jul.28, 1905; *The Right of Privacy*, WASH. POST, Jul. 13, 1905.

100. Lawrence Edward Savell, *Right of Privacy – Appropriation of a Person's Name, Portrait or Picture for Advertising or Trade Purposes Without Prior Written Consent, History and Scope in New York*, 48 ALB. L. REV. 1 (1983).

101. *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902; *see also* N.Y. CIV. RIGHTS L. § 50. Note that the New York law was a remedy for dignitary and emotional harm, not the commercial value of one's image. The "right of publicity" would evolve decades later, following many cultural transformations far removed from the developments I describe here. *See* Nimmer, *The Right of Publicity*, *supra* note 1.

102. *Old Principles Upheld*, N.Y. TIMES, Jun 8, 1897.

103. *Id.*

resembling publicity."[104] Before long this sort of spotlight-seeking would become unexceptional. As this section demonstrates, by the end of the 1920s, Americans lived in a culture where the public exposure of private lives—of both public figures and random unknowns—had become a central part of social life. It was the subject of popular entertainment, major national industries, a new model of idealized self-presentation, and a modern vision of fame.

If anything defines American life in the 1920s, it is the rise of the city and the sudden proliferation of visual media. In 1920, the census registered, for the first time, an equal number of Americans living within and outside of cities. The landscape of the modern metropolis was increasingly one of sensual overwhelm. City streets, now vibrant with electricity, teemed with bright billboards advertising a cornucopia of consumer products. Movie theaters appeared in urban neighborhoods, and the average American went to the movies three or four times a week. Newspapers reached circulation highs and, with the advent of halftone technology, were illustrated with photographs.[105] America was becoming a mass-mediated, urban consumer culture, and these material developments reflected and hastened great changes in social behavior.[106]

After World War I there was, among the middle-class, a "revolution in manners and morals" that broke down the strict Victorian barriers of public and private.[107] The popularization of Freudian psychology helped release Americans from the strictures of the nineteenth century by validating the display of inner instincts and impulses. A burgeoning consumer culture and advertising industry celebrated and commercialized desire, blurring the boundaries between intimate and social experience. The use of psychological techniques in advertising—the linkage of consumer products to inner happiness and self-esteem—made private fears and desires public.[108] As advertisers promised that products would make consumers likeable, increase self-confidence, and cure halitosis, deeply personal matters, "once thought beneath the attention of the governing

104. *Id.*

105. For circulation figures, see ALFRED MCCLUNG LEE, THE DAILY NEWSPAPER IN AMERICA 731 (1947). In 1929, more newspapers were circulated daily in New York than the city's total population of about 6 million.

106. As cultural historian Warren Susman summarized, "whether it is a change from a producer to a consumer society, an order of economic accumulation to disaccumulation, industrial capitalism to finance capitalism. . . it is clear that a new social was emerging." Even more important, he writes, was the awareness of the public that it was living through a historical shift that was fundamental. SUSMAN, *supra* note 13, at 275.

107. *See* FREDERICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920S (1931); *see also* LYNN DUMENIL, THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920S (1995); MAY, *supra* note 39; SUSMAN, *supra* note 13.

108. *See* STUART EWEN, CAPTAINS OF CONSCIOUSNESS: THE SOCIAL ROOTS OF MODERN ADVERTISING (1976); ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM (1986).

classes, became topics of urgent public debate."[109] The rise of liberal and radical feminisms challenged earlier norms of sexual modesty,[110] and the tone of emotional life shifted from repression to release.

Private life was exalted. Between 1880 and 1920 the number of salaried employees increased eightfold, comprising over 60 percent of the entire middle class.[111] As Americans acknowledged the new reality that the average middle-class worker would spend his life not as an individual producer but as a salaried employee within a large organization, the private sphere came to be seen as the antidote to the dulling and dehumanizing effects of the workplace. Increasingly, there was a belief that the organized work world thwarted the sense of freedom and autonomy found in the open marketplace and that fulfillment and one's "true self" could be found only in private life.[112]

The valorization of private life, emotional release, and the expression of inner desire led to a new model of idealized self-presentation, what historians have described as the "personality" ideal. Personality was "particularly suited for the problems of self in a changed social order, the developing consumer mass society," historian Warren Susman writes.[113] The personality ideal stressed emotions and qualities that were typically associated with the private sphere, such as humor, warmth, and spontaneity, traits that could be best developed in leisure time. Popular advice manuals no longer stressed the importance of creating a controlled public façade that concealed one's true emotions, but manifesting one's inner self, one's "personality" in public life by being effusive and candid.

"Be yourself is the first commandment of personality," they preached, "and act yourself the whole of it."[114] In her syndicated advice column "Daily Talks," movie star Mary Pickford reminded readers that the most attractive people were those who had learned to "be themselves."[115] Self-consciousness "steals your beauty and individuality," she explained.[116] As Henry Ford told the journalist Bruce Barton in 1921, "a young man . . . should look for the single spark of individuality that makes him different from other folks, and develop that for all he's worth."[117] The "sheer revelation" of inner impulses became fascinating. If a person could reveal himself in public and yet do so in a groomed and stylish manner, he was

109. T.J. JACKSON LEARS, FABLES OF ABUNDANCE 137 (1995).

110. NANCY COTT, THE GROUNDING OF MODERN FEMINISM (1987).

111. MAY, *supra* note 39, at 201.

112. MAY, *supra* note 39, at 200.

113. SUSMAN, *supra* note 13, at 280.

114. Quoted in SAMANTHA BARBAS, MOVIE CRAZY: FANS, STARS AND THE CULT OF CELEBRITY 43 (2001).

115. Quoted in BARBAS, *supra* note 114, at 50.

116. *Id.*

117. Quoted in DE LEON, *supra* note 27, at 117.

considered to be exciting.[118]

The new "personality" model did not compel complete self-exposure, however. There were still zones of privacy considered off-limits to the public—one's intimate relationships, bodily functions, embarrassing habits. Nor was it truly spontaneous. Like the performative ideal of self-presentation of the nineteenth century, the personality ideal involved a certain amount of theatricality. Despite Mary Pickford's assurances, public performance was still a self-conscious activity. One had to stage one's natural emotions, to channel them into culturally recognized forms—to appear warm and spontaneous in the ways that advertisers preached, and as the movie stars did on the screen. Personality was very much a consumer ideal, and at the height of the personality craze in the 1920s, manufacturers paid stars to endorse products that allegedly produced "personality." By selecting the right colors and styles of clothes, eating the right foods and driving the right sort of car, one could express one's individuality and find true fulfillment, celebrity endorsers claimed. In the 1920s, movie star Gladys Leslie promoted a beauty cream that allegedly created "magnetic personality." "Thousands of women and girls are actually wearing the wrong shade of face powder," said one actress in a cosmetics advertisement. "They quench their personality, destroy what ought to be their glamour and charm."[119]

With their ability to charismatically express their inner selves to an audience of millions, motion picture actors became exemplars of the personality ideal. Because of the cinema's extraordinary verisimilitude, they appeared natural, authentic, and intimate on the screen, which made them eminently fascinating figures in the new culture of self-exposure. Screen actors appeared not to be acting, but merely 'performing' their real, private selves in public.

The illusion that actors were the same on and off the screen was encouraged by the Hollywood film studio publicity departments.[120] The studios would make sure to cast the star consistently across roles and to assure that all of her public appearances outside of her films, including press interviews and advertising, attested to the transparency of the cinematic façade. A new empire of celebrity media—fan magazines, syndicated gossip columns, and Hollywood stories in newspapers and mass market magazines—assured readers that actors had naturally

118. SENNETT, *supra* note 63, at 269.

119. Quoted in BARBAS, *supra* note 114, at 52. As early as 1915, movie stars were mobilized by major corporations for product endorsements and advertisements. Consumer advertising "dovetailed with the movies to offer a seamless tableau of fashions, hairstyles, favorite foods, personal habits . . . many of which offered appealing alternatives to the stuffy residues of Victorianism," as one historian has noted. EWEN, *supra* note 108, at 98.

120. *See* BARBAS, *supra* note 114; RICHARD DECORDOVA, PICTURE PERSONALITIES: THE EMERGENCE OF THE STAR SYSTEM IN AMERICA (2001).

magnetic personalities that audiences should emulate to achieve success in both public and private life. To this end, journalists claimed to allow readers to "really know" the stars by exposing their "real selves." In 'exclusive' interviews, stars claimed to disclose the failures of their most recent romances, their deepest aspirations, and their trivial bad habits. And yet no matter how they sincerely they professed to reveal themselves, the moral of the story was almost always the same. As a typical fan magazine article from 1922 explained, "Norma Talmadge is very much like her screen personality—warm and genuine."[121] The "wonderful fact" of Blanche Sweet, one fan magazine wrote in 1915, was that she did not act; "instead, she lives through the stories with such fervor that the audience believes that it is not witnessing the illusion of life but life itself."[122]

As fan mail and sociological studies from this era illustrate, audiences indeed saw actors as models of personal and social success, and they copied their styles and "personalities" assiduously. "After one of [Mary] Pickford's movies, I'd find myself walking up the aisle with that certain little bent knee, toe turning in walk," one movie fan told a sociologist in 1931.[123] "I went so far as to dress up like Pickford's character..and have my picture taken." Pickford was blessed with charm, sincerity, and "magnetic personality—that so called indescribable something—which colors and vitalizes everything she does."[124] In a culture where star images had become the "basic semiotic and symbolic raw material" from which everyday citizens forged their own personal identities, the highest social reward one could achieve, in stark contrast to the Victorian ethos, was to have one's image and personality appropriated by others.[125] When she projected her personality freely to the world, when she allowed her photo to circulate in films, publicity photos, and ads, the star invited the creative transformation, reinterpretation, and resignification of the basic markers of her identity.

Personality became not only the basis of film stardom, but all of modern celebrity. As the *New York Times* noted in 1922, the definition of a star was "one who only had to confine himself to one role—that of being himself."[126] In contrast to nineteenth-century fame, which was seen as a reward for productive public achievements, modern celebrity rewarded not doing, but being. By 1927, the celebrity pantheon, as reflected in the

121. Quoted in BARBAS, *supra* note 114, at 41.

122. *Id.*

123. *Id.* at 46.

124. *Id.* at 47. *See also* ROBERT S. LYND & HELEN MERRELL LYND MIDDLETOWN: A STUDY IN MODERN AMERICAN CULTURE (1927) (discussing the influence of the movies on youth in the 1920s).

125. The meanings a star image comes to have, and hence the publicity values that attach to it, are determined by what different groups and individuals with different needs and interests make of it, as they use it to try and construct themselves and the world. Madow, *supra* note 90, at 195.

126. *Actors and Stars*, N.Y. TIMES, April 25, 1920, X4.

content of a typical issue of the Sunday *New York Times*, included Broadway producers, literary figures, movie stars, society personalities, sports players, the owners of baseball teams, screenwriters, and chefs, among others.[127] With the nineteenth-century American dream of social mobility through hard work diminished by the early twentieth century, the idea that one might be plucked from anonymity and made into a celebrity by the mass media, one's face and image splayed across a billboard or marquee because others have recognized the virtues of her unique inner self, had become the equivalent of the nineteenth-century frontier, with its promise of boundless opportunity for all.[128]

Instant celebrity, however, also came in a less glamorous variety. In the 1920s, newspapers, tabloids, and newsreels teemed with attention-getting stories about the involuntarily famous that played on the public's fascination with mass exposure. Crime and accident witnesses, the sufferers of rare diseases, lottery winners, and tragic victims were routinely paraded before the public in dramatic stories announced with screaming headlines. A survey of news content in the *Philadelphia Evening Bulletin* in 1928 showed that the two most common kinds of stories were crime and "human interest" stories. Many of the human interest stories were "instant fame" stories dealing with accidents and what editors called "freak" events ("Blind Storekeeper Saves Three Children at Fire," "Youth Saves Two from Cliff.")[129]

Warren and Brandeis had complained about "kodakers," newspaper cameramen who snapped the pictures of random passers-by on the street. As the Atlanta *Constitution* had lamented in 1902, "in this day of the Kodak no man can hope to escape a snapshot, if his likeness is wanted for any public use or private scheme of trade."[130] What was then a novel phenomenon had become by the 1920s fairly common. In cities, newsreel and newspaper cameramen patrolled the streets in search of the titillating and interesting, even if mundane. "No longer is it necessary to be spectacular in order to face the camera," observed the *New York Times* in 1931. "Now the newsreel companies search out their material, and youth, going for a stroll in the park, may suddenly find himself as part of a human interest sequence called 'Under a Lovers' Moon.'"[131]

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127. DE LEON, *supra* note 27, at 47.

128. In the new order, fame was not merely a reflection of hard work, but also luck. Modern success stories, particularly the film celebrity success narratives, placed considerable emphasis on the role of chance. Richard Dyer explains that the celebrity success myth tries to orchestrate several contradictory elements: 1) ordinariness is the hallmark of the star; 2) the system rewards talent; 3) lucky breaks are central to the career of the star; 4) hard work and professionalism are necessary for stardom. RICHARD DYER, STARS 48 (1981).

129. NANCY MAVITY, THE MODERN NEWSPAPER 36 (1930).

130. *The Right of Privacy*, ATLANTA CONSTITUTION, Nov. 10, 1902, at 4.

131. Lewis Nichols, *Our Sacred Privacy Becomes a Memory*, N.Y. TIMES, Oct. 11, 1931, at SM5.

By the 1920s, modern America had become a culture of looking and the gaze, where surface appearances assumed great social importance, and where constant visual scrutiny was a reality of daily life. With this new culture of self-exposure, the era of fifteen minutes of fame had arrived. The possibility of being publicly exposed in the media was no longer remote. Every person, no matter how exceptional or average, might have his or her brief time in the spotlight by finding his way, through intent or blunder, into the movies, the magazines, the papers.

C. The Law's Adaptation

The emerging tort law of privacy was integrally intertwined with these cultural transformations. Between 1910 and 1920, the common law right of privacy was recognized in two states, Kansas and Missouri, and in the federal territory of Alaska. In the 1930s, five more states recognized the right, bringing to fifteen the total number that permitted a cause of action for invasion of privacy.[132] Despite the increased recognition of the privacy right, plaintiffs rarely recovered. The culture of self-exposure had transformed the social significance of privacy and the ways that judges staked the boundaries of public and private life.

At a time when a burgeoning commercial modeling industry was taking off, courts recognized that what plaintiffs often really wanted was the economic value of their image, which was not recoverable under the right of privacy. By 1930, the unwilling subjects of photographic advertisements rarely based their claim for damages on embarrassment. In 1926, an eighteen year old housewife found her image on a poster for flour; she sought $50,000 for use of her likeness without consent, not for humiliation.[133] Most privacy suits in this period instead involved exposure of names, photographs, and personal facts in films and news media, a reflection of mass media's dependence on private life as a source of material. The judicial resistance to these claims, operationalized in the "newsworthiness," "public figure," and "involuntary public figure" defenses, reflected the new cultural acceptance of the inevitability, perhaps even desirability, of having one's personality exposed in public.

Part of the difficulty in winning a privacy lawsuit came from judges' general unwillingness to label plaintiffs "private figures." In contrast to the nineteenth century definition of public figures as politicians, inventors, and other traditional "public men," the modern definition of public figure

132. Flake v. Greensboro News Co., 195 S.E. 55, 61 (N.C. 1938) (North Carolina); Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (Cuyahoga County Ct. Com. Pl. 1938) (Ohio); Harlow v. Buno Co., 36 Pa D.&C. 101 (C.P. Ct. Phila. County 1939) (Pennsylvania); Melvin v. Reid, 112 Cal App.285 (Cal. Dist. Ct. App. 1931). *See* PEMBER, *supra* note 26, at 95.

133. George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 459 (1990).

for the purposes of the privacy action reflected the redefinition of fame and celebrity. By the 1930s, motion picture stars, singers, writers, athletes, entrepreneurs, inventors, explorers, soldiers, and university professors, among others, were considered by courts to be "public figures" who had surrendered much of their right to privacy when they became famous.[134] Judges acknowledged the difficulty in drawing lines between public and private figures in the era of instant celebrity—as a court asked in 1938, "must a distinction be drawn between those in private life and those in public office or public life, and if so, when does a person cease to be a private citizen and become a public character?"—and when faced with tough choices, tended to label plaintiffs public rather than private.[135]

The courts never precisely defined how much of their privacy public figures surrendered. There are virtually no reported appellate cases in this period in which celebrities brought suit against papers for publishing truthful gossip about their personal lives—probably because legal action would attract further publicity to the embarrassing matter. In general, Hollywood stars rarely brought claims of unwanted publicity because they had contractually released their image and publicity rights to the agencies and studios that managed them.[136]

The courts did suggest, however, that well-known celebrities, particularly entertainment celebrities, had little in the way of legally enforceable privacy. Because the very essence of their fame was their ability to publicize their personalities, actors' private lives and photos were a legitimately public matter. "Actresses and actors . . . . cannot expect to lead quiet, secluded lives," announced an Ohio court in 1938, declaring that "any person following the theatrical business for a life's work has no such right or privacy."[137] In a case where Paramount Pictures sued an Oklahoma printing company for publishing promotional materials for theaters containing caricatured images of Paramount stars, on the grounds that the printing company had invaded the stars' privacy, the court affirmed the defendant's motion to dismiss, stating that "common observation teaches us that the greatest asset to a star is constant

134. There was a good deal of "bootstrapping" going on here—the media turned private figures into public figures by focusing attention on them. *See* Smolla, *supra* note 6, at 300.

135. Flake v. Greensboro News Co., 195 S.E. (1938) at 55, 61.

136. The written seven-year studio contract not only gave the studio complete control over uses of the star's image but generally forbade actors from engaging in any behavior, such as changing their appearances or going out on dates without the studios' approval, that might reveal the falsity of the screen persona. *See* GAINES, *supra* note 12, at 143-174.

137. Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (Cuyahoga County Ct. Com. Pl. 1938). As the *Restatement (First) of Torts* summarized, in return for his fame, 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. RESTATEMENT (FIRST) OF TORTS §867 cmt. c (1939).

publicity."[138] Actors could not claim a right of privacy, because their "productions, faces and names are sold to the public."[139]

Courts also reassessed the relationship between volition and fame in the personality culture. By the 1930s, courts recognized that popular media routinely brought private citizens into the public eye with little effort on their part whatsoever, and that there was often little correlation between the public's interest in a person and his substantive accomplishments. Because of the tenuous connection between intent and fame, it was now public interest that determined whether one was a public figure.

The culture was coming to recognize that in the new media culture, fame was a relational phenomenon, something not necessarily earned but bestowed on a person by a fickle, often whimsical populace. The common legal and social wisdom, a California court explained, was that a person who "gives the public a legitimate interest in his doings is said to become a public personage and thereby relinquishes a part of his right of privacy."[140] In that case, a former professional boxer who went under the name Canvasback Cohen had retired from the ring, but ten years later, Groucho Marx mentioned his name in a radio broadcast, and Cohen sued for invasion of privacy. The court held that no matter how much he wished to retreat from the public eye, because he still piqued public interest, he could not "draw himself like a snail into his shell" and retreat from public view "at his will and whim."[141]

Yet the courts felt the need to retain the fiction of "waiver" and assumption of risk. In the Canvasback Cohen case, Cohen had "assumed the risk" of lifelong publicity when he became a boxer, knowing that a single appearance in popular culture potentially embedded him in the popular imagination forever. The extreme version of this was the involuntary public figure, the law's version of the "instant celebrity." The involuntary public figure concept allowed the press in many cases to escape liability for publicizing a private individual who had never overtly sought publicity. The idea was that by virtue of living in a modern, mass-mediated society, everyone assumed the risk of media publicity whenever they left the privacy of the home.

The Kentucky Supreme Court, in the 1929 case *Jones v. Herald Post*,[142] became the first to recognize the "involuntary public figure" concept. In Louisville, Mrs. Jones and her husband were walking on the street when two men attacked him and stabbed him to death. The following day, a story about the attack appeared in the local paper, accompanied by photos.

138. Paramount Pictures v. Leader Press, 24 F. Supp. 1004, 1007 (W.D. Okla. 1938).
139. *Id.*
140. Cohen v. Marx, 94 Cal. App. 2d 704, 705 (Cal. Dist. Ct. App. 1949).
141. *Id.*
142. 18 S.W. 2d 972 (Ky. 1929).

Mrs. Jones sued, stating that the photos were published without her consent, and that since she was not a "public figure," having never sought the spotlight, she had a right to live an unpublicized life. Yet the court refused her plea for two thousand dollars damages. It stated that because she went out on the street, she assumed the risk of publicity. Although the court acknowledged the right to privacy, it explained that there were times when "willingly or not," one became a participant in an event of public concern. She then "emerged from. . . seclusion," and there was no legal wrong when the press publicized her.[143]

Similar reasoning guided the outcome in the 1939 case *Metter v. Los Angeles Examiner*, involving a woman who had committed suicide by jumping off a building in downtown Los Angeles. The *Examiner* published a photo of it. The court observed that Mrs. Metter had waived her right to privacy by virtue of committing suicide in a public place. She "went to a public edifice in the heart of a large city and there ended her life by plunging from a high building. It would be difficult to imagine a more public method of self destruction. . . . Her own act brought this about. It was her own act which waived any right to keep her picture from public observation in connection with the news account of her suicide."[144]

Many cases in this period elaborated on this concept—that events and people became "public" when they occurred outside the private home, regardless of the facts disclosed or whether the subject had intended publicity. In *Humiston v. Universal Film Manufacturing Company*,[145] a woman lawyer who had assisted the police sued Universal Film for using newsreel footage of her in a police car. The court held that she had assumed the risk of publicity when she involved herself in the case. In *Themo v. New England Newspaper Publishing Co.*, the Supreme Judicial Court of Massachusetts held that a plaintiff did not have a cause of action for invasion of privacy when the *Boston American* published a photo of him speaking outside with the police captain of Cambridge after he had been robbed.[146] In *Thayer v. Worcester Post*, the same court held that the plaintiff did not state a claim for invasion of privacy when the paper published a picture of the plaintiff at an "airport, which is presumably a public place."[147] Courts generally agreed that there was no invasion of privacy when a newsreel or newspaper cameraman captured on film a

143. *Id.* at 974.

144. 35 Cal. App. 2d. 304, 312 (Cal. Dist. Ct. App. 1937). Metter's husband claimed that it had invaded his right to privacy. The California Court of Appeals, which had a few years previously recognized a right to privacy based on the state constitution, declared that there was no relational right of privacy; the right to privacy died with the individual.

145. Humiston v. Universal Film Mfg. Co., 189 A.D. 469, 476 (1919).

146. 306 Mass. 54, 58 (1940).

147. 284 Mass. 160, 163 (1933).

passerby in a "parade or street scene."[148]

"One who is not a recluse," according to the *Restatement (First) of Torts*, had a reasonable expectation of publicity in connection with "the ordinary incidents of community life of which he is a part. These include comment upon his conduct, the more or less casual observation of his neighbors as to what he does upon his own land," in addition to the possibility of being photographed as part of a street scene or group of persons."[149] A North Carolina court summarized the modern wisdom when it explained that in modern society "[p]eople do not live in seclusion. When a person goes upon the street or highway or into any other public place, he exhibits his features to public inspection."[150] Through its frank embrace of the culture of fame, the realities of modern visual surveillance, and the often irrational workings of the press and popular tastes in the media age, privacy law affirmed the personality culture and the impossibility of privacy in public.

PART II

A. Privacy and the News

The idea underlying the media's prerogative to publish the photos and private facts of both "voluntary" and "involuntary" public figures was that their activities were "newsworthy." The newsworthiness defense or privilege, which developed simultaneously in this period, immunized media defendants from invasion of privacy claims if a court found the publicized material to be "newsworthy," or a "matter of public concern" or of "public interest." Again, in a distinct change from the earlier era, the focus of courts' inquiry in this period was less on the intimate nature of the facts disclosed than the public's interest in those facts. Through the newsworthiness concept, judges defined an expansive domain of public knowledge and discourse that included personal information. They validated the broad scope of human interest journalism and a press that

148. 306 Mass. 54, 58 (1940). A rare case that came out the other way, *Blumenthal v. Picture Classics*, involved an immigrant widow who was shown in a newsreel vending bread and rolls on the street. 257 N.Y.S. 800 (N.Y. App. Div. 1932). The newsreel was part of a series of live scenes of New York City, titled "Sightseeing with Nick and Tony," advertised as "a series of faithful photographing of public views in and about such sections and quarters and a record of the scenes and events without exaggeration or ridicule." A New York appellate court, over a vigorous dissent, approved the motion for temporary injunction, holding that the newsreel depiction did constitute an invasion of privacy because Blumenthal was not merely photographed as part of a crowd, but "singled out because of merely being on the scene." The dissent suggested that the woman, by virtue of her street-vending occupation, opened herself up to the possibility of publicity and could not complain when she was depicted in an undistorted manner for the purposes of disseminating news or current information.

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

150. Flake v. Greensboro News Co., 195 S.E. 55, 63 (N.C. 1938).

published according to mass tastes.

Beginning in the 1920s and 30s, courts began to articulate a concept of "newsworthy material" that was defined in terms of the existing content of popular news media. In making the newsworthiness determination, courts often conflated material *of* public interest –that interests the public— and *in* the public interest –that serves the public good—so that public curiosity came to define "matters of public interest," which was then equated with newsworthiness.[151] If something appeared in a popular publication, courts assumed that it generated public interest and was therefore newsworthy. This approach to newsworthiness has been criticized as superficially descriptive and unduly deferential to the press. Not surprisingly, few privacy plaintiffs could succeed when newsworthiness came to be defined as "anything that appears in the press."[152]

Yet I argue that, particularly given the context of social debates over mass media at the time, newsworthiness was not merely a mechanically descriptive term—it had a normative valence as well. Judges confronted with the newsworthiness question deferred to the media, in part, because they seemed to acknowledge the relativity of taste and the impropriety of courts making aesthetic judgments about culture. Given the existence of morals regulations on mass media at the time—motion picture censorship, for example, was practiced in several states—this was not an insignificant development.[153] Applying emerging interpretations of constitutional freedom of speech to the common law privacy context, courts suggested that a press that followed public demands and curiosities was important to a functioning modern society not only because it disseminated useful and entertaining information, but because it sparked connection and conversation between people. The essence of valuable news was that it "invite[d] public comment," as a New York court suggested in a 1931 media privacy case.[154] Because of its ability to spark public interest and discussion, the popular press was "bound up with fundamental democratic institutions."[155]

The judicial development of newsworthiness was part of the larger cultural conversation in the interwar period about the role of mass communications in modern society. From that historic national discussion

151. Thomas Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 342 (1979) ("Anything that is published is by definition newsworthy and a matter of public interest."); *see also* Glasser & Dennis, *supra* note 8.

152. Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, U. CHI. L. REV. 722, 725 (1963) ("[I]f newsworthy is simply a descriptive term, then the newsworthiness privilege has engulfed the tort of invasion of privacy.").

153. On film censorship, see LAURA WITTERN-KELLER, FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP (2008).

154. Martin v. New Metropolitan Fiction, 139 Misc. 290, 292 (N.Y. App. Div. 1931).

155. Lahiri v. Daily Mirror, 162 Misc. 776, 777 (N.Y. Sup. Ct. 1937).

emerged a cultural awareness, even consensus that the people have a "right to know"—and the press a duty to furnish—a vast array of information on a variety of subjects, including at times personal or private affairs.[156] This obligation of the media to provide expansive news stemmed not only from the people's need for facts but from the media's social functions—its power to generate public discourse and to facilitate the essential, common social bonds that created the public itself.

In what follows I very briefly describe four different conversations on the subjects of press freedom, the boundaries of public knowledge, and the social uses of the news that took place in the 1920s and 30s, conversations that informed the development of the newsworthiness concept. Newspaper publishers justified the publication of private facts by promoting the idea of newspapers as public servants who catered to the public's interests and curiosities. Academic sociologists argued that the popular press, by sparking dialogue and conversation on a broad variety of topics of interest to the public, could reinvigorate democracy and community in America. This discourse theory of the news, and an expansive definition of "matters of public concern," were similarly taken up by the Supreme Court in its developing First Amendment doctrine.

1. The Press and the Public Interest

The continued rise of sensationalist and celebrity journalism in the 1920s and 30s led to further libel suits brought against newspaper publishers and ongoing attacks on the press by social reformers. States and municipalities strengthened libel, obscenity, and contempt laws and proposed veracity and disclosure laws that would prohibit anonymous editorials or willful misrepresentations of the truth.[157] To defend themselves against criticism that the news had become salacious and trivial, leading publishers embarked on a project of self-justification, self-regulation and professionalization that involved the creation of journalism schools and industry trade associations and professional codes.[158] Publishers portrayed their publications as devoted to the public interest.[159] As Joseph Pulitzer had famously stated, "The press . . . makes the public interest its own."[160]

Between the two world wars, human interest stories and news-as-

156. As Thomas Emerson later summarized it, the right to know concept includes "two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis of transmitting ideas or facts to others." Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2.

157. *See* LAWSON, *supra* note 45; ROSENBERG, *supra* note 41.

158. TEEL, *supra* note 33, at 117.

159. BENT, *supra* note 28, at 179.

160. TEEL, *supra* note 33, at 47.

entertainment had come to define modern mass-market journalism.[161] Publishers defended the focus on gossip and entertainment by claiming it to be in the "public interest." As one newspaper manual from 1930 proclaimed, the motto of the modern newspaper was to "give the public what it wants."[162] Anything immoral or sensationalistic was to be blamed on the public, since the "paper never prints anything for the general public that is worse than what the general public wants."[163]

This rationale was often used by editors and publishers to legitimate newspaper invasions of privacy. Even though the American Society of Newspaper Editors' code of ethics stated that "a newspaper should not invade private rights or feelings without sure warrant of public right as distinguished from public curiosity," in practice, "right" and "curiosity" were often conflated. Newspaper invasions of privacy were not the fault of editors and reporters, but "the circumstances which have made the private affairs of certain persons a matter of public interest, and the insistence of the public that its interest be satisfied," a newspaper manual explained.[164] In cases where a reporter was forced to invade the privacy of an unwilling subject, the "best thing the reporter can do is to meet (the subject's) resentment by leading them to face the fact that what they have done is already news, and that neither he nor they can change that fact."[165]

The relentless hounding of aviator Charles Lindbergh, who was so averse to publicity that he moved to England to escape the American press, sparked a national outcry.[166] Yet even some leading publishers defended the press conduct, arguing that the press had no duty to Lindbergh, only to the curiosities of the American people.[167] One publisher summarized the modern professional wisdom when he explained that "the only way to change the character of our newspapers is to change the character of the public."[168] What was newsworthy, and in the public's interest, was whatever the public wanted to read.

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161. As sociologist Helen McGill Hughes summarized in 1940: "The natural history of the newspaper . . . is the story of the expansion of the traditional function—originally the publishing of practical, important news—to include the sale of interesting personal gossip. In the long process of discovering and exploiting human interest the press ... became rich and powerful." HUGHES, *supra* note 29, at 35.

162. MAVITY, *supra* note 129, at 15.

163. TED CURTIS SMYTHE, THE GILDED AGE PRESS, 1865-1900, at 165 (2003) (quoting a contemporary journalist). Attacking an Illinois law prohibiting newspapers from publishing "gruesome details," a local paper explained that "[t]he fault is not in the newspapers, it is in the people. . . . Newspapers are blamed for giving the people what they want." KILLING THE MESSENGER 19 (Tom Goldstein ed., rev. ed. 2007) (quoting the 1911 editorial of journalist William Allen White).

164. MAVITY, *supra* note 129, at 75.

165. *Id.*

166. *Id.* at 74-5.

167. *Id.* at 75; *see also* Editorial, *Press Sees Nation "Shamed" In Lindbergh Exile*, N.Y. TIMES, Dec. 24, 1935.

168. *Id.* at 17.

2. A Craving for the News

Were journalists giving the public what it wanted? It is impossible to know. Journalists do not merely follow public interests but shape the interests of the public. It is clear, however, that much of the reading public had become dependent on mass media for information and entertainment, and felt entitled to the news.

Consumers were upset when they did not get the news or the news they wanted. As one editor noted, when newspapers were inadvertently published without popular features, such as gossip columns and the comics, the telephones at the newspaper office were deluged with inquiries.[169] Columbia University sociologist Bernard Berelson interviewed New Yorkers during a 1945 newspaper strike. Several interviewees were angry about missing news of national and world affairs, which kept them "informed." Some craved the details they used to structure their daily activities, such as radio and movie schedules and advertisements. Others longed for newspapers' entertainment features – crossword puzzles, human interest stories, and celebrity news—and the "escape" that reading the newspaper provided.

Readers missed not only the informational and entertainment aspects of the news but its social functions. Newspapers gave people "something to talk about," study participants reiterated, and when the papers were missing, they had nothing to say to the neighbors. "You have to read in order to keep up a conversation with other people," one subject noted.[170] As historian Lawrence Levine has demonstrated, consumers saw mass media and mass culture, which Levine likened to the "folklore of industrial society,"[171] as the basis of intimate social bonds. Neighbors and strangers came together daily to discuss and critique radio broadcasts and news articles.[172] Mass media also created a sense of national identity. In a period when immigrants and their second-generation children were forging new American identities, mass media and mass culture, disseminating shared values and symbols, transformed cultural outsiders into cultural insiders, and all Americans into consumers.[173] Mass media also created "imagined communities," to use Benedict Anderson's term,

169. Raymond Clapper, *A Free Press Needs Discriminating Public Criticism*, *in* FREEDOM OF THE PRESS TODAY, 83, 89-90 (Harold Ickes ed., 1941).

170. Bernard Berelson, *What Missing the Newspaper Means*, *in* COMMUNICATIONS RESEARCH 1948-49, at 111 (Paul Lazarsfeld & Frank Stanton eds., 1949).

171. LAWRENCE W. LEVINE, THE UNPREDICTABLE PAST 291 (1993).

172. For historical studies of audience reception, see RICHARD BUTSCH, THE MAKING OF AMERICAN AUDIENCES: FROM STAGE TO TELEVISION, 1750-1990 (2000); and KATHRYN FULLER-SEELEY, HOLLYWOOD IN THE NEIGHBORHOOD: HISTORICAL CASE STUDIES OF LOCAL MOVIEGOING (2008). On newspaper reading, see LEONARD, *supra* note 37.

173. *See, e.g.*, LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939 (1991).

through common practices of consumption.[174] Americans embraced mass media in this period in the sense that they consumed it avidly and incorporated it into all aspects of their daily lives. In various ways, they acknowledged that mass communications had become the connective tissue linking diverse social groups together under a common public identity.

3. News as Conversation

The "give the public what it wants" rationale—and the public enthusiasm for the news and facts of all types—was one justification for an expansive definition of newsworthiness. Yet the outline of another, more substantive justification for broad media content was being developed in the emerging academic field of communications studies, which developed within sociology departments in the early twentieth century. The field had grown from sociologists' awareness of the central role of mass communications in modern society—as George Herbert Mead had observed, society is a series of social acts, and a social act is a communicative process.[175] At the turn of the century, sociologists had begun to observe the dependence of the public on the news media as a source of knowledge. "The great majority of people depend on [newspapers] for most of their information—the raw material of opinion—and for nearly all their ideas."[176] In the period between 1920 and 1940, the study of communication became a discipline in its own right.[177]

The academic debate over the role of mass communications in modern life was marked by "significant doubts" and "significant hopes," according to one historian.[178] A well-known, pessimistic perspective was expressed by Walter Lippmann, who in his influential *Public Opinion* (1922) argued that newspapers fed the public a distorted view of the world, which produced a dangerously skewed public opinion. Lippmann's views had been shaped by his observations of the propagandistic manipulation of the press by the government during World War I, and by the increasingly common use of public relations professionals by major institutions to mediate their relations with the press. Lippmann argued that only official news bureaus staffed by experts could produce unbiased news and thereby

174. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (1991). Anderson emphasizes the role of the newspaper as the center of a mass ceremony in which a community coheres both in the text and in the act of reading.

175. SUSMAN, *supra* note 13, at 258.

176. Delos Wilcox, *The American Newspaper: A Study in Social Psychology*, 16 ANNALS AM. ACAD. POL. & SOC. SCI. 56 (1900); *see also* V.S. Yarros, *The Press and Public Opinion*, 5 AM. J. SOC. 372 (1899).

177. On the development of the field of communication studies, see DANIEL CZITROM, MEDIA AND THE AMERICAN MIND (1983); SUSMAN, *supra* note 13, at 259.

178. SUSMAN, *supra* note 13, at 258.

objective public opinion. The manufacture of consent by political elites working through the press was both a crisis of democracy and a crisis of journalism.[179]

There is no doubt a pessimistic strain that runs through academic studies of mass communications in this period. There were attacks on the biases and inaccuracies of the news media, its concentration in the hands of a few powerful publishers, its focus on entertainment values, and its potential for propagandist uses as a channel of "mass persuasion."[180] Yet some commentators and theorists, though nonetheless critical, had faith in the inherent possibilities of mass media to invigorate democracy and participatory social life. While Lippmann's model of the news was informational— for Lippmann, the duty of the press was to give to the public accurate representations of the world—others had a view of the news that was conversational: the purpose of news was not "to represent and inform but to signal, tell a story, and activate inquiry," to stimulate "conversation and discussion."[181]

This discourse model valued the news for its participatory dimension, which was an essential aspect of democracy. Public opinion, the foundation of the modern state and the basis of political action,[182] emerged from "discussions of individuals attempting to formulate and rationalize their individual interpretations of the news," according to Park.[183] As sociologist Carroll Clark wrote in 1933, the modern public was "organized on the basis of a universe of discourse."[184] By providing the public with shared experiences, common stimuli, and unified frames of reference, mass media allowed it to "carry on the conversation of our culture."[185]

4. News and the Constitution

The conversational model of the news also lay at the heart of the emerging constitutional free speech doctrine of this period. Although the United States has long had a commitment to freedom of speech and press, and to the broad dissemination of information to the public, until the

179. Walter Lippmann, LIBERTY AND THE NEWS (1920). On Lippmann's influence on the Supreme Court's free speech jurisprudence, see Robert Cover, *The Left, the Right and the First Amendment*, 40 MD. L. REV. 349 (1981).

179. FELDMAN, *supra* note 22, at 396.

180. *See* DAN SCHILLER, THEORIZING COMMUNICATION: A HISTORY 41 (1996).

181. JAMES CAREY, COMMUNICATION AS CULTURE 62 (1989).

182. Robert Park, *News as a Form of Knowledge*, 45 AM. J. SOC. 669, 686 (1940) ("Ours, it seems, is an age of the news, and one of the most important events in American civilization has been the rise of the reporter.").

183. Robert Park, *News and the Power of the Press*, 2 AM. J. SOC. (1941). "The power of the press is the influence that newspapers exercise in the formation of public opinion and in mobilizing the community for political action."

184. Carroll Clark, *The Concept of the Public*, 13 SW. SOC. SCI. Q. 311-20 (1933).

185. Carey, *supra* note 181, at 67.

twentieth century, the Supreme Court's general stance on free expression was that although prior restraints were proscribed, subsequent punishment of speech that had a "bad tendency," that threatened public safety or morals, was a legitimate exercise of the state's police powers.[186] At the turn of the twentieth century, this doctrine was beginning to be challenged by those who argued that there were constitutional limitations on governmental power to impose post-publication sanctions on speech.[187] Theorists had begun to argue that the First Amendment protected the social interest in free speech, which was "ample freedom of discussion" of "public affairs" or "matters of public concern."[188] This insight was first expressed at the Supreme Court level in two well-known opinions, one concurring and one dissenting, in cases during the World War I era challenging criminal convictions for seditious speech brought under the Espionage and Sedition Act. In 1919, Justice Oliver Wendell Holmes, in his dissent in *Abrams v. United States,* had described the democratic and social virtues of discussion, linking his famous "market[place] of ideas" to free and open public discourse.[189] In his concurring opinion in *Whitney v. California* (1927), Justice Louis Brandeis had also identified the core interest protected by the First Amendment as public discussion, which he linked to the search for truth and democratic self-governance. Public discussion was a "political duty" and a procedural prerequisite of any democratic society that was essential to stable government.[190]

During the 1930s and 40s, as the Supreme Court struck down the bad tendency test and instituted more speech-protective interpretations of the First Amendment, society's freedom to discuss public matters crystallized as the core of constitutional free speech protection. In case after case, the Court linked free expression to open discussion, participatory democracy, and democratic government. In a social environment characterized by the rise of organized labor, developing sociological theories of intergroup relations, and Roosevelt's efforts to court a broad and inclusive electorate, freedom of speech and "freedom of discussion" symbolized the Court's embrace of the emerging model of pluralist democracy—the notion of a diverse people who shared a cultural commitment to govern themselves through democratic processes characterized by fair bargaining.[191]

While never specifically defining "matters of public concern," the Court

186. *See* FELDMAN, FREEDOM OF EXPRESSION, *supra* note 22; GRABER, TRANSFORMING FREE SPEECH, *supra* note 22.

187. These are summarized in RABBAN, *supra* note 46.

188. *See* ERNST FREUND, THE POLICE POWER 509 (1904).

189. 250 U.S. 616, 630.

190. 274 U.S. 357, 375. After 1925, when the *Gitlow v. New York* case made the First Amendment, through the Fourteenth, binding on states, state laws, such as the syndicalism law at issue in *Whitney*, were constitutionally challenged before the Court.

191. FELDMAN, *supra* note 22, at 332-33.

suggested that these extended broadly, beyond material strictly related to politics and government. In the 1941 case *Thornhill v. Alabama*, which affirmed labor unions' right to picket peacefully as an exercise of free speech, the Court declared that the First Amendment guaranteed the public discussion, "without previous restraint or fear of subsequent punishment," of all "matters of public concern," which it defined as "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[192] In later cases, the Court spoke of the duty of the press to ensure the public a "flow of news" presented from a variety of viewpoints.[193] As the Court stated in the 1937 case of *Grosjean v. American Press*, in which it struck down a state license tax imposed only on periodicals with a certain minimum circulation, the First Amendment protected "not the censorship of the press merely," but any restriction that would impede its ability to provide information that would facilitate "free and general discussion . . . absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[194]

B. What is newsworthy?

It was in this context that the "newsworthiness" privilege, the modern version of Warren and Brandeis' qualified privilege for "comment and criticism on matters of public and general interest," was developed in the public disclosure cases of the interwar period. The judicial interpretation of newsworthiness—with few limitations, whatever truthful information satisfied readers' interests—was developed primarily in cases brought under the New York statute that was enacted after the *Roberson* case. The law was often described as a privacy statute, although it dealt with invasions of privacy in the broadest sense—the publication of photographs, facts, and stories about people who objected to publication on the grounds that it presented them to the public in a way that was undignified or humiliating. It banned unauthorized use of names, private facts, and personal images for "trade."[195]

The statute defined news as the antithesis of trade or advertising. The distinction drew on the traditional division in constitutional law between public and private speech; news was thought to have a public quality whereas advertising served private interests. Courts, however, often conflated private, in the sense of intimate, with so-called "private" trade purposes. The distinction was made even murkier by the fact that

192. 310 U.S. 88, 101-02.
193. Associated Press v. United States, 326 U.S. 1, 29 (1945).
194. 297 U.S. 233, 249-50.
195. N.Y. CIV. RIGHTS L. §50.

newspapers are commercial. Courts had to negotiate what Rochelle Gurstein aptly describes as the "new and ambiguous area between commercial exploitation of personality and the legitimate reporting of the news."[196]

Judges sometimes made the news-trade distinction by asking whether the material was factual or fictional. The more a particular publication verged on being untruthful, the more likely it was not "news"—that it was published for commercial purposes rather than the public purpose of "disseminating information." However, recognizing the blurring of news and entertainment in even the most respectable news outlets, courts rarely found material in newspapers to be entirely fictional.[197] A publication containing false or exaggerated elements was only considered to be an actionable 'trade' publication when it rose to the level of complete fictionalization, as in a 1913 case in which the New York *Herald* published a first-person piece about 'adventures in an African Forest,' which it falsely attributed to a "Baron d'Altomonte." D'Altomonte sued, and the court held that the use of the his name to sell the article was a usage "for the purposes of trade."[198]

Assuming that the market accurately reflected the value of publications to the consumers who read and used them, judges generally regarded news content as a reflection of popular values and interests. A publisher, with

196. Gurstein, *supra* note 48, at 169.

197. In a case that nicely summarizes the courts' general embrace of human interest journalism, the plaintiff Molony, a seventeen-year-old pharmacists' mate in the Coast Guard, had been acclaimed as a hero for his activities in aiding the victims of a plane which crashed against the Empire State Building. His doings were praised in all the major newspapers and in newsreels and magazines throughout the country. Six months later, cartoons depicting his heroism had been published in a magazine called *Boy Comics*. Molony sued for an invasion of privacy under a New York statute. The lower court, finding for Molony, explained that the comics of his exploits were actionable; they were not news because they were printed primarily for profit. Molony v. Boy Comics, 65 N.Y.S. 2d 173, 174 (1946).

But the appeals court reversed the decision on the grounds that the cartoons were in fact newsworthy and that the lower court had used an incorrect definition. It did not matter that the cartoons were entertaining or that they were not "educational." They were factually correct, their primary purpose was to inform, and most important, they dealt with a matter that interested the public. In order to escape the statutory ban, "a factual presentation need not be educational, even if it does not pertain strictly to current news. Such subjects as cartoons, Believe-it-or-Not Ripley, gossip and social columns are not chiefly educative in character, yet if about persons in the limelight, they are not likely to be actionable if the facts are true and if the comment fair." Molony v. Boy Comics, 277 A.D. 166, 170-1 (1950).

198. D'Altomonte v. New York Herald Co., 154 App. Div. 453, 457 (N.Y. 1913). The dominant approach to the news-trade distinction can be seen in an early case, *Jeffries v. New York Evening Journal Publ'g Co*, 124 N.Y.S. 780 (1910). In that case, prizefighter Jim Jeffries had written an autobiography which was on sale in bookstores throughout New York. At about the same time, the *Evening Journal* began to publish a serialized biography of him. He sought to restrain publication of the biography and claimed twenty five thousand dollars in damages. Jeffries claimed that the use of his picture in the publication was an invasion of privacy and that it was intended to increase circulation and therefore was 'trade.' The court held that because it had been published in a feature article in a newspaper, the serialized biography was not intended for the purposes of trade but rather "dissemination of information," and that no invasion of privacy had occurred.

the "interest of the public in view," would not publish any news if "interest in the item has died out."[199] Public interest was the essence of newsworthiness, and if an item appeared in a publication that called itself a newspaper, it presumably engaged public interests, no matter how banal it might have seemed to the judges. In a 1913 case, the *Police Gazette*, a lurid tabloid, published a photograph of the plaintiff, a young female professional entertainer. The court acknowledged that the *Police Gazette* was not respectable—it published "a very considerable amount of reading matter that scarcely appeals to a refined mind"—but that material was nonetheless newsworthy. The court observed that a contrary position would make almost every newspaper and magazine story actionable under the statute.[200]

Newsworthy material was not limited to newspapers—it could also appear in newsreels, magazines, and books. In 1936, when a woman who was part of an exercise course for overweight women sued a newsreel company for using her unauthorized image, the court dismissed the complaint, stating that it was within the boundaries of the public interest as long as women continued to worry about their weight.[201] When an infamous strikebreaker sued the publisher of a book about his criminal activities for invading his privacy, the court dismissed the claim, stating that the matter was newsworthy because the subject was one of great public interest even though it did not appear in a periodical. Because it concerned an important subject matter that created a public "reaction," it was "news."[202] In an Alabama case, *Smith v. Doss*, a court held that events that occurred decades earlier could remain "newsworthy" if they continued to pique "legitimate public interest."[203]

Through this "public interest" standard, gossip columns formally achieved the legal status of "news." In the 1936 case *Middleton v. News Syndicate Co.*, the name and picture of the plaintiff, an unemployed model working as a cigarette girl in a hotel, appeared in a newspaper column titled *The Inquiring Photographer*. Because it appeared in a regular

199. Humiston v. Universal Film Mfg. Co., 189 A.D. 469, 476 (1919).

200. Colyer v. Richard K. Fox Publ'g Co., 162 App. Div. 297, 299 (1914).

201. Sweenek v. Pathe News, 16 F. Supp. 746 (E.D.N.Y. 1936). "While it may be difficult in some instances to find the point at which the public interest ends, it seems reasonably clear that pictures of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus do not cross the borderline, at least so long as a large proportion of the female sex continues its concern about any increase in poundage." *Id* at 747.

202. Kline v. Robert McBride & Co, 11 N.Y.S.2d 674, 680 (N.Y. Sup. Ct. 1939).

203. 370 So. 2d 118, 121 (La. Ct. App. 1948). Entertainment and sports stars since retired from the spotlight remained newsworthy "public figures" for potentially the duration of their lives. Cohen v. Marx, 94 Cal. App. 2d 704, 705 (Cal. Dist. Ct. App. 1949). This was also the case with former criminals. In *Bernstein v. National Broad. Co.*, a federal district court held that a broadcast of a former criminal twelve years after his release did not invade his right to privacy, since "persons formerly public . . . cannot be protected against disclosure and re-disclosure of known facts," so long as they aroused "general interest." 129 F. Supp. 817, 828 (D.D.C. 1955).

column of a major New York newspaper, the court concluded that it was an item of human interest, and therefore legitimate news.[204] In a D.C. case, *Elmhurst v. Pearson*,[205] the notorious political columnist Drew Pearson was sued for invasion of privacy by a man who was a defendant in a sedition case. Pearson, in his weekly radio broadcast, had gossiped that Elmhurst was employed as a hotel waiter so that he would be in a position to overhear conversations carried on by high officials. Elmhurst's complaint was dismissed as a matter of law, since it dealt with a matter of "legitimate public interest." As the *Restatement of Torts* summarized, publishers had a 'privilege' to satisfy the "curiosity of the public as to their leaders, heroes, villains, and victims."[206]

The most substantive justification for the public interest/public curiosity standard appeared in the New York trial court case of *Sarat Lahiri v. New York Daily Mirror*, where a performer of "a feat known as the 'Hindu Rope Trick'" sued the New York *Mirror* when it published his picture alongside a feature article about a British society sponsoring a contest for the performance of rope tricks.[207] He had neither been involved with the contest nor endorsed it. The New York Supreme Court said that the picture was not published solely for the purposes of promoting sales, citing its "legitimate relation" to the article,[208] which was newsworthy because it addressed public curiosities. The court defined the scope of newsworthiness as encompassing articles or photographs that were "neither strictly news items nor strictly fictional in character."[209] Such articles included "travel stories, stories of distant places, the reproduction of items of past news, and surveys of social conditions."[210] It did not matter whether they appeared "in the news columns, the educational section, or the magazine section. It is the article itself rather than its location that is the determining factor."[211]

Sarat Lahiri was one of the first public disclosure cases to imply that there may be constitutional limitations on punishment for the publication of truthful material on matters of public concern. A right of privacy that covered "news items and articles of general public interest, educational and informative in character," implicated the rights of a "free press."[212] In another New York case, the court noted that to impose liability for disclosure of private facts in a book would be to abridge the freedom of

204. 295 N.Y.S. 120 (N.Y. Sup. Ct. 1937).
205. 153 F.2d 467, 468 (D.C. Cir. 1946).
206. RESTATEMENT (FIRST) OF TORTS §867 cmt. c (1939).
207. Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 782 (N.Y. Sup. Ct. 1937).
208. *Id.* at 782.
209. *Id.*
210. *Id.*
211. *Id.* at 776, 777.
212. *Id.* at 782.

the press.[213] A free press is "so intimately bound up with fundamental democratic institutions that if the right of privacy is to be extended to cover news items and articles of general public interest. . . it should be the result of a clear expression of legislative policy," the court concluded in *Sarat Lahiri*.[214] The Supreme Judicial Court of Massachusetts similarly spoke of a "right" of the public and the press to "discuss personalities."[215]

It was in this context that the Second Circuit decided the famous 1941 case of *Sidis v. F-R Publishing*, which affirmed the broad newsworthiness standard.[216] *Sidis* marked the first time a federal appellate court had ruled on a privacy case involving the public disclosure of private facts, and the impact of the decision was felt widely—in legal circles, in the publishing industry, and in popular culture.[217] William James Sidis was perhaps the most notorious child prodigy of the early twentieth century. He had taught math at Harvard at 11, graduated at 16, became a brilliant student at Harvard Law School, taught at a university, and then gave it all up for a life as a recluse. In 1937, when the *New Yorker* published a "where are they now" article on him, Sidis was a 39-year old eccentric who actively shied away from any kind of human contact.[218] The article described in searching detail his life in a shabby one-room apartment and his odd habits, including his obsession with streetcar transfers and an obscure Indian tribe.[219] Sidis had spoken freely with a female interviewer from the magazine but later claimed not to have known what the purpose of the interview was.[220]

Sidis sued the *New Yorker* in federal court on two counts of invasion of privacy, one under the New York privacy statute and one under the common law. He alleged that the articles exposed him to "unwarranted and undesired publicity" that held him up to "scorn and ridicule" and caused him severe anguish and loss of reputation.[221] The District Court for the Southern District of New York dismissed both privacy counts, and

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213. People v. Robert McBride Co., 159 Misc. 5, 11 (City Magis. Ct. of N.Y. 1936).

214. *Lahiri*, 162 Misc., at 783. Another New York court spoke of gossip about even private individuals – "private social affairs and prevailing fashions involving individuals who make no bid for publicity" – as "public property," "where the apparent use is to convey information of interest and not mere advertising." Martin v. New Metropolitan Fiction, 139 Misc. 290, 292 (N.Y. Sup. Ct. 1931), *rev'd*, 237 A.D. 863 (N.Y. App. Div. 1932).

215. Themo v. New England Newspaper Publ'g Co., 306 Mass. 54, 55 (Mass. 1940).

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

217. *See, e.g.*, *Sidis, A "Wonder" in Boyhood Dies*, N.Y. TIMES, July 18, 1944, at 21; *Former Child Prodigy Fails in Pushing Suit on Magazine*, L.A. TIMES, Dec. 17, 1940, at 11; *Prodigy's Progress*, WASH. POST, July 23, 1944, B4; *Burned Out Prodigy*, NEWSWEEK, July 31, 1944, at 77.

218. Jared Manley, Where Are They Now? April Fool, NEW YORKER, Aug. 14, 1937, at 22; *Sidis*, 807.

219. *Id.*

220. *See* Emile Karafiol, *The Right to Privacy and the Sidis Case*, 12 GA. L. REV. 513, 519 (1978).

221. 34 F. Supp, 19, 20 (S.D.N.Y. 1938).

on appeal, the Second Circuit affirmed the dismissal. The appeals court admitted that the article was "merciless in its dissection" of the details of Sidis' private life.[222] However, Sidis' privacy had not been invaded.

Sidis had no right of privacy in this context because he was a public figure, having voluntarily put himself in the spotlight and having remained there by virtue of the public's continued interest in him. "As a child prodigy, he excited both admiration and curiosity. . . . In 1910 he was a person about whom the newspapers might display a legitimate intellectual interest," Judge Clark explained.[223] The press attention to Sidis during his childhood made him a public figure then. But was he a public figure now? Even though years had passed since his heyday, like the former boxer Canvasback Cohen in *Cohen v. California*, Sidis could not "withdraw into his shell."[224] Even though "Sidis today is neither politician, public administrator, nor statesman," Judge Clark said, Sidis had retained the "questionable and indefinable status of public figure" because the public was still "curious about whether or not he had fulfilled his early promise."[225] The only evidence that the court had of people's curiosity, however, was the fact that the article appeared in the New Yorker, a widely-circulated publication. The court concluded that the "limited scrutiny of the private life of one who has attained, voluntarily or involuntarily, the status of public figure" would not constitute an invasion of privacy.[226]

Moreover, because the article was "amusing and instructive" and truthful, the court suggested, it was newsworthy.[227] The subject was of "considerable popular news interest" and a matter of public "discussion."[228] The Second Circuit did not rule on the question of whether newsworthiness would always constitute a complete defense. It did, however, acknowledge the offensiveness exception described in the *Restatement*— that in some cases, "revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."[229] "Decency," however, in the *Sidis* court's equation, was to be defined by the limits of public curiosity. "Regrettably or not, the misfortunes and frailties of neighbors and public

222. *Sidis*, at 809.

223. *Id.* Indeed, the press had shown great interest in him during his years as a child prodigy; a search of the *New York Times* in that era reveals numerous mentions of Sidis, including his early psychological problems. *See, e.g.*, *Fear is Felt for Sidis*, N.Y. TIMES, Jan. 28, 1910, at 1; *Farmer a Rival to Harvard Prodigy*, N.Y. TIMES, Feb. 19, 1910, at 20.

224. *Id.*

225. *Sidis*, at 809.

226. *Id.*

227. *Id* at 807.

228. *Id.* at 809.

229. *Id.*

figures" were subjects of interest to the public, "and 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."[230] The court described this as a matter of common wisdom: "everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy."[231] Originally envisioned as a means to curb the excesses of the new journalism, by the time of Sidis, privacy cases had become vehicles through which judges affirmed the social worth of public curiosity and the right of the press to fulfill it, whether mundane, banal, or intrusive.

CONCLUSION

By the time of *Sidis*, fifteen states recognized the public disclosure action.[232] However, as lawyer Louis Nizer acknowledged that year, recovery had become virtually impossible because few plaintiffs could surmount the hurdle of newsworthiness.[233] The broad newsworthiness standard and the involuntary public figure or "instant celebrity" concept continued to define the outcome of public disclosure cases in the post-World War II period. In making judgments about newsworthiness, courts admitted that it was impossible to know whether editorial staffs were responsible for press content or whether newspapers were merely catering to the "present mores of the people." Because of this, a federal district court stated, it was simply more expedient for judges to assume the latter.[234] With the advent of television and the need for unifying national symbols in the suburbanizing, geographically dispersed postwar society, celebrity culture expanded into all realms of American life, including politics. Courts repeatedly held that scandal magazines and television programs could not be punished for disclosures of private facts about celebrities unless they were false; their widespread consumption was "mute testimony" that the public was obsessed with gossip.[235]

In *Time, Inc. v. Hill*, a case involving a claim of "false light" invasion of privacy brought under the New York privacy statute, the Supreme Court for the first time in 1967 offered its perspective on the developments this

230. *Id.*

231. *Id.*

232. California, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Jersey, North Carolina, Pennsylvania, South Carolina, Alaska, at common law; D.C., New York, and Utah by statute. *See* PEMBER, *supra* note 26, at 264-66.

233. *See* Nizer, *supra* note 59, at 542.

234. Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 962 (D. Minn. 1948).

235. Goelet v. Confidential, Inc., 5 App. Div.2d 226, 230 (N.Y. App. Div. 1958). Television news coverage produced many instant celebrities, whose public disclosure claims were generally rejected. As long as they were "present at a scene where news was in the making," they were, for the purposes of the law, involuntary public figures. Jacova v. S. Radio Television Co., 83 So. 2d 34, 40 (Fla. 1955).

paper has described: the divergence between fame and volition, the social and legal status of the "involuntary public figure," and the relationship of the news media, "matters of public concern," public discourse, and core protected speech under the First Amendment. In that case, the Court overturned the decision of the New York Court of Appeals upholding a jury award for the magazine's invasion of the Hill family's privacy under the New York privacy statute.[236] Hill and his family had been held hostage in their home by escaped convicts, and the ordeal was made into a play that was highly fictionalized. *Life* magazine, in an illustrated news story about the play, disclosed the identity of the Hill family and described the play as true.[237] The appellate court stated that *Life*'s story was "trade" under the statute rather than "news," as its purpose was to "attract further attention to the play, and to increase present and future magazine circulation as well."[238]

The Supreme Court ruled that the "constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest" absent proof that the publisher knew of their falsity or acted in reckless disregard of the truth. Brennan defined "matters of public interest" in terms of newsworthiness, defined as public curiosity. The content of mainstream newspapers and magazines, he suggested, reflected the public's interest. Not only political news, but news about personalities and social events, no matter how mundane or trivial, were newsworthy and therefore fulfilled the function of a free press, which is to stimulate the discourse "essential. . . to healthy government."[239] "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . 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."[240] Although the holding was carefully limited to the New York statute, according to Harry Kalven Jr., it suggested that the newsworthiness standard had constitutional or near-constitutional stature.[241] As Kalven observed, in Brennan's opinion, newsworthiness defined "the ambit of constitutional concern. The newsworthy is a kind of speech which is public enough so that its

236. Time, Inc. v. Hill, 385 U.S. 374 (1967).

237. *Id.*

238. *Id.* at 379.

239. *Id.* at 384.

240. *Id.* at 387. In his concurrence, Douglas observed that even though Hill was "a private person," because he had been "catapulted into the news by events over which he has no control," he and his activities were "in the public domain." *Id.*

241. Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267, 283 (1967).

protection cannot be left entirely to state policy."[242]

The Supreme Court has made many efforts in subsequent cases to define the domain of constitutionally-protected speech on "matters of public concern," which like "newsworthiness," encompasses a broad array of material—"expression about philosophical, social, artistic, economic, literary, or ethical matters,"[243] commercial speech, and sexual matter—"far more than politics in a narrow sense."[244] In cases involving mass media disclosure of private facts obtained from public records, the Court suggested that "matters of public concern" encompasses all truthful information except that which would contravene a "state interest of the highest order."[245] The Court has yet to define the protection of personal privacy as an interest "of the highest order."[246]

As this Article has demonstrated, the notion that the public has an entitlement to know about a wide array of persons and events, one that overrides individual claims to privacy, has roots that run deep in our social experience.[247] The "right to privacy" and the public disclosure tort developed in response to fundamental changes that accompanied the growth of a mass society, changes that created vast public demand for information about the private affairs of others. The impersonalizing forces of urbanization and mass population growth generated a sense of anonymity and alienation. There was a deep need for intimacy in the hard world of the mass crowd, and gossip and the public revelation of personality provided it. News about other people's private lives generated a public identity and public discourse among a diverse mass populace otherwise lacking common bonds and experiences. From this milieu developed our modern legal and social systems of privacy and freedom of expression.

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242. *Id.*

243. Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

244. Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 41 (1971). *See also* Roth v. United States, 354 U.S. 476 (1957); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

245. Smith v. Daily Mail Publ'g Co. 443 U.S. 97 (1979); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Fla. Star v. B.J.F., 491 U.S. 524 (1989).

246. In *Bartnicki v. Vopper*, the most recent Supreme Court case involving public disclosure of private facts, involving the radio broadcasting of conversations obtained by illegal wiretapping, the Court ruled that federal laws making it illegal to disclose such material are unconstitutional, when those laws are applied against defendants who do not engage in acts of interception and when the subjects in the conversation are truthful "matters of public concern," no matter how "mundane" those issues may be—in this case, a labor dispute involving local teachers. Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

247. Robert Post has described this as "a normative theory of public accountability." Post, *Social Foundations*, *supra* note 10, at 1001.