

# THE ROLE OF SIDIS V. F-R PUBLISHING CO. CASE IN THE FORMATION OF RIGHT TO BE FORGOTTEN

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*The given article displays the case of Sidis v. F-R Publishing Co., which features a suit of a former adolescent prodigy, William Sidis against the New Yorker newspaper for publishing an article "Where Are They Now? April Fool" where his biography as well as a then-present style of life were portrayed. This case possesses a particular concordance for the theory of "right to be forgotten" as a derivative of right to privacy in common law as well as having triggered the issues of celebrity-related public interest and article newsworthiness tests applied by US courts in later cases.*

## I. Introductory clause

### 1. Statement of issue. The definition of right to be forgotten, its scope and place in human rights law

The right of privacy as separate right deriving from common law jurisdictions and had a prominent development in United States common law though having some protogene routes in UK common law. The emergence of the right to privacy in the United States is connected with an article by American scholars Samuel Warren and Louis Brandeis in 1890, but several privacy cases occurred way before this treatise<sup>1</sup>. The violation of the right is recognized as an independent tort and the right to privacy is treated as common law right: as it was stated in *Bremmer v. Journal Tribune Co.*: "The modern doctrine of the right to privacy is a development of the common law to fill a need for the protection of the interest which person has in living without unwarranted publicity"<sup>2</sup>. The right to privacy is a limited right and does not protect an individual from a number of occurrences<sup>3</sup>. The right to privacy

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<sup>1</sup> See; KRAMER, I. R. The Birth of Privacy Law: A Century Since Warren and Brandeis (1990), *Catholic University Law Review*, Vol. 39, Issue 3 (Spring 1990), Article 3, p. 705–708; MENSEL, R. E., The Anti-Progressive Origins and Uses of the Right to Privacy in the Federal Courts 1860–1937 (2009), *The Federal Courts Review*, Vol. 3, iss. 2, p. 111–112. Several antique specimen of the 19<sup>th</sup> century also existed in UK common law, generally see. CUMMINGS, J. J., Television and the Right to Privacy (1952), *Marquette Law Review*, Volume 36, Iss. 2 (Fall 1952), p. 157–158. For an early prominent UK common law privacy violation case, *Prince Albert v. Strange* (1848) see generally SOLOVE, D. J.; RICHARDS, N. M., Privacy's Other Path: Recovering the Law of Confidentiality, 2007, *GW Law Faculty Publications & Other Works*, Vol. 96:123, p. 130–131. For a discussion on the earliest privacy-related cases see also, POUND, R. Interests in Personality, 1915, *Harvard Law Review*, Vol. XXVIII (February 1915), No. 4, p. 347–348 and footnote 7. One privacy-related case, appearing 23 years before Warren and Brandeis declared privacy an independent tort, *Grigsby and Wife v. R. J. Breckinbridge* (1867), was classified as a privacy case in *Brents v. Morgan*, see in detail: *Brents v. Morgan*, 221 Ky. 765 (Ky. Ct. App. 1927), at. 770.

<sup>2</sup> *Bremmer v. Journal Tribune Co.*, 247 Iowa 817 (Iowa 1956), at. 821.

<sup>3</sup> Such were well summarized in a number of earlier cases. In *Brents v. Morgan*, the Court classified these derogations as follows: 1) the right of privacy ceases when the matter is a matter of public and general interest; 2) it doesn't

is examined by the scale of ordinary sensibilities<sup>4</sup> and common law does not afford protection on basis of the plaintiffs hypersensitivity, that is, it is not accounted: as stated by the Supreme Court of Florida in the case of *Cason v. Baskin*: “The protection afforded by the law to this right must be restricted to “ordinary” sensibilities” and can not extent to supersensitive or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence”<sup>5</sup>. The US common law distinguishes defamations from privacy violations by separating injuries to one’s reputation, character or property from “injury to the person”<sup>6</sup> which may be overally described as an insult of one’s mental integrity and private feelings<sup>7</sup>. The disctinction between the foregoing torts were well interpreted by the California Court of Appeal in *Fairsfield v. American Photocopy etc. Co*: “The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community”<sup>8</sup>. A defamation is displayed in the field of blackening one’s reputation, whether of a living or a deceased person, it commonly contains false statements and assumptions (however, in earlier cases, United States courts came to a conclusion that not entirely false facts are directly libelous, but the facts which bring a person to contempt and ridicule<sup>9</sup>), a libel is malicious by its nature and is to be distinguished from the so-called “injury to the person”<sup>10</sup> or, as R. Pound proposed in his prominent treatise “*Interests in Personality*”, an “interest in the peace and comfort of one’s thoughts and emotions”<sup>11</sup>. Defamations may also involve a somehow indirect reference to a person and is actionable in case the plaintiff is capable of proving the statements are attributed particularly to him<sup>12</sup>. The so-called “false light” cases are not stringently defamatory in case they contain minor inaccuracies and do not outrage community decency<sup>13</sup>. The right to privacy bore several derivatives which generally fall within the scope of the right to privacy violations, but are divergent by some circumstances. The first, the “*relational right to privacy*”, or, as Larremore denoted “*post mortem privacy*”<sup>14</sup>, displays an action on privacy invasion of an already deceased person. It was unleashed since a prominent case of *Schuyler v. Curtis* way back in 1895<sup>15</sup> which declared that

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prohibit priviledged communication unless breaking the rules of slander and libel 3) there is no recovery for an oral publication 4) the right to privacy does not subsist when the individual publishes these facts itself or they are published with its consent (*Brents v. Morgan*, 221 Ky. 765 (Ky. Ct. App. 1927), at. 770–771). In the case of *Reed v. Real Detective Pub. Co* it was given in a somehow alternate way: 1) it surrenders with the death of the person 2) there was consent given to publication; 3) when the plaintiff became a public character and hence sacrificed a major part of his privacy; 4) from ordinary dissemination of news and events; 5) in regard with a person to which the community has got a licit interest; 6) when the information would be of public benefit (*Reed v. Real Detective Pub. Co.* 63 Ariz. 294 (Ariz. 1945), at. 304).

<sup>4</sup> ZOLICH, J. Laudatory Invasion of Privacy (1967), *Cleveland State Law Review*, Vol. 16, iss. 3, art. 6, p. 533.

<sup>5</sup> *Cason v. Baskin*, 155 Fla. 198 (Fla. 1945), at. 215.

<sup>6</sup> *Reed v. Real Detective Pub. Co.*, 162 P. 2d 133, 63 Ariz. 294, at. 301.

<sup>7</sup> POUND, R. *Interests in Personality*. Harvard Law Review, 1915, Vol. 28 (XXVIII), No. 4 (February 1915), p. 356–357, 363–364.

<sup>8</sup> *Fairsfield v. American Photocopy etc. Co* (1955), 138 Cal App. 82, at. 86.

<sup>9</sup> *Morey v. M. J. Association*, 123 N.Y. 207 (N.Y. 1890), at. 209.

<sup>10</sup> See. *Reed v. Real Detective Pub Co* (1945). 162 P. 2d 133, 63 Ariz. 294, at. 301.

<sup>11</sup> POUND, R. *Interests of Personality* (1915), *Harvard Law Review*, Vol. 28, No. 4 (Feb. 1915), p. 362–363.

<sup>12</sup> See. *Gibler v. Houston Post Co*, 310 S.W. 2d 377 (Tex. Civ. App. 1958), at. 384, with a reference to Prosser.

<sup>13</sup> See. for instance, *Koussevitzky v. Allen, Towne and Heathe*, 188 Misc. 479 (N.Y. Misc. 1947), at. 482–483.

<sup>14</sup> LARREMORE, W. *The Law of Privacy* (1912), *Columbia Law Review*, Vol. 18, No. 8 (Dec. 1912), p. 706.

<sup>15</sup> HAND, A. N. *Schuyler against Curtis and the right to privacy* (1897), *The American Law Register and Review*, Vol. 45 O.S. (36 N.S.) December 1897, No. 12, p. 745–759.

the death of person deprives it from all the rights, including privacy<sup>16</sup>. This was however altered in *Bazemore v. Savannah Hospital*, a sophisticated per curiam case, where an unauthorized photograph of a dead deformed child was published in a newspaper and the court held that the right of action can be in the forebearers<sup>17</sup>. There have been multiple interpretations of the Bazemore case<sup>18</sup>, including the opinions of courts in similar cases<sup>19</sup>. The “relational privacy” concept did not acclimatize in the common law apart from some cases where other interests, such as breach of contract, or trust were abused<sup>20</sup>. The second derivative, yet never unanimously entitled, deals with disclosures of one’s past facts and events. Being tentatively called “*right to be forgotten*” or “right to oblivion”, it is a complicated legal concept in the field of the right to privacy with a vague normative scope. Still, I would define it in the undergoing categories:

- 1) a common law concept emerging from US common law that represents a recovery on grounds of disclosure of one’s past, subjectively irrelevant, embarrassing or displeasing, sometimes meticulously sealed private events and facts by the means of mass media – the press, television, broadcast and others. The abiding component of such cases was the existence of a time lapse between events and their publication, which may have altered from a number of months<sup>21</sup> and 2 years<sup>22</sup> to a decade<sup>23</sup>, two decades<sup>24</sup>, from twenty to thirty years of time lapse<sup>25</sup> and even more<sup>26</sup>. This concept is frequently attributed to a concept of so-called “past news”, namely a revivification of the bygone events in reprints of old newspapers and revitalization of old news<sup>27</sup>; disclosure of truthful life stories<sup>28</sup>; an unveiling of an elected office position aspirant’s criminal past<sup>29</sup>, a deplorable life story of an ordinary woman who chose to be espoused at an immature age of fourteen<sup>30</sup>, revelation of one’s sensitive personal data, barely relevant for

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<sup>16</sup> *Schuyler v. Curtis*, 147 N.Y. 434 (N.Y. 1895), at. 446–447.

<sup>17</sup> *Bazemore v. Savannah Hospital*, 171 Ga. 257 (Ga. 1930), at. 262.

<sup>18</sup> COMMENTS (*Washington University Law Review*): Torts – Right of Privacy – No Right of Recovery for Publication Concerning Deceased Relatives (1953), Vol. 1953, iss. 1, p. 111; see the opinion on Bazemore in *Cox Broadcasting Corp v. Cohn*; where it was held that the “relational” right to privacy still was recognized in that case without other interests abused (see. *Cox Broadcasting Corp v. Cohn*, 231 Ga. 60 (1973), at. 62–64).

<sup>19</sup> See *Waters v. Fleetwood*, 212 Ga. 161 (1956), at. 167–168 and *Bremmer v. Journal Tribune Co.*, 247 Iowa 817 (Iowa 1956), at. 826.

<sup>20</sup> See generally: *Douglas v. Stokes* (1912); *Fitzsimmons v. Ollinger Mortuary Assn* (1932).

<sup>21</sup> See generally *Miller v. National Broadcasting Co.* (1957).

<sup>22</sup> *Samuel v. Curtis Pub. Co.*, 122 F. Supp. 327 (N. D. Cal. 1954), at. 328.

<sup>23</sup> See generally e.g. *Barbieri v. News Journal Co.* (1963) – 10 years, *Briscoe v. Reader’s Digest Assn.* (1971) – 11 years.

<sup>24</sup> See. *Conklin v. Sloss* (1978), 86 Cal. App. 3d 241, at. 243 – 20 years.

<sup>25</sup> See. *Smith v. Doss* (1948), 251 Ala. 250 (Ala. 1948), at. 252 – 25 years until the death of the person concerned, the actual time lapse between the event (1905) and publication (1946) tolled 41 year; In the present case, *Sidis v. F-R Publishing Co.* (1940) – the plaintiff’s heyday was about 27 years before the publication; in *Werner v. Times-Mirror Co.* (1961), the events described were mostly over 20 years of remoteness (see. *Werner v. Times-Mirror Co* (1961), 193 Cal. App. 2d 111, footnote 1–2).

<sup>26</sup> See. *Street v. National Broadcasting Co.* (1981) – about 36 years.

<sup>27</sup> See in detail: *Bernstein v. National Broadcasting Co.* 129 F Supp. 817 (1955), at. 828–829; *Barbieri v. News-Journal Company*, 189 A.2d 773 (Del. 1963), at. 773–774; *Conklin v. Sloss* (1978), 86 Cal. App. 3d 241, at. 242.

<sup>28</sup> See. *Smith v. Doss*, 251 Ala. 250 (Ala. 1948), at. 251–252.

<sup>29</sup> For instance, in *Beruan v. French*, the plaintiff was a candidate for a secretary-treasurer at International Association of Machinists and Aerospace Workers and tempted to be elected in December 1970. The defendants distributed a letter to oppose his candidacy. It contained facts of the plaintiff’s past, which counted on six criminal convictions between 1943 and 1958. As a result, the plaintiff lost the competition. The Court found that the criminal records were relevant to determine his fitness for an office in a labor union and so the plaintiff lost. See. *Beruan v. French* (1976), 56 Cal. App. 3d 825, at. 827–829.

<sup>30</sup> See. *Carlisle v. Fawcett Publications* (1962), 201 Cal. App. 2d 733, at. 736–740.

one's office fitness<sup>31</sup>, past scandalous incidents of an ex-attorney<sup>32</sup>, unsavory past events of an allegedly rehabilitated criminal<sup>33</sup>, as expunged criminal records may be newsworthy in case of a person with criminal past applies for a public office; though it may be convergent to do so, there may be no "right to oblivion" for an aspirant's past<sup>34</sup>, as the subsistence of such facts, irrespective of how remote are they, have an impact on his fitness for office<sup>35</sup>. A common law "right to be forgotten" conception also subsists in the field of defamation<sup>36</sup> when the defamatory statements are connected with past life events. In UK, a wayward prototype of "right to be forgotten" existed in libel law: in a 1849 decision by an English court it was ruled that a libel suit was not actionable as the limitation period for a libel action could not overcome more than six years<sup>37</sup>. Apart from US and UK common law, a "common law"-based right to be forgotten has received a somehow modest coverage in international law – the practice of the European Court of Human Rights possesses 3 outstanding cases, *Schwabe v. Austria* (held that the interference with freedom of expression was unjustified<sup>38</sup>); the case of *Tolstoy Miloslavsky v. UK* (it was held that injunction featuring a defamation on one's alleged past criminal acts wasn't an interference of freedom of speech and the award to the plaintiff in a British court was prescribed by law and was sustained in the boundaries of Article 10 of the ECHR<sup>39</sup> and a relatively contemporary entry – *Times Newspapers Ltd v. United Kingdom*, where it was held that the disclosure of archives in digital media did not constitute a violation of privacy as archives are a substantial source for education and historical research<sup>40</sup>).

- 2) a statutory right of a person to demand deletion of personal data stored in a certain record system from a person or legal entity maintaining the respective records. The mechanism of the

<sup>31</sup> See. *Diaz v. Oakland Tribune, Inc* (1983), 139 Cal. App. 118, at. 123.

<sup>32</sup> See. *Werner v. Times-Mirror Co.* (1961), 193 Cal. App. 2d 111, at. 114–115; footnote 1–2.

<sup>33</sup> The primary, and the most cited case of ex-criminal rehabilitation is apparently *Melvin v. Reid*, where a dictum on an ex-criminal's rehabilitation prevailing over freedom of expression was held (*Melvin v. Reid*, 112 Cal. App. 285 (Cal. Ct. App., 1931), at. 292). At the same time, a dictum on "right to be forgotten" was held in *Briscoe*, where the plaintiff was to prove his rehabilitation before the trier of fact as well as asserting the severity of the moral damages caused by the disclosure of the past facts, see. *Briscoe v. Reader's Digest Association Inc* (1971), 4 Cal. 3d 529, at. 541–543. This dictum was later used in *Conklin*, see. *Conklin v. Sloss* (1978), 86 Cal. App. 3d 241, at. 248. For other "criminal oblivion" cases, see generally: *Mau v. Rio Grande Oil Corp.* (1939) [the plaintiff was not a criminal, but instead fell a victim of a robbery and was portrayed in a dramatization]; *Milner v. Red River Valley Pub. Co.* (1952), *Bernstein v. National Broadcasting Co.* (1955); *Smith v. National Broadcasting Co.* (1957); *Barbieri v. Journal Tribune Pub. Co.* (1963); *Beruan v. French* (1976); *Conklin v. Sloss* (1978); *Dresbach v. Doubleday* (1981); *Wasser v. San Diego Union* (1987). In a dissenting opinion of Judge Bishop in *Werner v. Times-Mirror Co* (1961), it was proposed that the plaintiff, an ex-attorney, rehabilitated himself morally as a lawyer after a bribery scandal and was regarded in the light of an "involuntary public figure", see. *Werner v. Times-Mirror Co.* (1961), 193 Cal. App. 2d 111, at. 123–124.

<sup>34</sup> See. FRANKLIN A. M, JOHNSEN D. Expunging Criminal Records: Concealment and Dishonesty in an Open Society, 1981, *Hofstra Law Review*, Vol. 9, No. 3, p. 755–756.

<sup>35</sup> See. *Beruan v. French* (1976), 56 Cal. App. 3d 825, at. 828.

<sup>36</sup> For defamation-based recovery based on past facts disclosure, see generally *Wolston v. Reader's Digest Assn.* (1979); *Zerangue v. TSP Newspapers* (1987). In *Estill v. Hearst* (1951), the primary count for defamation regarding past events of a 15-year lapse were also held actionable though the invasion of privacy was denied; the same may be attributed to the case of *Carlisle v. Fawcett Publications*, where the primary cause of action was also relied on defamation, see for detail, *Carlisle v. Fawcett Publications* (1962), 201 Cal. App. 2d 733, at. 741.

<sup>37</sup> See. *The Duke of Brunswick v. Harmer* (1849), S. C. 19 L. J. Q. B. 20; 14 Jur. 110, at. 185–186. In this case, plaintiff filed a suit for publishing false statements on him in a newspaper, published in 1830. It was held that as the limitation period of libel was six years, the lawsuit was not actionable.

<sup>38</sup> *Schwabe v. Austria*, Application No. 13704/88, Judgment of 28 August 1992, para. 49–53.

<sup>39</sup> *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91, Judgment of 13 July 1995, para. 36–44, 52–54.

<sup>40</sup> *Times Newspapers Ltd. (Nos. 1 and 2) v. The United Kingdom*, Applications 3002/03 and 23676/03, Judgment of 10 March 2009, para. 45.

personal data storage is immaterial<sup>41</sup>. It arguably derives from the expungement of trial records which tolls over a hundred years of history. Kenneth Karst called it “*a right to redemption*” as well as “*a right to a fresh start*”<sup>42</sup>. The issue of criminal rehabilitation is well covered in the “common law” right to be forgotten, too<sup>43</sup>. California has enacted legislation which allowed to expunge records of “driving under influence” within a decade, but in case the misdemeanour is repeated within the period of 10 years, the punishment may be even more striking<sup>44</sup>. A 1970 US federal law allowed to expunge personal data from consumer reports<sup>45</sup>. In the 70s, the data privacy pioneering expert Alan Westin argued that the maintenance of health records involving data on one’s psychiatric diseases and treatment as well as records that belonged to the worker’s relatives may cause a substantially adverse impact on their employment<sup>46</sup>. Theoretical concepts of personal data maintenance principles in the 1970s featured notions on irrelevant data abolishment<sup>47</sup>. Being warped into a data protection law, they would be imperative norms defining the obligations of a data controller, but not the rights of the data subject. At an international level, the problem of data erasure was not sharp until the early 2010s though international instruments implied norms on data erasure in a fashion similar to the one proposed by Ware in the seventies. Finally, a statutory “right to be forgotten” was injunct into *General Data Protection Regulation* of the EU, which is supposed to enter into force in Spring 2018<sup>48</sup>.

- 3) a statutory<sup>49</sup> or a common law<sup>50</sup> right referring to a deletion of personal data held on an Internet server, occasionally known as an “erasure button (law)”. Some of them may feature consumer information while others may involve data retained on search engines and servers of social networks. These are the least regulated out of all three types of “right to be forgotten” and the least researched ones. A similar bill with a code name of “SB 568” was passed in California which obliges websites to lodge instructions and notifications for minors of removing material from the servers<sup>51</sup>.

It is still obscure to consider a “right to be forgotten” as a separate human right though a number of legal scholars argue that it may be somehow respected as such<sup>52</sup>, but it is highly objectionable

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<sup>41</sup> Since the 1970s, the data privacy-related record systems became mainly associated with computer databases. See. WESTIN, A. *Computers, Health Records and Citizen Rights (NBS Monograph 157)*, 1976, US Government Printing Office, Washington D.C., p. 348–349. For the issues of “paper and ink” record systems, see. BLANCHETTE, J. F. & JOHNSON D.G. Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness, 2002, *The Information Society – An International Journal*, Vol. 18 (2002), iss. 1, p. 36–37.

<sup>42</sup> KARST, K. “The Files”: Legal Controls Over The Accuracy and Accessibility of Stored Personal Data, 1966, *Law and Contemporary Problems (Duke Law)*, Vol. 31 (Spring 1966), p. 368–369.

<sup>43</sup> See footnote 20 supra.

<sup>44</sup> California Vehicle Code, Section 23540 (a).

<sup>45</sup> 15 U.S.C. Para. 1681c, subsection (a) (1), (2), (3), (4), (5), (6) (A); (B).

<sup>46</sup> WESTIN, A. *Computers, Health Records and Citizen Rights (NBS Monograph 157)*, 1976, US Government Printing Office, Washington D. C., p. 62–63.

<sup>47</sup> WARE, W. Records, Computers and The Rights of Citizens (DHEW Publication No. (OS)73–94), 1973, U.S. Department of Health, Education and Welfare, p. 56–57.

<sup>48</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation.), 2016, *Official Journal of the European Union.*, Article 17.

<sup>49</sup> See. e.g. The New York State Assembly Bill No. A5323, referred internally as “Right to be forgotten act” proposes to remove web content on the individual’s demand within 30 days.

<sup>50</sup> BENNETT, S. C. The “Right to be Forgotten”: Reconciling EU and US Perspectives, 2012, *Berkeley Journal of International Law*, Vol. 30, Iss. 3, Art. 4, p. 163–164.

<sup>51</sup> LEE, J. SB 568: Does California’s Online Erasure Button Protect the Privacy of Minors?, 2015, *University of California*, Davis. Zvol. 48:1173, p. 1176.

<sup>52</sup> See. BENNETT, S. C. The “Right to be Forgotten”: Reconciling EU and US Perspectives, 2012, *Berkeley Journal*

owing to the vague status of the subject. The common law notion decently lies within the right to privacy with an appendix of “*lapse of time*” when dealing with the issue of newsworthiness of the facts disclosed<sup>53</sup>; and no specific principles, apart from a “rehabilitation issue” were ever applied to separate a conventional interference to privacy<sup>54</sup>. In the practice of the ECtHR, the *Schwabe, Tolstoy Miloslavskiy* and *Times Ltd* cases were also decided in the general embrace of right to privacy and defamation<sup>55</sup>. As a statutory right, the “right to be forgotten” provision is engaged into data protection laws and codes. The appearing of such issue in EU law also does not transform it into a human right. The tapering of right to be forgotten into an entirely “digital” right is also objectionable as it does not display the actual scope of the concept. Thus, the “right to be forgotten” is more likely to exist within the embrace of the right to privacy as a common law right or a statutory right in data protection laws or specific codes of ethics (e.g. maintaining personal data in hospitals, educational institutions or industrial enterprises).

## 2. Topicality justification

The *Sidis* case unleashes a doctrine of a common law “right to be forgotten” concept, which was thereafter disposed for dozens of times in suits regarding private information disclosure. The value of the “leading” right to be forgotten case is still inestimable as it was cited in hundreds of follow-up cases as a precedent as well as launching a broad issue of a so-called “public figure test”<sup>56</sup>, though discussions on an exact normative content of this status were held much earlier<sup>57</sup>. The *Sidis* case also evoked the issue of newsworthiness estimation which was later developed in the early 1960s. Being one of the leading privacy-related cases in the embrace of past event resurrection, the *Sidis* case amalgamated a common law trend “once a public figure – always a public figure” that literally means a public figure of voluntary nature is to maintain this status for the entire life.

## 3. The analysis of current condition in the legal sphere

Although not being anyhow a landmark case, the *Sidis v. F-R Publishing Corp.* repeatedly attracted the attention of several legal scholars. At first, it became quite resonant within early 1940s case comments<sup>58</sup>, as well as mid 20<sup>th</sup> century scholars, such as L. R. Yankwich<sup>59</sup>, W. Prosser<sup>60</sup>,

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*of International Law*, Vol. 30, Iss. 3, Art. 4, p. 167. The author refers to a French “*droit d’oubli*” as a “fundamental human value”; WECHSLER, S. The Right to Remember: The European Convention on Human Rights and The Right to be Forgotten, 2014, *Columbia Journal of Law and Social Problems*, Vol. 49, Iss. 1, p. 139–140.

<sup>53</sup> CASE NOTES: Torts – Invasion of Privacy – Lapse of Time and the Destruction of the Newsworthiness Privilege – Wagner v. Fawcett Publications, 307 F. 2d 409 (7th Cir. 1962), 1964, *De Paul Law Review*, Vol. 13, iss. 2, article 15, p. 325–327.

<sup>54</sup> For the dictum, see. *Briscoe v. Reader’s Digest Association* (1971), 4 Cal. 3d 533, at 542–544. For other issues on the “right to be forgotten” and criminal rehabilitation in US common law, see footnote 33.

<sup>55</sup> See footnotes 38–40 supra.

<sup>56</sup> See. Recent Cases: Torts. Right of Privacy. Public Figure Test as Determinative of Right to Recovery, 1940, *The University of Chicago Law Review*, Vol. 8 (1940), Iss. 2, p. 382–383.

<sup>57</sup> See e.g. HAND, A. N. Schuyler against Curtis and the right to privacy (1897), *The American Law Register and Review*, Vol. 45 O.S. (36 N.S.) December 1897, No. 12, p. 747–748.

<sup>58</sup> See the following: Recent Cases: Torts. Right of Privacy. Public Figure Test as Determinative of Right to Recovery, 1940, *The University of Chicago Law Review*, Vol. 8 (1940), Iss. 2, p. 382–385; Torts – Right of Privacy – Liability or Violating Retirement of Public Figure, 1940, *Washington University Law Review*, Vol. 26 (January 1940), Iss. 1, p. 137–139; Torts. Right of Privacy. Magazine Account of Individual’s Past (1940), *Columbia Law Review*, Vol. 40, No. 7 (Nov., 1940), p. 1283–1285 and CASE NOTES: Torts – Invasion of Privacy – Lapse of Time and the Destruction of the Newsworthiness Privilege – Wagner v. Fawcett Publications, 307 F. 2d 409 (7th Cir. 1962), 1964, *De Paul Law Review*, Vol. 13, iss. 2, article 15, p. 329.

<sup>59</sup> YANKWICH, L. R. Right of Privacy: Its Development, Scope and Limitations, 1952, *Notre Dame Law Review*, Vol. 27, Iss. 4, Art. 1, p. 513–514.

<sup>60</sup> PROSSER, W. L. Privacy, *California Law Review*, 1960, Vol. 48, iss. 3, p. 397.

I. Silver<sup>61</sup>, R. Posner<sup>62</sup>, A. Kaminsky<sup>63</sup> as well as contemporary researchers, who investigated on the issues of right to privacy in case law, right to be forgotten and the issues of privacy for public figures, such as J. Whitman<sup>64</sup>, C. Bennett<sup>65</sup> and S. Royston<sup>66</sup>. Apart from the given article, my aim is to systemize the United States common law legacy concerning right to be forgotten to corroborate and boost the entire concept as well as broaden its vague margins.

## II. The main body

### 1. Brief overview. The Sidis case as an early right to be forgotten footage and other 30s right-to-be-forgotten-related cases: the interest in persons and incidents

*Sidis v. F-R Publishing Corp.*<sup>67</sup> is a case decided by the US Court of Appeals of the Second Circuit dealing with an alleged violation of privacy by a story published in an American magazine “*New Yorker*”, which displayed the life of an adolescent genius, *William Sidis*. In the article, the author revealed a multitude of facts as well as some personal data regarding *William Sidis*, as well as having made several assessing statements of his then-current lifestyle which evoked him to file a lawsuit against the *New Yorker* magazine. Particularly this case attracted the attention of several legal researchers. As I denoted on the foregoing page, the case was briefly examined in the scope of “*right to be forgotten*” (though not directly named) by various scholars in articles and case comments<sup>68</sup>. Although upon the decision of the Court, *William Sidis* lost, this case may become a specimen as an early “*right to be forgotten*” footage. Though no specific references to a “*right to be forgotten*” in the *Sidis* case existed and it fell within the verbatim of alleged privacy violations, it certainly deals with the common law right to be forgotten, as the matter of the publication is tangent to remote, past and irrelevant (they were such for *W. Sidis*, I presume) facts from early life of *William James Sidis*. The *Sidis* case has got several divergencies from several other “*right to be forgotten cases*”:

- 1) First and foremost, the public figure status of the plaintiff in the case of *Melvin v. Reid* may not be compared with *William Sidis*, although in both types of cases courts would render such persons as public figures<sup>69</sup>. As of the classification of A. Fague, who divided public figures into

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<sup>61</sup> SILVER, I. Privacy and the First Amendment, 1966, *Fordham Law Review*, Vol. 34, Iss. 4, Art. 1, p. 556–559.

<sup>62</sup> POSNER, R. A. Right to Privacy, *Georgia Law Review*, 1978, Vol. 12, no. 3, p. 415–417.

<sup>63</sup> KAMINSKY, A. Defamation Law: Once a Public Figure Always a Public Figure?, 1982, *Hosfra law review*, Vol. 10, iss. 3, article 6, p. 803.

<sup>64</sup> WHITMAN, J. Q. The Two Western Cultures of Privacy: Dignity versus Liberty, 2004, *Yale Law School; Faculty Scholarship Series*, Paper 649, p. 1209–1210.

<sup>65</sup> BENNETT, C. The “Right to be Forgotten”: Reconciling EU and US Perspectives, 2012, *Berkeley Journal of International Law*, Vol. 30, iss. 1, art. 4, p. 170–171.

<sup>66</sup> ROYSTON, S. The Right to Be Forgotten: Comparing U.S. and European Approaches, 2017, *St. Mary's Law Journal*, Vol. 48:253, p. 267–268.

<sup>67</sup> *Sidis v. F-R Publishing Co.* 112 F. 2d 806 (2<sup>nd</sup> Cir. 1940).

<sup>68</sup> See. footnote 47 supra.

<sup>69</sup> It is true that a person, willingly or not may become an actor of the event which is of community concern even though this event might be thanatoid. As outlined in *Jones v. Herald Post Co.*: “*There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence*” (see in detail, *Jones v. Herald Post Co.* 230 Ky. 227 (Ky. Ct. App, 1929), at. 229). People plunged into certain events as casualties, loss a part of their privacy: *One who unwillingly comes into the public eye as in the case of a criminal and even one unjustly charged with crime or the subject of a striking catastrophe, is subject to limitations of the right to be let alone* (*Aquino v. Bulletin Co.*, 190 Pa. Super 528 (1959), at. 533, citing the Restatement of Torts, Vol. 4, para. 867, at. 400–401) For similar instances, see generally the following cases: *Metter v. Los Angeles Examiner* (1939), *Themo v. New England Insurance Co.* (1940) *Kelley v. Post Publishing Co.* (1951); *Leverton v. Curtis Publishing Co.*

“voluntary” and “involuntary”<sup>70</sup>, plaintiff in *Melvin* had received an involuntary publicity and her privacy was no way invaded by news reports, or a telecast featuring her true name, story and activities, but a film with usage of her personal data and her life story. Being not actionable in the state of California, it was ruled on basis of an unwarranted intrusion into one’s private life<sup>71</sup>. Following the public figure achievement subdevison in the *Werner v. Times-Mirror Co.*, a person can achieve this status either by his acts or by circumstances<sup>72</sup>. The incidents of the plaintiff’s unsavory past in *Melvin* case became public owing to their subsistence in public records<sup>73</sup> whereas William Sidis amalgamated his publicity by his uncommon mental abilities. From my point of view, the idea of rehabilitation in society must be tied not with W. Sidis case at all: the case of *Briscoe*. will fit it at its best<sup>74</sup>, where the dictum of an ex-criminal rehabilitation was observed by the court. However, the *Briscoe* case did not grant the right to be forgotten: although the court expressed a dictum upon which a conjectural jury would incline to decide in favor of plaintiff<sup>75</sup>, the judgement was reversed and remanded to the trial court<sup>76</sup>, the plaintiff was to prove his rehabilitation to the trier of fact as well as ascertain malice of the publication<sup>77</sup>. The case of *Mau v. Rio Grande Oil Inc.*, an early “right to be forgotten” case is akin to *Melvin v. Reid*: the plaintiff, previously a chauffeur, filed a suit against a broadcasting company for unauthorized dramatization of the incident he was plunged into in a relatively recent past, when he suffered a gunshot wound within a robbery; the reminder of

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(1951); *Abernathy v. Thornton* (1955); *Waters v. Fleetwood* (1956), *Bremmer v. Journal Tribune Co.* (1956); *Jenkins v. Dell Publishing Company* (1956); *Wagner v. Fawcett Publications* (1962); *Time Inc. v. Hill* (1967); *Cox Broadcasting Corp. v. Cohn* (1973).

<sup>70</sup> FAGUE, A. C. Right to privacy in California, *Santa Clara Law Review*, 1967, Vol. 7, no. 2 article 5, p. 253–254. In fact In fact, this idea was coined earlier in a 1941 comment on a so-called “public figure test” in *Chicago University Law Review* (See. Torts. Right to Privacy. Public Figure Test as Determinative of Right to Recovery (1941), The University of Chicago Law Review, Vol. 8 No. 2 (Feb. 1941), p. 382–383). Upon the foregoing article, involuntary public figures are to have a greater amount of privacy remained. It was argued that in case an involuntary public figure does not “capitalize” from the fact of obtaining some publicity, this person may have the privilege and escaping public attention in any concern except from the situation that made him public. In the 1970s and early 1980s, involuntary public figures were designated by several legal scholars as “limited-size public figures” whereas the ones entitled as “voluntary” were referred as “all-purpose public figures”. Albeit courts rarely disposed these terms directly, Kaminsky hinted that *Gertz v. Robert Welch Inc.* made a stringent distinction between them (see. KAMINSKY, A. Defamation Law: Once a Public Figure Always a Public Figure? 1982, *Hosfra law review*, Vol. 10, iss. 3, article 6, p. 809). As the U.S. Supreme Court stated in the *Gertz* case, “In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions” (see. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), at. 351).

<sup>71</sup> In fact, there was no such statute in the law of California and it is apparent that if such statute exists in the State of New York, it is not applicable in another jurisdiction, see *Stryker v. Republic Pictures Corp* (1951), 108 Cal. App. 2d 191 at. 197. In this case, the Court cited the *Melvin* case, where the Court directly stressed that the “use of the incidents from the life of appellant in the moving picture is in itself not actionable” (*Melvin v. Reid*. 112 Cal. App 285 (Cal. Ct. App. 1931), at. 291).

<sup>72</sup> See. *Werner v. Times-Mirror Co.* (1961), 193 Cal. App. 2d, at. 117. “A person may, by his own activities or by the force of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character”.

<sup>73</sup> *Melvin v. Reid*. 112 Cal. App 285 (Cal. Ct. App. 1931), at. 291.

<sup>74</sup> Although, the issue of criminal rehabilitation was decently covered in *Bernstein v. National Broadcasting Co.* and *Barbieri v. News Journal Co.*, the primary dictum on felon oblivion was featured explicitly in *Briscoe*.

<sup>75</sup> *Briscoe v. Reader’s Digest Association Inc.* 4 Cal. 3d 529, at. 541–542.

<sup>76</sup> Here the court referred to the *Liberty Lobby Inc. v. Pearson* (1968) case, see. *Briscoe v. Reader’s Digest Association Inc.* 4 Cal. 3d 533 at 542.

<sup>77</sup> *Briscoe v. Reader’s Digest Association Inc.*, 4 Cal. 3d 529 at. 543.

the incident caused the plaintiff deep stress, soon he felt unable to work as a driver that brought to his subsequent job loss<sup>78</sup>. The court ruled in favor of plaintiff, but not on foundations of a civil statute prohibiting the use of one's likeness or name: *Melvin* was hallmarked as a direct precedent in the *Mau* case, consequently, the plaintiff won on grounds of unwarranted privacy invasion.

- 2) The second point of disparity is that the plaintiff in the *Sidis* case did not require to be rehabilitated in society from anything obscene: the unsavory past of the plaintiffs in the *Melvin* and *Briscoe* cases is apparent and I personally can not say *Sidis*'s youth may have been considered as impious. In my humble opinion the adolescent facts of Mr. *Sidis*'s youth might have not stimulated an adverse impact on his mature life. Though, according to the publication concerned, the plaintiff had an alternate vision. So, let us proceed to the case.

## 1.2. The first suit

Filing the first suit, *Sidis* stated two causes of action – one count for a violation of a common law right to privacy (which, as of 1938 was recognized in five US states<sup>79</sup>) and another for an alleged violation of New York Civil Rights Law, §50–51<sup>80</sup>. *Sidis* also appended his claim by the fact that the article about him was announced in the New York World Telegram with the following liner notes: “Out To-Day. Harvard Prodigy. Biography of the Man Who Astonished Harvard at the Age of Eleven. Where Are They Now? By J. L. Manley, p. 22, The New Yorker”<sup>81</sup>. Before examining the existing cases that recognized the right to privacy, Judge Goddard stated that there were no decisions abolishing truthful press publications regarding somebody's life events: “<...> no decision of the courts in these states has been cited by counsel, nor have I found any which held the “right of privacy” to be violated by a newspaper or magazine publishing a correct account of one's life or doings, or a picture, except under abnormal circumstances which do not exist in the case at bar”<sup>82</sup>. The majority of the cited cases dealt primarily with unauthorized employment of one's pictures or names/surnames for making commercial products. After having analyzed the 11 cases, the Court held that the allegations of *Sidis* regarding a privacy infringement didn't state a cause of action and the count was thereupon dismissed<sup>83</sup>. As mentioned before, in the second count, *Sidis* blamed the newspaper for using his name within advertising the article about him and sought exemplary damages. Within filing the second cause of action, *Sidis* relied on the case of *Binns v. Vitagraph Co.*, where a portrayal of a ship wreck was dramatized with disposing the name and the picture of the plaintiff; the Court stated that the *Binns* case featured a classic privacy violation that fell under the provisions *Sidis* referred to. The Court represented a demarcation between the provisions of the New York Civil Rights Law and a paper publication featuring someone's photographs and other personal data as follows: “It is plain that there is a wide difference between such forbidden use of one's name and picture and the mere publication in a newspaper or magazine of an account of one's deeds or doings together with his picture”<sup>84</sup>. A more detailed elucidation of such a distinction was held in the 1940 judgement as *Sidis* repeated the first two

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<sup>78</sup> *Mau v. Rio Grande Oil Inc.*, 28 F Supp. 845 (N. D. Cal. 1939), at. 845–846.

<sup>79</sup> The following cases were observed by the Court: Georgia: *Pavesich v. New England Life Insurance Co.* (1905), *Bazemore v. Savannah Hospital* (1930); *Goodyear Tire & Rubber Co. et al. v. Vandergriff* (1936); Kansas: *Kunz v. Allen* (1918); Kentucky: *Foster-Milburn v. Chinn* (1909), *Douglas v. Stokes* (1912); *Brents v. Morgan* (1927); *Jones v. Herald Post Company* (1927); *Rhodes v. Graham* (1931); California: *Melvin v. Reid* (1931); Missouri: *Munden v. Harris* (1911).

<sup>80</sup> *Sidis v. FR Pub. Corporation*, 34 F. Supp. 19 (S.D.N.Y. 1938), at. 20.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, at. 21.

<sup>83</sup> *Ibid.*, at. 22.

<sup>84</sup> *Ibid.*, at. 25.

causes of action in his second suit<sup>85</sup>. The Court held that the unauthorized employment of one's name or picture for commercial purposes under the law of five (as of 1938) states was illicit being a common law right to privacy violation. The state of New York, instead, did not recognize a common law right to privacy – such violation was prescribed by a statute. As the Court held, in the aforementioned cases there were no decisions which showed that a newspaper or a magazine article that displayed someone's photographs or names and truthful information regarding people is a violation of privacy<sup>86</sup>. So, the Court dismissed both causes of actions and Sidis lost the primary suit.

It is also noteworthy that the first Sidis case decided by the district court, did not feature an extended discussion on the public concern regarding William Sidis in sharp contrast with the opinion in the 1940 judgement. The solitary case involving a public interest test cited by the Court within the opinion was *Jones v. Herald Post Publishing Co.* In this case, the plaintiff, a wife of a man slayed before her eyes on the street, filed a suit against the newspaper who published her photograph and her menacing quotations addressed to the murderers as well as the fact she had attacked one of the villains<sup>87</sup>. The Court found that no violation of privacy occurred in *Jones* case and stated that “*There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence*”<sup>88</sup>.

## 2. The history of William James Sidis

*William James Sidis* (1898 – 1944) was an American mathematician and by far the youngest child prodigy ever recorded. Sidis sued the “*New Yorker*” for the article “*Where Are They Now? April Fool!*”, released on August 14, 1937 that was written by Jared Manley and James Thurber<sup>89</sup>. So let us examine the article for which the plaintiff filed the suit. I have to denote that all information regarding the early life of Sidis is outtaken from the original article. So, William James Sidis was born on April 1, 1898 in New York in the family of emigrant scholars descending from Ukraine<sup>90</sup>. His father *Boris Sidis* (1868 – 1923), who was born in Kyiv, emigrated to the US and graduated from *Harvard University*, was a psychiatrist (PhD) and engaged his son into science from his very birth: at age two, William managed to read and write. Within a year, he learned English and French; at age five William wrote a paper on anatomy and conducted rather complexified arithmetic calculations; the achievement of the infant genius were described by his father *Boris* in a number of scientific articles, including a book “*Philistine and Genius*” (1911)<sup>91</sup>. After William overruen a six-year school program in half a year, his father tempted to enrol the 9-year-old William into Harvard Univesity, but his effort was primordially retarded owing to the age of his son<sup>92</sup>. In 1909, William was allowed to immatulate into Harvard as a full-pledged freshman, becoming the youngest recorded Harvard student<sup>93</sup>. He apparently became prominent, but could not endure his notoriety for a long time and soonly departed to his father's sanatorium to regain his depleted forces. After he had returned to Harvard, Sidis developed shyness, phobias and distrust to other people and repeatedly omitted the press<sup>94</sup> William's adherence to

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<sup>85</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806 (2<sup>nd</sup> Cir. 1940), at. 810.

<sup>86</sup> *Sidis v. FR Pub. Corporation*, 34 F. Supp. 19 (S.D.N.Y. 1938), at. 25.

<sup>87</sup> *Jones v. Herald Post Company* 230 Ky. 227 (Ky. Ct. App, 1929), at. 227–228.

<sup>88</sup> *Ibid.*, at. 229.

<sup>89</sup> THE NEW YORKER (by J. Manley and J. Thurber): Where Are They Now? April Fool!, Aug. 14, 1937, p. 22–26.  
Link < <http://www.sidis.net/newyorker3.htm>>.

<sup>90</sup> *Ibid.*, p. 22.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, p. 23.

seclusion has hallmarked in an adolescent age: W. Sidis reportedly claimed to have dogged welters<sup>95</sup>, and he vowed to take up celibacy at the age of 17<sup>96</sup>. In the interview on his graduation day, William Sidis claimed he would thereafter prefer to conduct “*a perfect life*”. In the interpretation of Sidis, oblivion was the best way to fulfill it: “The only way to live the perfect life is to live it in seclusion. I have always hated crowds” – he said<sup>97</sup>. The reporter came to an corollary that by employing the word “crowds” W. Sidis thereby implied “people” in general. Over the next years, the press turmoil around W. Sidis ceased. As Sidis became a mature man, he entered Harvard Law School and was not disturbed by reporters, but he occasionally found himself in the center of interest, that was apparently annoying for him<sup>98</sup>. In 1919 Sidis was plunge into a largely-displayed scandal, when he participated in a Communist demonstration that lasted in *Roxbury* on May 1, 1919, which transmuted into a riot. Within the demonstration, Sidis carried a Communist flag and got busted as one of the meeting instigators<sup>99</sup>. Sidis was reported to be audacious within his trial, too: Sidis approved his Socialist views, claimed he had been an atheist, upheld the Soviet Union form of government and jeered at the interrogation of why he did not carry an American flag instead of a Communist one by unfolding a miniature United States flag out of his pocket in the courtroom and stating he had carried it on the meeting as well<sup>100</sup>. Though Sidis was sentenced to a 18-month imprisonment for provoking a riot, his father bailed him and later put Sidis into a sanatorium where he underwent treatment. Since then, William Sidis abandoned any publicity, moving from town to town and taking up conventional office jobs, quitting occupied positions after having been unveiled by other people (in the conclusive part of the passage, Sidis told in an interview he had to leave jobs when employers or colleagues found out who Sidis used to be in his youth)<sup>101</sup>. Through the 1920s, reporters repeatedly approached Sidis. In 1926, Sidis wrote a book regarding the optimization of streetcar and other railroad transportation under a pseudonym of *Frank Folupa*: after cunning reporters unveiled it was him, William subsequently found himself in the center of attention<sup>102</sup>. By 1927, Sidis returned to New York, where he lived with his sister and made friends with a man named *Harry Friedman*, his landlord and spent his time discussing his hobby in collecting transfer tickets<sup>103</sup>. I have to outline, that at this point, the article’s author unveiled a handful of personal data regarding Sidis’s then-current life: namely, the authors mentioned the address of his domicile (112, West 119<sup>th</sup> Street), as well as the initials of his relative. Until 1937 Sidis was likely to live unobtrusively in the way he had preferred before.

Displaying the life of Sidis at age 39 (as of 1937), Manley stated that then-contemporary Sidis resided in Boston (“*in a hall bedroom of Boston’s shabby south end*”) and gave details of the interior of his dwelling, overally depicting it as a sloven one<sup>104</sup>. He also described the appearance of Sidis, who turned out to be “*a large, heavy man, with a prominent jaw, a thickish neck and a reddish moustache*”<sup>105</sup>, as well as his manner of speech, gestures and a so-designated “gaspig laugh”. Manley, who made this corollary on grounds of a recent interview with Sidis, assessed his lifestyle as underwritten: “He seems to get a great enjoyment of leading a life of wandering irresponsibility after a childhood of

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<sup>95</sup> *Ibid.*

<sup>96</sup> THE WASHINGTON POST: “*Harvard’s Prodigy at Figures, Aged 17, Takes Vow of Celibacy*”, April 18, 1915.

<sup>97</sup> THE NEW YORKER (by J. Manley and J. Thurber): *Where Are They Now? April Fool!*, Aug. 14, 1937, p. 23 Link <<http://www.sidis.net/newyorker3.htm>>.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, p. 25–26.

<sup>102</sup> *Ibid.*, p. 24–25.

<sup>103</sup> *Ibid.*, p. 24.

<sup>104</sup> *Ibid.*, p. 25–26.

<sup>105</sup> *Ibid.*, p. 26.

scrupulous regimentation”<sup>106</sup>. The last part of the New Yorker article revealed that Sidis confessed to have dispose a simple piece of red silk to substitute a Soviet flag in the demonstration in 1919<sup>107</sup> Sidis also affirmed his interests in Socialist theories as well as disclosing the fact he was working on a treatise concerning floods. This is all concerning the content of the given article, with a remark: the primary page contained a sketch of an 11-year-old Sidis conducting a lecture for senior researchers on four-dimensional bodies<sup>108</sup>.

### 3. Opinion of the Court

William Sidis stated three causes of action of such alleged violations:

- an overall intrusion of privacy, malice of the publication;
- a breach of New York Civil Rights Law (para. 50–51)<sup>109</sup>;
- a libel which allegedly existed in the article “*Where Are They Now? April Fool!*”<sup>110</sup>.

#### 3.1. Opinion of the Court regarding the first cause of action

##### 3.1.1. An issue of public figures

The first cause of action was an alleged violation of privacy. I have to outline that the Court examined a number of cases which were principal ones evolving a common law right to privacy in several US states (Georgia, Kansas, Kentucky and Missouri<sup>111</sup> – as of 1940) and a constitutional right (“<...> to be let alone to a certain extent”) in California, recognized in *Melvin v. Reid*<sup>112</sup>. The Court outlined, that after having examined the principal cases of other states, there were no rulings that averted a newspaper from publishing truth about a person even though certain life-secluded details were unfolded, quoting literally “None of the cited rulings goes so far as to prevent a newspaper or magazine from publishing the truth about a person, however intimate, revealing, or harmful the truth may be”. At the same time, the Court hallmarked that privileges for the press were also not granted in the principal cases. To solve the contraversion, the Court reckoned up a handful of prototype concepts elaborated by *Warren and Brandeis* in 1890<sup>113</sup>, however the considerations of the court dispersed from their notions<sup>114</sup>. At first, the Court referred to their treatise, where the scholars expressed the notion that a bunch of limitations regarding press privileges still are to exist. In the scope of privacy and public interest collision, as of *Warren and Brandeis*, public figures are to relinquish a substantial part of their privacy as an atonement for the powers they obtain within their tenure<sup>115</sup>. At the same time, the abovementioned

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<sup>106</sup> *Ibid.*, p. 25–26.

<sup>107</sup> Sidis on the 1919 demonstration: “*I was the flag-bearer. And do you know what the flag was? Just a piece of red silk*” (outtake from the New Yorker: “Where are they now? April fool!”, p. 26).

<sup>108</sup> THE NEW YORKER (by J. Manley and J. Thurber): *Where Are They Now? April Fool!*, Aug. 14, 1937, p. 22 Link < <http://www.sidis.net/newyorker3.htm>>.

<sup>109</sup> Within his second suit, Sidis filed a suit on grounds of citizenship diversity, announced in *Erie Railroad v. Tompkins* by the US Supreme Court. It would allow to recover under the law of each state where the publication with the story of Sidis occurred. See. Torts – Right of Privacy – Liability or Violating Retirement of Public Figure, 1940, *Washington University Law Review*, Vol. 26 (January 1940), Iss. 1, p. 137.

<sup>110</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806, at. 807.

<sup>111</sup> This figure was apparently virtual for 1940. In *Briscoe*, the Supreme Court of California mentioned that the common law recognition of privacy by 1971 encompassed at least 36 US states, see. *Briscoe v. Reader's Digest Association Inc.*, 4 Cal. 3d 533, at 534.

<sup>112</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806., at. 808.

<sup>113</sup> *Ibid.*, at. 808–809.

<sup>114</sup> *Ibid.*, at. 809.

<sup>115</sup> *Ibid.*

scholars considered that public figures must preserve privacy to a certain extent – that is, for their private affairs which do not expose issues on their eligibility to sustain the position of an official. The Court stressed that in such an interpretation Sidis’s privacy might have been invaded, as in 1940, he wasn’t public in general: “Sidis today is neither politician, public administrator, nor statesman”<sup>116</sup>.

However, the Court did not adhere to the priorly depicted notion: despite the opinion given by Warren and Brandeis, the Court stated: “we are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press”, augmenting that Warren and Brandeis predominantly focused this concept on public officers. The Court ruled that some trespassing into private life of a person that achieved the status of a “*public figure*” is eligible<sup>117</sup> (it is concordant to outline that the status of “*public figure*” is a pretty vague substance). The Court stated that William Sidis apparently was once a public figure (though it occurred in his adolescent time, around 1910), the interest of the press was entirely legitimate even though the young Sidis, as in his later years, repulsed public attention<sup>118</sup>. The Court augmented, that the interest to William Sidis was licit in the succeeding years either: whether Sidis had fulfilled the expectations entrusted to him in his youth or not *remained* a matter of public concern, concluded the Court<sup>119</sup>. A few pages above I briefly touched the issue of public interest test in the Sidis case in comparison with the one in *Metter v. Los Angeles Examiner* case. So now, let us discuss it in details. The *public interest test* applied in the first cause of action in the Sidis case was as follows: in general, disclosures of intimate details may be quite offensive. However, in terms of public characters, truthfull statements on their dressing, speech and habits “will usually not transgress this line”. The Court augmented that “<...> Regrettably or not, the misfortunes and frailties of neighbors and “public figures” are subjects of considerable interest and discussion to the rest of the population”. As such public interest constituted one of the mores of community, the Court ruled that it would be unwise to bar such expressions of mass-media<sup>120</sup>.

### 3.1.2. (Not) transgressing the line?

Next, what assumptions are to be said concerning “will usually not transgress this line”? Such statement hints this line does exist. If we return to the foregoing page, the court outlined that “Revelations may be so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency”<sup>121</sup>. The problem here is to define the margins of the line that may result in the plaintiff’s prevail in the action against the publisher. The protogene balancing boundaries, examined through the prism of Warren and Brandeis’ treatise<sup>122</sup> were not issued in the Sidis case or anyhow defined. The question how offensive a publication may be, was frequently observed by US courts but a definite stand was never announced. As summarized by the US Supreme Court in *Time v. Hill*, although newsworthy and truthful news are generally privileged, it does not deprive a person on preserving some degree of privacy, citing the Sidis court’s quotation on outraging the norms of public decency<sup>123</sup>. As Kalven denoted in his treatise “*Privacy in Tort Law: Were Warren and Brandeis Wrong?*”: “<...> It has been agreed that there is a generous privilege to serve the public interest in news. And today, since

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<sup>116</sup> *Ibid.*

<sup>117</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806, at. 809, quoting: “We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the “private” life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a “public figure”.

<sup>118</sup> *Ibid.*, at. 809.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, at. 808–809.

<sup>123</sup> *Time v. Hill*, 385 U.S. 374 (1964), footnote 7.

New York Time Co. v. Sullivan, the privilege may arguably have some constitutional status. What is an issue, it seems to me, is whether a claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?<sup>124</sup> At the same time, a publication of anything offensive to privacy is not actionable itself, as quoted in *Wasser v. San Diego Union*: “<...> The supreme mandate of the constitutional protection of freedom of the press provides that even a tortious invasion of privacy is exempt from liability if the publication of private facts is truthful and newsworthy”<sup>125</sup>. We can additionally cite *Kelley v. Post Publishing Co.*, “Many things which are distressing or may be lacking in propriety or good taste are not actionable”<sup>126</sup>. An akin assumption was made in the case of *Waters v. Fleetwood*<sup>127</sup>. In *Abernathy v. Thornton*, plaintiff was a woman whose son was murdered by a gunshot; a story regarding the murder was issued in a newspaper and a photograph of the deceased man featured a bullet protruding from his head<sup>128</sup>. The Court found that no privacy violation occurred, as the murdered man, who was the plaintiff’s son, by fact became a public character as the circumstances of his tragic death were of public concern<sup>129</sup>. In *Bremmer v. Journal Tribune Publishing Company*, a dreadful incident occurred concerning an 8-year-old boy, who disappeared for a month; his body was discovered mutilated. The photo of the child’s body was published in the article concerning his death<sup>130</sup>. The plaintiffs, who were the parents of the deceased child admitted the overall story was of legitimate public interest argued that the exposure of the body which was partially decomposed had no public concern regarding the condition of the dead body – that is, it the proposed notion was “proportionality” proposed by plaintiffs – such an incident, as the accident which brought to his death apparently can not be barred from publication, but a portrayal of the body may be deemed too offensive to be issued freely. Such balance could also be found in the elucidation of Georgia’s rape shield law: as stated by Justice Gunter in the Georgia’s Supreme Court decision in *Cox Broadcasting Corp. v. Cohn*: “This statute does not prevent disclosure or publication of “the event” [a rape], it merely prohibits the disclosure or publication of the identity of the victim of the event”<sup>131</sup>. However, the Court withdrew such “balance” grounding the conclusion on basis of general interest of public in a local victim’s appearance<sup>132</sup>. In the case of *Waters v. Fleetwood*, a suit was filed for publishing a photo of a murdered girl photographed from the back wrapped in covering assortment and chains, but was unidentifiable in contrast to the Bremmer case<sup>133</sup>. In a later case, *Diaz v. Oakland Tribune Inc.*, a transsexual being a public figure sued the newspaper for referring to her as such, won the suit on grounds the court found that such disclosure wasn’t newsworthy; at the same time, the Court hallmarked that highly offensive revelations do not constitute a privacy invasion themselves in case they’re proved to be newsworthy: “The proof that defendants have published an article containing highly offensive private matters does not itself establish a claim for relief. It certainly must be recognized

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<sup>124</sup> KALVEN, H. Privacy in Tort Law: Were Warren and Brandeis Wrong?, 1966, Law and Contemporary Problems (Duke Law), Vol. 31 (Spring 1966), p. 335–336.

<sup>125</sup> *Wasser v. San Diego Union* (1987), 191 Cal. App. 3d 1455, at. 1461.

<sup>126</sup> *Kelley v. Post Publishing Co.* (1951), 327 Mass. 275, at. 278.

<sup>127</sup> *Waters v. Fleetwood* (1956), 91 S. E.2d 344, 212 Ga. 161, at. 167, quotation: “There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances. Through no fault of the petitioner or her deceased child, they became the objects of widespread public interest”.

<sup>128</sup> *Abernathy v. Thornton*, 83 So. 2d 235 (1955), at. 235–236.

<sup>129</sup> *Ibid.*, at. 237.

<sup>130</sup> *Bremmer v. Journal Tribune Publishing Company*, 76 N.W. 2d 762 (1956), at. 763.

<sup>131</sup> *Cox Broadcasting Corp v. Cohn*, 231 Ga. 60 (1973), at. 68.

<sup>132</sup> *Ibid.*, at. 768.

<sup>133</sup> *Waters v. Fleetwood* (1956), 91 S. E. 2d 344, 212 Ga. 161, at. 167; see also. *Bremmer v. Journal Tribune Publishing Company*, 76 N.W. 2d 762 (1956), at. 768.

that an otherwise embarrassing article may be newsworthy, depending on the circumstances”<sup>134</sup>. Criminals were also regarded as ones whose past unsavory story may be newsworthy and educational enough to be published<sup>135</sup> and owing to the fact the community has a strong interest towards law enforcement, involving tracking down delinquency<sup>136</sup>. Apart from being treated as public figures, ex-criminals were not granted a right to be forgotten even though they claimed to have been rehabilitated after serving an unusual punishment<sup>137</sup>, serving a 9-year incarceration<sup>138</sup>, acquitted<sup>139</sup>, having lived as a virtuous citizen for 11 years after committing a hijack (reversed and remanded)<sup>140</sup>, having lived for 20 years after having committed a murder and being rehabilitated as a law-abiding citizen (reversed and remanded)<sup>141</sup> or even being dead by the time of trial in a so-called “relational right to privacy suit”<sup>142</sup>. There are still some cases, though, which display that “decencies” still exist. Yes, such cases as *Barber v. Time* and *Bazemore v. Savannah Hospital* where the photographs featured more, so-to-say “intimate” details of one’s affairs, namely, a woman with an orphan pancrea disease in the former case, and a body of a malformed child in the latter<sup>143</sup>. In his respective treatise, Charles Simon referred to the two abovegiven cases as the ones that “violate ordinary decencies”<sup>144</sup>. In the case of *Barber v. Time*, the plaintiff was a woman who suffered from an orphan pancrea pathology that forced her to encounter permanent hunger. She sued the newspaper for unveiling the details of her impairment as well as a photograph of her in a hospital outfit<sup>145</sup> and the court found a privacy violation; the Bazemore case featured a photograph of a malformed child who died soonly after birth and the Court found that the action under such circumstances may lie in the parents of the deceased infant<sup>146</sup>. Another issue is a portrayal of an embarrassing pose. In sharp contrast with *Gill v. Curtis Publishing Co.* and *Gill v. Hearst Publishing Co.*, the case of *Daily Times Democrat v. Graham* featured an unauthorized photo of a 44-year-old woman in an embarrassing posture with her skirt blown upwards by the flow of air jets<sup>147</sup> and a recovery was also granted to her.

In “Privacy”, Prosser strived to grasp the conjectural boundaries<sup>148</sup> and a few cases featuring them really occurred. In an unreported case, namely the *Douglas v. Disney Productions* (1956), a Los Angeles trial court held that *Kirk Douglas* (born 1916), a famous actor, who was engaged in a merriment in his comrade’s apartment, which was filmed on a camera and was later used for public showing<sup>149</sup>, to have a cause of action. Prosser also briefly commented on the *Melvin* case, where the

<sup>134</sup> *Diaz v. Oakland Tribune, Inc.* (1983), 139 Cal. App. 3d 118, at. 130.

<sup>135</sup> *Briscoe v. Reader’s Digest Association, Inc.* (1971), 4 Cal. 3d 529, at. 538.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Barbieri v. News Journal Co.*, 189 A. 2d 773 (1963), at. 775.

<sup>138</sup> *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), at. 818–819.

<sup>139</sup> See. *Wasser v. San Diego Union* (1987), 191 Cal. App. 3d 1455, at. 1459.

<sup>140</sup> See. *Briscoe v. Reader’s Digest Association, Inc.* (1971), 4 Cal. 3d 529, at. 532–533.

<sup>141</sup> See. *Conklin v. Sloss* (1978), 86 Cal. App. 3d 242, at. 243.

<sup>142</sup> See. *Milner v. Red River Valley Pub. Co.* 249 S. W. 2d 227 (1952), at. 228.

<sup>143</sup> See. *Bazemore v. Savannah Hospital*, 171 Ga. 257 (Ga. 1930), at. 257–258; is a very dubious Georgian case as it recognized the right to relational privacy with no other interests abused. The opinion was not unanimous and in a strict sense *Bazemore* did not have a direct successor case. There are more comments on the public interest in people plunged into casualties in this paper and the Bazemore case is briefly discussed within certain comparisons. But in general it requires a separate treatise.

<sup>144</sup> SIMON, C. Torts – Invasion of Privacy – Unauthorized Use of Photograph (1966), *DePaul Law Review*, Vol. 16, iss. 1 (Fall – Winter 1966), Article 22, p. 256–257.

<sup>145</sup> *Barber v. Time*, 348 Mo. 1199 (Mo. 1942), at. 1203–1204.

<sup>146</sup> *Bazemore v. Savannah Hospital*, 171 Ga. 257 (Ga. 1930), at. 262.

<sup>147</sup> *Daily Times Democrat v. Graham* 162 So. 2d 474 (1964), at. 476.

<sup>148</sup> PROSSER, W. L., Privacy, *California Law Review*, 1960, Vol. 48, iss. 3, p. 397, p. 417–419.

<sup>149</sup> FAGUE, A. C. Right to privacy in California, *Santa Clara Law Review*, 1967, Vol. 7, no. 2 article 5, p. 250.

scholar surmised one of reasons for the plaintiffs prevailing in her action was precisely the shocking content of the revelation: “<...> or perhaps that the explanation lay in the shocking enormity of the revelation of a woman’s past when she was trying to lead a decent life”<sup>150</sup>. Another “*boundary*” described by Prosser was an existence of statutes in a number of US states which inhibited the disclosure of sex-crimes victims<sup>151</sup>. Actually, the statutes Prosser referred to in his treatise are called “*rape-shield laws*”, they may differ in various states and impose liability on publishing the identities of sex crime sacrifices. However, a *Georgian* statute imposing civil liability on media for publishing a rape victim’s identity was invalidated by the US Supreme Court’s decision in *Cox Broadcasting Corp. v. Cohn* (1975) where the Court on grounds of the First and Fourteenth Amendments barred the State of Georgia from “making appellants’ broadcast the basis of civil liability”<sup>152</sup>. Therefore, the boundaries of what the US Court of Appeals of the 2<sup>nd</sup> Circuit called “*will not usually transgress this line*” in the Sidis case are quite vague.

### 3.1.3. *A public interest test: never to be forgotten*

So, the principal public interest test concerning *a public personage’s private life* ever decided in United States common law<sup>153</sup> and employed by the US Court of Appeals of the 2<sup>nd</sup> Circuit goes as follows:

1. The grades of privacy in the cases of private and public persons considerably vary as owing to their status and any types of public figures are to sacrifice their privacy. The same applies to private citizens who are spotted in *public* places: the case of *Gill v. Hearst Publishing Co.* (1953) unleashes this pattern at its best; this is also relevant for the people spotted within unique events<sup>154</sup>. In the *Gill* case, the plaintiffs (a husband and a wife) sued the newspaper for publishing an unauthorized picture of them sitting in a restaurant hugging. Although the court found that no news value subsisted in the picture it held that it contained an entertaining purpose and thus had legitimate public interest<sup>155</sup>. As the picture was taken in a public place (it was a worldwide-famous restaurant) and the couple voluntarily exhibited themselves in an affectionate pose, the court employed the doctrinal principle introduced in *Melvin v. Reid: there can be no privacy in that which is already public*<sup>156</sup>. In the *Gill v. Hearst Publishing Co.* (1953), a dissenting opinion was conveyed by Judge Carter, who brought the following view regarding defining a private citizen’s right to privacy in scope of publishing such materials by the press: “courts should consider the effect of such publication upon the sensibility of the ordinary private citizen, and not upon the sensibility of those persons who seek and enjoy publicity<sup>157</sup> and notoriety and seeing their pictures on public display, or those who are in the „public eye“ such as public officials, clergymen, lecturers, actors and others whose professional careers bring them in constant contact with the public and in whom the public or some segment thereof

<sup>150</sup> PROSSER, W. L. Privacy, *California Law Review*, 1960, Vol. 48, iss. 3, p. 397, p. 419.

<sup>151</sup> *Ibid*, p. 417.

<sup>152</sup> *Cox Broadcasting Corp. v. Cohn*, 420 US 469 (1975), at. 497.

<sup>153</sup> WHITMAN, J. Q. The Two Western Cultures of Privacy: Dignity versus Liberty (2004), *Yale Law School; Faculty Scholarship Series*, Paper 649, p. 1209–1210.

<sup>154</sup> *Briscoe v. Reader’s Digest Association, Inc.* (1971), 4 Cal. 3d 529, at. 538.

<sup>155</sup> *Gill v. Hearst Publishing Co.* 40 Cal. 2<sup>nd</sup> 224 (1953), at. 229.

<sup>156</sup> *Ibid*, at. 230.

<sup>157</sup> I also would like to hallmark that a person *seeking* publicity is equalled to a public personage in US common law. See *Cohen v. Marx* 94 (1949) Cal. App. 2<sup>nd</sup> 704 at 705: “A person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy”.

is interested”<sup>158</sup>. As for an equivoque, in *Daily Times Democrat v. Graham* the Court held that although the scene may be public, it does not necessarily mean that the person concerned will relinquish all his privacy: “One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place”<sup>159</sup>. That is, the principle amalgamated in *Melvin v. Reid*, “there is no privacy in what is already public” is confined to a matter of decency. At the same time, the right to privacy in public also can not go out of strict boundaries as it will definitely abuse the freedom of press: as it was hallmarked in *Themo v. New England Newspaper Publishing Company*, “The counts in question stated no case unless the plaintiffs under all conceivable circumstances had an absolute legal right to exclude from a newspaper any photograph of them taken without their permission. If every person has such a right, no newspaper could lawfully publish a photograph of a parade or a street scene”<sup>160</sup>.

2. The publicity is likely to remain for the whole life of a once-public character. It is actually the Sidis case which established this principle. Two decades after, *William Prosser* also turned to some issues of “right to be forgotten” in his treatise “Privacy” (1960)<sup>161</sup>. As he denoted, the function of press regarding its educational role, as well as a reminder of past events and people and events that were notorious at some time in the past may be a matter of the public interest at present time. Prosser also briefly discussed an issue of a lapse of time in the embrace of which the plaintiff disappeared from the attention of public. After all, he concluded that once an individual became a public personage, the interest in him would sustain until his demise<sup>162</sup>. Not being stringently announced, this rule seemed to have been accommodated: in *Stryker v. Republic Pictures Corp.*, where the plaintiff, an ex-serviceman sued the establishment for an alleged commercial use of his name and life story in a film named “The Sands of Iwo Jima”, the Court found him a public figure tating that the activities of military men are under public scrutiny and one’s discharge from the army does may not bar a publication of them<sup>163</sup>. Although William Sidis was once a public figure, the court neither defined lapses of publicity fade nor defined any boundaries of being a public figure or an issue of the subsistence of *ex-public figures*. In “Privacy”, W. Prosser argued, that a voluntary public figure, or plainly public figure is generally a celebrity in one field of affairs, or another<sup>164</sup>. The embrace of voluntary public figures is complicated to define explicitly, a great summary definition was given in *Cason v. Baskin*: “It is true that a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, may be said to have become a public personage and to that extent he thereby relinquishes at least a part of his right of privacy”<sup>165</sup>. Prosser made an attempt to classify the voluntary public figures on basis of existing common law: among public officials, actors, musicians, sportsmen, entertainers, public officers and servicemen as well as inventors

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<sup>158</sup> *Gill v. Hearst Publishing Co.* 40 Cal. 2<sup>nd</sup> 224 (1953), at. 234.

<sup>159</sup> *Ibid.*, at. 478.

<sup>160</sup> *Themo v. New England Newspaper Publishing Company* (1940), 306 Mass. 54, at. 57.

<sup>161</sup> PROSSER, W. L. *Privacy*, *California Law Review*, 1960, Vol. 48, iss. 3, p. 418.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Stryker v. Republic Pictures Corp.* (1951), 108 Cal App. 2d 191, at. 194.

<sup>164</sup> PROSSER, W. *Privacy* (1960), *California Law Review*, Vol. 48 (August 1960), Iss. 3, Art. 1, p. 410–411.

<sup>165</sup> *Cason v. Baskin*, 159 Fla. 31 (Fla. 1947), at. 36.

fell into such a category<sup>166</sup>. Upon the assumptions in the *Gill v. Hearst Publishing Co.* case, it would be logical to conclude a corollary that people working in the sphere of education and religion are also to be treated in this category<sup>167</sup>.

3. The article was newsworthy. No actual standards for newsworthiness were anyhow established though<sup>168</sup>, the article regarding Sidis was considered as a newsworthy one owing to the fact it depicted an unusual personality. The Court also emphasized that the newsworthiness does not constitute a complete defence<sup>169</sup>. The newsworthiness issue in the Sidis case was also overviewed in a 1963 comment release published in *Chicago Law Review*, where the authors philosophically interrogate if the privilege of newsworthiness is “qualified”, or not<sup>170</sup>. If it is, then where’s the measuring line? Conjecturally, a certain lapse of time would be one. An exception nearly occurred in the case of *Wagner v. Fawcett Publications* (1962), where the plaintiff, a mother of a raped and slain 14-year-old lass filed a suit for privacy invasion. After the complaint was dismissed by a district court, the plaintiff appealed to the US Court of Appeals<sup>171</sup>. The U.S. Court of Appeals of the 7<sup>th</sup> Circuit stated that a jury would consider that the abovementioned events ceased to be news and henceforth might constitute a privacy violation; the lapse of the occurrences tolled several months<sup>172</sup>. This ruling, however was withdrawn on the re-hearing<sup>173</sup>, and the judgement of the district court was thereafter affirmed<sup>174</sup>. In *Werner*, a dissenting opinion of Judge Bishop hinted that the marriage of the plaintiff which we would prefer to seal still was “news”, but his early career scandals and exploits were off the point<sup>175</sup>.

### 3.1.4. No privacy infringement – no malice

Retracing to the concluding fragmenton for the first cause of action, the alleged malice of the “*New Yorker*” publication, which was withdrawn by the Court either. As the Court ruled that the publication did not invade Sidis’s privacy, the presumed subsistence of any malice would not sequence an alteration in the outcome of the article: “If plaintiff’s right of privacy was not invaded by the article, the existence of actual malice in its publication would not change that result”<sup>176</sup>. A true publication will not become a libel unless provided by statute and the same principle is to be applicable regarding privacy<sup>177</sup>. It is concordant to outline that the notion of explicit truthfulness of the publication became

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<sup>166</sup> PROSSER, W. Privacy (1960), *California Law Review*, Vol. 48 (August 1960), Iss. 3, Art. 1, p. 411.

<sup>167</sup> *Gill v. Hearst Publishing Co.* (1953), 40 Cal.2d 224, at. 234.

<sup>168</sup> See cases involving the issue of newsworthiness assessment, prior to the newsworthiness criteria applied in *Kapellas v. Hoffman* (1969); *Barber v. Time* (1942); *Gill v. Curtis Publishing Co.* (1952); *Booth v. Curtis Publishing Co.* (1962); *Wagner v. Fawcett Publications* (1962); *Time v. Hill* (1967) and some others. In *Kapellas v. Kofman*, a so-called “three-piece test” was announced by the California Court of Appeal: “In determining whether a particular incident is “newsworthy”, and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article’s intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety” (*Kapellas v. Kofman*, 1 Cal. 3d 20, at. 36).

<sup>169</sup> *Sidis v. F-R Publishing Co.* (1940) 113 F.2d 806 (2<sup>nd</sup> Cir. 1940), at. 809.

<sup>170</sup> COMMENTS: The Right to Privacy: Normative-Descriptive Confusion in the Defence of Newsworthiness, 1963, *Chicago Law Review*, Vol. 30 (1962), iss. 4, p. 725–726.

<sup>171</sup> CASE NOTES: Torts – Invasion of Privacy – Lapse of Time and the Destruction of the Newsworthiness Privilege – *Wagner v. Fawcett Publications*, 307 F. 2d 409 (7<sup>th</sup> Cir. 1962), 1964, *De Paul Law Review*, Vol. 13, iss. 2, article 15, p. 325–327.

<sup>172</sup> *Wagner v. Fawcett Publications* 307 F.2d 409 (7<sup>th</sup> Cir. 1962), at. 411.

<sup>173</sup> *Ibid.*, at. 410.

<sup>174</sup> *Ibid.*, at. 412.

<sup>175</sup> *Werner v. Times-Mirror Co.* (1961), 193 Cal. App. 2d 111, at. 123–124.

<sup>176</sup> The same principle was disposed in the *Werner* case, see *Werner v. Times-Mirror Co.* 193 Cal. App. 2d 111 at. 120.

<sup>177</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806, at. 810.

partially outdated since the *New York Times v. Sullivan* (1964) case, where an “actual malice” test was enunciated upon which the plaintiff was required to prove actual malice of the news publication to recover and inaccurate statements were thereafter not automatically considered as defamatory<sup>178</sup>. It is substantial to append, that *Alan Kaminsky* (1982) stressed that in several cases, people who once become “public figures”, may vanish from publicity; then they may be displayed in a defamatory light<sup>179</sup>. As we can conceive from the Sidis case, no defamation occurred in the reflection of his early endeavours.

## 2.2. The second and third causes of action

2. The second cause of action dealt with an alleged violation of statutes, namely §§ 50-51 of *New York Civil Rights Law*<sup>180</sup>. §50 of this act proceeds as underwritten: “A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor”. This statute owes to *Robertson v. Rochester Folding Box. Co.* case featuring a suit against an unauthorized usage of a woman’s photograph for advertising a brand of flour. By 1902, there was no common law right to privacy in the state of New York<sup>181</sup>. When reviewing the case, O’Brien denoted that although the wrongful act by the defendant was apparent, “there are many impertinent and disagreeable things which one may suffer from another that do not amount to legal injuries such as courts may redress”<sup>182</sup>. Although the court did not decide in favor of plaintiff, this case led to the enactment of a statute on prohibiting the use of one’s personal data (a name and likeness) for commercial purposes in 1903<sup>183</sup>. So was the matter with the right to privacy by the foregoing date<sup>184</sup>. Here we should interrogate: is a press publication an advertisement? There were a multitude of cases to clarify the statute. In *Jeffries v. N.Y. Evening Journal Pub. Co.*, the plaintiff sued the journal for publishing news regarding his released autobiography<sup>185</sup> which allegedly violated the provisions Sidis referred to stating the second cause of action. The plaintiff blamed the journal in disposing the picture of him to enhance the circulation, which upon his claim might increase the value as an advertising medium. The Court stated that the provisions of the aforegiven statute refer to commerce or traffic, not to dissemination of information and thereby the motion was denied<sup>186</sup>. A similar inference was made in *Colyer v. Fox Publishing Co.*, where an actress was not allowed to recover when an unauthorized photograph in a weekly periodical, where it was held as follows: “So far this statute has not been so far extended as to prohibit, under penalty of exemplary damages, a publication in a daily, weekly or periodical paper or magazine of the portrait of an individual<sup>187</sup>”. In

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<sup>178</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964), at. 279–280.

<sup>179</sup> KAMINSKY, A. Defamation Law: Once a Public Figure Always a Public Figure?, 1982, *Hofstra law review*, Vol. 10, iss. 3, article 6, p. 805.

<sup>180</sup> *Ibid.*, at. 810–811.

<sup>181</sup> Though recovery was denied in the *Robertson* case, it soonly brought to the enactment of a civil rights statute prohibiting the unconsented use of one’s name and likeness for trade. See. Torts. Right of Privacy. Magazine Account of Individual’s Past (1940), *Columbia Law Review*, Vol. 40, No. 7 (Nov., 1940), p. 1283, footnote 2.

<sup>182</sup> O’BRIEN, D. The Right of Privacy (1902), *Columbia Law Review*, Vol. 2, No. 7 (Nov., 1902), p. 439–440.

<sup>183</sup> KALVEN, H. Privacy in Tort Law: Were Warren and Brandeis Wrong? (1966), *Law and Contemporary Problems* (*Duke Law*), Vol. 31, No. 2 (1966), p. 331.

<sup>184</sup> It was repeated in various cases that the right to privacy was unknown to ancient common law. As stated in *Reed v. Real Detective Pub. Co.*, the existing law did not protect that right and the gain of privacy was subject to individual effort. See.: *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294 (Ariz. 1945), at. 303.

<sup>185</sup> *Jeffries v. N. Y. Evening Journal Pub. Co.* 67 Misc 570 (N. Y. Misc 1910), at. 571.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Colyer v. Fox Publishing Co.*, 162 App. Div. 297 (N.Y. App. Div. 1914), at. 299.

*Humiston v. Universal Film Manufacturing Co.*, the Court also elucidated the foregoing statute: “It can not be contended that the publication of moving pictures is not a trade. But we think it is not such trade as was within the contemplation of the Legislature in the passage of the act. They are published for profit, as a newspaper is published for profit. Their profit depends upon their ability to present accurate and interesting news, as well as the photoplays of fiction. It is precisely the same with a newspaper”<sup>188</sup>. Again, it was well summarized in *Sweenek v. Pathe News, Inc.*: “The publication of matters of public interest in newspaper or newsreels is not a trade purpose within the meaning and purview of this statute”<sup>189</sup>. In my point of view, the most explicit comment on this statute was featured in *Sarat Lahiri v. Daily Mirror* as well as *Molony v. Boy Comics Publishers*. Elucidating on the New York Civil Rights Law statute providing a partial protection of one’s right to privacy, Mr. Justice Shientag in *Lahiri v. Daily Mirror* stated that “<...> There may be no recovery under the statute for publication of a photograph in connection with an article of current news or immediate public interest <...> Such articles include, among others, travel stories, stories of distant places, tales of historical personages and events, the reproduction of items of past news and surveys of social conditions. These are articles educational and informative in character. As a general rule, such cases are not within the purview of the statute”<sup>190</sup>. As it was held in *Molony v. Boy Comics Publishers Co.* in the continuation of the Lahiri opinion, citing: “These classifications apply, with some possible distinctions, to books and magazines. It is well settled that the right of privacy does not prohibit the publication of matter which is of legitimate public or general interest, although no longer current” and referred to the Sidis case<sup>191</sup>.

In the Sidis case, the Court stated that since (as of 1940) the New York state did not possess a common law-based right to privacy; therefore liability upon the defendant must be thereby imposed originating from a statute<sup>192</sup>. On grounds of a number of authorities, the Court did not consider the article about Sidis was executed for commercial purposes irrespective of the fact that it was recognized that all the newspapers actually do expect profits from selling their commodities<sup>193</sup>. The Court found that the activity of New Yorker magazine apparently did not fall within the scope of the given provisions: “so long as he [the publisher] confines himself to the unembroidered dissemination of facts”. Here the transgression of the aforementioned statute would occur only in case of fictionalization of the stories<sup>194</sup>. The issue of advertising was withdrawn by an identical root: though an advertisement did actually occur, the paper was not released beyond New York, the article was unobjectionable and the authors did not use the Sidis’s personal data as referred to in §50 of *New York Civil Rights Law*<sup>195</sup>.

3. The libel issue, claimed in the last cause of action, was also withdrawn though the defendant did not carry out motions to dismiss it. Finally, the Court recognized that no invasion of privacy occurred in the Sidis case.

### III. Corollary

The Sidis case was the principal one to resurrect the collision of privacy and freedom of press within the issue of public characters in the US common law. It also unfolded a partition of “right to be forgotten” to a) priorly public incidents b) ex-public figures. As it goes from the case, an ex-public

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<sup>188</sup> *Humiston v. Universal Film Manufacturing Co.*, 189 App. Div. 467 (N.Y. app. Div. 1919), at. 471.

<sup>189</sup> *Sweenek v. Pathe News, Inc.*, 16 F. Supp 746 (1936), at. 747.

<sup>190</sup> *Lahiri v Daily Mirror Inc.*, 162 Misc. 776 (N.Y. Misc 1937), at. 782.

<sup>191</sup> *Molony v. Boy Comics Publishers*, 277 App. Div. 166 (N.Y. App. Div. 1950), at. 170.

<sup>192</sup> *Sidis v. F-R Publishing Co.* 113 F.2d 806, at. 810.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, at. 811.

figure will never be forgotten, which was later transformed into the notion “Once public – always public” meaning that no deed or life story of a notorious, even once-notorious person will be ever injunct from public view. Having discussed the case with dozens of references to other cases, I should make a following corollary:

- The Sidis case displays the issue of a public interest in a person in general, but not in an incident s/he was involved into. Sidis strived to covert his entire prior life, not an obscure incident, an unsavory fragmenton from his life. The court considered that the interest in Sidis owing to his uncommonness may remain even after his seclusion.
- The correlation of *Melvin* and *Sidis* cases is quite superficial albeit some similarities do virtually subsist – both plaintiffs tempted to conceal the past events of their lives. At the same time, the former case did not feature a collision with press and though the facts of the plaintiff’s live in the *Melvin* case were unfolded in public records, she had never been a public figure before in contrast to the plaintiff in the *Sidis* case. As the unauthorized disposal of one’s name or photograph in advertising and trade is tortious or prohibited by statute, the same can not be said for newspaper articles about public figures. The article about Sidis was truthful, and in most US jurisdictions truth serves as a defence<sup>196</sup>, including the press. The doctrine of privacy, enunciated in the *Melvin* case served for dozens of subsequent cases, including the *Sidis* one; at the same time, I should denote that the doctrine was general and was not specifically attributed to *Melvin* case. An other inference which should be undertaken is the issue of rehabilitation that occurred in the *Melvin* case but was inapplicable for the *Sidis* case. In criminal oblivion cases<sup>197</sup>, the courts considered that no violation of privacy occurred in the publication of prior criminal actions of the plaintiffs, who blamed news agencies for privacy infringement. Hence, the *Sidis* case has nothing to do with the notion of someone’s rehabilitation from an unsavory past.
- The *Sidis* case contributed to the issue of newsworthiness of the publication – at least, to a certain degree. As the Court held, the figure of Sidis constituted legitimate public interest owing to the fact he was a notorious person even if it was in a remote past.
- The *Sidis* case provided a powerful endowment to the evolution of the “right to be forgotten”, as it displayed a completely dissenting situation from the *Melvin* case, as it unleashed an issue of a public figure fadeaway. In this embrace, the case of *Werner v. Times-Mirror Co.* has got more resemblances with the *Sidis* case (here we should exclude the factor of several minor inaccuracies in the publication about the plaintiff). The practice of United States common law features several dozens of cases which are connected with a right to be forgotten, where the *Sidis* case seems to be one of the most outstanding ones.

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<sup>196</sup> See. *Garrison v. Lousiana* 379 U.S. 64 (1964), footnote 7.

<sup>197</sup> See. footnote 27, 29 and 33 supra.

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