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CONSTITUTIONS AND STATUTES.

AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 22

TIME, INC.,

Appellant,

against

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE ON REARGUMENT

Probable jurisdiction of this appeal was noted December 6, 1965, 382 U. S. 936, and oral argument was heard April 27, 1966. The case was restored to the docket for reargument at this Term of the Court by the Court's order of June 20, 1966, 384 U. S. 995. Constitutional and statutory provisions involved are appended to the Brief for Appellee in No. 562 last Term.

Statement

The law of privacy has a narrow focus. It is directed against the commercial manipulation of an individual or intrusion into his personal life for reasons unrelated to the dissemination of news, information or opinion. It operates for the most part in the area of advertising and pub-

licity. It represents the modest limits set by an open society on the harmful exploitation of private individuals for selfish ends.

Implicit in the right of privacy—under the common law and in New York—is a definition of "news" and "newsworthiness". Giving the broadest range to the freedom of the press and the right of the public to know, the law of privacy is based on a willingness to draw lines. Those lines define the limited circumstances under which an individual is entitled to be protected against publicity, or certain forms of publicity, no matter how interesting the particular publication may be to the general public.

In its furthest reach, privacy in New York and elsewhere does not deal with the kinds of speech that are encompassed in the rulings of this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), *Garrison* v. *Louisiana,* 379 U. S. 64 (1964), and *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966). It does not inhibit or even relate to criticism of public officials or the conduct of government. It has no concern with the expression of ideas and opinion, whether they be embodied in newspapers, magazines, novels or plays. Every jurisdiction that recognizes the tort of privacy excludes from its coverage news, information of general interest and relevant comment thereon.*

Privacy should be seen for what it is—a limited but useful tool, akin to private libel, which the states have developed under the Ninth and Tenth Amendments to redress injury to the personality and sensibilities of an individual. Starting with the enactment of Sections 50 and 51 of the Civil Rights Law in 1903 and then, over a period of 63 years, in more than 250 recorded decisions, New York has developed rules and definitions which keep the tort of

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* See generally, Prosser, *Torts,* 844-50 (3d ed. 1964) and 1 Harper & James, *Torts,* 686-89 (1956).

privacy far removed from issues and information that relate to the business of governing. Applied to this case, these rules and definitions made actionable a concededly false publication found by the state courts to have been concocted for commercial purposes and to have caused substantial harm.

This, we submit, is the relevant perspective in which to consider the facts of this case.

The LIFE article was a hoax executed with painstaking precision. It was based upon an admitted "gimmick"—the use of the Hills' former home and the cast of The Desperate Hours to create a "newsy" approach to coverage of the play (Br. Appellee, pp. 7-17).

No one picture or caption or section of text produced the desired result. The article's designed effect was a total one, achieved by a montage of news clippings, staged photographs and text, which informed LIFE's readership that if they went to the Barrymore Theatre, they would see a re-enactment of the Hill family's "true crime" ordeal of violence and heroism. Illustrative scenes from this "re-enactment", posed by the cast of The Desperate Hours in the purported "actual" setting (the Hills' former home), served to heighten the illusion. These scenes of course bore no relationship—individually or collectively—to the actual Hill incident. Nor, for that matter, did any of the violence, ugliness and melodrama of The Desperate Hours actually take place in the Hill home (Br. Appellee, pp. 3-7).

As author Hayes wrote in 1955 and confirmed at the trial, The Desperate Hours was loosely related to many sources of inspiration, including a number of actual incidents, but was a complete fictional departure from all these background sources. Whatever use he may have made of the published data on the Hill incident for general setting,

the story of The Desperate Hours was the antithesis of what transpired during the Hill incident and of the behavior of the criminals and the besieged family (*Ibid.*).

All of this was known to appellant when it prepared and published the LIFE article. Its claim that it acted in undisputed "good faith" and that, at worst, it failed to make an adequate investigation of the facts is belied by the record. The main part of appellee's case consisted of the direct examination of appellant's Entertainment Editor to the single end of showing that he and his colleagues knew, but were indifferent to, the falsity of the LIFE article's basic premise—that The Desperate Hours was a re-enactment of the Hill incident. (Br. Appellee, pp. 7-17). The several drafts of the LIFE article showed that LIFE's editorial staff freely altered the text and meaning of the article, solely to satisfy the desire for editorial impact and without regard to the truth of what was being presented (Br. Appellee, pp. 12-16). Testimony as to the various meetings between Hayes and Prideaux established that not once during those meetings was any attempt made by Prideaux to verify the basic premise of the LIFE article (Br. Appellee, pp. 8-9). LIFE's story file, admittedly read by Prideaux at the time he wrote the LIFE article, contained Joseph Hayes' New York Times article which revealed the falsity of the LIFE article's basic premise (Br. Appellee, pp. 10-12).*

Appellant's editors prepared the LIFE article after seeing the play, reading the author's statement of how he

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* Appellee had earlier called defendant Hayes, who testified that he was never asked by Prideaux or any other LIFE employee what, if any, relationship there was between his play and the Hill experience. Hayes claimed that he never saw the LIFE article before it was published and therefore never knew that LIFE intended to state that appellee's experience was re-enacted in the play (Br. Appellee, pp. 8-9).

came to write it, and examining news reports of the Hill incident (Br. Appellee, pp. 7-17). Having seen the sensationally melodramatic play not once, but twice, it is utterly incredible that a Senior Editor of LIFE could entertain the thought that it re-enacted the brief episode in which the Hill family had been involved.

Appellant's editors proceeded to ignore the facts because the dissemination of news was not the objective of the "True Crime" article. Rather, their sole objective in transporting actors to the former Hill home, staging scenes from The Desperate Hours in and around the house, and publishing an article describing the play as a "re-enactment" or "account" of the Hill experience was to create an interesting story. By casting appellee and his family as the fictional family of The Desperate Hours, the LIFE article itself became fictional.

Questions Presented.

In its order of June 20, 1966, 384 U. S. 995, restoring this case to the docket for reargument, the Court requested that counsel discuss in their further briefs, in addition to the other issues, the following questions:

> (1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?
>
> (2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?
>
> > "However, if it can be clearly demonstrated that the newsworthy item is presented, not for the pur-

pose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exemption from Section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized."

(3) Does the concept of "fictionalization", as used in the charge, the intermediate appellate decision in this case, and in other New York cases, require intentional fabrication, or reckless disregard of the truth or falsity of statements of fact, as a condition of liability? Would either negligent or non-negligent misstatements suffice? With respect to these issues, how should the instructions to the jury be construed?

(4) What are the First Amendment ramifications of the respective answers to the above questions?

Summary of Argument.

1. The truthful presentation of newsworthy items is not made actionable by the New York statute. By its terms, the statutory prohibition extends only to the use of names or pictures for purposes of advertising or trade. The New York courts have consistently held that the natural and intended meaning of those terms excludes the dissemination of news. Appellant has no standing to raise this question because its own publication was false and was found to be false by the courts below. There are no circumstances here present which would justify an exception to the well-settled rules of standing in this court.

2. The Court of Appeals adopted the quoted portion of the concurring opinion in the Appellate Division only as a dictum. This dictum has never been applied and does

not represent the law of New York. Moreover, taken on its own terms, the dictum does not suggest an unconstitutional test of liability.

3. "Fictionalization" involves the alteration of facts or the introduction of imaginary events in order to make a publication more interesting and thus to increase its circulation. In this and other "fictionalization" cases, the evidence and findings of a specific commercial purpose negate any possibility that facts were "altered" through mere negligence or inadvertence. The charge to the jury correctly required them to find that appellant altered the facts concerning the Hill family, that the alteration was made in order to serve a commercial purpose and that, by reason of such alteration, the LIFE article was fiction.

4. There is no substantial First Amendment question raised by the New York statute or its application to the LIFE article in this case. The statute is a limited and reasonable regulation which does not, in any application, abridge freedom of speech. The LIFE article contained false statements which concerned a private individual and were unrelated to any public issue. Under such circumstances, the false statements are, like private defamation, outside the protection of the First Amendment. Moreover, the finding of "fictionalization" by the jury and courts below clearly satisfies the stringent actual malice test applicable to defamation of public officials. Thus, the decision below meets every constitutional standard which is even arguably relevant.

ARGUMENT.

1. The truthful presentation of a newsworthy item is not ever actionable under the New York statute, as construed or on its face. Appellant does not have standing to raise this question.

The New York privacy statute was designed to afford relief to an individual whose name or likeness is exploited for a commercial purpose (Br. Appellee, pp. 21-26). This narrow regulation was enacted in 1903 to remedy the holding by the Court of Appeals in the *Roberson* case that the common law did not make actionable the use of a non-consenting individual's photograph for a commercial purpose. *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). The words chosen by the legislature to define commercial purpose—"advertising purposes" or "purposes of trade"—were given content by the nature of the wrong which the statute was designed to redress, and were effectively limited by the deeply ingrained commitment to freedom of expression in the constitution of the State of New York.* The statute was construed "from the outset" as excluding from its coverage the dissemination of news or information. *Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 482, 68 N. Y. S. 2d 779, 782 (Sup. Ct.), *aff'd mem.* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947).

> "'[T]rade' refers to 'commerce or traffic', not to the dissemination of information." *Jeffries* v. *New York Evening Journal Pub. Co.*, 67 Misc. 570, 571, 124 N. Y. Supp. 780, 781 (Sup. Ct. 1910).
>
> "[C]onstrued in connection with the history of chapter 132, Laws of 1903, which was enacted at the

* N. Y. Const. art. I, §8.

> first session of the Legislature after the decision in the Roberson Case, [the statute] does not prohibit every use of the name, portrait or picture of a living person. It would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper." *Binns* v. *Vitagraph Co. of America*, 210 N. Y. 51, 55-56, 103 N. E. 1108, 1110 (1913).

For the most part, the hundreds of decisions under the New York privacy statue have related to advertisements, merchandising uses, and other blatant commercial displays. Throughout the cases, the courts have consistently found that the dissemination of news is not actionable. See, *Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, 359, 107 N. E. 2d 485, 488 (1952). See also, *e.g., Dallesandro* v. *Henry Holt & Co.,* 4 App. Div. 2d 470, 166 N. Y. S. 2d 805 (1st Dep't), *appeal dismissed,* 7 N. Y. 2d 735, 193 N. Y. S. 2d 635, 162 N. E. 2d 726 (1959), and *Oma* v. *Hillman Periodicals, Inc.,* 281 App. Div. 240, 118 N. Y. S. 2d 720 (1st Dep't 1953). "News" has been broadly interpreted both as to form and subject matter (Br. Appellee, pp. 27-28). The broad news privilege is not lost through mere errors of fact, nor is it affected by the quality or taste of the publication. *Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct.), *aff'd mem.,* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947); *Goelet* v. *Confidential, Inc.,* 5 A. D. 2d 226, 171 N. Y. S. 2d 223 (1st Dep't 1958).

In support of its argument that New York makes actionable truthful accounts of newsworthy items, appellant cites *Gautier* v. *Pro-Football, Inc., supra,* which it describes as the "leading exposition" of the New York statute by the

Court of Appeals prior to the present case (Br. Appellant Reargument., p. 6).

Gautier held that the televising of plaintiff's trained-animal act (performed publicly on a football field at half-time) was the dissemination of news and, on this basis, the complaint was dismissed. The opinion distinguished five earlier New York cases as treatments of non-consenting plaintiffs "distinct from the dissemination of news or information". *Gautier, supra,* 304 N. Y. at 359, 107 N. E. 2d at 488.

Two of the cases, *Redmond* v. *Columbia Pictures Corp.,* 253 App. Div. 708, 1 N. Y. S. 2d 643 (1st Dep't), *aff'd per curiam* 277 N. Y. 707, 14 N. E. 2d 636 (1938), and *Franklin* v. *Columbia Pictures Corp.,* 246 App. Div. 35, 284 N. Y. S. 96 (1st Dep't), *aff'd per curiam* 271 N. Y. 554, 2 N. E. 2d 691 (1936), involved performances of a trick-shot golfer and a bullfighter, respectively, which had been the subject of authorized newsreels and which were later incorporated without consent into humorous motion picture features. Exploitive intent was found in the wrongful appropriation of the "public" efforts of the plaintiffs to serve an unauthorized commercial end. As *Gautier* pointed out, if the performances had been reproduced in the same form as originally authorized (*i. e.,* newsreels), there would have been no cause of action, at least under the privacy statute. It may be argued that, in either case, breach of contract or unfair competition would have been a more appropriate remedy, *i. e.,* that the plaintiff did not seek to redress an invasion of privacy so much as to protect a property right in his performance.* See *Gautier, supra,* 304 N. Y. at 361,

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* The basis for *Redmond* and *Franklin* would appear to lie in concepts of law relating to the protection of creative work from misappropriation and impairment. *International News Service* v. *Associated Press,* 248 U. S. 215 (1918). See also, *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited, Inc.,* 42 Misc. 2d 723, 248 N. Y. S. 2d 809 (Sup. Ct. 1964); *Metropolitan Opera Assn.*

107 N. E. 2d at 489, *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (3d Cir. 1956). This, however, is not a question of constitutional moment. Irrespective of the remedy provided by state law, such commercial appropriation obviously falls outside the bounds of First Amendment protection.

The third case, *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't), *aff'd mem.*, 261 N. Y. 504, 185 N. E. 713 (1933), involved a motion picture short subject which featured actors who traveled the streets of New York making ethnic comments and "gags" directed at the persons and places filmed.* The film included full-sized, close-up photography of the plaintiff vending rolls and bread and she alleged that she was made to look ridiculous in order to amuse the audience. *Gautier* pointed out that Mrs. Blumenthal could have been shown as part of the general scene without liability. 304 N. Y. at 360, 107 N. E. 2d at 489.** However, the details of Mrs. Blumenthal's physical characteristics and movements were

v. *Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N. Y. S. 2d 483 (Sup. Ct.), *aff'd mem.* 279 App. Div. 632, 107 N. Y. S. 2d 795 (1st Dep't 1951); *Waring* v. *WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937). And see generally, *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 932-46 (1964).

* Four professional actors played the roles of two guides escorting two vacationing schoolteachers around New York City. The roles of the guides were played by professional comics ("Nick and Tony, Ace Funsters"), who throughout the picture humorously "amused the audience with their songs, sallies, antics and peculiarities of speech by characterising the traits and habits of the various nationalities and made other remarks or so-called 'gags'" (Record on Appeal, *Blumenthal* v. *Picture Classics, Inc.*, *supra*).

** *Cf.*, Restatement, Torts §867, comment c at 399-400, (1939): "One who is not a recluse must expect the ordinary incidents of community life of which he is a part. These include casual comment upon his conduct, the more or less casual observation of his neighbors as to what he does upon his own land and the possibility that he may be photographed *as a part of a street scene or a group of persons.*" [Emphasis added.]

neither newsworthy nor a subject of public interest and no news or informational purpose was served by a close-up photographic study coupled with a derisive commentary.

Neither *Blumenthal* nor *Gautier* support appellant's contention that "the mere focusing of a television camera upon a spectator at a sporting event will be enough to incur liability" (Br. Appellant Rearg., p. 6). To the contrary, *Gautier* specifically noted that such a spectator "may expect to be televised in the status in which he attends," 304 N. Y. at 360, 107 N. E. 2d at 489. The common sense principle of *Blumenthal,* articulated some 20 years later in *Gautier,* was that private persons on the public streets are not commercial props who may, unwittingly, be "picked out of the crowd alone," photographed, and then unduly featured before the public to serve the commercial purposes of another. *Ibid.*

The final two cases discussed in *Gautier* are *Binns* v. *Vitagraph Co. of America,* 210 N. Y. 51, 103 N. E. 1108 (1913), and *Sutton* v. *Hearst Corp.,* 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950). Appellant recognizes that these cases are in a separate class in which the courts have found that the defendant's publication was fictionalized. Contrary to appellant's assertion, however, these cases did not involve reports which were "basically true" (Br. Appellant Rearg., p. 7).* Thus, in *Binns* v. *Vitagraph Co. of America, supra,* the court found that the motion picture

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* Appellant seems to argue that, however falsely a publication describes an individual in relation to a news event, the mere existence of some "connection" between the person and event makes the publication "basically truthful". This argument is a variation of the proposition advanced in appellant's prior brief and in oral argument, *i.e.,* that if such a "connection" exists, the truth or falsity of a publication is immaterial (Br. Appellant, p. 40; Transcript of Oral Argument, pp. 40-41). In either case, appellant would take the existence of some "connection" as a license to publish intentional fabrications at least so long as they are non-defamatory. (See Br. Appellee, p. 45.)

portrayal of plaintiff was "mainly a product of the imagination" (210 N. Y. at 56, 103 N. E. at 1110). And in *Sutton* v. *Hearst Corp., supra,* the court refused to dismiss a complaint which alleged that the "total dominant impression" conveyed by defendant's publication was "basically not a true picture or representation of the salient facts, but dramatic fiction for trade purposes" (277 App. Div. at 156, 98 N. Y. S. 2d at 234).

Similarly, in the more recent case of *Spahn* v. *Julian Messner, Inc.,* 23 App. Div. 2d 216, 260 N. Y. S. 2d 451 (1st Dep't 1965), the fictionalized biography involved use of imaginary incidents, manufactured dialogue and a manipulated chronology—the author "made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline and to the extent that the facts readily supplied a dramatic portrayal attractive to the juvenile reader" (23 App. Div. 2d at 219, 260 N. Y. S. 2d at 454).

In short, the five cited cases, as well as the subsequent opinion in *Spahn,* support the principle enunciated in *Gautier:*

> "While one who is a public figure or is presently newsworthy may be made the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." 304 N. Y. at 359, 107 N. E. 2d at 488.

Standing.

It was alleged, proven and found below that the LIFE article was substantially fictional. Appellant, therefore, has no standing to urge that the statute also makes actionable truthful news accounts, and is therefore unconstitu-

tional. This conclusion is compelled by well-settled rules of standing enunciated by this Court over a period of many years. See, *e.g., United States* v. *Raines,* 362 U. S. 17 (1960), *Poe* v. *Ullman,* 367 U. S. 497 (1961), and cases cited therein. Moreover, under the circumstances of this case, there are no "weighty countervailing policies" which require an exception to the usual rules of standing. *United States* v. *Raines, supra,* 362 U. S. at 22, and *McGowan* v. *Maryland,* 366 U. S. 420, 430 (1961). On the contrary, a comparison of the present case with the authorities cited by appellant underscores the absence of any factor which would justify such an exception here.

The principal cases relied on by appellant are *NAACP* v. *Button,* 371 U. S. 415 (1963), and *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965).* Each case involved a statute which was directly aimed at repressing or curtailing the activities of a politically unpopular group. See also, *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). In contrast, the operation of the New York statute is completely unrelated to any area of political or social controversy. Thus, it does not lend itself to "selective enforcement against unpopular causes," *NAACP* v. *Button, supra,* 371 U. S. at 435 (1940), *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98 (1940), or to

* Both cases involved a declaratory judgment challenging the validity of the statute and, in each case, the question of the validity of the statute on its face was directly before this Court as a result of the proceedings below. In *NAACP* v. *Button, supra,* the state court, in its decree, had gone beyond the facts before it in determining the purpose and reach of the statute. And in *Dombrowski* v. *Pfister, supra,* the complaint was directed specifically at the validity of the statute. In contrast, the validity of the statute on its face was raised here for the first time on appeal. The amended *remittitur* stated only that the Court of Appeals had passed on the constitutionality of the statute as applied to appellant (R. 458). Even the Question Presented in appellant's Jurisdictional Statement referred to the validity of the statute only in terms of the facts of this case (Jurisdictional Statement, pp. 2-3).

prosecutions undertaken for purposes of harassment. *Dombrowski* v. *Pfister, supra,* 380 U. S. at 487-90.

Moreover, the New York statute is not a recent enactment but one which has a sixty-year history of construction and application. The experience under the statute refutes any argument that it is a "penal statute susceptible of sweeping and improper application." *NAACP* v. *Button, supra,* 315 U. S. at 433. And, in contrast with the demonstrably "chilling effect" of the statutes involved in *NAACP* v. *Button* and *Dombrowski,* there is not a scintilla of evidence that the threat of sanctions has ever had any deterrent effect whatsoever on the exercise of First Amendment freedoms.

The construction of the statute has not been "hammered out case by case—and tested only by those hardy enough to risk criminal prosecution. . . ." *Dombrowski* v. *Pfister, supra,* 380 U. S. at 487. The essential and prevailing construction was accomplished early in the history of the statute. It merely recognized that the statute was obviously not intended to prohibit the dissemination of news or information. *Binns* v. *Vitagraph Co. of America,* 210 N. Y. 51, 103 N. E. 1108 (1913) (see *supra,* pp. 8-9). Thereafter, the application of the statute—and the exclusion of news—in various factual situations was tested by civil suits, not criminal prosecutions.*

Relatively few cases have even involved a claim by the defendant that its publication constituted a truthful presentation of news. In a still lesser number has a court considered such a claim and, under the facts as alleged or

* As pointed out in appellee's main brief, there have been only two Magistrate's Court prosecutions, both initiated by private complaint and both dismissed (Br. Appellee, p. 44). It is also significant that in the civil cases wherein liability has been found, the award of damages is generally modest. See Hofstader & Horowitz, *The Right of Privacy,* 283-286 (1964).

proven, rejected it. Thus, the most that can be made of appellant's argument is that, in rare factual situations, the New York statute has been applied in a manner which appellant finds unconstitutional. None of the three New York cases relied on by appellant—*Blumenthal* v. *Picture Classics, Inc., supra, Redmond* v. *Columbia Pictures Corp., supra,* and *Franklin* v. *Columbia Pictures Corp., supra*—even approached areas of political speech or current news. Each involved undeniable elements of commercial exploitation. There is no basis for suggesting that these thirty-year-old cases have inhibited speech, limited the dissemination of news, or in any way hampered the development of techniques or formats by which modern media attract and entertain mass audiences for essentially commercial ends.*

We submit that appellant's argument falls far short of demonstrating a chilling effect on freedom of speech and a consequent need to dispense with firmly established rules of standing.

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* The development of the right of privacy in New York—as elsewhere—has been by case law. New York's starting point was the enactment of Sections 50 and 51 in 1903. Other jurisdictions have worked out operative rules at common law. We do not believe appellee should be required to shoulder every case decided in the past 63 years to sustain the constitutionality of the statute—any more than an appellee from a jurisdiction which recognizes a common law right of privacy would be required to sustain such a burden. We deem it striking, however, that the New York cases show such consistency over such a long period. They now reflect well-defined and limited categories that are entirely in accord with modern First Amendment pronouncements of this Court.

2. Judge Rabin's dictum regarding the truthful presentation of newsworthy items has not been made part of the law of New York.

In the New York Appellate Division, both the majority and concurring opinions held that the LIFE article was basically false in its treatment of appellee (R. 435-44). The affirmance by the Court of Appeals on the majority and concurring opinions of the Appellate Division adopted this holding. Judge Rabin's concurring opinion, however, went beyond the facts of the present case and stated in a dictum what in his opinion should take place where it could be "clearly demonstrated" that a "newsworthy item" was presented "not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation," even though a "true account" is given (R. 441).

Appellant speculates that the Rabin dictum was "apparently" a reaffirmation of the *Blumenthal, Redmond* and *Franklin* decisions (Br. Appellant Rearg., p. 10). However, Judge Rabin cited no authority in support of his dictum, as would surely have been the case if he intended it as a reaffirmation of past decisions. Moreover, the dictum is purely prospective in its terms, indicating what "should" be the rule if a future case satisfied certain theoretical requirements. The opinion does not state any factual context, even hypothetical, in which the requirement might be satisfied. It therefore is a dictum and, under well established New York law, is not governing authority for future decisions.

"[W]hat is said in a judicial opinion must be confined by the facts of the case in which it was uttered." *In re Smathers' Will,* 309 N. Y. 487, 495, 131 N. E. 2d 896, 900 (1956). "No opinion is an authority beyond the point actually decided. . . ." *Dougherty* v. *Equitable Life Assur.*

Society, 266 N. Y. 71, 88, 193 N. E. 897, 902 (1934). "[*S*]*tare decisis* . . . is limited to actual determinations in respect to litigated and necessarily decided questions and . . . does not apply to dicta or *'obiter dicta'*. . . ." *Matter of Herle,* 165 Misc. 46, 50, 300 N. Y. Supp. 103, 110 (1937). When the Court of Appeals affirmed on the concurring as well as majority opinion, the statement remained a dictum, and accordingly is not part of the law of New York.

Under the Rabin dictum a plaintiff would have to "clearly establish" that his name was used "not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation." Although the test imposed is so stringent that it is difficult to conceive of realistic situations within its coverage, it would seem unchallengeable that some state of facts *might* arise in the future where its application would be constitutionally appropriate. The Rabin dictum does nothing more than preserve the option of possible liability against a defendant who flouts the law—liability on a theory akin to the "evasion" theory of *Valentine* v. *Chrestensen,* 316 U. S. 52, 55 (1942) the "pandering" theory of *Ginzburg* v. *United States,* 383 U. S. 463, 474 (1966) or the theory that holds in abeyance decision of the facts contemplated by Lord Campbell's Reservation, see *Garrison* v. *Louisiana,* 379 U. S. 64, 72 & n. 8 (1964).

3. (a) Intentional fabrication or reckless disregard of the truth or falsity of statements of fact is inherent in a finding of fictionalization. Negligent or non-negligent misstatements of fact have not resulted in liability under the New York privacy statute.

The New York privacy statute was enacted to prevent commercial exploitation of individuals. Commercial exploitation is inherently a knowing act.

The concept of fictionalization under the New York privacy law involves intentional fabrication for purposes of trade, *i.e.,* the alteration of facts to create fiction which will make the publication more interesting and therefore more salable (Br. Appellee, pp. 34-35).

Fictionalization is a deliberate act. Liability under the privacy law, for example, does not result from a coincidence in names, *Kreiger* v. *Popular Publications, Inc.,* 167 Misc. 5, 3 N. Y. S. 2d 480 (Sup. Ct. 1937); *Swacker* v. *Wright,* 154 Misc. 822, 277 N. Y. S. 296 (1935); *People* v. *Charles Scribner's Sons,* 205 Misc. 818, 130 N. Y. S. 2d 514 (1954). Nor is liability under the privacy law created by mere erroneous statements even where such statements are offensive or injurious, *Koussevitzky* v. *Allen, Towne & Heath, supra,* 188 Misc. at 484-85, 68 N. Y. S. 2d at 783-84, *Middleton* v. *News Syndicate Co.,* 162 Misc. 516, 295 N. Y. S. 120 (Sup. Ct. 1937).

Fictionalization is found where there is proof that the publication is substantially false and that imaginary events were introduced, or facts altered, simply to make the publication more interesting.

In *Binns* v. *Vitagraph Co. of America, supra,* for example, it was conceded that the motion picture in question was drawn "largely" from the "imagination," 210 N. Y. at 56, 103 N. E. at 1110. The movie was written, staged and produced as a fictional work, using a real person and real event to provide impact. The court noted that, in the final portion of the film, plaintiff was depicted in a manner which "had no connection whatever with any other place or person or with any event," and thus it was "not designed to instruct or educate those who saw it."

In *Spahn* v. *Julian Messner, Inc., supra,* it was conceded that the author consciously altered facts and added imaginary scenes to make the book interesting. Indeed, the

principal defense offered was that such fictionalization was essential if the book was "to be read widely." 23 App. Div. 2d at 219, 260 N. Y. S. 2d at 454. And in *Sutton* v. *Hearst Corp., supra,* defendant's motion to dismiss the complaint for insufficiency was denied on the basis that, for the purposes of the motion, the court was compelled to accept as true plaintiff's contention that the article was "designed to create" a dominantly false impression, and therefor was "not a true picture or representation of the actual salient facts, but a dramatic fiction for trade purposes," 277 App. Div. at 156, 98 N. Y. S. 2d at 234.

Similarly, in the present case, the courts below reached the "inescapable conclusion" that appellant falsely portrayed The Desperate Hours as a re-enactment of the Hills' experience in order "to advertise and attract further attention to the play, and to increase present and future magazine circulation as well" (R. 438). They further found that the LIFE article was "not even an effort to supply legitimate newsworthy information" (R. 439). In support of their finding, the courts observed that appellant was able to "conclude" that the play was a "re-enactment" only by disregarding the Hayes article in its files.*

Appellant is wrong, therefore, when it argues that, in finding a trade purpose, the New York courts have indulged in a "strange legal presumption" (Br. Appellant Rearg., p. 13). The finding of a trade purpose reflects a factual determination that the defendant departed from the truth for the specific purpose of making its publication more interesting and, hence, to increase circulation.

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* Hayes' article in *The New York Times*, January 30, 1955, was in the file which Prideaux read at the time he wrote the LIFE article (R. 196-98). It refers to the several hostage incidents Hayes knew about when he wrote The Desperate Hours and states that the plot of The Desperate Hours was "something quite distinct from all the other hostage stories [he] had ever encountered." (Ex. G, R. 384; see Br. Appellee, pp. 10-12.)

The cases cited by appellant do not conflict with this well established pattern of New York law. *Thompson* v. *Close-up, Inc.*, 277 App. Div. 848, 98 N. Y. S. 2d 300 (1st Dep't 1950), is cited as "the outstanding example" of New York's failure to include intent as an element of a privacy law violation. In that case, however, the court merely declined to decide (on a motion for judgment on the pleadings) whether the existence of a purpose to increase circulation should be determined as a matter of law or as a matter of fact. *Cf., Pierrottie* v. *Dell Publications Co.*, 199 F. Supp. 686 (S. D. N. Y. 1961).

Appellant also quotes at length from a concurring opinion in *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 41 Misc. 2d 42, 244 N. Y. S. 2d 701 (Sup. Ct.), *aff'd* 19 A. D. 2d 865, 244 N. Y. S. 2d 1 (1st Dep't 1965). The opinion is, in effect, a dissent from the holding of the majority and therefore not a part of the law of New York.* In that case, plaintiff conceded, *arguendo,* defendant's claim of historical accuracy, and moved for summary judgment on the ground that dramatization alone gave rise to liability. The motion was denied on the ground that this did not establish fictionalization.

The holding of *Youssoupoff* was cited in *Spahn* to illustrate the distinction under New York law between a rendition which is essentially factual and one which is fictionalized:

> "The distinction between an intentionally fictionalized treatment and a straight factual treatment

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* The concurring judges noted that while they disagreed with the majority decision, "nevertheless, we do not feel constrained to dissent from the holding of the majority. Summary judgment is a particularly inept form of relief in most actions of this character. . . . As the application here does not further plaintiff's recovery in point of time, or in dispensing with otherwise unneeded proof, the interests of justice are unaffected by the refusal to grant it to him." *Youssoupoff, supra,* 19 App. Div. 2d at 866, 244 N. Y. S. 2d at 2.

> (subject to inadvertent or superficial inaccuracies) was the basis for the Court's holding in *Youssoupoff* v. *Columbia Broadcasting System.*'' *Spahn* v. *Julian Messner, Inc., supra,* 23 App. Div. 2d at 220, 260 N. Y. S. 2d at 454.

Thus, in *Spahn,* the court stated that although a factual work may be ''liberally reconstructed from available evidence,'' the biography there involved was ''unabashed fictionalization.'' 23 App. Div. 2d at 222, 260 N. Y. S. 2d at 456.

Appellant further notes that in *Youssoupoff,* the trial court rejected a contention that ''actual malice'' must be shown. However, by its charge, the trial court effectively required proof of ''actual malice'' as defined in *New York Times Co.* v. *Sullivan, supra.* Thus, the court advised the jury that, in order to reach a verdict for plaintiff, they were required to find that the defendant ''altered or changed the true facts concerning the plaintiff's relationship to the events of Rasputin's death so that the play as televised constituted substantial fiction or a fictionalized version of what actually did take place,'' (Br. Appellant Rearg., Appendix, p. 48). The alteration or changing of facts to create fiction is something which cannot take place as a result of mere negligence or inadvertence on the part of the publisher.* Indeed, definitions and uses of the word ''fiction'' and ''fictionalized'' in the dictionary include, without exception, the concept of intent to fabricate, or the

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* Moreover, the court's opinion and charge suggest that, in purporting to reject a requirement of ''actual malice,'' the court used that term in its traditional sense, *i.e.,* ill will, rather than as defined in *New York Times Co.* v. *Sullivan, supra.* Compare *New York Times* with *Crane* v. *New York World Telegram Corp.,* 203 Misc. 916, 919, 119 N. Y. S. 2d 199, 203 (Sup. Ct. 1952). Thus, although the opinion referred to *New York Times,* it did not specifically consider the definition of ''actual malice'' adopted therein.

deliberate creation of imaginary matter. (Br. Appellee, p. 34).

There is no foundation for appellant's assertion that the New York courts presume a trade purpose if they find an article to be inaccurate or in bad taste. (Br. Appellant Rearg., pp. 13, 24). This conclusion is not drawn from the cases, and the principal decisions bearing on this question are not even mentioned in appellant's discussion. No explanation is offered by appellant for such leading cases as *Goelet* v. *Confidential, Inc., supra; Koussevitzky* v. *Allen, Towne & Heath, supra; d'Altomonte* v. *New York Herald Co.,* 154 App. Div. 453, 139 N. Y. Supp. 200 (1st Dep't), *modified* 208 N. Y. 596, 102 N. E. 1101 (1913); *Colyer* v. *Richard K. Fox Pub. Co.,* 162 App. Div. 297, 146 N. Y. Supp. 999 (2d Dep't 1914), which illustrate the New York rule that mere inaccuracy or offensiveness of published matter does not amount to fictionalization.

Nor does appellant explain on what basis it can be said that "the opinions are searched in vain to find any discussion about the publisher's intent to fabricate" (Br. Appellant Rearg., p. 13), in light of such decisions as *Binns* v. *Vitagraph Co. of America, supra,* in which the court emphasized the producer's deliberate concoction of imaginary scenes as the basis for its conclusion that plaintiff was fictionalized, and *Spahn* v. *Julian Messner, Inc., supra,* in which, again, the fact that the publisher "made no effort and had no intention to follow the facts concerning plaintiff's life" was said to be the basis for the finding of liability.

We submit that the concept of "fictionalization" under the New York privacy statute—consistent with the dictionary and common parlance—inherently requires intentional fabrication, or reckless disregard of the truth, as a condition of liability.

(b) The issue of intent was properly presented to the jury.

At the trial of this case, two principal issues were presented to the jury: Whether the LIFE article was basically false, and whether the falsity resulted from intentional fabrication.

The trial court's instructions on appellant's claim of good faith indicated that acceptance of that claim by the jury would preclude a finding of substantial fictionalization:

> "The defendant Time, Inc., claims . . . that the article was not wholly nor substantially fictionalized, but stated facts as known to the writer of the article, and which he, the writer, believed to be true." (R. 295.)

Thereafter the trial court defined the privacy tort as an act involving deliberation, *i.e.,* the manipulation of facts for a trade purpose. The court instructed the jury that they were to determine whether appellant "altered or changed the true facts" so that the article "constituted substantially fiction or a fictionalized version for trade purposes, that is to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit." (R. 300.)

The trial court repeatedly cautioned the jury that they could not bring in a verdict for appellee if they found that the article was published "to disseminate news", but could do so only if the article "constituted fiction" and was published for appellant's commercial purposes. The jury was further cautioned that incidental mistakes of fact or incorrect statements did not render appellant liable. (R. 300-01.)

The alteration of facts to create a fiction clearly involves deliberate falsehood. Similarly the finding that a fiction

was created to serve a specific commercial purpose is consistent only with a finding of intentional fabrication or reckless disregard of the truth.

The jury instructions must, therefore, be construed as requiring intent and excluding negligent or non-negligent misstatements. We submit that any possible question about the validity of this construction is eliminated by the context in which they appeared, namely, at the conclusion of a trial in which counsel for both parties had agreed upon and clearly delineated the bases upon which appellant might be found liable. In their opening and closing arguments, counsel for both appellant and appellee made clear to the jury that the action was not predicated on negligence, but that the gravamen of the action was deliberate falsehood.

Counsel for appellee argued that appellant had deliberately falsified the relationship between the Hill family and The Desperate Hours in the LIFE article.* On the other hand, appellant's counsel not only argued that LIFE had acted in good faith in publishing the article, but told the jury that if it believed that LIFE acted in good faith, it had

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* Opening Statement of Appellee's Counsel:

> "This was not haphazard, this was not accidental. This was deliberate. The Life people knew what they were doing." (R. 472.)

Closing Statement of Appellee's Counsel:

> "In this case the defendant Time, Incorporated is charged with something of enormous gravity. We charge Time, Incorporated with having published a false article, falsely dragging the plaintiffs into the news, falsely linking them with a violent, melodramatic work of fiction for commercial purposes, pure and simple.
>
> "We charged this most powerful of all news publications in the world with having done this deliberately, with knowledge of falsity, and we charged them with having brought about the permanent disability of a human being by reason of their action." (R. 549.)

See also, in particular R. 550, 554-60.

to find for the defendant.* The court presented appellant's claim of good faith to the jury. The jury rejected that argument, finding, rather, that appellant altered the facts to create fiction.

The New York statute authorizes the award of punitive damages upon a finding that the defendant "knowingly used" the plaintiff's name, portrait or picture in violation of the statute. The judge charged the jury that it could award punitive damages only if it found that appellant acted "knowingly or through failure to make a reasonable investigation" and also that there was "a reckless and wanton disregard of plaintiff's rights."** This charge clearly

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* Opening Statement of Appellant's Counsel:

"[T]hese plaintiffs here have to show three things if they are going to recover....

"First, that the play wasn't inspired by the crime; secondly, and of equal importance, that we knew it wasn't inspired by the crime; thirdly, and of equal importance, that we, knowing that this was false, went on wantonly, for the purpose of advertising the play and not to report upon a newsworthy event, and therefore lost the normal privilege of reporting on news.

"... [T]hose three elements.... Was it inspired? Did we know whether or not it was inspired? Were we acting in good faith? And what was our motive in publishing the story?

"I may also add that even if it wasn't inspired, if there was a connection between the two and we in good faith believed it, we are entitled to publish this article." (R. 474.)

Closing Statement of Appellant's Counsel:

"Nor is it a negligence suit. There isn't any claim here, nor can there be, as to whether we were careless or non-careless or what a reasonable man should have done." (R. 529.)

** The Court's charge on punitive damages is as follows:

"You may only award exemplary or punitive damages against such defendant or defendants if you find from the evidence that such defendant or defendants knowingly referred to the plaintiffs without first obtaining their consent, and falsely connected plaintiffs with The Desperate Hours, and that this was done knowingly or through failure to make a reasonable investigation. [Footnote continued on p. 27.]

required a finding of actual malice within the meaning of *New York Times Co.* v. *Sullivan, supra.* Bearing in mind that appellant did not, as in *New York Times,* publish an advertisement submitted by a well-known, reputable source, but was itself the author, the failure to make a reasonable investigation—"in reckless and wanton disregard" of appellee's rights—supports two conclusions: First, that there was an adequate basis for punitive damages under state law; and, second, that the jury found the elements of actual malice in the award of damages as well as in the determination of liability. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L.Q. 581, 590-600 (1964) (quoted in Br. Appellee, p. 36, footnote).

4. The New York statutory right of privacy and the decision in this case are fully consistent with the demands of the First Amendment.

(a) The New York privacy statute is a valid regulatory measure.

A direct response to the Court's fourth question follows from our previous discussion: The right of privacy in New York does not impinge upon matters which are subjects of First Amendment concern. The New York statute is a mini-

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"You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find a reckless or wanton disregard of the plaintiffs' rights." (R. 566.)

Appellant refers to the holding in *Garrison* v. *Louisiana, supra,* 379 U. S. at 70-75, that the constitutional protection extended to false statements concerning public officials is not removed by showing that such statements were made with ill will or intent to harm. (Br. Appellant Rearg., p. 22, footnote.) However, ill will was not alleged or made the subject of proof in the present case. Accordingly, the judge's reference to ill will was superfluous and could not have affected the jury's determination.

mum regulatory effort to protect a private individual from harmful commercial exploitation by another (Br. Appellee, pp. 38-39). The New York law of privacy does not interfere with the content of journalistic or creative expressions, nor does it abridge the free play of ideas and opinions; it regulates only the commercial use of an individual's name or picture—"the symbols of his existence" through which "he is known to the world." 1 Harper & James, *Torts,* 682 (1956).

Enforcement of the right depends upon a clear showing that a living person's name or picture has been used in a manner *not* constituting the dissemination of news or information of general interest. "News" has been defined in the broadest sense, so that the statute's actual application is essentially confined to (a) formal advertisements; (b) merchandising uses; (c) the appropriation of the property interest of entertainers and athletes in their work; and (d) the substantial alteration of actual events or the fabrication of imaginary events so as to create a false picture of an individual for commercial purposes—*i.e.,* the doctrine of "fictionalization". (*Supra,* pp. 8-13, 18-23.)

(b) Recovery for Invasion of Privacy should not depend upon proof of actual malice.

In *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966), this Court recognized that there are "important social values which underlie the law of defamation" and that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." The law of defamation was required to yield there only in the face of a "particularly strong" and carefully delineated interest in public discussion. *Id.,* 383 U. S. at 86. The court was careful to preserve the distinction between private and public libel

which had been drawn in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and *Garrison* v. *Louisiana,* 379 U. S. 64 (1964). Where private speech is involved, the states retain the power to apply traditional state remedies against defamatory or other injurious utterances.

False words which invade privacy and cause harm to an individual's sensibilities and feelings should be subject to the same degree of state regulation as false words which injure private reputation. Statutory and case law developments in the law of privacy, as in other areas of the law, reflect the growing recognition that injury to personality and feelings is as tangible as injury to body or reputation. *Cf. Brown* v. *Board of Education,* 349 U. S. 294 (1954). The New York right of privacy is concerned with a social interest which is clear and legitimate. It protects the individual from "commercialization of his personality" at the pleasure of a mass communications industry and thus stands as a significant safeguard of individual dignity. See, 1 Harper & James, *supra,* at 683; and see generally, Bloustein, *Privacy As An Aspect of Human Dignity—An Answer to Dean Prosser,* 39 N. Y. U. L. Rev. 962 (1964).*

We submit there is no basis for application of the *New York Times* test of actual malice to the right of privacy in general or to the New York statute in particular. Falsity should be a sufficient constitutional standard for privacy, as it is for private defamation.

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* Harper & James describes the right of privacy as an "almost inevitable development of the law under the pressure of a great social need, produced by the technological developments and the vast extension of business which transformed American society into mass urbanization thus creating many new sensitivities." They further observe that the social need "has become more intense with the development of media of mass communication—newspapers, national magazines, radio and television." 1 Harper & James, *supra,* at 683 & n. 16. As to modern media size and technology see, *e.g.,* Mott, *American Journalism,* 803-834 (1962); Chester, Garrison & Willis, *Television and Radio,* 3-51 (3d ed. 1963).

(c) Appellant's contention that actual malice should be required is not based on relevant authority or reasoned argument.

Appellant's principal argument appears to be that when a publication relates, however tangentially, to a "public issue" (such as crime and criminals), it is entitled to First Amendment protection, *i.e.,* it cannot be made actionable unless actual malice is proven. Appellant's proposed rule would apparently extend to private defamation as well as privacy actions. (Br. Appellant Rearg., p. 29-38.)

Such a rule would involve a major extension of *New York Times, Rosenblatt* and *Garrison.* Appellant urges its adoption of this rule on the basis of the "redeeming social value" test. It argues that the LIFE article, although concededly untrue as to appellant, nevertheless was entitled to the benefit of an "actual malice" requirement because it concerned a subject of public importance, and therefore had some "redeeming social value." (Br. Appellant Rearg., p. 29-38.)

The test proposed by appellant is inapposite. "Redeeming social value" is a standard basically employed to determine whether matter is obscene and therefore outside the protection of the First Amendment, *e.g., Roth* v. *United States,* 354 U. S. 476 (1957), and *Ginzburg* v. *United States,* 383 U. S. 463 (1966). See also, Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 5, 6 (1965). Efforts to control inchoate wrongs to broad group or social interests in the community—as, for example, by obscenity laws—involve fundamentally different First Amendment considerations from efforts by one private individual to seek redress for private defamation or invasion of privacy. The differences—prospective injury to the public versus direct and immediate injury to the individual, government

action versus private suit, potential strong social pressures versus relative neutrality, etc.—are of "crucial significance in framing satisfactory principles to govern a system of freedom of expression." Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 920-921, 927 (1963).*

After a generalized argument about the purported social importance of the LIFE article, appellant urges:

> "Where malice is not present, the publication should be protected because 'the interests in public discussion are particularly strong.' See *Rosenblatt* v. *Baer,* 383 U. S. 75, 86." (Br. Appellant Rearg., p. 38)

Such a conclusion, however, is not supported by *Rosenblatt.* In that case, as in *New York Times,* the finding of a "particularly strong" interest in public discussion was based upon two specific considerations: "[F]irst, a strong interest in debate on public issues, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Rosenblatt* v. *Baer, supra,* 383 U. S. at 85. Such considerations are utterly foreign to this case.

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* Even on its own terms appellant's argument is unpersuasive. The lengthy argument to the effect that the LIFE article discussed a subject of public interest is essentially beside the point (Appellant's Br. Rearg., pp. 29-37). If reliance is to be placed on some "redeeming social value," such value must be found not merely in the subject discussed but in what the article actually said, *e.g.,* in this case, the false depiction of appellee. This Court suggested in *New York Times* that "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error'." *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at 279 & n. 19. That reasoning is wholly inapplicable where, as here, the false statement concerns a private person who is neither the subject of, nor a participant in, any public debate, and is entirely lacking in the resources to produce the requisite "collision" between truth and error. Such false statements must be deemed to be utterly without value.

The LIFE article did not involve a "debate" in any sense of the word. Appellee is not even remotely analogous to a public official. And, although appellant urges that its article concerned a social problem of great importance, the article itself contained not a single word of comment on the social significance, if any, of the play or its theme. Similarly, the testimony of LIFE's editor belies the suggestion that LIFE undertook to review the play because it was recognized as a "serious contribution to the public discussion of crime and its profound effects." *Compare* Br. Appellant Rearg., p. 36, *with* R. 245. The very use of appellee's name and former home was regarded as a mere "gimmick" (R. 164). In short, the LIFE article was wholly unlike the public discussion delineated in *New York Times, Rosenblatt,* and *Garrison.*

(d) Fictionalization is an appropriate constitutional test of liability.

Although we do not believe there is a constitutional requirement that actual malice be shown in a privacy action, New York has in effect imposed such a requirement by the doctrine of "fictionalization". In accordance with that doctrine, appellee established that LIFE fabricated and staged a basically false story centering around appellee and his family, and did so for the purpose of entertaining, not informing, its readership. (See *supra,* pp. 3-5).

Initially applied in *Binns* v. *Vitagraph Co. of America, supra,* in 1913, the "fictionalization" test imposes at least as exacting a standard as the "malice" test of *New York Times,* and it does so in terms which are particularly suited to the "trade purposes" language of the New York statute. (See discussion, *supra,* at pp. 19-20). Moreover, the reasoning of the New York courts, in applying a test of fictionalization to determine the existence of a dominant commercial

purpose, is similar to the reasoning of *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), and recent cases which have cited that decision. See *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at 265-66, *Ginzburg* v. *United States, supra,* 383 U. S. at 474 & n. 17.* Circumstances amounting to fictionalization demonstrate motive and establish that the use is exploitive.

The right of privacy in New York is a carefully considered response to a distinct and genuine social need. Its contribution to the fabric of society is not measured simply by the modest awards of damages which have been made. Rather, its value is that it provides a basis for personal vindication to individuals who suffer the indignity and harm of public manipulation for a commercial purpose. The law of privacy affirms a conviction that, even in a society increasingly characterized by powerful and impersonal organizations of government and commerce, the personality of the individual is worth protecting.

At the same time, the right of privacy in New York has developed with a sensitive regard for freedom of the press. In no case has the right of privacy been applied so as to prohibit or constrict the dissemination of news, information, comment, opinion or criticism. The overriding commitment to freedom of the press, and a statute concerned solely with commercial exploitation, have resulted in a clearly limited law of privacy in New York.

We suggest that the law does not fully occupy the constitutionally permissible area of regulation. There may be

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* That magazines or books are sold is not a commercial purpose which is significant in terms of either the Constitution or the New York privacy law. *New York Times,* 376 U. S. at 266; *Koussevitzky* v. *Allen, Towne & Heath, supra,* 188 Misc. at 483, 68 N. Y. S. 2d at 783. In each case, the content of the utterance is analyzed to determine whether it is commercial exploitation "dressed up as speech." See *Ginzburg* v. *United States, supra,* 383 U. S. at 474 & n. 17.

invasions of privacy unrelated to commercial purpose, which can and should be redressed. There are, perhaps, cases in which even the truthful presentation of news should be actionable if the content or manner or presentation inflicts harm which is utterly disproportionate to any legitimate public interest. These questions, however, are not before the Court in this case. It is only certain that if the Court strikes down the New York statute, which is limited in its objective and has been applied so cautiously, there will be little future for the law of privacy in New York or elsewhere. Such a result is neither required nor justified by the demands of the First Amendment.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Brief for Appellee last Term, this appeal should be dismissed, or, in the alternative, the judgment of the Court of Appeals of New York should be affirmed.

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