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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

TIME, INC., *Appellant,* —*against*— JAMES J. HILL, *Appellee.*		No. 22

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

BRIEF FOR THE APPELLANT ON REARGUMENT

QUESTIONS PRESENTED

In its order of June 20, 1966, 384 U. S. 995, restoring this case to the docket for reargument, the Court requested a response to 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 purpose 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 decisions 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?

STATEMENT

Probable jurisdiction of this appeal was noted December 6, 1965, 382 U. S. 936, and oral argument was heard April 27, 1966. Appellant submitted a brief (to which the constitutional and statutory provisions involved were appended) and a reply brief; briefs were also submitted by the appellee, and by the Attorney General of the State of New York, as *amicus curiae,* in support of appellee. This brief is intended primarily as a reply to the specific questions put by the Court and, additionally, as a supplement to the previous discussion of the other issues.

SUMMARY OF ARGUMENT

1. The New York courts have found truthful presentations of newsworthy items to be actionable under Sections 50 and 51 of the Civil Rights Law on several occasions. In 1952 these cases were reviewed in detail and approved by the New York Court of Appeals. Appellant has standing to challenge this aspect of the statute because, first, its article was basically truthful and, second, traditional notions of standing are relaxed where a threat to First Amendment freedoms is plain.

2. The Court of Appeals adopted the concurring opinion in the Appellate Division including, specifically, the portion of that opinion quoted in the Court's second question. That section of the concurring opinion reiterates the view that New York will impose liability, even upon truthful reports, where the publisher's motive is to increase circulation and profits.

3. The so-called "newsworthiness" exemption that has been judicially grafted upon this overbroad statute does not apply whenever a court finds "fictionalization." That finding is made by comparing the publication and the event described. While some of the New York cases may have actually involved reckless or obviously false statements, the opinions say nothing about intent. More important, many decisions involved such modest deviations from the truth that they could easily have resulted from non-negligent or, at the most, negligent investigation. In the present case, the charge was silent as to the state of mind of the LIFE writer; it only mentioned knowing misstatements on the question of punitive damages, and then merely as an alternative to a theory of negligence, that is, the failure to make a reasonable investigation.

4. The answers to the Court's questions show this penal statute to be excessively broad on its face: as a substantial restraint upon expression, it should be struck down. As applied to appellant, the statute has permitted an award of damages (including, originally, punitive damages) because of factual misstatements apparently the result of failure to make a reasonable investigation. The award should be overturned because the discussion of public issues at stake here is entitled to First Amendment protection; because expression of ideas cannot be curtailed unless there is little public interest in its advancement or unless it is based upon statements that are knowingly false or recklessly oblivious of the truth.

ARGUMENT

1. (a) *Truthful presentations of newsworthy items have been held actionable under the New York statute.* On its face the New York statute applies to a truthful presentation of newsworthy items because it prohibits any use of a name or picture, without consent, "for the purposes of trade." N. Y. Civ. Rights Law §§ 50, 51. LIFE, a picture magazine, uses names and pictures in its news stories to sell magazines. Literally, any use of a name or picture in LIFE (or in the New York Times which seeks to sell its newspapers) is a use "for purposes of trade." The New York statute is thus incredibly broad on its face.

Construction of the statute, in certain important circumstances directly related to the Court's first question, has been almost co-extensive with its plain language. While lip service has been devoted to the judicial exemption for totally factual accounts of newsworthy items, New York has nevertheless imposed liability where courts objected to the style of presentation or degree of emphasis upon the plaintiff.

The principal example is *Blumenthal* v. *Picture Classics, Inc.,* 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), *aff'd no op.,* 261 N. Y. 504, 185 N. E. 713 (1933) (a case that we have stressed in four briefs previously filed in this Court but which the opposing briefs have treated with silence). The defendant had produced a documentary motion picture showing scenes in different parts of New York City. A close-up of the plaintiff selling bread and rolls on Orchard Street appeared in the film for approximately six seconds. That use was found to be for purposes of trade and hence subject to injunction:

> "Sections 50 and 51 of the Civil Rights Law give to the plaintiff an absolute right to have the defendants enjoined from using her picture for trade purposes even though her trade brings her into the public view." 235 App. Div. at 571.

The *Blumenthal* decision, in turn, led to similar results in *Redmond* v. *Columbia Pictures Corp.,* 253 App. Div. 708, 1 N. Y. S. 2d 643 (1st Dep't 1937), *aff'd no op.,* 277 N. Y. 707, 14 N. E. 2d 636 (1938), and *Franklin* v. *Columbia Pictures Corp.,* 246 App. Div. 35, 284 N. Y. Supp. 96 (1st Dep't 1935), *aff'd no op.,* 271 N. Y. 554, 2 N. E. 2d 691 (1936). These cases were treated summarily in the Appellate Division, but, in a later extensive review of the law of privacy by the New York Court of Appeals, were described in detail:

> ". . . . Thus, in the *Redmond* and *Franklin* cases, the plaintiffs had been photographed for *newsreel* purposes, to which no objection was made. The films were later sold and used as part of short feature pictures dealing in a humorous manner with the sports involved, which were distributed for profit in numerous moving picture theatres. This, we said,

> was a use for purposes of trade. . . ." *Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, 359-60, 107 N. E. 2d 485 (1952).

Prior to the recent adoption by the Court of Appeals of the majority and concurring opinions of the Appellate Division in the present case, the *Gautier* opinion represented that court's leading exposition of Sections 50 and 51 of the Civil Rights Law. In addition to *Redmond* and *Franklin,* the *Blumenthal* decision was also cited with approval in *Gautier* and discussed at length. Indeed, as a result of *Blumenthal,* the Court of Appeals indicated that the mere focusing of a television camera upon a spectator at a sporting event will be enough to incur liability. 304 N. Y. at 360. The objection to the defendant's conduct in *Blumenthal* was the momentary singling out of the plaintiff by the camera, notwithstanding the accuracy her picture lent to the depiction of a life-like view of Orchard Street in New York City. The objection to the defendant's conduct in *Redmond* and *Franklin* stemmed from the conversion of photographic material in a newsreel to a humorous short subject. Thus, the New York Court of Appeals has allowed recovery for the truthful presentation of newsworthy items where, in its view, there was undue emphasis upon the plaintiff or the manner of presentation was objectionable, that is, it somehow transformed the dissemination of news into commercialization for profit.

The next class of cases, substantially larger, involves liability where the account is essentially true but contains some inaccuracies. Here the judicial exemption for dissemination of news does not apply. The courts found "fictionalization" in such cases as *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), both discussed in *Gautier,* although the reports in both were basically true and newsworthy. As *Gautier* suggests, only absolute truth can escape liability, and even then only if the manner of presentation is not irritating to judges or the publisher's purpose does not seem to them unduly crass.

(b) *Appellant has standing to challenge this aspect of the statute.* Appellant has standing to challenge application of the New York statute to truthful presentations because its article was basically true. The basic truth of the LIFE article, that is, the legitimate connection between THE DESPERATE HOURS and the Hill incident (as required by *Gautier,* 304 N. Y. at 359), was expressly found by the concurring opinion in the Appellate Division (R. 441). The criterion of fictionalization, of course, is an intermediate standard between truth and falsity; it is imprecise and will apply to any factual deviation save "minor inaccuracies." See *Molony* v. *Boy Comics Publishers, Inc.,* 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dep't 1950). Under such a standard, and because the LIFE article was basically true, appellant should be permitted to challenge this furthest reach of the New York statute.

Even if the article were not basically true, the First Amendment ramifications of the present case call for the "exception to the usual rules governing standing." See *Dombrowski* v. *Pfister,* 380 U. S. 479, 486. But for that exception, the "chilling effect" of these constitutionally impermissible decisions (one already more than thirty years old) would continue unchallenged as the law that governs publishers in New York. But for that exception, the ordinary standing requirement would "itself have an inhibitory effect on freedom of speech." *United States* v. *Raines,* 362 U. S. 17, 22. New York's imposition of liability for truthful reports shows its regulation of expression in the

privacy area is overbroad, both on its face and as construed. *Cf. Aptheker* v. *Secretary of State,* 378 U. S. 500. Moreover, the forms of liability include criminal punishment, punitive damages, and injunction. Such potentially inhibiting effects on speech should not be left in suspension. See *Smith* v. *California,* 361 U. S. 147, 151; *Mills* v. *Alabama,* 384 U. S. 214, 221-22 (concurring opinion). The Court has already made this quite clear in other First Amendment cases:

> ". . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. Cf. *Garrison* v. *Louisiana,* 379 U. S. 64, 74-75. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98; *NAACP* v. *Button, supra,* at 432-433; cf. *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515-517; *United States* v. *Raines,* 362 U. S. 17, 21-22. We have fashioned this exception to the usual rules governing standing, see *United States* v. *Raines, supra,* because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP* v. *Button, supra,* at 433. If the rules were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. *Ex*

parte Young, supra, at 147-148. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. See *NAACP* v. *Button, supra,* at 432-433; cf. *Baggett* v. *Bullitt, supra,* at 378-379; *Bush* v. *Orleans School Board,* 194 F. Supp. 182, 185, affirmed *sub nom. Tugwell* v. *Bush,* 367 U. S. 907; *Gremillion* v. *United States,* 368 U. S. 11." *Dombrowski* v. *Pfister, supra* at 486-87.

". . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. *Cf. Staub* v. *City of Baxley,* 355 U. S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the

> danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus* v. *Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Cf. Smith* v. *California, supra,* at 151-154; *Speiser* v. *Randall,* 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311." *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432-33 (footnote omitted).

2. *The Court of Appeals adopted the concurring opinion in the Appellate Division.* Because of such decisions as *Blumenthal, Redmond,* and *Franklin, supra,* the Court of Appeals by affirming "on the majority and concurring opinions at the Appellate Division" (R. 453) apparently wanted specifically to affirm the statement in the concurring opinion that truth would be no defense if the publisher's purpose were to increase circulation and thus engage in trade. Whether or not this was prompted by a desire to emphasize its reiteration of the *Blumenthal* doctrine as it had done earlier in *Gautier, supra,* the Court of Appeals went out of its way to adopt the majority and concurring opinions in the Appellate Division.

"Affirmed, no opinion," is the statement used by the Court of Appeals in cases where it affirms without writing its own opinion but does not adopt the opinion of the lower court. *E. g, Adrico Realty Corp.* v. *City of New York,* 250 N. Y. 29, 164 N. E. 732 (1928). A review of the New York reports shows that this practice is widely used; in the volume of those reports in which the present case appears,

for example, the following cases affirmed without opinion the result reached in the Appellate Division: *Dacchille* v. *New York World Telegram Corp.,* 15 N. Y. 2d 923, 206 N. E. 2d 868, 258 N. Y. S. 2d 845 (1965), *affirming,* 20 App. Div. 2d 892, 248 N. Y. S. 2d 1021 (2d Dep't 1964); *Thornton* v. *City of New York,* 15 N. Y. 2d 931, 207 N. E. 2d 196 (1965), *affirming,* 21 App. Div. 2d 813, 250 N. Y. S. 2d 902 (2d Dep't 1964). In those cases there were opinions rendered in the Appellate Division, which the Court of Appeals chose not to adopt. Another alternative in the present case would have been for the court to adopt the majority opinion in the Appellate Division. Instead, it expressly affirmed on both opinions and the only conclusion to be drawn is that the court intended to adopt as its own the reasoning in both of those opinions, taken together. See *People ex rel. Kniffin* v. *Knight,* 184 Misc. 545, 56 N. Y. S. 2d 108 (Sup. Ct. 1945).

These forms of summary disposition practiced by the Court of Appeals are commonly used elsewhere. In *American Fid. & Cas. Co.* v. *Indemnity Ins. Co. of North America,* 308 F. 2d 697, 700 (6th Cir. 1962), the court dealt with the significance for state law purposes of a decision of an inferior Ohio court:

> ". . . . The order, without an accompanying opinion or statement of reasons therefor, affirmed the judgment of the Common Pleas Court, but it did not approve the opinion of the trial court or adopt its reasoning. Victor Talking Mach. Co. v. Hoschke, 188 F. 326, 328, C. A. 2nd; Rogers v. Decker, 131 N. Y. 490, 493, 30 N. E. 571; People ex rel. Palmer v. Travis, 223 N. Y. 150, 156, 119 N. E. 437. It is well settled that a correct judgment must be affirmed by an appellate court although the trial court gave a wrong reason for its action. Agricul-

> tural Ins. Co. v. Constantine, 144 Ohio St. 275, 284, 58 N. E. 2d 658; Riley Co. v. Commissioner, 311 U. S. 55, 59, 61 S. Ct. 95, 85 L. Ed. 36. The order of the Court of Appeals affirming the judgment did not state that it did so 'on the opinion of the trial judge' or 'for the reasons given by the trial judge.' It does not disclose its reasons for the affirmance. Under the circumstances we do not believe that the case is a rule of decision by an Ohio court 'commonly accepted and acted upon by the bar and inferior courts' within the meaning of West v. A. T. & T. Co., supra, 311 U. S. 223, at p. 236, 61 S. Ct. at p. 183."

Further, in *Rittenberry* v. *Lewis,* 333 F. 2d 573, 574 (6th Cir. 1964), the Sixth Circuit observed:

> " 'It is not the policy or practice of this court, in reviewing cases on appeal where a district court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion and, in a sense, to deprive the trial court of the credit of its careful consideration of the issues and arguments, and complete determination of the cause * * *.' Patrol Valve Co. v. Robertshaw-Fulton Controls Co., 210 F. 2d 146, 147 (C. C. A. 6). The foregoing policy, practice, and rule of this court was reaffirmed, in the same language, in West v. United States, 274 F. 2d 885 (C. C. A. 6).
>
> "With the comprehensive opinion of the district court in this case, and in its conclusions on all issues, we find ourselves in full agreement.
>
> "In accordance with the foregoing, the order of the district court denying appellants' motion to dismiss or, in the alternative, to quash service of

process, is affirmed for the reasons set forth in the opinion of Judge Wilson."

The Appellate Division itself has indicated its belief that the Court of Appeals had earlier adopted the majority and concurring opinions in the present case. See *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 220, 260 N. Y. S. 2d 451 (1st Dep't 1965). See also Silver, *Privacy and the First Amendment,* 34 FORDHAM L. REV. 553, 557 (1966); Donnelly, *Torts and Family Law, 1965 Survey of N. Y. Law,* 17 SYRACUSE L. REV. 299, 305 n.39 (1965).

3. (a) *New York does not require intentional fabrication or reckless disregard of the truth or falsity of statements of fact.* The most striking thing about Sections 50 and 51 of the New York Civil Rights Law is they are strict-liability provisions, both on their face and as construed. The test under the statute is starkly simple: Use of a person's name or picture without consent for trade purposes is actionable. The judicial exception for newsworthiness, when invoked, is limited to totally accurate reporting. "Fictionalization" that removes the exemption is determined by examining the article in question. Only the end product is scrutinized; the opinions are searched in vain to find any discussion about the publisher's intent to fabricate. The only discussion relating to intent is this strange legal presumption indulged in by New York courts that if they find inaccuracy in the report they presume intent or desire to increase circulation and to promote trade.

The outstanding example of that presumption is *Thompson* v. *Close-Up, Inc.*, 277 App. Div. 848, 98 N. Y. S. 2d 300 (1st Dep't 1950), where the court held that ". . . plaintiff's photograph may be found to have been published (*although, perhaps, by mistake*) merely to increase the circulation of the magazine . . . ." (Emphasis added.) A more

recent example is *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 48 Misc. 2d 700, 265 N. Y. S. 2d 754 (Sup. Ct. 1965), which, to the astonishment of the legal world and presumably because of the earlier Court of Appeals decision in the present case, enabled the admitted assassin of Rasputin to go to the jury on his claim that the assassination had been erroneously reported. Previously motions by both sides for summary judgment had been denied and the denial affirmed by the Appellate Division, although two concurring justices expressed the remarkable view that the plaintiff was entitled to recover without even going to the jury (but not, however, by means of summary judgment):

> "We are of the opinion that this case presents no issue of fact and that the plaintiff is entitled to recover. It appears that in January, 1963, defendant telecast a dramatic production entitled 'If I Should Die.' The production depicted the killing of Rasputin. Plaintiff was depicted by an actor and mentioned by name. The production was undoubtedly based on an actual occurrence in which plaintiff admittedly participated. Furthermore, the incident depicted was an event of historical import. On the other hand, the production was fictionalized in that the dialogue, the settings, and the appearance, expression and gestures of the actors were all the result of the imagination of the writers and the producers of the presentation. This was a use of plaintiff's name for the purposes of trade, admittedly without his permission. Unless it comes within some exception to sections 50 and 51 of the Civil Rights Law, it is actionable. While the statute makes no exception for informative or news broadcasts, these are excepted and television enjoys the same immunity accorded to other media (*Gautier*

> v. *Pro-Football,* 304 N. Y. 354). The immunity granted in respect to informative matter does not extend to dramatized or fictionalized versions of the event reported (*Binns* v. *Vitagraph Co. of Amer.,* 210 N. Y. 51). . . ." 19 App. Div. 2d 865, 244 N. Y. S. 2d 1 (1st Dep't), *affirming,* 41 Misc. 2d 700, 265 N. Y. S. 2d 754 (Sup. Ct. 1963).

Following the Appellate Division affirmance, a trial was had on the merits. At its conclusion, the judge specifically rejected malice as an element of the plaintiff's proof:

> ". . . . Any requirement that such an aggrieved person must establish *malice* as a basis for a successful prosecution for a right of action, would be an open invitation for scandal mongers and keyhole peepers to spew their reckless stories with impunity . . . ." 48 Misc. 2d 700, 703, 265 N. Y. S. 2d 764 (Sup. Ct. 1965).

Similarly, there is nothing in the opinions here, including the dissenting opinions, to indicate that the result depended in any way on intentional fabrication or reckless disregard of the truth or falsity of factual statements. Indeed, the majority opinion in the Appellate Division appears to have found the contrary. The opinion notes that an article by the author of THE DESPERATE HOURS stating that the play was fictionalized was in appellant's files at the time of publication and, further, that appellant did not attempt to ascertain from the author if his play was an account of what actually happened to the Hills. "Defendant merely concluded that basically the play was a re-enactment and so stated." (R. 439.) The court's discussion at the most is consistent with a theory of negligence. The opinion adds that appellant's identification

and commercial exploitation of the Hills was not justified by the points of similarity it found (*ibid.*). The only reference in the majority opinion to intent (albeit indirect) relates to appellant's presumed desire to increase present and future magazine circulation (R. 438). In other words, appellant wanted to use the word "re-enacted," in the court's view, because such a word would add interest and thus increase circulation; it hit upon that word because of an unwarranted assumption bottomed on similarities between the play and the actual incident and because of its failure to make a reasonable investigation. *Cf. New York Times Co.* v. *Sullivan,* 376 U. S. 254, 287-88.

The concurring opinion in the Appellate Division rested on a similar presumption. It found that intent to increase circulation could be predicated on the conclusion that the Hill incident was the primary subject of the article rather than incidental to the review of the play:

> ". . . . It is quite obvious that the reference to the Hill incident was not incidental to the review of the play. It would seem that the converse is true and it is quite apparent that its portrayal in such a sensational and fictional manner was not for its newsworthy content but for the purpose of trade." (R. 442.)

Thus, the majority opinion found intent to increase circulation because appellant made use of a negligent misstatement regarding the word "reenacted"; the concurring opinion found that intent for the same reason and also because of emphasis upon the Hill experience. The Court of Appeals, in affirming on the two opinions, held in effect that both standards could be invoked. Apart from the validity of these judicial presumptions, they dealt only with commercial intent. If any of the opinions below had meant to

suggest or to presume that appellant intentionally fabricated or recklessly disregarded the truth or falsity of its factual statements, it would have been a very simple matter to have said so.

(b) *Negligent or non-negligent misstatements of fact are sufficient.* "Fictionalization," that is, factual inaccuracy, removes a report from the judicial exemption for dissemination of news under New York's strict-liability statute. Plainly, factual misstatements can result from a negligent or even non-negligent mistake. In *Lahiri* v. *Daily Mirror, Inc.,* 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937), Mr. Justice Shientag laid down certain rules for determining liability under Sections 50 and 51 of the Civil Rights Law which have had a marked influence on subsequent decisions. Those rules concerned only the article's content and not the publisher's intent.

In *Sutton* v. *Hearst Corp.,* 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950), both the majority and dissenting opinions spoke only of the truth or falsity of the article. The most recent and perhaps most significant decision is *Youssoupoff*. The pertinent portions of the charge in that case (reproduced in full in the appendix, *infra,* pp. 40-51) make crystal clear that the publisher's intent is irrelevant. The court defined the lone issue:

> ". . . . Were those portions of the play of which the plaintiff complains a fictionalized version of the events surrounding the death of Rasputin, or was it a substantially accurate re-enactment of such events as claimed by the defendant? Did the televised play, as claimed by the plaintiff, falsely depict plaintiff's motive in participating in the acts culminating in Rasputin's death? Did the play, as claimed by the plaintiff, falsely depict the plaintiff as offering his wife's body and soul to Rasputin as the bait to

> lure Rasputin to plaintiff's palace on the night of the assassination? Or was the televised play, as contended by the defendant, a substantially accurate relation of these events? There are the questions which you must answer and decide in this case." (App. 47).

Only as to punitive damages did the court speak of knowing falsehood (App. 50). The court authorized the jury first, to award general damages if it found substantial inaccuracies and, second, to award punitive damages in addition if it found that the inaccuracies were knowingly made.

(c) *The instructions in the present case permitted a finding of liability for negligent or non-negligent misstatements.* In denying appellant's motion to dismiss, the trial court held it was a question of fact whether the LIFE article was true or whether an inference could be drawn from reading it that it was not true (R. 292). In putting that question to the jury the court summarized the parties' opposing claims (R. 294-97). Its summary included appellant's claim that the LIFE writer stated facts he believed to be true. It did not include any claim by appellee that the facts were intentionally fabricated, but rather that the article took advantage of plaintiff's name and private life for advertising or commercial purposes (R. 295). After describing the impact of Section 51 of the Civil Rights Law and noting that consent to use the Hill name had not been obtained, the court stated:

> "It is for you to determine as to the defendant Time, Incorporated whether the plaintiffs' names were used in the articles for purposes of trade or advertising.
>
> ". . . .

"It is for you to determine whether, in publishing the article, the defendant Time, Incorporated altered or changed the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, 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.

"If you feel that the defendant Time, Incorporated did publish the article, not to disseminate news, but was using plaintiffs' names, in connection with a fictionalized episode as to plaintiffs' relationship to The Desperate Hours, your verdict must be in favor of the plaintiffs.

"Of course, an incidental mistake in the statement of a fact or facts does not render the defendant liable. The privacy law is not violated merely because of some incidental mistake of fact, or some incidental incorrect statement.

"Before the plaintiffs can be entitled to a verdict against the defendant Time, Incorporated, you must find that the statements concerning the plaintiffs in the article constituted fiction, as compared with news, or matters which were newsworthy, and that they were published for purposes of trade; that is to increase circulation or enhance the standing of the magazine with its readers, or you must find that the defendant Time, Incorporated in the preparation and publication of the article did so to advertise The Desperate Hours for the purpose of increasing the play's patronage.

"Unless you find that the defendant Time, Incorporated published a fictionalized article for its own purposes or that it published the article in question as an advertising medium to increase patronage for the play, your verdict must be in favor of the defendant Time, Incorporated.

"If, on the other hand, you are satisfied from the evidence that the defendant Time, Incorporated was not, so far as the plaintiffs are concerned, reporting fairly past or current events, but was publishing a fictionalized account mentioning the names of the plaintiffs for the purposes of trade; that is for the publisher's profits through increased circulation, induced by exploitation of the plaintiffs, or that the defendant Time, Incorporated published the article for the purpose of advertising the play, your verdict should be in favor of the plaintiffs against the defendant Time, Incorporated." (R. 300-01.)

The jury requested additional instructions on the definition of trade, to which the court responded as follows:

"Section 51 of the New York Civil Rights Law, sometimes referred to as the Privacy Law, provides that any person whose name, portrait or picture is used within this state for advertising purposes or for the purpose of trade, without written consent first obtained, may sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name in such manner as is forbidden, the jury in its discretion may award exemplary damages.

"I went on to tell you that it is for you to determine as to the defendant Time, Inc., whether plain-

> tiffs' names were used in the article for purposes of trade or advertising and, generally, as I applied it in my charge—and if I am wrong I will permit you lawyers to correct me or call my attention to anything else I may have said—this means with regard to Time, it was done in this particular fashion, either for the purposes of enhancing the circulation of the magazine or for the purposes of making it more interesting to its readers and thus enhance its circulation, or for the purpose of creating patronage for the play, the additional purchase of tickets." (R. 304.)

Thereafter, counsel for appellee made the following comment on the question of trade:

> "Mr. Garment: Your Honor, if they are telling news, if they are telling news, purporting to tell news, but have as the basis for the use of the individual's name something that is spurious or essentially false that, we contend—and I think the law is clear—it is for trade purposes." (R. 306-07.)

The court replied:

> "I think it is covered. I am going to reread this portion I just read for you. It is for you to determine whether in publishing the article the defendant Time, Incorporated altered or changed the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially 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. 307.)

Only on the question of punitive damages did the court finally turn to knowing misstatements, and even then only in the alternative. The court explicitly directed that punitive damages could be awarded solely on a theory of negligence:

> "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." (R. 566.)*

It is thus apparent that the instructions set up a standard of strict liability which simply excludes the element of intent (or scienter). Indeed, except on the question of punitive damages, a finding of even non-negligent misstatements was possible. The jury was directed to look at the article, as published, and determine whether the facts contained in the article were substantially fictionalized (R. 300). Furthermore, while the court referred in passing to appellant's claim of good faith (R. 295), it made no further mention of that subject when it came to instructing on the law (and counsel for appellant was cut off when he attempted to develop the subject in his summation, R. 530).

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*At the oral argument last Term counsel for appellee indicated that the trial court added a standard of recklessness. In fact, the court said: "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.) Remembering that this additional instruction only applied to the question of punitive damages, it is still substantially different from a requirement that the jury find either intentional falsification or reckless disregard of the truth or falsity of factual statements in the article. See *Garrison* v. *Louisiana*, 379 U. S. 64, 70-75.

In so doing, the court disregarded testimony of the LIFE writer that his article was "completely truthful" (R. 250), and by the researcher that the article was "correct and accurate" (R. 266). It ignored testimony that the writer had been informed the play "had a substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia" (R. 174). It ignored earlier reviews in Philadelphia papers which observed that THE DESPERATE HOURS was "based on an actual incident" (R. 429) and that Philadelphians would "recognize a slice of real life out of the fairly recent past" (R. 326). Finally, it ignored the significance of arrangements made by the author of THE DESPERATE HOURS enabling appellant to photograph scenes from the play at the Hills' former home (R. 108-15, 180-82).

No testimony relating to appellant's good faith was impeached or even rebutted, presumably because trial counsel for appellee correctly determined that under existing New York law the article spoke for itself and the question of good faith was immaterial. See *Washington Post Co.* v. *Keogh,* No. 19,668, p. 7 (D. C. Cir. July 28, 1966).

4. *First Amendment ramifications.* We submit that the answers to the Court's questions, singly and together, demonstrate that the New York statute and its application to the present facts cannot be reconciled with the demands of the First Amendment.

First. It is clear that for many years the press in New York has had to operate under a strict-liability statute that does not look to intent. News accounts entirely true, as well as those basically true, are held actionable when a person's name or picture connected with a news item is used without consent in what a judge considers a graphic or flamboyant manner. The statute's breadth in practice, then, virtually

equals its breadth on its face. In light of its inhibitory effect on free discussion, it should be declared void.

Second. The adoption by the Court of Appeals of the concurring opinion in the Appellate Division indicates that New York law has not deviated from criteria of strict liability. The portion of Justice Rabin's opinion quoted in the Court's second question shows that intent remains irrelevant, except as it bears on a desire to increase circulation. How the publisher's purpose is magically converted from disseminating news to solely increasing circulation (here by the use of an off-stage setting and frequent reference to the Hill family who were concededly a legitimate subject in the review) is never explained. The conversion is determined by means of a presumption that has pervaded the privacy law in New York. This presumption that begins with an article annoying or offensive to judicial taste and ends with an automatic determination that the manner of presentation was designed to increase circulation is at the heart of the New York law. Because of its operation, proof of intentional falsehood or reckless disregard of the truth is unnecessary.

Indeed, it is apparent that the concurring opinion would have imposed liability even if there had been no finding of fictionalization because the use of the Hill name was primary rather than incidental, hence a "sensational" portrayal published "not for its newsworthy content but for the purpose of trade." (R. 442.) In any event, motive to increase circulation is not only an unrealistic criterion—as pointed out by Presiding Justice Botein in dissent (R. 444)—it is constitutionally impermissible. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266.

Third. The fact that negligent or even non-negligent misstatements of fact are sufficient to incur liability under

the New York statute again demonstrates that intent to falisfy, as distinguished from intent to increase circulation and to engage in trade, is not an element of the tort. It is true, of course, that the label "fictionalization" might connote some intentional tampering with the facts. But the cases have not used the term in that fashion nor was it so applied here. It is a conclusion of law drawn with the aid of hindsight from a comparison of the article and the event described. It means if a publisher fails to get his facts straight (aside from very minor inaccuracies), either negligently or otherwise, he will be held liable when the article includes a person's name or picture without consent. The various opinions of the Court of Appeals and the Appellate Division discussed above, the recent *Youssoupoff* decision, and the present case make this abundantly clear.

The instructions below, while consistent with prior New York law, inevitably led the jury to curtail First Amendment freedoms by means of an award that included punitive damages. The entire thrust of the charge relates to the LIFE article. Though it speaks of altering or changing the true facts concerning the Hills' relationship to THE DESPERATE HOURS, the alteration is only in terms of the article "as published" (R. 300). "Fictionalization" is equated with "trade purposes"; there is not the slightest reference to what the LIFE writer believed or had reason to believe nor to knowing or reckless misstatements of fact. This omission is particularly revealing, in the context of the entire charge, because toward the end the trial judge demonstrated that he was able to speak in terms of knowing falsification. There, and only as regards the question of punitive damages, the court referred to a false connection "done knowingly or through failure to make a reasonable investigation" (R. 566).

Under such a charge it is no wonder the jury returned an award of punitive damages—an astonishingly high award at that. See, for example, the discussion of libel awards, petition for certiorari, *Curtis Publishing Co.* v. *Butts,* No. 814, 1965 Term, p. 20. The jury was further inflamed when the trial court added that they could find for the plaintiffs if appellant had used the Hills' name "for the purposes of making [the article] more interesting to its readers" (R. 304).

Although the Appellate Division found the verdict "grossly excessive" (R. 440), and showing the film version of THE DESPERATE HOURS "substantial prejudicial error" (R. 439) (as was the introduction of other inflammatory material in behalf of the plaintiffs, R. 439-40), it did not disturb the jury verdict as to liability. This remarkable result is perhaps indicative of the judicial annoyance at the LIFE article and the willingness of the majority and concurring opinions in the Appellate Division to adopt presumptions and "inescapable" conclusions (R. 438) in order to sustain the jury finding of liability. Counsel for appellee stated at the oral argument last Term that he liked the style of LIFE magazine. It is all too plain that his blessing, or that of individual judges according to their idiosyncrasies and tastes, is not enough. The presumptions and conclusions of law indulged in below reveal a substantial degree of judicial censorship in the name of the New York statute; only a clear holding under the First Amendment can undo the mischief of a half-century.*

*Nor will a remand for a new trial suffice. This ample record more than testifies to appellant's good faith. In the face of substantial evidence to justify the assumption that the play was basically a reenactment of the Hill incident, appellee can only point to an isolated article in appellant's files (where the author of the play stated his work was fiction based on news stories) and to appellee's failure to obtain the Hills' consent after they had moved away from their home near Philadelphia and after they had been prominently mentioned in

Fourth. We turn last to the broader First Amendment ramifications of the answers to the questions posed by the Court and by the decision below. As we said in our briefs last Term, the New York courts have been slow to recognize the force of the Constitution in this tort field, although they frequently took note, even in civil cases, of the statute's penal character. See, *e.g., Flores* v. *Mosler Safe Co.,* 7 N. Y. 2d 276, 280, 164 N. E. 2d 583, 196 N. Y. S. 2d 975 (1959); *Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, 356, 107 N. E. 2d 485 (1952). They have been equally shortsighted in assuming that the LIFE article in the present case is entitled to something less than full protection under the First Amendment. The majority opinion in the Appellate Division concluded there should be no protection because the article could not "be characterized as a mere dissemination of news, or even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest." (R. 438-39.) The judicial infallibility suggested by that approach can only be corrected by an express determination under the Constitution.

It is illuminating that both the majority and concurring opinions in the Appellate Division based their conclusions upon the article's mode of presentation. Pejorative inferences were drawn from the photographs of the Hills' former home and from the primary, rather than incidental, reference to the Hill family (R. 437-39, 441-42). Yet, is it so startling under the First Amendment that appellant sought to emphasize that a serious play, concerning crime and its

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the press at the time of the actual incident. Under no reasonable view of the facts can this amount to a reckless disregard of the truth. See *New York Times Co.* v. *Sullivan, supra* at 284-88; *Washington Post Co.* v. *Keogh, supra* at pp. 11-13. Moreover, the Appellate Division, which, unlike the Court of Appeals, is empowered to make findings of fact under N. Y. CPLR § 5501 (b),(c), implied that at most appellant was negligent in failing to pin down with certainty whether the play was a reenactment of the actual incident (R. 438).

impact upon an average American family held hostage, was largely rooted in a real-life event? Is there not a substantial public interest for a society unfortunately plagued by a high degree of crime and violence to learn that an actual family could keep its wits, persevere, and survive such an experience?

Because of this effort, nonetheless, the LIFE article is characterized in the concurring opinion in the Appellate Division as "sensational" and "sensationalized" (R. 441-42). In fact, the article was faithful word for word to the play (as were the off-stage photographs at the Hills' former home because the stage setting depicted a cross section of a two-story home and was also photographed, R. 15). The label "sensational," therefore, derives solely from appellant's treatment of the real-life connection, although that connection was expressly found to have existed (R. 441). Appellant's only error was describing the play as a reenactment of the Hill incident rather than somewhat fictionalized, strikingly similar, or reminiscent—an error that apparently resulted from inadequate investigation of the facts (R. 439).

As a consequence of that single error, appellant was subjected to an award of punitive damages (never renounced by the courts below), is presently indictable, and could have been enjoined. Although criminal prosecutions have been rare under the New York statute, injunctions, as demonstrated by *Blumenthal,* have not. The threat of prior restraint cannot be taken lightly by a magazine with a circulation of several million copies whose salable period is one week. Finally, these various sanctions, both threatened and applied, are available under a statute that does not require the element of scienter. See *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 492-93; *Smith* v. *California,* 361 U. S. 147, 152-55.

Surely the utterance involved in this case is entitled to First Amendment protection:

> ". . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties unless excludable because they encroach upon the limited area of more important interests. . . ." *Roth* v. *United States,* 354 U. S. 476, 484.

We submit that the publication here had considerably more than slight redeeming social importance, that it described a public event involving public issues, and that it was an attempt to engage in free public discussion. The national interest in such discussion must be considered in the present context, that is, devoid of defamation or obscenity and discounted only by the effect upon the appellee (whose name had already been prominently mentioned in the press some two years earlier in connection with the same public event).

New York Times Co. v. *Sullivan, supra,* is a vigorous reaffirmation of the American belief that people are able to govern themselves:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U. S. 476, 484.
>
> ". . . .
>
> "Thus we consider this case against the background of a profound national commitment to the

> principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . ." 376 U. S. at 269-70.

For men to govern themselves, they have to be informed. This, the Court has made clear, is the reason for the First Amendment. If all commentary on public issues must be entirely accurate, free discussion will be stifled, because, as the Court recognized, "erroneous statement is inevitable in free debate." *Id.* at 271.

The publication in the *Times* case concerned the public issue of civil rights:

> ". . . . It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. . . ." *Id.* at 266, 271.

The New York Times readers, located primarily in the East, had to be informed about the treatment of Negroes in the South in order to take a position on the many proposals for civil rights legislation at that time. They had to be informed to review the positions that their representatives had taken in Congress; they had to be informed to prod their representatives to act. The Court rejected the argument that a stricter standard should be imposed where the discussion of a public issue defamed a public official: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." *Id.* at 272. See Note. *The Scope of First Amendment Pro-*

tection for Good-Faith Defamatory Error, 75 YALE L. J. 642 (1966).

Since *New York Times* the Court has reaffirmed the importance of discussion of public issues in *Garrison* v. *Louisiana,* 379 U. S. 64, and *Rosenblatt* v. *Baer,* 383 U. S. 75. The public issue in those cases was the way local officials had performed their duties. Discussion of these matters had to be protected so people could decide whether to bring pressure to oust their officials. This was a different form of public participation in the process of government than the situation in *New York Times,* since the record there showed that only thirty-five issues of the Times reached the voters in Montgomery County, Alabama, who could oust Commissioner Sullivan. 376 U. S. at 260 n.3. In these two later cases, the performance of a "public official" was the "public issue."

THE DESPERATE HOURS, like the advertisement in *New York Times,* dealt with one of our major public issues. Attention in the United States given to civil rights has been rivaled by attention given to crime. For many years, a major debate has centered on capital punishment. The long developing concern about the increase in crime led to its inclusion as an issue in the last presidential campaign. Many proposals have been advanced to prevent crime—proposals that go to root causes such as slums, broken homes, or the impersonal urban environment. Nor has public debate about crime been limited to criminal conduct. Searching questions have been asked about the neighbors who, from their windows, watched the murder of a young girl yet did nothing to save her, and about the recent Chicago victims who walked passively to their slaughter. Such inquiries echo thoughts about the sadism of Nazis and the submissiveness of most of their Jewish victims. See generally ARENDT, EICHMANN IN JERUSALEM 7-10, 102-13, 154-58 (1963). In our society, these issues must be put to the

public and eventually resolved by the public. But their resolution demands more than a front-page newspaper inventory of anti-social acts and nameless victims. It requires a sustained examination of how criminals think and behave, their fears and motivations, and how ordinary Americans react to their behavior. Such an examination must come primarily from the arts—the novel and the theatre. THE DESPERATE HOURS is such an examination; it makes a contribution to public understanding of the problem of crime.

Artistic comment on current social probems of intense public concern has a long and distinguished history in our country. Harriet Beecher Stowe's treatment of slavery in UNCLE TOM'S CABIN was a major force hardening opposition. See, *e.g.*, FILLER, THE CRUSADE AGAINST SLAVERY 1830-1860, at 208-11 (1960). The film study of alcoholism in DAYS OF WINE AND ROSES presented the problem with an impact that could never come from newsprint. The theatre has proved an especially effective medium for communicatings ideas: Brecht, Odets, Lorca, Shaw, Synge, and O'Casey, to name a few, followed the highest tradition of theatre that can stimulate thought as well as entertain. Such recent controversial works as THE DEPUTY and the dramas of LeRoi Jones must be included. So must THE DESPERATE HOURS.

Hayes, in an article in the New York Times a few weeks before the play's opening, described the study of criminals, and victims held captive, that was the theme of his novel and play:

> "At the moment I am writing this, the newspapers are headlining a story about five guards held hostage in the Massachusetts State Prison. The news accounts concentrate on the action. But what of the more personal stories involved? What are the thoughts and emotions of the guards' waiting relatives? And what of the inner struggles of the con-

victs themselves? No matter how evil or violent in action, aren't these men human beings with their own needs, loves, hungers, fears?

"It was out of conjecture such as these that, in the spring of 1953, I sat down to write a novel which, when completed, I called 'The Desperate Hours'.

". . . .

". . . . Curiously enough, I discovered as I wrote that the principal theme came into focus: the life-and-death struggle between a typical, law-abiding man, with no knowledge of his own inner resources or of the precious quality of his way of life, and the twisted, jungle-like mind of a young criminal, himself a human being and a victim. It became more and more interesting to explore a mind that has almost totally escaped the civilizing influence of our society. (And why are there so many like him today?)

". . . .

"The human emotions, only hinted at in the description of exterior events in a newspaper, and the complexities they suggest and the personal and social questions they pose, remain, a year and a half later, vital and interesting to me. Fortunately, I have been able to communicate my own deep and aching concern—not only for the characters but for the human plight in general—to hundreds of thousands of novel readers, both here and abroad.

"It is to the external credit of mankind that—at least up to now—some inherent personal force within civilized man has thwarted slavery, even if by a clearly defined violence that separates (roughly,

> at least) the civilized from the aggressive man—and even if by a hairbreadth. If this be melodrama, so be it. It is also history." (R. 382-85.)

Reviewers of Hayes' novel immediately appreciated its contribution to public discussion. Orville Prescott in the New York Times said:

> ". . . . But this is not just a tale of violence and terror. It is an expert study of the agonizing dilemma of a group of sharply delineated and deeply understood characters. The people involved in Mr. Hayes' frightful predicament matter. They aren't just good guys and bad guys. They have tired bodies and shocked minds and genuine emotions. And they are capable of suffering because of their love for others." (R. 330-31.)

The review in the Sunday edition of the New York Times concluded:

> ". . . . The author draws each member of his hard-pressed cast with a sharp, true pen. When you have turned the last page, you'll find the Hilliards are as convincing (and as cohesive) as the family next door. So, for that matter, are the convicts themselves. These are completely evil men, doomed and damned almost from birth. Yet they are completely human too, from first to last. This perhaps, is the book's most ominous social comment." (R. 328.)

Truman Capote's recent study of criminals and victims, IN COLD BLOOD, is similar in technique and contributes to public understanding in much the same way as THE DESPERATE HOURS.

When the stage adaptation of Hayes' novel opened, LIFE recognized it as more than just another Broadway opening in the same way reviewers have understood IN COLD BLOOD

to be more than just another novel. Both were serious contributions to public discussion of crime and its profound effects. Believing that the play was based on the Hill incident, the LIFE writer sought by tying the two together to get across the contrast between the convicts and the Hilliards that the play developed and to emphasize that the play's theme was hardly imaginary. (Two reviewers for the Philadelphia Inquirer had earlier made the same link, presumably for the same reason, R. 326, 429.) Indeed, the LIFE writer told Hayes he felt obliged to point out the connection (R. 245-46). As a result, the play's theme and the public issues on which it focused became more meaningful to readers of LIFE who learned that the play was inspired by an actual event.

Whether the Court will ultimately extend the malice rule adopted in *New York Times* to protect all defamation where public discussion is at stake, surely it has already determined by such cases as *Roth, Winters* v. *New York,* 333 U. S. 507, and, more recently, *Ginzburg* v. *United States,* 383 U. S. 463, that Dr. Meiklejohn was essentially correct:

> ". . . There are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values; the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom. . . ." Meiklejohn, *The First Amendment As An Absolute,* in 1961 SUPREME COURT REVIEW 245, 256 (Kurland ed.).

Dr. Meiklejohn concluded that literature and the arts have a social importance and what he called a "governing importance":

". . . . Here, as elsewhere, the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government. It is 'reserved to the people,' each deciding for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention. . . .

". . . . In my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression. Moreover, as against Professor Kalven's interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned." Id. at 262-63.

The initial disagreement between Messrs. Meiklejohn and Kalven has disappeared with the *Times* decision:

> ". . . . But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming. If the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* in 1964 SUPREME COURT REVIEW 191, 221 (Kurland ed.).

Professor Kalven is drawn by the logic of the *New York Times* rationale to his stated conclusion, even in cases of defamation. Where defamation or obscenity is not present, we submit, a fortiori, that public discussion of the form involved here is guaranteed prima facie protection under the First Amendment. See DOUGLAS, THE RIGHT OF THE PEOPLE 25-35 (1958); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 12-14 (1965).*

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*The *Quebec Letter* (quoted in *Roth* at 484) indicates that the Framers did not itend to limit the scope of press freedom to criticism of official conduct. We suspect that the Framers who met June 8, 1789 to pass on the First Amendment would have been surprised that the following account, published at the time of their deliberations, might some day subject a publisher to liability because of inaccuracy notwithstanding the good intentions contained in the disclaimer in the last sentence:

> "We hear that last Saturday night, at Skull Creek, south side of Great Ogechee River, Mrs. Mills, and her two infant children, were murdered by the Indians. Between 10 and 11 o'clock at night, Mrs. Mills, hearing a noise among the poultry, went into the yard, where she was immediately shot down; a young woman by the name of Mezzle hid herself under a bed, by which means she saved her life; her sister and Mr. Mills escaped out of a window; the Indians (in number 9 or 10) on entering the house, seized the two infants, one of whom

The Court's third question suggests that the malice rule of *New York Times* should be applicable to this case and to the privacy field in general. Presumably this is because where malice is present, that is, where the utterance is calculated falsehood, such as a false endorsement in an advertisement, or constitutes reckless disregard of the truth, its social importance is greatly reduced; 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. At the same time, the interests in expression are not so strong where the publication is unrelated to public issues. The interests in gossip and prurience, for example, would seem not to be particularly strong. Such cases as raking up long-forgotten misconduct, electronic spying on a couple's private sex life, or photographic harassment of a non-public person in his day-to-day life, might well receive less protection. *Cf. Garrison* v. *Louisiana, supra* at 72 n.8. See generally Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part I—The Current Impact of Surveillance on Privacy,* 66 COLUM. L. REV. 1003 (1966). In other words, such items might properly be described as something other than newsworthy, although newsworthiness criteria are perhaps better defined in terms of the type of interest to be furthered and the type of discussion at stake. See Comment 30 U. CHI. L. REV. 722, 733-34 (1963).

Here we find a publication that satisfies both standards. It was discussion of public issues and it was not based on intentional fabrication or reckless disregard of the truth or falsehood of its factual statements. Accordingly, this

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they trod to death with their feet, the other they shot with arrows. On going away they left five bows and a number of arrows behind them. We give the above as reports and sincerely wish they may only prove to be such." New York Journal and Weekly Register, p. 3, col. 1, June 11, 1789.

punitive New York statute should be struck down as repugnant to the First Amendment, or, at the very least, its application to appellant should be corrected.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the briefs for the appellant in No. 562 last Term, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

CRAVATH, SWAINE & MOORE

Of Counsel.

August 25, 1966.

APPENDIX

APPENDIX

Supreme Court

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 23

FELIX YOUSSOUPOFF,
Plaintiff,

—against—

COLUMBIA BROADCASTING SYSTEM, INC.,
Defendant.

Index No.
6416-63

November 8, 1965.

Before:

HONORABLE WILFRED A. WALTEMADE,
Justice, and a Jury.

Appearances:

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Alfred H. Ehrlich, CSR,
Official Court Reporter.

Appendix

The Court's Charge

Waltemade, J.: Madam Foreman, ladies and gentlemen, you have heard the evidence and the arguments of counsel, and it is now the duty of the Court to instruct you on the law which applies to this case.

The Court and the jury have separate functions. The jury is the sole judge of and decides the disputed facts, and the Court provides instructions on the law. It is your sworn duty to accept the instructions of the Court and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

At the inception I charge you that your verdict must be based solely upon the evidence as you have heard it from the mouths of all the witnesses who have testified, from the various exhibits which were admitted in evidence, and such inferences as may be fairly and reasonably drawn from the oral testimony and exhibits. The objections, summations, and arguments of counsel are not evidence and must not be considered by you as such. These are merely arguments propounded by the respective lawyers to assist you in arriving at a conclusion, telling you what they believe to be the conclusions which you should draw from the evidence.

What I will say to you with regard to the facts is not evidence. Your recollection of the testimony prevails.

I caution you that a question is not evidence. The answers to questions are evidence.

I further caution you that any paper, book, or document which was not admitted into evidence is not to be considered by you, and you are not to conjecture or guess what that paper or document or book might have contained.

Appendix

I must remind you that it is your duty to determine from the evidence where lies the truth in this case; that is, which version of the evidence convinces you that it is credible or believable evidence. You may not surmise, you may not conjecture, you may not speculate, and you must predicate your verdict upon the evidence.

I also charge you that you are not to allow sympathy or prejudice to enter into your considerations. This case is of great importance to the plaintiff and to the defendant.

During the trial of this case certain questions were asked of the witnesses to which objections were made, and I overruled or sustained these objections. The rulings were made purely and solely upon questions of law. My rulings do not indicate any opinion of the facts by the Court. You must disregard the testimony also which was stricken from the record.

I referred to credible or believable evidence and I said you are the sole judges of what testimony you will believe. In determining the truthfulness of witnesses, use your own ordinary intelligence as practical persons who are accustomed to meeting and dealing with people in your everyday business and social life. You have observed these various witnesses upon the stand and you have heard them testify. Bring your everyday experiences into use in weighing the testimony of the witnesses and determine whether you believe them or not and to what extent you do believe them.

Differences in the testimony of witnesses describing the same event do not necessarily mean that any one of them is willfully telling an untruth. In evaluating all of the testimony you should understand that some people are keener than others, they observe more quickly and

easily and express themselves more readily and accurately. Compare the various witnesses and their testimony on direct and cross-examination and determine for yourselves what are the true facts.

If a witness has given testimony at this trial which you find is inconsistent with testimony the witness may have given at an examination before trial or in interrogatories, or the testimony given here is inconsistent with statements on the same matter made by the witness on any previous occasion, you may consider that fact as bearing upon the truthfulness of the witness and the value and worth of that witness' testimony given at this trial. You must take into consideration the character of the witness, the witness' experience in life, his or her intelligence and capacity for self-expression, and the witness' powers of observation and recollection.

You must examine into the interest of the witnesses. Determine whether any interest which a witness may have has caused that witness to exaggerate, to distort, or to testify untruthfully. An interested witness is one who has something to gain or lose by your verdict.

I further charge you that the plaintiff, Prince Youssoupoff, and his wife, Princess Irina Youssoupoff, and the defendant's witnesses, Mrs. Peggy Kent and Mrs. Ginny Blair, the authors of the play "If I Should Die," are all interested witnesses.

It must be noted here that the plaintiff, Prince Felix Youssoupoff, is not a citizen of the United States of America, nor is he a resident of the State of New York. This fact is not to enter into your deliberations on the question of whether he should receive a verdict in his favor or whether the verdict should be in favor of the defendant. Under our laws, a foreign national or a non-resident of

this state who sues in our courts to recover damages for a claim he has against another is entitled to the same consideration you would give to a citizen of this country or a resident of this state. As I told you in my preliminary instructions which I gave you at the opening of this trial, equal justice under the law is the goal of this Court.

The testimony of an interested witness is to be weighed more carefully and scrutinized more closely than the testimony of a disinterested witness. However, if you believe a witness, whether interested or disinterested, you must give full weight to the testimony of such witness.

If you believe that any witness in this case has deliberately testified falsely as to any material fact, you may, if you choose, disregard the whole or any part of his or her testimony. You may believe part, you may disbelieve part.

You are not concerned with the question of whether the plaintiff killed Rasputin. Prince Youssoupoff admits that. You are to decide whether the defendant's half-hour telecast entitled "If I Should Die" did invade the privacy of the plaintiff, as he contends, by the authors' use of certain fictionalized dialogue and actors' movements in recreating the last hours of Rasputin and thereby ascribed certain untrue actions to the plaintiff.

In your appraisal of the plaintiff as a witness in his own behalf you are to employ the same bases for determining his credibility as you will use in deciding the believability of every other interested witness, and in addition, you may include as criteria of his credibility the plaintiff's admission that he did participate in the killing of Rasputin.

I have previously stated to you that the plaintiff has the burden of proving his case by a fair preponderance of the evidence. The term "fair preponderance of the evi-

dence" means such credible or believable evidence, when weighed with that opposed to it, as has more convincing force, and that the greater probability of truth lies therein. It is the evidence that is more probable, more persuasive, and of greater probative value.

It is the quality of the evidence that must be weighed, not the quantity. You must therefore weigh the credible or believable evidence given to you by both sides.

If, after weighing the evidence, you find that it favors the plaintiff, then he has sustained his burden of proof. If you find that the evidence is equal between the plaintiff and the defendant or if you find that the evidence favors the defendant, then the plaintiff has not sustained the burden of proof, and your verdict must be for the defendant.

The plaintiff, Felix Youssoupoff, brings this action against the defendant, Columbia Broadcasting System, Incorporated, to recover money damages he sustained resulting from a violation of his right of privacy under Section 51 of the Civil Rights Law of the State of New York. It is the plaintiff's claim that his right of privacy was violated by the defendant on January 5, 1963, when the defendant televised over the facilities of its New York City station, WCBS-TV, a play entitled "If I Should Die."

The plaintiff has withdrawn his claim for damages arising out of the Chicago telecast over WBBM-TV on January 2, 1963.

This play allegedly depicted the events surrounding the assassination of Rasputin on December 16, 1916, in plaintiff's palace in Russia. The part of the plaintiff, as well as that of the other male and female characters, were portrayed by different actors. The plaintiff contends that the play did not accurately recreate the true events surrounding

the slaying of Rasputin and that it was in a large part a fictionalization with contrived dialogue composed by the authors of the play to make it more palatable and acceptable to the viewing public. The plaintiff claims that many of the events depicted in the play never took place and the dialogue ascribed to plaintiff, Rasputin and others, never occurred.

It is the further contention of the plaintiff that the untrue dialogue, combined with the expressions and gestures of the actors and actresses in the delivery of their lines, falsely portrayed the plaintiff as offering the body and soul of his wife, Princess Irina, as the bait to lure Rasputin to the palace on the night of the assassination. Plaintiff further contends that his patriotic motive for killing Rasputin was distorted in the opening narration by limiting the Prince's motive for the slaying of Rasputin to because of his debaucheries in a sensual sense only.

The defendant denies that it is in any way liable to the plaintiff. The defendant contends that the play was a substantially accurate retelling of the historical events of the conspiracy to kill and the assassination of Rasputin.

Section 51 of the Civil Rights Law of the State of New York is known as the right of privacy law. In so far as it applies to this action, it provides that any person whose name, portrait or picture is used within the state for the purpose of trade without first obtaining his written consent may sue and recover compensatory damages for any injury sustained by such use, and if the defendant shall have knowingly used such person's name, portrait or picture, in a manner forbidden by this law, then the jury may, in its discretion, also award punitive damages.

There is no dispute in this case that the play "If I Should Die" was televised in this state and that the defendant did

not obtain plaintiff's written consent to such broadcast of the play.

You will recall that during the course of the trial counsel for the defendant conceded that the play was televised during the regular course of defendant's business and/or trade. However, this concession was made without any admission by the defendant that it was thereby liable to the plaintiff.

Under the law, there are certain instances in which a defendant may use a person's name, portrait or picture for purposes of trade without first obtaining such person's written consent and still not be liable to that person. One of such examples is where the use of the person's name, portrait or picture is made in connection with a substantially accurate retelling or showing of an historical event.

That is the issue which you must decide in this case. Were those portions of the play of which the plaintiff complains a fictionalized version of the events surrounding the death of Rasputin, or was it a substantially accurate re-enactment of such events as claimed by the defendant? Did the televised play, as claimed by the plaintiff, falsely depict plaintiff's motive in participating in the acts culminating in Rasputin's death? Did the play, as claimed by the plaintiff, falsely depict the plaintiff as offering his wife's body and soul to Rasputin as the bait to lure Rasputin to plaintiff's palace on the night of the assassination? Or was the televised play, as contended by the defendant, a substantially accurate relation of these events? These are the questions which you must answer and decide in this case.

In your consideration of these questions you must consider all of the testimony in this case and the exhibits, which include the passages from plaintiff's two books, the photographs in the same books, the transcript of the dia-

logue, as well as the film of the telecast "If I Should Die" which you viewed during this trial. You must consider both the direct and the cross-examination testimony of each of the witnesses. In determining the meaning of the words spoken by the actors and actresses in the broadcast you should also consider their gestures and appearances as they spoke their lines and the continuity and sequence of the scenes.

I charge you that the burden of proof is upon the plaintiff to prove by a fair preponderance of the credible or believable evidence that portions of the television program were fictionalized and not based upon fact, and the plaintiff has the burden of proving in what respects the play varied from what in fact occurred. Of course, an innocuous departure from the fact does not render the defendant liable.

I charge you that the mere use of the drama form involving actors, stage settings and dialogue to recreate an historical event does not in and of itself represent a violation of plaintiff's right of privacy.

Before the plaintiff is entitled to a verdict against the defendant you must find that the television program "If I Should Die" 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. Unless you find that the play was a substantial fictionalization, then your verdict must be for the defendant. If you find that the play was a substantially accurate retelling of the events, then your verdict must be for the defendant.

I shall now discuss with you the question of damages, that is, how much money you may award to the plaintiff.

There is only one plaintiff. I must underscore that. The Prince alone is suing here, not the princess.

The fact that I now speak of damages is not to be taken by you as any indication of how the Court feels about this case. The Court has no opinion of the facts in the case, and it is for you alone, as the exclusive judges of the facts, to determine whether or not the plaintiff is entitled to any damages. If you do first determine that the plaintiff is entitled to a verdict against the defendant, then and only then are you to give consideration to an award of the types of damages as provided for in Section 51 of the Civil Rights Law.

The first type is what is known as compensatory damages. Compensatory damages may be awarded to the plaintiff to reasonably and adequately compensate him for any embarrassment, humiliation or mental distress he may have sustained as a result of the television broadcast on January 5, 1963, over the facilities of Station WCBS-TV, New York.

I charge you that the plaintiff does not seek any money damages for any injury he may have sustained to his reputation. This is not a libel action, but is a right of privacy action in which the plaintiff is claiming money damages for the embarrassment, humiliation, or mental distress he suffered as a result of the showing of the play.

I caution you that the plaintiff's wife, Princess Irina Youssoupoff, is not a party to this action. Therefore, you must consider only such injuries as may have been suffered by the Prince.

In determining whether the plaintiff suffered any embarrassment, humiliation, or mental pain resulting from the television broadcast of January 5, 1963, you may take into

consideration that the plaintiff never saw the television broadcast prior to the commencement of this trial. However, you must also take into consideration the plaintiff's testimony that he was informed about the television broadcast a short time after it was made.

If, after a careful review and consideration of all the evidence in this case, you find that the plaintiff is entitled to a verdict against the defendant, but you also find that the plaintiff suffered no measureable damages, you will award the plaintiff compensatory damages in the nominal sum of six cents.

If you find a verdict in favor of the plaintiff for compensatory damages in any amount, then and only then you may, in your discretion, also award what are known as punitive damages. Punitive damages are the second type of damages provided for in Section 51 of the Civil Rights Law of the state, and are awarded, not to compensate a plaintiff for any injuries he may have sustained, but are granted to punish a defendant and to deter the defendant and others from committing similar acts in the future.

You may award punitive damages against the defendant only if you find from the evidence that the defendant knowingly and falsely depicted plaintiff's role in the killing of Rasputin and that this was done through a failure to make a reasonable investigation of the facts surrounding the killing of Rasputin and whether the plaintiff was still alive. Actual malice or ill will towards the plaintiff does not have to be proven if you find that the defendant recklessly and wantonly disregarded the plaintiff's rights.

If you find that the defendant acted in good faith, based upon a reasonable research on the subject of Rasputin's death, then you may not award punitive damages to the plaintiff. You may also consider the testimony of defendant's witnesses that although they were not certain

that the plaintiff was dead or alive, they made no efforts to locate him, nor did any of the defendant's witnesses read the plaintiff's own books. You may also consider that the authors and the producer did read other books on the subject, three of which were written by recognized authorities on Rasputin's death.

Members of the jury, the law provides that in this case, as in every civil case, a determination by five-sixths of the jury in favor of one party against the other constitutes a valid jury verdict. If, therefore, after a careful review and consideration of the evidence, ten or more of you agree in favor of one party and against the other, you may bring your deliberations to an end and report your verdict to the Court through your foreman.

Your verdict will be one of the following, and I give you three:

First, a verdict in favor of the defendant Columbia Broadcasting System, Incorporated, against the plaintiff, Felix Youssoupoff; or,

Two, a verdict in favor of the plaintiff against the defendant for compensatory damages only, in such sum as you fix and determine; or,

Three, a verdict in favor of the plaintiff against the defendant for compensatory damages, in such sum as you decide, and a separate verdict in favor of the plaintiff against the defendant for punitive damages, in such amount as you determine.

Take this case now, discuss the evidence with the other jurors, and try by legitimate argument, to reconcile any differences of opinion which may exist. Make a conscientious effort to agree upon a verdict in accordance with the evidence and the law as I have charged you. Be fair, do what you know is right, and then no one may rightfully complain.