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CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TIME, INC., *Appellant,* —*against*— JAMES J. HILL, *Appellee.*	No. 562

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

BRIEF FOR THE APPELLANT

Opinions Below

The memorandum opinion of affirmance and the dissenting opinion of the New York Court of Appeals (R. 453-56) are reported at 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965). The majority, concurring, and dissenting opinions of the Appellate Division (R. 435-44) are reported at 18 App. Div. 2d 485, 240 N. Y. S. 2d 286 (1st Dep't 1963).

Jurisdiction

The judgment in the Court of Appeals was entered April 15, 1965 (R. 456), and amended May 27, 1965 (R. 457). Notice of appeal to this Court from that judgment was filed on July 13, 1965 (R. 459), and probable

jurisdiction was noted December 6, 1965 (R. 460). 382 U. S. 936. The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1257, 2101(c).

Question Presented

Whether Sections 50 and 51 of the New York Civil Rights Law abridge the freedom of the press guaranteed by the First and Fourteenth Amendments when they are construed to permit the award of damages for invasion of privacy by the publication of a review of a play that resembled a prior incident involving a private person, the review and accompanying photographs being inaccurate in some particulars.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Appendix, *infra,* pp. 42-44.

Statement

Appellee and his wife commenced this action on October 28, 1955, to recover damages because their name was mentioned in the February 28, 1955, issue of LIFE Magazine. They asserted that the reference in the LIFE article to them and their family constituted an invasion of their privacy in violation of Sections 50 and 51 of the New York Civil Rights Law. The jury reutrned a verdict (ten to two) against appellant in the amount of $175,000 in compensatory and punitive damages (R. 308). The Appellate Division, the presiding justice dissenting, affirmed the judgment of the trial court on the question of liability, but directed a new trial on the issue of damages (R. 440). Upon

remand, the action was discontinued as to appellee's wife and judgment in the amount of $30,000 in compensatory damages was awarded to appellee (R. 446-47). That judgment and the order of modification of the Appellate Division were affirmed by the court below, two judges dissenting.

A challenge to Sections 50 and 51 of the New York Civil Rights Law, as applied, was asserted in the trial court (R. 446), and in the appellate courts below, under the guaranty of freedom of the press in the First Amendment, as embodied in the Fourteenth. The court below affirmed the judgment of the Appellate Division on the majority and concurring opinions of the latter court. By amendment of its remittitur, however, the court below added the following:

> ". . . . Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether sections 50 and 51 of the Civil Rights Law of the State of New York, as applied to defendant, were invalid under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that sections 50 and 51 of the Civil Rights Law of the State of New York, as so applied, were valid." (R. 457.)

1. *The Hill Incident.* In the fall of 1952 appellee and his family (the Hills) were held captive in their home in a Philadelphia suburb by three escaped convicts (R. 23-25). After a period of nineteen hours, the convicts released their hostages, unharmed, and departed (R. 380-81). The incident provoked widespread local and national attention in the press (R. 31-34, 321-22, 377). Mr. Hill gave a statement to the press on the morning he and his family were

released, during which he recounted the events of the previous day and night (R. 32).

As reported on the front page of The New York Times of September 13, 1952 (an article which Mr. Hill agreed repeated the substance of his statement to the press), the three convicts, two of whom were brothers in their twenties, were being sought by local and state police and FBI agents (R. 67, 380-81). They had arrived at approximately 8:30 the previous morning at the Hills' two story home in Whitemarsh, Pennsylvania, after appellee and his daughters had left for the day (R. 380-81). The fugitives warned Mrs. Elizabeth Hill to remain silent so as to avoid injury to herself and family. When Mr. Hill and his daughters returned home, they too were held prisoners. The convicts also took some of Mr. Hill's clothing. When they left, the family emerged from the incident unharmed. The New York Times article was accompanied by a photograph of the Hills' teenage daughter and sons, one of whom appeared to be about ten or eleven years old (*ibid.*).

On September 14, 1952, The Philadelphia Bulletin published an interview with Mrs. Hill under the headline, "Wife Describes 19-Hour Captivity" (Ex. D). Thereafter, the Hills sought to retreat from the public eye and did not attempt to capitalize on the occurrence (R. 436).

2. THE DESPERATE HOURS. In the spring of 1953 Joseph Hayes wrote a book entitled THE DESPERATE HOURS, which dealt with three escaped convicts holding the members of a family (the Hilliards) as hostages in their suburban home (R. 81-82). According to the book, the father and son were assaulted, profanity was used, and in other ways the story differed from the account given to the press by appellee, who stated immediately after the actual incident that the convicts had been courteous, save for the

restraint (R. 436). On the other hand, the book, and the ensuing play of the same name, were strikingly similar to the actual incident in terms of the names and relationships of the characters, the setting, many events occurring during the period of restraint, and the denouement (Exs. 15, D; R. 380-81, 454):

	The Desperate Hours (Samuel French edition, Ex. 15)	**The Hill Incident (as reported in the press, R. 380-81; Ex. D)**
	SETTING	
Season:	Early fall.	Early fall.
Time:	Approximately 8:30 a.m.	Approximately 8:30 a.m.
Place:	Isolated suburb of a large city.	Isolated suburb of a large city.
House:	Two-story suburban home.	Two-story suburban home. (Although the Hill residence was actually a three-story house, the Associated Press photograph of the front of the house appearing in THE NEW YORK TIMES article of September 13, 1952, disclosed only two stories.)
	CHARACTERS	
The Convicts:	Glenn Griffin, elder of the two convict brothers, in his mid-twenties. Acted as spokesman for the three while in the Hilliard home and had previously been familiar with the area in which that home was located.	Joseph Nolen, elder of the two convict brothers, in his mid-twenties. Acted as spokesman for the three while in the Hill home and had previously been familiar with the area in which that home was located.
	Hank Griffin, younger brother of Glenn.	Ballard Nolen, younger brother of Joseph.
	Samuel Robish.	Elmer Schuer.

	The Desperate Hours (Samuel French edition, Ex. 15)	**The Hill Incident (as reported in the press, R. 380-81; Ex. D)**
The Family:	Mr. Hilliard, a man in his early forties.	Mr. Hill, a man in his early forties.
	Mrs. Hilliard, an attractive woman in her early forties.	Mrs. Hill, an attractive woman in her early forties.
	Their teenage daughter.	Their teenage daughter.
	Their ten-year old son.	Their eleven-year old son. (The Hills' younger children were not depicted by the play.)
	ACTION	
The Opening:	Play opens with a scene in which local and state police, together with FBI agents, are working on the case.	THE NEW YORK TIMES article of September 13, 1952, opens with a statement that local and state police, together with FBI agents, are working on the case.
The Convicts' Escape from Prison:	Federal prison break, some time before dawn.	Federal prison break, some time before dawn.
	Convicts steal a car from a farmer.	Convicts steal a car from a farmer.
Scenes at the House:	Mr. Hilliard and daughter leave for the day.	Mr. Hill and daughter (together with other children not depicted by the play) leave for the day.
	Mrs. Hilliard turns on the radio to hear a news broadcast reporting the search for the escaped convicts.	Mrs. Hill turns on the radio to hear a news broadcast reporting the search for the escaped convicts.
	Convicts arrive.	Convicts arrive.
	The elder brother among the convicts warns Mrs. Hilliard to remain silent so as to avoid injury to herself and family.	The elder brother among the convicts warns Mrs. Hill to remain silent so as to avoid injury to herself and family.

	The Desperate Hours (Samuel French edition, Ex. 15)	The Hill Incident (as reported in the press, R. 380-81; Ex. D)
	Convicts conduct a search of the premises for firearms and find a gun in a drawer in the master bedroom.	Convicts conduct a search of the premises for firearms and find none.
	Mr. Hilliard and daughter return home and are also held as prisoners by the escaped convicts.	Mr. Hill and daughter (together with other children) return home and are also held as prisoners by the escaped convicts.
	Convicts play dance music on the radio.	Convicts play dance music on the radio.
	Convicts steal Mr. Hilliard's clothes (mention is made of the fact that those clothes are of the finest quality).	Convicts steal Mr. Hill's clothes (mention is made of the fact that those clothes are of the finest quality).
	Telephone calls and visits by acquaintances play dramatic part in the experience.	Telephone calls and visits by acquaintances play dramatic part in the experience.
The Convicts' Escape from the Home:	One of the convicts steals the Hilliards' automobile.	The convicts steal the Hills' automobile.
	The family emerges from the incident unharmed.	The family emerges from the incident unharmed.
	The brothers among the convicts are killed during their escape in a gun battle with the police.	The brothers among the convicts are killed during their escape in gun battles with the police.
	The third convict is captured alive.	The third convict is captured alive.

3. *The Publication.* In 1954 THE DESPERATE HOURS, in drama form, began pre-Broadway tryouts in Philadelphia. Following conferences with the producer and the author, appellant decided to review the play by means of a pictorial article (R. 436). Arrangements were made by the author to permit the taking of photographs in the home in which appellee and his family had been held captive (and which at the time of publication was no longer in their possession). Appellant transported members of the cast of the play to the Hills' former home, where it photographed actual scenes from the play, and thereafter published those photographs in connection with the accompanying review (*ibid.*). The portion of that review which was quoted in the majority opinion of the Appellate Division is as follows:

> "True Crime Inspires Tense Play
>
> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside of Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed, but is being held up until the play gets a chance to pay off." (*Ibid.*)

The remainder of the review, which, however, was not quoted, reads:

> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. *Life* photographed the play during its Philadelphia try-out,

> transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime." (R. 15.)

Tom Prideaux, who wrote the LIFE article, had read of the Hill incident at the time that appellee's statement first appeared in the press (R. 176-77, 202). He later recognized the remarkable similarities between that incident and THE DESPERATE HOURS (R. 203). The play was brought to his attention during a luncheon conference, regarding another subject, with the producer, Robert Montgomery, who suggested that the play with its unusual stage setting would be an interesting subject for an article in LIFE (R. 170-71). At a subsequent conference, Montgomery disclosed to Prideaux that a real-life incident was involved (R. 173).

Later, Prideaux had a brief discussion with Bradley Smith, a free-lance photographer, who also brought up the possibility of publishing an article about the play and stated that it "had a substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia" (R. 173-74). Smith told Prideaux that he was a friend and neighbor of the author of the play, Joseph Hayes, and indicated that his information had come from Hayes himself (R. 174).

Thereafter, Prideaux noted a report that the play was trying out in Philadelphia and realized that there might be a possibility of an off-stage setting (R. 176). He telephoned Hayes in Philadelphia to discuss that possibility (R. 177, 179). Hayes stated that he was interested in the idea and, in response to Prideaux's question, confirmed "that there had been an incident in Philadelphia" (R. 108, 145). Hayes agreed to contact the current occupants of the house where that incident had occurred and arrange for an

appointment between them and Prideaux (R. 108-110). In accordance with the arrangements subsequently made by Hayes, Prideaux traveled to Philadelphia, conferred with Hayes, went with him to the former residence of the Hills, and negotiated with him and the occupants of the house for all photographic work that appeared in the article (R. 112-115).

By the time that Prideaux started work on the text of the article, he had seen the play twice, examined newspaper reviews of it, and compared it to the details of the actual incident as they had appeared in the press (R. 197-202). Prideaux thus became satisfied that the story was newsworthy:

> "It seemed from the very beginning that this was an important news event in the entertainment field for reasons that I think we have talked about before, that it was a play based on a novel that was very well received. There was something quite unusual about it in that the movie had already been made and kept aside as the play was being developed. The production itself was of interest, as we stated, and when we were told about the connection with the Hill incident, that seemed to augment the interest of this whole production." (R. 245.)

Accordingly, he included a reference to the Hill incident:

> "Being told by a source, to begin with, which I trusted, namely, a friend and neighbor of Mr. Hayes, and by the fact that Mr. Hayes, who it seemed to me realized that we were closely connected with or were interested in this incident, was cooperating . . . our hope was to make this connection as part of the entire combination of events that made this an interesting news item." (*Ibid.*)

In addition, he believed in the substantiality of the relationship stated in the article between the incident and the play:

> ". . . [A] discussion [between Prideaux and Hayes] of the play itself, what the play was about, in the light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that." (R. 180.)
>
> "It was staring us in the face. The evidence was quite conclusive." (R. 203.)
>
> "I would say that I knew it was between a little bit and moderately fictionalized, but the heart and soul of this play was based on the true incident." (R. 202.)

Finally, Mr. Prideaux also believed that the Hill incident had been itself highly newsworthy. When asked if it had ever occurred to him that he might be invading someone's privacy by the article, he testified:

> "The question of privacy never crossed my mind, because I felt it was a matter of public record—a very public record, inasmuch as it had been so well publicized across the country, and the newspapers that I had seen, that were sent to us from Philadelphia, were screaming headlines." (R. 246.)

The LIFE article was checked for accuracy by a researcher-reporter (R. 261). The researcher was given the drafts or so-called "checking copies" of the article and asked to verify its contents (R. 262-63, 275). She went to Philadelphia and saw the play, read the drama reviews, studied the newspaper accounts of the incident, and later placed a check mark over each word in the article to confirm

her belief in its accuracy (R. 261, 263-66). She also became satisfied that THE DESPERATE HOURS was based on the Hills' experience (R. 275-76). Her conclusion was supported by numerous and arresting points of similarity and coincidence between the two (Exs. 15, D; R. 380-81, 454).

The conclusions reached by the LIFE employees were shared by others. For example, the Philadelphia Inquirer literary critic commented at the outset of his review of the novel that "Philadelphia readers will recognize a slice of real life out of the fairly-recent past" (R. 326). The drama critic of the Philadelphia Inquirer observed in reviewing the play that it was "based upon an actual incident" (R. 429). Many of the Hills' friends immediately connected THE DESPERATE HOURS with the incident (R. 66, 277-86). Appellee himself in two verified complaints prior to the complaint extant at the time of trial swore that the Hayes story was "based upon the actual occurrences of September 1952 in which plaintiffs Hill were involved" (R. 390, 413-14). Mrs. Hill testified that the number of similarities was beyond coincidence (R. 286).

4. *The Charge.* After appellant had unsuccessfully moved for summary judgment, *Hill* v. *Hayes,* 27 Misc. 2d 863, 207 N. Y. S. 2d 901 (Sup. Ct. 1960), *aff'd,* 13 App. Div. 2d 954, 216 N. Y. S. 2d 497 (1st Dep't 1961), a trial was had on the merits to a judge and a jury (R. 19). The trial court charged in part as follows:

> ". . . . 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 facts concerning plaintiffs' relationship to The Desperate Hours so that the article, as published, constituted substantially a fiction-

> alized version for trade purposes; thus to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine, or for some other material benefit.
>
> ". . . .
>
> "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 the 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." (R. 307.)

Earlier the court had been specifically asked by the jury to define trade as stated in the Civil Rights Law (R. 304). The court replied that this meant "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." (*Ibid.*) The court further charged 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." (R. 566.)

5. *The Rulings of the New York Appellate Courts.* The Appellate Division affirmed as to liability the judgment of the trial court, on the ground that the publication in February 28, 1955, revived or intensified interest in the Hills' ordeal of September 1952, the prior occurrence having "been relegated to the outer fringe of the public consciousness" (R. 438). (THE DESPERATE HOURS, in novel form, was written in the spring of 1953 and first published in January 1954, R. 81-82.) The court continued:

> ". . . . Although the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest.
>
> "Hayes, the author of the play 'The Desperate Hours', in an article which appeared January 30, 1955, in *The New York Times,* had stated the play was fictionalized. This article was available to, and, in fact apparently in the possession of the defendant when its publication of February 28, 1955, appeared. Defendant did not seek to ascertain from Hayes if his play was an account of what happened to the Hills. Defendant merely concluded that basically the play was a re-enactment and so stated. The contention of defendant that it found points of similarity in the book and the occurrence of September 11, 1952, justified neither the identification nor the commercial exploitation of plaintiffs' name and family with the play." (R. 438-39.)

While affirming on the question of liability, the Appellate Division remanded for a new trial on the question of damages. It did so on the ground that the jury was undoubtedly prejudiced by the admission of certain evidence (although, in the court's view, unaffected in its determination of liability):

> "Since a retrial is being directed on the sole issue of damages, certain matters may be adverted to for the guidance of the parties. The admission into evidence and viewing of the film by the jury constituted substantial prejudicial error. The film was released almost one year after the article appeared, and subsequent to the institution of the suit. The emotional impact of viewing a highly charged, tense, dramatic film portrayal of incidents of the nature here involved, with accompanying sound effects, was inflammatory and undoubtedly served to influence the jury improperly. Because of the remoteness in time it is doubtful that much, if any, of the public recalled the article or were significantly influenced by it. Elements and factors were introduced by the showing of the film for which defendant should not fairly be held responsible." (R. 439.)

The concurring opinion of Mr. Justice Rabin noted that the Civil Rights Law is not violated by the portrayal of an actual current event, even if the reference is to a past newsworthy event, so long as the reference bears some relationship to the current event portrayed (R. 440-41). The opinion objected to appellant's portrayal of the previous Hill incident "in a highly sensational manner," representing "that the play was a true version of that event," when it was not (R. 441). It was conceded, however, that:

> "Properly presented, the Hill incident could have been referred to in the article reviewing the play

> without subjecting the defendant to liability despite the fact that to do so would constitute an invasion of the Hills' privacy and might cause them grief and distress. . . ." (*Ibid.*)

The concurring opinion concluded that the article was published for the purpose of enhancing appellant's sales of its magazine because the Hill incident was not incidental to the review of the play (R. 442).

The dissenting opinion of Presiding Justice Botein noted the relationship between the play and the admittedly newsworthy incident in which the Hills had been involved:

> ". . . . To point out, in an article of that nature [about a play, a newsworthy subject], a relation between the play and the concededly newsworthy incident in which plaintiff had been involved creates no cause of action in their favor . . . unless they can show that the incident 'has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relationship to it'. . . .
>
> ". . . . To be sure, a searching eye can detect elements of inaccuracy or exaggeration in the article. By taking the pictures in the Whitemarsh house, as well as by words, defendant indicated that the incident there inspired the play. Though the incident happened in September, 1952 and the novel on which the play was based was written the following Spring, perhaps it is an overdrawn inference from their common features above mentioned that the one inspired the other; and perhaps it is erroneous to say that an occurrence is the inspiration of a work when it is only the unconscious trigger. Perhaps the word 'story' in the last sentence of the

> excerpt quoted in the majority opinion can be construed as a reference to the Whitemarsh incident rather than to the word 'novel' in the preceding sentence. But, especially when it is recalled that '[t]ruth or falsity does not, of itself, determine whether the publication comes within the ban of sections 50 and 51' (*Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 484, SHIENTAG, J., *affd.* 272 App. Div. 759), can it be said that such flaws are of so extravagant a nature as to convert into fiction an informative presentation of legitimate news? In my opinion not; we are in a domain where 'the lines may not be drawn so tight as to imperil more than we protect' . . . ." (R. 442-43.)

The Court of Appeals affirmed the judgment in a memorandum decision. That decision expressly approved both the majority and the concurring opinions of the Appellate Division (R. 453). Judge Fuld, dissenting in an opinion in which Judge Bergan joined, pointed out that the author of THE DESPERATE HOURS testified he had been "inspired" by the Hill incident which "triggered the book in a very direct way" (R. 454):

> ". . . . And, once it be established that the reported matter is newsworthy, I query whether the fact that the article may also have been intended to advertise or promote the play is, in and of itself, sufficient basis for subjecting the defendant to a cause of action under the provisions of the Civil Rights Law. If the article is of such a nature as not to come within the proscription of section 51—because it is, on its face, an account of newsworthy information—it is not brought within its coverage by virtue of the fact that it may, incidentally, have

been written with an eye toward promoting the play or, as is the underlying purpose of every article, in the hope of bolstering the magazine's own appeal and circulation. . . ." (R. 455.)

Introduction

The law of privacy in New York (articulated by the majoring and concurring opinions of the Appellate Division on which the judgment of the Court of Appeals rests), now imposes damages and criminal and prior restraints upon members of the press who mention a private person in a news article to which that person is relevantly connected, whenever the article is factually inaccurate, that is, in the court's view, "fictionalized." This is startling doctrine to be abroad in a nation that prides itself on freedom of expression and, specifically in this case, freedom of the press. It has come about because the law of privacy, although a late starter, has been the product in New York and elsewhere of a common law development, subject to the discretion and varying content furnished by judges in a climate that did not feel the presence of the First Amendment. Like the common law rule of *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908), rendered constitutional by *New York Times Co.* v. *Sullivan,* 376 U. S. 254, the tort remedy for invasion of privacy was created before there was full appreciation that the First Amendment guarantees even applied to the states. See *Rosenblatt* v. *Baer,* 86 Sup. Ct. 669, 678 (concurring opinion), citing *Stromberg* v. *California,* 283 U. S. 359. See also *Gitlow* v. *New York,* 268 U. S. 652.

Messrs. Warren and Brandeis recognized in 1890 that the imposition of damages for invasion of privacy was a limitation upon the press, *The Right to Privacy,* 4 Harv. L.

Rev. 193, 214 (1890), but the subsequent decisions have been based by and large upon a common law balancing in which the public's right to know is weighed against the utility of the news involved, the degree of fictionalization, the motive of the publisher, and the like. See Comment, 30 U. Chi. L. Rev. 722, 733 n.37 (1963). New York, for example, has greatly expanded the tort in the sixty years since it sought to remedy exploitation of a name or photograph in an advertisement. See *Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902).

The protest following the *Roberson* decision led not only to the adoption of the New York statute, but to the decisional recognition of the right in most of the other states. The common law development in those states has not been substantially different from the decisions interpreting the New York statute. See Prosser, *Privacy,* 48 Calif. L. Rev. 383, 385-86 (1960). Hence, a decision in the present case should shed considerable light on what has heretofore been considered exclusively "tort territory." See Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact,* 16 Stan. L. Rev. 107, 139 (1963). The New York statute is much broader in one important respect, however. The criminal section of the statute, Section 50, adds immeasurably to the constitutional doubt cast upon New York's protection of privacy.

Because of the balancing process out of which the law of privacy has grown, there have developed various doctrines which are either constitutionally impermissible or at best vulnerable to reexamination in light of the First Amendment. For example, judges have felt free to evaluate the content of matters reported in the press in terms of decency, profit motive, fictionalization, and involuntary participation in the event described. See, *e.g., Binns* v. *Vitagraph Co.,* 210 N. Y. 51, 103 N. E. 1108 (1913); *Sutton* v.

Hearst Corp., 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950); *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't 1932); *Leverton* v. *Curtis Pub. Co.*, 192 F. 2d 974 (3d Cir. 1951); *Mau* v. *Rio Grande Oil Co.*, 28 F. Supp. 845 (N. D. Cal. 1939).

On the other hand, from the beginning there has been recognition that the tort should have limitations, especially where public facts are involved. Warren and Brandeis noted that the new right should not prohibit a publication of public or general interest:

> ". . . . The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn. . . ." 4 Harv. L. Rev. 193, 215.*

In the leading case to date, the Second Circuit went further and denied recovery to a former child prodigy who had long been removed from public life. See *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (2d Cir. 1940), *cert. denied*, 311 U. S. 711. Several other decisions have also noted that the mere passage of time does not destroy the newsworthy privilege, at least where the lapse of time is confined to a few years. See *Leverton* v. *Curtis Pub. Co.*, 192 F. 2d 974, 977 (3d Cir. 1951); *Samuel* v. *Curtis Pub. Co.*, 122 F. Supp. 327 (N. D. Cal. 1954); *Molony* v. *Boy Comics Publishers, Inc.*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dep't 1950). See

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*It is noteworthy in the present case that appellee became a public figure as a result of the ordeal he experienced with his family. Indeed, his publicity was enlarged by the press conference he convened the next day and the prepared statement he delivered over a microphone to the throng of reporters (R. 32-34, 379).

also *Smith* v. *Doss,* 251 Ala. 250, 37 So. 2d 118, 121 (1948): "The passage of time could not give privacy to his acts because the story of John Lindgren is a part of the history of the community. . . ." In *Bernstein* v. *National Broadcasting Co.,* 129 F. Supp. 817, 828 & n. 25 (D. D. C. 1955), *aff'd mem.,* 232 F. 2d 369 (D. C. Cir. 1956), the court pointed out that "persons formerly public . . . cannot be protected against . . . reprinting of known facts of general interest, in a reasonable manner and for a legitimate purpose. . . . To hold otherwise leads to absurd results."

Unfortunately, Judge Clark's opinion in *Sidis* did not speak in constitutional terms, except implicitly by its reference to the public's interest in the news; nor has the decision come to enjoy the kind of respect, in the three states within the Second Circuit's jurisdiction, that one would expect of a court of appeals decision bottomed on the Constitution where there has been no further elaboration from this Court.

In New York, some of the opinions have struck out emphatically in favor of the public's right to know and in defense of items that were newsworthy. In *Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 435, 106 N. Y. S. 2d 553, 557 (1st Dep't 1951), *aff'd,* 304 N. Y. 354 (1952), Mr. Justice Shientag noted the "over-riding social interest in the dissemination of news." See also *Koussevitzky* v. *Allen, Towne & Heath, Inc.,* 188 Misc. 479, 484, 68 N.Y.S. 2d 779, 783 (Sup. Ct.), *aff'd,* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947); *Sarat Lahiri* v. *Daily Mirror, Inc.,* 162 Misc. 776, 782, 295 N. Y. Supp. 382, 388 (Sup. Ct. 1937). And in *Humiston* v. *Universal Film Mfg. Co.,* 189 App. Div. 467, 474, 178 N. Y. Supp. 752, 757 (1st Dep't 1919), the court indicated that the publisher's motive, whether instructive, or whether to satisfy morbid curiosity, was irrelevant. Nevertheless, because of the lack of a controlling constitutional rationale, the New York

courts have often ignored these policy restrictions where their sensibilities were offended or they found little social utility in the publication. See Note, 79 Harv. L. Rev. 863, 864 (1966). A prime example in New York is *Binns* v. *Vitagraph Co., supra,* where a wireless operator had become a public hero in connection with a rescue at sea and the defendant's motion picture exaggerated the incident. Similarly, in *Blumenthal* v. *Picture Classics, Inc., supra,* the defendant was enjoined from distributing its motion picture showing the plaintiff as she was selling bread to passersby on Orchard Street in New York City.

Another example is *Melvin* v. *Reid,* 112 Cal. App. 285, 297 Pac. 91 (1931), where recovery was permitted to a reformed prostitute who complained of the distribution of a movie depicting her in her former occupation. The California court affirmed the award after assessing the value of the publication as weighed against the societal interest in rehabilitation of the plaintiff. That decision has recently been criticized, but upon policy rather than constitutional grounds, namely, that the standard of good taste is not a viable rule to impose upon the working press. See *Barbieri* v. *News-Journal Co.,* 189 A. 2d 773, 776 (Del. 1963). It also contradicts the policy emanations of the RESTATEMENT, TORTS § 867, comment c (1939), which describes the privileges "publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."

Most of these cases have involved restriction of the press and of expression. Where the press has been successful in court the stated explanation is usually that of newsworthiness, as in *Gautier* v. *Pro-Football, Inc., supra.* Where the press has been curtailed, newsworthiness is often found to be lacking or outweighed by other social interests, commercial motive, or factually inaccurate reporting which the courts have described as "fictionalization," *e.g., Sutton* v. *Hearst Corp., supra* (described by Dean Prosser as the "false light" cases, Prosser, *supra* at 398). These are re-

markable doctrines when one stops to realize that freedom of the press is at stake. In fact, it is a rare privacy opinion where the First Amendment is even cited, nor was it mentioned in the majority and concurring opinions below.*

Thus, while we are dealing with a body of law that is "still that of a haystack in a hurricane," *Ettore* v. *Philco Television Broadcasting Corp.,* 229 F. 2d 481, 485 (3d Cir. 1956), it has been sufficiently developed to warrant constitutional examination. Indeed, now that the tort territory of defamation has been made to bend to the demands of the First Amendment by the decisions in *New York Times* v. *Sullivan, supra,* and *Rosenblatt* v. *Baer,* 86 Sup. Ct. 669, the tort territory of privacy must make, at the very least, a comparable yielding. As in *New York Times,* we start with a "clean slate," 376 U. S. at 299 (concurring opinion). Dean Prosser made this abundantly clear, with respect to the field of privacy, just a few years before that decision:

> "The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation. Here, as a result of some centuries of conflict, there have been jealous safeguards thrown about the freedom of speech and of the press, which are now turned on the left flank. Gone is the defense of truth, and the defendant is held liable for the publication of entirely accurate statements of fact, without any wrongful motive. Gone also is the requirement of special damage where what is said is not libel or slander

*In a recent New York privacy case, decided after the *Times* decision, there is a grudging reference to the First Amendment: "Whatever privileges or exemptions [from literal application of sections 50 and 51 of the Civil Rights Law] have been developed in the decisional law rest on strong policy considerations and, perhaps to some extent, on constitutional guaranties of free speech and of the press." *Spahn* v. *Julian Messner, Inc.,* 23 App. Div. 2d 216, 221, 260 N. Y. S. 2d 451 (1st Dep't 1965).

'per se'—which, however antiquated and unreasonable the rigid categories may be, has at least served some useful purpose in the discouragement of trivial and extortionate claims. Gone even is the need for any defamatory innuendo at all, since the publication of non-defamatory facts, or of even laudatory fiction concerning the plaintiff, may be enough. The retraction statutes, with their provision for demand upon the defendant, and the limitation to proved special damage if a demand is not made, or is complied with, are circumvented; and so are the statutes requiring the filing of a bond for costs before a defamation action can be begun. These are major inroads upon a right to which there has always been much sentimental devotion in our land; and they have gone almost entirely unremarked. Perhaps more important still is the extent to which, under any test of 'ordinary sensibilities,' or the 'mores' of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.

". . . .

"This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt." Prosser, *Privacy,* 48 Calif. L. Rev. 383, 422-23 (1960).

Summary of Argument

I

We start from the premise that the First Amendment protects the kind of utterance involved here, indeed, that the utterance has considerably more redeeming social value than defamation, obscenity, intentional falsehood, or advertising. The Court has previously recognized that damage awards inhibit free expression. Hence, there should be no reluctance to impose constitutional limitations upon the privacy tort, notwithstanding the *de facto* immunity it has thus far received.

In the present case, appellant reviewed a current newsworthy event which bore a substantial connection to a newsworthy event that had occurred some two and one-half years before. Such a publication, without more, is entitled to constitutional protection.

II

The judgment must be reversed on the independent ground that it is based in part on Section 50 of the New York Civil Rights Law. That section is unconstitutional on its face, because it imposes criminal sanctions upon the mere use of a person's name or picture "for purposes of trade." Such a criminal restraint upon expression is plainly impermissible under the First Amendment. While this is a civil case for damages, Section 50 is part of New York's statutory scheme providing remedies for invasion of privacy. And Section 51, which authorizes injunctions and damages, by its terms is dependent upon the provisions of Section 50. The Court below expressly upheld Section 50 in the face of appellant's constitutional challenge.

III

The right of privacy is itself a fundamental right, the protection of which perhaps requires that the First Amend-

ment safeguards of expression in this area not be rendered absolute. By attempting to resolve the conflicting rights involved here, it is possible to derive a principle that would protect publication of news bearing a logical connection to the person identified but would not protect private facts wantonly raked up, or public facts grossly distorted, so as to be shocking to community standards of decency.

Argument

I

THE JUDGMENT MUST BE REVERSED AS AN ABRIDGMENT OF THE FREEDOM OF THE PRESS.

Section 51 of the New York Civil Rights Law provides for damages, including punitive damages, and prior restraint by way of injunction, *e.g., Blumenthal* v. *Picture Classics,* 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't 1932). Although the ultimate award in this case was for compensatory damages only, the original jury verdict included substantial punitive damages, notwithstanding the conceded connection between the Hill incident and the play, and notwithstanding the utterance was entirely laudatory, "how a family rose to heroism in a crisis" (R. 15).

First. Appellant reported on a current news event, to which appellee and his family were logically and relevantly connected. There can be no reasonable dispute about this fact and it was expressly conceded by Mr. Justice Rabin (whose concurring opinion in the Appellate Division was also adopted by the majority of the court below and has thus become part of the law of New York) (R. 453). The subject of the publication was a current news event to which the prior incident was relevant. See Prosser, *supra* at 414. The degree to which the play and the actual incident were identical should not be constitutionally important, so long as there was some similarity, and some relevant

connection, between the two. In order to make absolutely clear there was a strong similarity, however, we have set forth in the Statement, *supra* at pp. 5 -7, a columnar comparison of the play and the actual incident—taken from our brief below—that was cited by Judge Fuld in his dissenting opinion (R. 454).

Conceding that appellee and his family could properly have been mentioned by appellant in its review, the courts below nevertheless imposed liability because they were offended by the manner of presentation, which somehow converted a news story into an attempt to increase circulation, the purpose of which was not to disseminate news but "solely" to enhance sales of the magazine (R. 442). Apart from the constitutionality of such judicial omniscience in the area of freedom of expression, it now should be plain that the significance of a publisher's commercial motive has been laid to rest. See *New York Times Co.* v. *Sullivan, supra* at 266. Of course, part of the purpose in the present case was to sell magazines; undistributed, uncirculated, and unread journals hardly serve to promote the dissemination of information or the advancement of ideas:

> "To hold . . . that a violation of section 51 may be established by a showing that a newsworthy item has been published solely to increase circulation injects an unrealistic ingredient in the complex of the right to privacy, and would abridge dangerously the people's right to know. In the final analysis, the reading public, not the publisher, determines what is newsworthy, and what is newsworthy will perforce tend to increase circulation." (Dissenting opinion in the Appellate Division, R. 444.)

Whatever may have been the commercial motive for photographing scenes from a play on location rather than on the stage and for describing the play as a reenactment

of a prior incident when in fact it was merely "stimulated," "inspired," and "triggered" by that incident (R. 454), it is of no constitutional moment:*

> "For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication

*Actually, as suggested by Presiding Justice Botein in dissent (R. 443), the word "re-enacted" in appellant's review can very sensibly be read to modify Hayes's novel and not the Hill incident.

> is privileged." *Jenkins* v. *Dell Publishing Co.,* 251 F. 2d 447, 451 (3d Cir. 1958).

Second. Recently, in expanding upon the *Times* decision, the Court declared: "Our decision in *New York Times,* moreover, draws its force from the constitutional protections afforded free expression." *Rosenblatt* v. *Baer, supra* at 675. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581, 592 (1964). Since free expression is the central consideration, it should matter little that the present case requires the Court to consider the privacy tort as distinguished from the defamation tort. Indeed, the considerations are actually more compelling, since we are here dealing with non-defamatory public facts.

Thus, the law of privacy should receive no special protection merely because of the state label:

> ". . . . In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269.

For more than seventy-five years there has been some murky understanding that freedom of expression is involved in the law of privacy, and yet to this day that body of law

has still to be "measured by standards that satisfy the First Amendment":*

> "It is here [the "false light" cases], however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?" Prosser, *supra* at 401.

The *Times* case involved a form of liability for defamation that amounted to a penalty for sedition, because the award of damages impaired the citizen's ability to criticize elected public officials. It is hardly necessary to assert now that the analogue to defamation, the law of privacy, is as central to First Amendment considerations as the problem of government-criticism faced in the *Times* case. There

*Early in its history the New York privacy statute did come to this Court for review. See *Sperry & Hutchison Co.* v. *Rhodes,* 220 U. S. 502. The decision was not directed to First Amendment considerations, however, and was rendered well before such cases as *Gitlow* v. *New York, supra.* The Court held it was not a taking of property without due process for New York to apply its new statute to the use of photographs made after the law went into effect. 220 U. S. at 505.

are, nonetheless, important similarities. The Court stressed that the advertisement about which the police commissioner complained did not carry a commercial message but rather a message of social protest on one of the major questions of our time. The present case also involves a non-commercial message, and the First Amendment draws no distinction between reports from Broadway and reports from Montgomery. *Cf. Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 157-58. Nor is it limited by the type of public concern or the size of community affected. *Rosenblatt* v. *Baer, supra* at 674-75.

The Court in the *Times* opinion pointed out that the authors of the advertisement were not members of the press but were still entitled to exercise their freedom of speech. Here we *are* dealing with members of the press. The press, after all, is specifically singled out for protection in the First Amendment and that protection entails something more than the public's right to know. It includes not only the right of the press to report the news, but also the right to investigate, to analyze, to criticize, to characterize, and even to exaggerate. The Court emphasized that "the constitutional protection does not turn upon 'the truth, popularity or social utility of the ideas and beliefs which are offered.' *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' " 376 U. S. at 271.

It is true that in the typical privacy case a public official will not be involved; instead, as here, often a private person is unwillingly catapulted into the news by events over which he has no control. In the past, because of the lack of federal mandate, certain of those situations have produced constitutionally dubious results. See, *e.g., Wagner* v. *Fawcett Publications,* No. 13541 (7th Cir. June 18, 1962), *rev'd on rehearing,* 307 F. 2d 409 (1962), *cert. denied,* 372 U. S.

909, where there was publication of stories of the rape-murder of the plaintiff's daughter two months after the crime had occurred and the Seventh Circuit originally imposed liability before reversing itself on rehearing. *Cf.* RESTATEMENT, TORTS § 867, comment c (1939). See also *Mau* v. *Rio Grande Oil Co.*, 28 F. Supp. 845 (N. D. Cal. 1939). The esesntial point overlooked in such cases is that the victim or unwilling participant is "functioning in the public arena." See Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 923 (1963). His identification, or his relationship to the event or a related event, is part of the information sought by the public.

It would thus seem a short step for the Court to extend a general constitutional protection to the press against damage awards and prior restraints under the law of privacy, at least so long as the publication reveals some logical connection between the person named and the public event and makes some contribution to the dissemination of information or ideas, that is, to what is most broadly conceived to be news. See *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447, 451 (3d Cir. 1958).

Third. In the courts below, appellant argued its report was essentially accurate, and one that could hardly be described as fictionalized or sensational. Because we believe those characterizations are not constitutionally relevant, however, we have conceded in this Court that appellant's review and accompanying photographs were inaccurate to the extent they suggested the play was a reenactment of the prior incident (Jurisdictional Statement, pp. 19-20). Similarly, appellant argued it had every reason to believe the author of the play considered his work to have been essentially a reenactment of the prior incident. But the majority opinion of the Appellate Division suggested appellant was negligent in not directly putting this question to the author

and because it had in its files an earlier newspaper article in which the author said his play was fictionalized (R. 439). *Cf. New York Times Co.* v. *Sullivan, supra* at 287-88.

The question, then, is whether New York can properly impose tort liability upon a publisher who connects with justification a non-public figure* to a current news event in a report containing factual errors that could have been obviated by a more diligent investigation. The recital of that question suggests its inevitable answer under the First Amendment. To require the press to be totally accurate at its peril is precisely the kind of " 'self-censorship' " that was so roundly condemned in the *Times* opinion, *supra* at 279. Under such a rule, the press, like the citizen-critic, will also " 'steer far wider of the unlawful zone' " (*ibid.*). Like the citizen-critic, who has a duty to judge his government (*id.* at 282), the fourth estate has a duty to report the news. If that duty is encumbered by liabilities arising out of factual error or exaggeration, then it will not always be fully discharged, and the entire community suffers. Especially is this so where publication occurs only at the risk of criminal sanctions or of crippling damage awards which hinge on the ability to persuade twelve persons, after the event, of the whole "truth." As Presiding Justice Botein warned in his dissenting opinion in the Appellate Division, "we are in a domain where 'the lines may not be drawn so tight as to imperil more than we protect' . . ." (R. 443).

The courts below have imposed a rule of liability as to anyone mentioned in a report about a recent news event if the nature of his connection with that event is erroneously stated. Such a rule makes a shambles of everyday

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*As we have said, at the time of publication appellee was considerably more than a non-public figure with respect to items based on the hostage theme.

news reporting, and confines the press to items involving public officials. We submit the test can only be whether the connection is plainly false, that is, whether it " 'has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relationship to it' " (R. 442).

II

THE JUDGMENT RESTS IN PART UPON A STATUTE THAT IS UNCONSTITUTIONAL ON ITS FACE.

In New York the tort sanction for invasion of privacy (including, in addition to the provision for damages and exemplary damages the threat of injunction and prior restraint) is coupled with a criminal sanction, and hence the very conduct for which appellant has been found liable could readily be the subject of prosecution by the State. *Cf. Garrison* v. *Louisiana,* 379 U. S. 64. Although appellee was awarded only damages under Section 51 of the New York Civil Rights Law, that section is by its terms dependent upon the language of Section 50, and the court below has certified that both of those sections are involved in this case and both have been held valid in the face of appellant's challenge (R. 458).

The Court in *Garrison* sharply curtailed Louisiana's brand of Sedition Act. Section 50 of the New York Civil Rights Law likewise is a criminal restraint upon expression:

> "A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Whether or not the words of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech," are to be applied literally, there will be great difficulty in accommodating them to the plain language of this overbroad New York statute. See *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432-33:

> "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 hestitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . 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. Shelton v. *Tucker,* 364 U. S. 479, 488. While the statute is most explicit, it has been narrowed somewhat (perhaps to the point of vagueness) by the New York courts whenever they have purported to graft upon it a news privilege, *e.g., Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 106 N. Y. S. 2d 553 (1st Dep't 1951), *aff'd,* 304 N. Y. 354 (1952). But, as we have seen, that exemption is frequently lost in the event of exaggeration or "fictionalization." See *Winters* v. *New York,* 333 U. S. 507, 519-20; Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 96-104 (1960).

The majority and concurring opinions of the Appellate Division have stated, in effect, that appellant's conduct was

such as to subject it to criminal liability under Section 50 and that an indictment based on the facts of this case would be legally sufficient. What a frightening prospect for any publisher! Now, in New York, if a news report involving a non-public person is partially inaccurate, Section 50 of the Civil Rights Law will apply in all its rigor and, apparently, the burden of establishing complete truth is to be borne by the publisher.

Finally, this criminal sanction is not even aimed at a form of expression that stretches the outer limits of constitutional protection, such as defamation or obscenity. Instead of such less preferred forms of expression, the problem here is "free discussion of public issues." *Rosenblatt* v. *Baer, supra* at 677 (concurring opinion). *Cf. Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (2d Cir. 1965); *Walker* v. *Courier-Journal and Louisville Times Co.,* 246 F. Supp. 231, 234 (W. D. Ky. 1965). See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 217-18. Ordinary news, not motivated by malice, can be the subject of the statute's proscription, so long as the news reporting is partially inaccurate or "fictionalized" (R. 438-39). It is this exaggerated manner of presentation (R. 438) that somehow converts a news report into an item "for purposes of trade," and hence indictable under Section 50. Purported fictionalization is a slim reed on which to rest this criminal curtailment of the press; we submit that it is insufficient under the First Amendment:

> ". . . [E]rroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . .
>
> ". . . [Factual error] affords no more warrant for repressing speech that would otherwise be free . . ." *New York Times Co.* v. *Sullivan, supra* at 271-72.

III

THE FIRST AMENDMENT REQUIRES THAT THE PRIVACY TORT BE LIMITED.

In *Garrison* v. *Louisiana, supra* at 73, the Court's footnote 9 seems to prophesy the arrival of this very case: "Even the law of privacy, which evolved to meet Lord Campbell's reservations ["forgotten misconduct . . . wantonly raked up"] recognizes severe limitations where public figures or newsworthy facts are concerned. See *Sidis* v. *F-R Pub. Corp.,* 113 F. 2d 806, 809-10 (C. A. 2d Cir. 1940)." If the *Sidis* decision had been given the proper constitutional respect by state courts and, in particular, those of New York, the common law "limitations" of policy might have been sufficient to forestall constitutional scrutiny of the law of privacy. As we have said, that has not proved to be the course the law has taken, and the perfect example is the present case, where, indeed, "newsworthy facts are concerned."

In its preceding footnote 8, at 72, the Court made clear it was expressing no views "as to the impact of constitutional guarantees in the discrete area of purely private libels." Here, on the other hand, we are not only dealing with something other than libel, that is, a non-defamatory publication (actually laudatory in this case), but also with a field that is anything but isolated or private. Appellee and his wife and children were involved, albeit involuntarily, in an event of considerable public significance, which appellant recalled when it reported on another and related public event. The latter event was significant on two counts: first, because of its occurrence as a dramatic play on Broadway, and, second, because of the play's subject, a problem of interest to a child-centered population already disturbed by the

rising incidence of crime.* Appellee would prefer to forget the former event, but even the concurring opinion below noted that "the Hill incident could have been referred to in the article reviewing the play without subjecting the defendant to liability despite the fact that to do so would constitute an invasion of the Hills' privacy and might cause them grief and distress" (R. 441). Some involuntary participation in the news is perhaps the only answer if the press is to be left free to "discuss public affairs with impunity." See *New York Times Co.* v. *Sullivan, supra* at 296 (concurring opinion).

The constitutional protection afforded the defamatory statements involved in *Garrison* v. *Louisiana, supra* at 75, will yield only upon proof of the "calculated falsehood." In contrast, in the present case we find a non-defamatory report about a public event, inaccurate in some particulars because the publisher failed to unearth all of the facts. Even where the privacy tort has been confined in a way that would appear to satisfy constitutional requirements, for example, *Sidis* v. *F-R Pub. Corp., supra,* there has been insufficient check on the variant directions taken by other courts in New York and elsewhere in their common law development. Long before the *Times* decision, the Supreme Court of Kansas in *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908), had worked out a rule which, as it eventually turned out, was the right one. A number of jurisdictions had followed that decision, but the Court felt obliged, nonetheless, to make it crystal clear there was but a single federal rule on the subject, and that it was the First Amendment being expounded. See *Rosenblatt* v. *Baer, supra* at 675: "If existing state-law standards reflect the purposes of *New York Times,* this is at best accidental."

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*For a recent news report of a similar episode, see N. Y. Times, July 9, 1965, p. 1, col. 5.

We submit that the decision below, upholding the validity of the New York statute in the face of appellant's constitutional challenge, requires that a comparable federal rule be announced, this time for application to the law of privacy. As opposed to the libel and obscenity cases, we are here dealing with an expression regarding public facts that has substantial "social value" in the sense of *Roth* v. *United States,* 354 U. S. 476, and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Nor is it a form of expression in any way inimical or dangerous to the interests of the community. *Cf. United States* v. *Roth,* 237 F. 2d 796, 801, 825-26 (2d Cir. 1956) (concurring opinion). Thus, it would seem that this form of expression is entitled to absolute protection under the First Amendment.

On the other hand, the right of privacy is itself fundamental, perhaps comparable to the Fourth and Fifth Amendment guarantees against government action. Privacy and the sanctity of the home and bedroom have been stressed by the Court in recent decisions. See *Mapp* v. *Ohio,* 367 U. S. 643; *Griswold* v. *Connecticut,* 381 U. S. 479. "[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U. S. 438, 478 (dissenting opinion). Because of the policies emanating from the Fourth and Fifth Amendments, it is a right, even as against a nongovernmental agency, that is entitled to a momentum of constitutional respect. *Cf. York* v. *Story,* 324 F. 2d 450, 456 (9th Cir. 1963). And because of its importance and its collision here with the demands of the First Amendment, we recognize that the Court may wish to provide something less than absolute protection in this field, that is, to carve out a limited exception where the publication has little redeeming social value. *Cf. Bridges* v. *California,* 314 U. S. 252; see generally Taylor, *Crime Reporting and Publicity of Criminal Proceedings,* 66 Col. L. Rev. 34 (1966).

It may be, for example, that the right of privacy will be paramount in cases where purely private facts are raked up in such a way as to be shocking to community notions of decency. *Cf. Rochin* v. *California,* 342 U. S. 165. Or, if an individual is depicted in a totally false light, that is, if his identification has no logical connection to the news event described, it is arguable that the protection under the First Amendment should give way. Such an approach would not be dissimilar from the principle of calculated falsity established for libel. *Cf. Linn* v. *United Plant Guard Workers of America, Local 114,* 86 Sup. Ct. 657, 664-65. The constitutional protection would thus yield upon proof that the non-public figure was connected to the news item by a publisher who knew that the connection was baseless or who acted in reckless disregard of that fact.*

Thus, the rule cannot depend on fictionalization or motive to increase circulation. Motive is only relevant in determining whether the publisher knew the connection was false; fictionalization is irrelevant except where it is complete, that is, where the connection is totally false.**

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*The question of malice or reckless disregard for the truth is not involved in the present case, as demonstrated by a comparison of the majority and concurring opinions in the Appellate Division on the one hand and the dissenting opinions in the two appellate courts below on the other. Those opinions did not disagree on the facts but rather on the significance to be drawn from appellant's error in describing THE DESPERATE HOURS as a reenactment of the actual incident involving appellee and his family. None of the opinions, including the two in appellee's favor, found or even suggested that appellant was malicious or recklessly oblivious of the truth, nor did any of them find or suggest that there was less than a substantial connection between the play and the prior incident. Nor is there any support for such a contention in the record.

**"Suppose that same account were dramatized, were fictionalized, were embellished with a lot of matter out of some writer's imagination on a newspaper or in some advertising agency and that was published. If it were fictional, if it were so embellished as to really give you a distorted impression of what actually happened, again, that would not be news. That would be a commercial use." (Extract from opening address for plaintiffs, R. 464.)

Such a rule would protect the press from self-censorship, but at the same time would not destroy the privacy tort, especially in cases where advertisers make use of names for endorsement purposes without consent, the precise situation for which the tort remedy was created. See *Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902). And such a rule would not go so far as that suggested by Warren and Brandeis whenever a man's life has ceased to be private. See 4 Harv. L. Rev. 193, 215. It would still require that there be a connection between that man and the current news item.

Appellant submits, however, that the Court need not now consider the full extent of possible exceptions to the general rule of constitutional protection, since the present case clearly calls for application of the rule rather than one of the exceptions. If the door is left ajar for development of exceptions, that can be done case by case in the state courts, subject to federal review.

Apart from the *Times* and *Rosenblatt* decisions, we ask the Court to recognize that the tort territory of privacy is no longer immune to the light shed by the Constitution, and that the tort, criminal, and injunctive provisions of state law must be made amenable to the demands of the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted,

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March 14, 1966.

APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK CIVIL RIGHTS LAW

§ 50. *Right of privacy*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also 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, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury,

in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.