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CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 562

TIME, INC.,

Appellant,

against

JAMES J. HILL,

Appellee.

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

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

Interest of the *Amicus*

The appellant in this case challenges the constitutionality of the right to privacy statutes of the State of New York (New York Civil Rights Law §§ 50 and 51), both on their face and as applied to the facts of this case by the New York courts, on the ground that they abridge the freedom of the press.

These statutes reflect a strong legislative policy against the commercial exploitation of an individual's name and personality. In interpreting the statutes, the New York courts have taken care to ensure that the strong public interest in the dissemination of news and interchange of ideas is in no way affected by the operation of the law. It is only where an individual can show injury to himself from the use of his name or likeness solely for commercial purposes that the law provides a right of action.

Thus, the purported conflict between the First Amendment and the State's privacy laws which is raised by the appellant in this case is, we believe, an illusory one. Concerned over the validity of New York's statutes protecting the right to privacy, and convinced that the judgment of the New York Court of Appeals in no way jeopardizes the public right to a free press, we file this brief pursuant to Rule 42 of the Rules of this Court.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I

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

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.

Question Presented

Does the law of privacy in New York State violate the constitutional guarantee of a free press when the law is applied to remedy the injury resulting to a private individual from the use of his name and personality solely for commercial purposes and not for the dissemination of news and ideas?

Statement of the Case

In September, 1955, appellee and his wife instituted an action to recover damages for the use of their name in an article appearing in the February 28, 1955 issue of LIFE Magazine. At the trial, held before a jury in Supreme Court, New York County, the plaintiffs introduced evidence to establish:

(1) that the appellant had appropriated their name for use in its LIFE article without obtaining his consent;

(2) that the contents of the article, insofar as it related to appellee and his wife, were not true;

(3) that the purpose of the appropriation of the Hill name was solely commercial and not for the dissemination of news; and

(4) that the publication of the article had injured appellee and his wife.

The jury returned a verdict against the appellant, awarding the appellee $50,000 and his wife $75,000 in compensatory damages; in addition, it awarded $50,000 exemlary damages to be divided equally between appellee and his wife. On appeal to the Appellate Division, First Department, the judgment was vacated as to damages and affirmed on the issue of liability, one justice dissenting. *Hill* v. *Hayes,* 18 App. Div. 2d 485, 240 N.Y.S.

2d 286 (1st Dept. 1963). After stipulation between the parties vacating the judgment as to appellee's wife, judgment for $30,000 compensatory damages was awarded to appellee James J. Hill by the trial court sitting without a jury.

On appellant's appeal to the New York Court of Appeals, the judgment was affirmed on the majority and concurring opinions of the Appellate Division. *Hill* v. *Hayes,* 15 N. Y. 2d 986, 207 N. E. 2d 604, 260 N.Y.S. 2d 7 (1965). The remittitur was amended to show that the court had considered and upheld the constitutional validity of New York Civil Rights Law §§ 50 and 51 as applied to this case. 16 N. Y. 2d 658, 261 N.Y.S. 2d 289 (1965).

The Facts

In 1952, appellee and his family were held hostage for nineteen hours in their home in Whitemarsh, Pennsylvania, by three convicts who had escaped from Lewisburg Federal Penitentiary (R. 21, 35). The men eventually left having used no violence or profanity (R. 29, 31). The incident received some publicity at the time of its occurrence (R. 39), as had other similar incidents at the time of their occurrence. Beyond seeking initially to dispel any idea that his family was at all molested (R. 32-34), Mr. Hill consistently refused all efforts to perpetuate the incident in the public mind, rejecting every offer for written or broadcast interviews (R. 42-44, 55-56).

In 1953, Joseph Hayes wrote his novel *The Desperate Hours,* telling the violent and sensational story of a family held hostage by three escaped convicts (R. 81). Mr. Hayes, who had long been interested in the hostage theme, had clipped articles from newspapers about such incidents including an article about the incident involving appellee and his family (R. 86-87). It was apparent from Mr. Hayes' trial testimony that the novel and play were products of his own imagination and did not reenact any one incident (R. 83-84, 90-91, 99-100).

The novel became a play and then a motion picture (R. 81). In the fall of 1954, the play was in pre-Broadway tryouts in Philadelphia (R. 106). The entertainment editor of LIFE Magazine, Tom Prideaux, became interested in covering the play because of its unique staging (R. 171). Aware that a hostage incident had taken place in the Philadelphia area, he made arrangements to take photographs of the cast at the former Hill residence. (The Hills had moved to Connecticut shortly after the incident [R. 40-41].) Full cooperation was accorded by The Desperate Hours company (R. 108-109) which also paid part of the costs of the photographic work (R. 118).

The picture story appeared in the February 28, 1955 issue of LIFE. The preparation of the article started from the assumption that there was a connection between the Hill incident and the play (R. 179). No attempt was made to verify the assumed connection and the article as it ultimately was written left the impression that the play was the story of the Hill incident (R. 180). The article, entitled "True Crime Inspires Tense Play", read as follows:

> "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 Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes' novel, *The Desperate Hours* inspired by the family's experience. Now they can see the story re-enacted in Hayes' 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 has a chance to pay off.
>
> The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family grows to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills

> were beseiged. On the next page scenes from the play are re-enacted on the site of the crime."

Above the title of the article was a reproduction of a headline in a Philadelphia newspaper about the Hill incident and a picture of the former Hill home. The caption to the picture begins "Actual Event" and mentions the Hill name. In fact, although there were superficial similarities between the play and the Hill incident (see appellant's brief, pp. 5 to 7), the two incidents were very different. Thus, for example, the Hills experienced no violence, their captors used no profanity and made no untoward advances to any of the members of the family, and none of the family made any attempt to resist or to escape (R. 29-30). By contrast, *The Desperate Hours,* especially as depicted in the LIFE article and accompanying photographs (R. 15-17), is concerned with acts of terror, violence and heroism which were wholly absent from the Hills' experience.

The Application of New York Law

As to appellant Time, Inc., the jury was charged (R. 300-301):

> "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."

In affirming the judgment of the Supreme Court, the Appellate Division discussed the limits of the right of

privacy in the State. Adopting the standard set forth in 1 Harper and James, TORTS, § 9.7, p. 687, the Court found that either a newsworthy event or a notorious person or both "may be involved in justifying a breach of the seal of privacy" (R. 438). The Court added that "New York also requires that the use of the name, etc. be for advertising purposes or for the purposes of trade. For the right protected is the right to be protected against the commercial exploitation of one's personality without his written consent (Civil Rights Law, § 51)" (*id.*).

The Court found that the Hill incident "had been relegated to the outer fringe of the public consciousness" (*id.*) when appellant revived the incident:

> "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" (R. 438-39).

In his concurring opinion, Justice Rabin further defined the scope of Section 51 of the Civil Rights Law, emphasizing that reference to a newsworthy event, past or present "is not proscribed" (R. 440-41). But, he observed, any theory that the article was presented "for the purpose of disseminating news" must fail since the article "portrayed the previous Hill incident in a highly sensational manner and represented that the play was a true version of that event. It was not" (R. 441). The judgment was affirmed by the Court of Appeals on the basis of both majority and concurring opinions of the Appellate Division.

Summary of Argument

A.

In construing the privacy law, the New York courts have carved out a broad exception for matters dealing with public figures or newsworthy facts. Recovery under the statute has been denied to persons who have become newsworthy figures (even if not by their own choice) whose activities were the subject of an essentially accurate report, and to persons whose name or picture has been used to illustrate an article of news interest with which it has reasonable connection.

It has only been where the use of the individual's name or picture has been used in a manner which bears no reasonable relation to the dissemination of information—where the use is for the sole purpose of gaining commercial benefit through the exploitation of the individual's personality—that the New York courts have allowed recovery. Thus, the present case stands in striking contrast to the leading federal case interpreting the New York law, *Sidis* v. *F-R Pub. Corp.,* 113 F. 2d 806 (2d Cir., 1940), *cert. denied* 311 U. S. 711 (1941), where the publication of an article exposing intimate details of the private life of a person who had been a public figure some twenty-five years earlier was held non-actionable. The Circuit Court in *Sidis* emphasized that the article at issue there had been limited to "the unvarnished, unfictionalized truth." In the present case, even the appellant concedes that its LIFE article was inaccurate (Br., p. 32).

Appellant's reliance on the decision in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), for the proposition that its fictionalized treatment of the Hills' unfortunate prior experience is protected by the First Amendment, is wholly misplaced. The decision in the *Times* case emphasized the strong interest in open debate on public issues, and limited the protection to statements about the official conduct of

public officials. In the present case, as in all of the cases allowing recovery under the New York privacy law, the plaintiff was not a public official, the conduct which was the subject of the publication was not in any manner official conduct, and the use of the plaintiff's name cannot be said to have made any contribution to the interchange of ideas.

Unlike the publication of false statements about the official conduct of public officials, the statements made about the appellee in the LIFE article have no conceivable social value. If the right to privacy is to be meaningful at all, it must at the very least protect persons from the appropriation of their names in a manner which is false and which contributes nothing to the exchange of ideas.

B.

Appellant's attack on the criminal sanctions of Section 50 is frivolous. Since the appellant has not been subject to the sanctions of Section 50, it has no standing to challenge its validity. *United States* v. *Raines,* 362 U. S. 17 (1960). Indeed, there is no justiciable controversy over Section 50—its criminal sanctions have never been imposed in New York and the appellant is under no real threat of prosecution.

ARGUMENT

New York's law of privacy is wholly consistent with the constitutional guarantee of a free press.

In their famous law review article calling for legal recognition of a right of action for invasion of privacy, Samuel D. Warren and Louis D. Brandeis emphasized the interest of the individual in being "let alone" in words which have at least as great relevance 76 years later:

> "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some

> retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." (Warren and Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 196 [1890]).

The right to privacy, which has come to be recognized as fundamental (*Griswold* v. *Connecticut,* 381 U. S. 479 [1965]; *cf. Mapp* v. *Ohio,* 367 U. S. 643 [1961]), was at first rejected by the New York Court of Appeals, in *Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902). In that case the Court of Appeals, in a 4 to 3 decision, held that a cause of action was not stated by the plaintiff's complaint that the defendants had infringed her right to privacy by using her portrait, without her consent, to advertise a commercial product.[1]

In 1903 the New York Legislature, in direct response to *Roberson,*[2] enacted the privacy law which (with but minor amendments) is at issue in the present case. The law (N. Y. Civil Rights Law §§ 50 and 51, *supra,* pp. 2-3) provides a right of action for any person whose name or likeness is used within the state "for advertising purposes or purposes of trade" without his written consent.

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[1] Prior to the decision in *Roberson,* the Court of Appeals had, in *Schuyler* v. *Curtis,* 147 N. Y. 434 (1895), seemingly acknowledged a common law right of privacy (147 N. Y. at 443), though rejecting the claim of the plaintiff under the particular facts of that case. The majority opinion in *Roberson,* which characterized this part of the *Schuyler* opinion as dicta, was severely criticized by the press and bar. See Hofstadter and Horowitz, THE RIGHT OF PRIVACY, pp. 26-28 (1964); Prosser, TORTS, p. 828 (3d Ed. 1964).

[2] The majority opinion in *Roberson* suggested that the legislature could provide a remedy for commercial exploitation of an individual's personality (171 N. Y. at 546, 556).

In construing the statute, the New York courts have recognized that the strong public interest in a free press demands a narrow reading of the phrase "for advertising purposes or for the purposes of trade", and the privacy law of the State has thus developed in a manner which is wholly consistent with the state and federal constitutional protections of freedom of speech and freedom of the press. The limitations upon the right of privacy where public figures or newsworthy facts are concerned (remarked upon by this Court in *Garrison* v. *Louisiana,* 379 U. S. 64, 73 n. 9 [1964]), have been carefully observed by New York.

In *Sidis* v. *F-R Pub. Corp.,* 113 F. 2d 806 (2d Cir. 1940), *cert. denied* 311 U. S. 711 (1941), a former child prodigy sought to establish that an article about him which appeared in the NEW YORKER Magazine had violated his right to privacy under New York law and under the law of several other states. The Circuit Court observed that "the article is merciless in its dissection of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny" (*id.* at 807). It characterized the piece as "a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life" (*id.* at 807-808). Nevertheless, the Court denied recovery, emphasizing that the subject of the article, as a once public figure, was still newsworthy, and that the article itself was wholly truthful (*id.* at 809-810). With respect to the New York law it was said that (*id.* at 810):

> "The statute forbids the use of a name or picture only when employed 'for advertising purposes or for the purpose of trade'. In this context it is clear that 'for the purposes of trade' does not contemplate the publication of a newspaper, magazine or book which imparts truthful news or other factual information to the public. Though a publisher sells a commodity,

> and expects to profit from the sale of his product, he is immune from the interdict of sections 50 and 51 so long as he confines himself to the unembroidered dissemination of facts [footnote omitted]. Publishers and motion picture producers have occasionally been held to transgress the statute in New York, but in each case the factual presentation was embellished by some degree of fictionalization. . . . The New Yorker articles limit themselves to the unvarnished, unfictionalized truth."

The *Sidis* case, cited with approval in *Garrison* v. *Louisiana, supra,* at 73 n. 9, has also—contrary to the implications in appellant's brief (Br. pp. 21, 37)—been expressly approved, and followed, by the New York courts. See, *e.g., Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, 359 (1952); *D'Allessandro* v. *Henry Holt & Co.,* 4 App. Div. 2d 470, 471, 166 N.Y.S. 2d 805, *appeal dismissed* 7 N. Y. 2d 735, 162 N. E. 2d 726 (1957). Thus, recovery has been denied to persons who (even if not by their own choice) have become newsworthy figures whose activities were the subject of an essentially accurate report (*e.g., Humiston* v. *Universal Film Mfg. Co.,* 189 App. Div. 467, 178 N.Y.S. 752 [1st Dept. 1919]; *Molony* v. *Boy Comics,* 277 App. Div. 166, 98 N.Y.S. 2d 119 [1st Dept. 1950]; *Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 68 N.Y.S. 2d 779 [Sup. Ct. N. Y. Co.], aff'd 272 App. Div. 759, 69 N.Y.S. 2d 432 [1st Dept. 1947]), or whose name or picture has been used in to illustrate an article of news interest with which it has reasonable connection (*e.g., Colyer* v. *Fox Publishing Co.,* 162 App. Div. 297, 146 N.Y.S. 999 [2d Dept. 1914]; *Lahiri* v. *Daily Mirror, Inc.,* 162 Misc. 776, 295 N.Y.S. 382 [Sup. Ct., N. Y. Co. 1937]; *Oma* v. *Hillman Periodicals,* 281 App. Div. 240, 118 N.Y.S. 2d 720 [1st Dept. 1953]).

New York makes no attempt to evaluate the relative merits of different kinds of "news" items for the purposes

of Sections 50 and 51. A story about current events (e.g., *Molony* v. *Boy Comics, supra*) and an item of gossip (e.g., *Goelet* v. *Confidential, Inc.,* 5 App. Div. 2d 226, 171 N.Y.S. 2d 223 [1st Dept. 1958]) are equally protected. The publication is entitled to protection if it is essentially true (compare *Koussevitzky* v. *Allen, Towne & Heath, supra,* with *Spahn* v. *Julian Messner, Inc., supra*), and the burden is upon the plaintiff to establish the fictionalization. Thus, the trial judge in the instant case, after reviewing the claims made by both sides (R. 293-297), charged the jury that (R. 297):

> "The plaintiffs have the burden of proving their case substantially as they have pleaded it in their complaint. They have the burden of proving by a preponderance of the credible evidence—that is the believable evidence —that the published article, so far as it referred to them, was a violation of their right to privacy."

Exemption of the press from the operation of the privacy law has even extended to cases where the person's name or picture has been used to advertise the publication itself. See, *e. g., Sidis* v. *F-R Pub. Corp. supra,* 113 F. 2d at 810; *Humiston* v. *Universal Film Mfg. Co., supra,* 189 App. Div. at 476; *Booth* v. *Curtis Publishing Co.,* 15 App. Div. 2d 343, 223 N.Y.S. 2d 737 [1st Dept. 1962], *aff'd* 11 N. Y. 2d 907, 182 N. E. 2d 812 (1962). It is only where the use of the individual's name or picture has been for the sole purpose of gaining commercial benefit through the exploitation of the individual's personality, and not for the dissemination of news or ideas, that the New York courts allow recovery under the privacy law.

Thus, in *Binns* v. *Vitagraph Co.,* 147 App. Div. 783, 132 N.Y.S. 237 (1st Dept. 1911), *aff'd* 210 N. Y. 51, 103 N. E. 1108 (1913), recovery was allowed where the defendant, in making and exhibiting a motion picture reproduction of a collision at sea, had included a scene in which the plaintiff (a hero at the time of the event and thus a legitimate subject

for factual reporting) was represented in a manner which was false and which made him appear ridiculous. Similarly, in *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 260 N.Y.S. 2d 451 (1st Dept. 1965), recovery was allowed where the defendant published a highly fictionalized version of the life of a famous baseball pitcher.

Significantly, the opinion of the Appellate Division in the *Spahn* case relied on both the majority and concurring opinions in the present case, emphasizing that the fictionalized treatment of an individual's experience was an important factor negating the privilege which would otherwise extend to press treatment of a public figure (*Spahn, supra,* 23 App. Div. 2d at 219-221).[1] The appellant in the present case concedes that its article and accompanying photographs "were inaccurate to the extent that they suggested the play was a re-enactment of the incident" (Br., p. 32); it relies however, on this Court's decision in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), for the proposition that its fictionalized and highly sensational treatment of the Hills' unfortunate experience is protected by the First Amendment.

Such reliance, we submit, is wholly misplaced. The protection accorded to false statements under the *Times* rule is limited to statements about the official conduct of public officials. *New York Times* v. *Sullivan, supra* at 282-283; see also *Garrison* v. *Louisiana,* 379 U. S. 64 at 67, 76 (1964); *Rosenblatt* v. *Baer,* —— U. S. ——, 34 U.S.L. Week 4111 (February 21, 1966). The reason for such protection is made clear in each of these opinions—the strong public interest in free and open debate on public issues, to which even false statements may make a valuable contribution.

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[1] The degree of fictionalization is, of course, an important factor in establishing whether a publication can reasonably be considered news. Minor inaccuracies will not make a publication actionable under the New York law. See e.g., *Koussevitzky* v. *Allen, Towne & Heath, supra; Molony* v. *Boy Comics, supra.*

See *New York Times* v. *Sullivan, supra,* at 279 at *n.* 19; *Garrison* v. *Louisiana, supra,* at 73; *Rosenblatt* v. *Baer, supra,* 34 U.S.L. Week at 4114. In the present case—as indeed in all of the cases allowing recovery under New York's privacy law—the plaintiff was not a public official and the conduct which was the subject of publication was not in any manner official conduct.

The First Amendment was intended "to assure unfettered interchange of ideas for the purpose of bringing about sound changes desired by the people". *Roth* v. *United States,* 354 U. S. 476, 484 (1957). It cannot be conceived to cover the situation in the instant case, where a publisher has used news channels for a non-news purpose, i.e., to portray a private individual's personality and prior experience, without authorization, in an untrue manner. The use of the Hills' name in the article has nothing to do with either the dissemination of news or the interchange of ideas; it is "utterly without redeeming social value." Cf. *Roth* v. *United States, supra,* at 484. There is present here no element which can be said to have "overborne" the individual's right of privacy. Cf. *Garrison* v. *Louisiana, supra,* at 73.

To the extent that the right of privacy contains potential for conflict with the First Amendment, it is in the area of publication of essentially private truths. Compare *Sidis* v. *F-R Pub. Corp., supra,* with *Melvin* v. *Reid,* 112 Cal. App. 285, 297 Pac. 91 (1931). No such conflict exists under the New York privacy law, however, because the New York courts have consistently required that the plaintiff show fictionalization in order to recover. The New York law is thus considerably narrower than the right to privacy which was contemplated by Warren and Brandeis and which has been enforced in many of the states which have recognized a common law right to privacy. See Prosser, TORTS, p. 840 (3d Ed. 1964); Hofstadter and Horowitz, THE RIGHT OF PRIVACY, p. 29 (1964).

Appellant's contention that the rule of liability imposed in the present case "makes a shambles of every day news reporting" (Br., pp. 33-34) is both a misstatement of the rule and an indictment of the press. The present case is not simply one in which the appellee's name was "mentioned" in a report of a recent news event (Br., p. 33); on the contrary, the LIFE article gave the impression that a Broadway play had portrayed *his* experience. As the jury and the appellate courts found, this was a fictionalization. It is only where a commercial publication has indulged in such fictionalization, in a manner which bears no relation to "everyday news reporting", that the New York courts allow recovery under the privacy law.

If there is a right to privacy at all, it must at a minimum protect persons from the appropriation of their name and personality in a manner which is false and which makes no contribution to the interchange of ideas. It was precisely this kind of commercial exploitation of an individual's personality which the New York Legislature, following ing the decision in *Roberson, supra,* sought to remedy by enacting Sections 50 and 51 of the Civil Rights Law.

B.

Appellant's attack on the constitutional validity of Section 50 of the New York Civil Rights Law in that the Section provides a criminal sanction is frivolous. Section 50 is relevant to the present case only insofar as it defines the manner of obtaining the consent of the individual ("the written consent of such person or, if a minor of his or her parent or guardian") which, if not obtained, may subject the person, firm or corporation using the individual's name for solely commercial purposes to a civil action under Section 51.

In the instant case there has been no prosecution. The fact that the amended remittitur of the Court of Appeals reflects that the validity of Section 50 was upheld

as it applies to this case clearly does not refer to the criminal sanction. Even if the court had meant to uphold the criminal sanction, it was not involved in the case and is not properly before this Court. *Doremus* v. *Board of Education,* 342 U. S. 429, 434 (1952).

Appellant has no standing to challenge the criminal sanction provided by Section 50. It is well established that one who has not been subject to the effect of the statute may not challenge its validity in this Court. *United States* v. *Raines,* 362 U. S. 17, 20-24 (1960); *NAACP* v. *Alabama,* 357 U. S. 449, 459 (1958); *Tileston* v. *Ullmann,* 318 U. S. 44 (1943); See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346-8 (19) (concurring opinion). Nor is this a case where the "constitutional rights of persons who are not immediately before the court could not be effectively vindicated. . . ." *NAACP* v. *Alabama, supra,* at 459. See also *Barrows* v. *Jackson,* 346 U. S. 249, 255-259 (1953).

Moreover, the threat of criminal prosecution in the instant case is at most minimal. We have been able to find only two reported cases in which an attempt was made to invoke the criminal penalty of Section 50 and in each case, the complaint was dismissed. *People on complaint of Maggio* v. *Charles Scribners Sons,* 205 Misc. 818, 130 N.Y.S. 2d 514 (Magistrate's Ct., Kings Co., 1954); *People on complaint of Stern* v. *Robert R. McBride and Co.,* 159 Misc. 5, 288 N.Y.S. 501 (Magistrate's Ct., Manhattan, 1936). See Hofstadter and Horowitz, *supra,* p. 287. There is thus not even a justiciable controversy as to that section. See *South Carolina* v. *United States,* —— U. S. ——, 34 U.S.L. Week 4207, 4211 (March 7, 1966); *Poe* v. *Ullmann,* 367 U. S. 497 (1961).

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of the State of New York should be affirmed.

Dated: New York, N. Y., April 14, 1966.

Respectfully submitted,

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