INDEX

Citations

CASES:

Constitution and Statutes

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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

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

REPLY BRIEF FOR THE APPELLANT ON REARGUMENT

STATEMENT

At the beginning of the proceedings in this Court appellant sought to avoid extensive factual disagreement by adopting the statement of facts in the majority opinion of the Appellate Division and by conceding both inaccuracy and negligence—thereby abandoning its contention advanced throughout the courts below that the LIFE article could not properly be described as "fictionalized" even as defined by New York law (jurisdictional statement, pp. 5-6, 19-20).*

That effort has been largely unsuccessful. The brief for appellee on reargument has departed from the record

*It is ironic that the *amicus curiae,* who did not choose to participate in the proceedings below although the much earlier Appellate Division opinion was reported and widely commented on, claims that appellant tried to establish the complete accuracy of its report to the detriment of a full constitutional argument in the Court of Appeals (p. 11). Such a constitutional argument was in fact advanced in that court, however, and the subject has been conclusively settled by the amended remittitur (R. 457).

and from the findings and conclusions contained in the opinions below to the extent of invoking supporting references not drawn from the evidence but rather from appellee's own prior briefs (pp. 3-5).* For example, in view of the sole inaccuracy in this case, that is, the use (albeit ambiguous) of the word "re-enacted," the express determination by the courts below that the Hills could properly have been mentioned in the LIFE article (R. 41), and the concession made by counsel for appellee last Term in response to a question put by The Chief Justice that substitution of the single word "reminiscent" would have rendered the article blameless, it is remarkable that appellee can now speak of a "hoax executed with painstaking precision" (p. 3).**

Similarly, notwithstanding the close connection found by earlier reviewers (R. 326, 429), the Hills' friends and business acquaintances (R. 66, 279), and by Mr. and Mrs. Hill themselves (R. 277-86, 390, 413-14), THE DESPERATE HOURS story is now described as "the antithesis" of the actual event (p. 4).*** Worst of all, it is now claimed that "all of this ["antithesis"] was known to appellant when

*This technique of overstated generalization on a factual basis that is nonexistent or sparse is similar to the flexible concept of "fictionalization" enabling New York judges to condemn publications they do not like and vice versa. See *Donahue* v. *Warner Bros. Distrib. Corp.*, 2 Utah 2d 256, 272 P. 2d 177, 182-83 (1954).

**Compare the finding below in appellee's favor: "Defendant merely concluded that basically the play was a re-enactment and so stated." (R. 439.)

***Paragraph 22 of the original verified complaint reads as follows:

> "In truth and in fact, said novel was based upon the actual occurrences of September, 1952 in which plaintiffs Hill were involved, as above set forth, with certain modifications of the actual facts, including the partial modification of the name of the family involved from 'Hill' to 'Hilliard', the reduction of the size of the besieged family, the creation of numerous melodramatic and violent incidents which did not in fact occur, the insinuation of sexual approaches by one of the convicts to the hostage daughter, and with numerous other fictional embellishments in the characterization of the personalities, relationships, attitudes and acts of the members of the besieged family." (R. 390.)

it prepared and published the LIFE article" (*ibid.*). It is difficult to rebut unsupported conclusions of this sort without resorting to a page-by-page examination of the entire record. Suffice it to say that nothing in the record supports these conclusions, and virtually all of the inferences that can fairly be drawn from the evidence point the other way, that is, in favor of appellant's demonstrable good faith. The earlier reviews, the host of similarities between the play and the event, the information furnished by the producer and the author of the play and by a friend of the author that a real-life incident near Philadelphia was involved, and Mr. Hayes' arrangements for, and presence at, the photographing of scenes from the play at the Hills' former home, are examples (R. 108-15, 121, 145, 173-74, 180-82, 326, 429, Exs. 15, B, D).

We have thus come a long way from a case originally put to the jury on competing claims on the one hand that the article was entirely accurate and on the other that it was was fictionalized. In order to restore the original posture of the appeal to this Court, as framed by the differences between the two sets of opinions below, we suggest that the legal arguments advanced by the opposing briefs on reargument be considered in the context of those differences.

SUMMARY OF ARGUMENT

1. The briefs for appellee and the *amicus curiae* respectively have been unable to distinguish the New York decisions, approved in 1952 by the Court of Appeals, imposing liability for even truthful presentations of newsworthy items. Moreover, the opposing briefs fail to explain the many cases in which liability has rested upon basically truthful accounts, irrespective of the publisher's state of mind. Appellant has standing to challenge this aspect of the statute because its publication was basically truthful, because of the standing exception, and because, in any event, the court below necessarily upheld the criminal part of the New York statute on its face.

2. The opposing briefs are unable to cite a single opinion in which the concept of fictionalization is said to include intentional fabrication. Some cases involved deliberate misstatements as a matter of fact, but intentional fabrication or reckless disregard of the truth is nowhere treated or even alluded to as a condition of liability. As for the instructions in the present case, the *amicus curiae* virtually concedes they were silent on the question of intent; appellee is forced to argue they impliedly or presumptively included that element because of their reference to altered facts in the published article. The opposing briefs offer no meaningful explanation to support the trial court's final instruction on punitive damages, put to the jury under an alternative theory of negligence.

3. Last, the opposing briefs offer no constitutional criteria of their own by which to measure the New York statute. Passing over its provisions for criminal prosecution, injunctive relief, and punitive damages, they assert that the statute is a modest regulation of expression. Indeed, appellee insists the statute should not be limited by the actual malice test of *New York Times Co.* v. *Sullivan,* 376 U. S. 254. It is also claimed that the real-life connection drawn by appellant's publication somehow falls outside the scope of First Amendment protection.

We thus repeat our demand that the award be overturned as a substantial restraint upon expression. The publication, including its references to the real-life incident, constituted a non-defamatory discussion of public issues; as such it should be protected by a constitutional standard of actual malice.

ARGUMENT

1. *Truth.* It is clear from the analyses set forth in the opposing briefs that, literally, the truthful presentation of newsworthy items is actionable in New York. This is plainly

so, in answer to part of the Court's first question, when viewing the language of the statute on its face. Appellee seems to concede the vulnerability of the statute to this form of attack, by arguing that the statute has received a narrowing construction "from the outset" (p. 8). *Cf. Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87.*

Moving to the "as construed" argument, appellee claims that New York's narrow construction has consistently permitted a news exemption while never imposing liability for truthful accounts (pp. 8-12). The principal decision in this regard is *Blumenthal* v. *Picture Classics, Inc.,* 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), *aff'd no op.,* 261 N. Y. 504, 185 N. E. 713 (1933). After ignoring that case throughout the briefing and oral argument last Term, appellee finally discusses it by resort to facts purportedly contained in the record though not mentioned in the opinion of the Appellate Division—or in the recent Court of Appeals opinion in which the facts of the case are discussed in detail. See *Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, 360, 107 N. E. 2d 485 (1952). Appellee emphasizes that professional "comics" played roles in the motion picture challenged in *Blumenthal* and made "ethnic comments" and "gags" as various persons and places in New York City were filmed (p. 11). Whatever may be the significance of these record facts (apparently taken from the complaint), there is absolutely no support for the concluding comment in the brief that the photographic close-up

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*The *amicus curiae* argues that the statute is valid even on its face because of the supposedly limiting words "for advertising purposes or for purposes of trade," pointing to the context in which the statute was enacted (pp. 4-5). Since the Court has repeatedly and realistically recognized that profit motives of news and book publishers are constitutionally irrelevant, *e.g., Ginzburg* v. *United States,* 383 U. S. 463, 474, and since the context in which the New York statute was enacted involved the public reaction to deliberately false advertising endorsements, *e.g., Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902), the argument is without merit.

of Mrs. Blumenthal was "coupled with a derisive commentary" (p. 12).*

In any event, since the opinions have not relied on any of the "facts" intuitively put together in appellee's brief, it remains beyond dispute that truthful accounts will be actionable wherever the courts object to the manner of presentation. The objection in *Blumenthal* was that the plaintiff was singled out and photographed for some six seconds in nine feet out of a total length of 1,550 feet of film. 235 App. Div. at 572-73 (dissenting opinion); 304 N. Y. at 360. The "common sense principle" of the decision can scarcely be that "private persons on the public streets are not commercial props" (brief for appellee, p. 12), because Mrs.

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*Appellee's fanciful descriptions of the facts in *Blumenthal* are another example of how simple it is to conjure up "fictionalization" without factual support. It is illuminating to compare those descriptions with the conclusions of the two dissenting judges who viewed the motion picture in which Mrs. Blumenthal appeared (235 App. Div. at 572)—conclusions that are not disputed in the majority opinion nor in the subsequent *Gautier* opinion approving the result:

> "It is further shown that at no time does plaintiff's picture appear alone, but on the contrary the pictures of other individuals appear to the side, in front or in back of her. In no part of the picture, either by sound, title, subtitle or otherwise, is any reference whatever made to her or any of her actions or motions and nothing whatever is reproduced to emphasize her likeness, occupation or actions, other than the usual silent reproduction of life and events in that particular quarter of the city.
>
> "It is further shown that at no time in the picture is plaintiff depicted in a foolish, unnatural or undignified manner, nor is there any tendency to hold her up to public ridicule or contempt. There is no distortion or exaggeration of the natural and normal physical conditions which obtained or of the events portrayed. . . .
>
> "The parties posing as guides and school teachers engage in a dialogue which consists largely of merely announcing the places, buildings, etc., in the sections through which they pass, but there is no statement or announcement in the dialogue billing or otherwise referring in any manner to the picture of the plaintiff." 235 App. Div. at 573.

Blumenthal was plying her trade on the public way and was obviously an indigenous part of the local scene on Orchard Street.

Similarly, the objection to *Redmond* v. *Columbia Pictures Corp.*, 253 App. Div. 708, 1 N. Y. S. 2d 643 (1st Dep't 1937), *aff'd no op.*, 277 N. Y. 707, 14 N. E. 2d 636 (1938), and *Franklin* v. *Columbia Pictures Corp.*, 246 App. Div. 35, 284 N. Y. Supp. 96 (1st Dep't 1935), *aff'd no op.*, 271 N. Y. 544, 2 N. E. 2d 691 (1936), appears not to be that the treatment of the plaintiffs' activities was inaccurate but rather that it was humorous and that "humorous commercial movies" (brief for *amicus curiae*, p. 6), are somehow different from newsreel commercial movies of the same activity.

When it comes to the cases that are basically true, their strained treatment in the opposing briefs is the best proof of our point. In *Binns* v. *Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913), the only inaccuracy consisted of a single scene from the motion picture in which the protagonist, a public hero, apparently was shown to be grinning. See *Molony* v. *Boy Comics Publishers, Inc.*, 277 App. Div. 166, 173, 98 N. Y. S. 2d 119 (1st Dep't 1950). In *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950), not even a single misstatement was identified yet the case was allowed to go to the jury on the plaintiff's conclusory allegation that the dominant impression created was not a true representation of the facts. These cases show how little it takes for a judicial finding of fictionalization:

> ". . . In the case before us the series of pictures were not true pictures of a current event [a recent collision at sea] but mainly a product of the imagination, based, however, largely upon such information [from newspaper accounts] relating to an actual occurrence as could readily be obtained. . . ." *Binns* v. *Vitagraph Co. of America*, *supra* at 56.

That statement by the court in *Binns* has generated much of the difficulty with the fictionalization concept in New York. By definition, all dramatic works based on current or historical events, plays, films, novels, telecasts, and the like, make use of imagined dialogue and descriptions. A MAN FOR ALL SEASONS is an example.* Even in such a scholarly historical work as THE ARMADA (1959), Professor Mattingly included dialogue that could only have been drawn from his imagination. A colorful and imaginative biography is Catherine Drinker Bowen's THE LION AND THE THRONE (1956). Schlesinger, in I THE AGE OF ROOSEVELT, CRISIS OF THE OLD ORDER, 1919-1933 (1957), describes very recent history interpretively and with embellishment. See also *Donahue* v. *Warner Bros. Pictures, Inc.*, 194 F. 2d 6, 19-21 (10th Cir. 1952) (dissenting opinion). Nevertheless, beginning with *Binns,* where an event was dramatized within days after its occurrence,** the New York courts have expressed a willingness to impose liability merely because a person's name is mentioned in connection with a dramatization of the news.

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*The following passage can be admired by those who believe in a regime of law and in concepts of equal justice; yet we doubt it was ever uttered by Thomas More or by anyone else in the sixteenth century. It movingly conveys part of the play's theme, however, that Thomas More tried to live by the law (as he tried to live by his conscience, too):

> ". . . Oh? And when the last law was down . . . and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." BOLT, A MAN FOR ALL SEASONS 56 (Samuel French ed. 1960).

**The assertion by counsel for appellee on oral argument last Term that New York exempts inaccurate accounts of current news is supported by no decision known to us and is expressly contradicted by *Binns*.

Two justices of the Appellate Division have spelled out this very point so that it is incapable of being misunderstood:

> ". . . The production was undoubtedly based on an actual occurrence in which plaintiff admittedly participated. Furthermore, the incident depicted was an event of historical import. On the other hand, the production was fictionalized in that the dialogue, the settings, and the appearance, expression and gestures of the actors were all the result of the imagination of the writers and the producers of the presentation. This was a use of the plaintiff's name for the purposes of trade, admittedly without his permission. . . . The immunity granted in respect to informative matter does not extent to dramatized or fictionalized versions of the event reported. . . ." *Youssoupoff* v. *Columbia Broadcasting System, Inc.,* 19 App. Div. 2d 865, 244 N. Y. S. 2d 1 (1st Dep't 1963) (concurring opinion).

Appellee attempts to rebut this most recent statement of New York law by pointing out that it represents only the view of two justices of the Appellate Division (Eager and Steuer, JJ.). But when their views are added to those of their Brother Rabin, whose remarkable statement in this case has already been adopted by the Court of Appeals, they cannot be lightly dismissed. More important, the concurring justices were willing to grant the plaintiff relief without the intervention of a jury solely because of this inevitable dramatization. The majority did not write an opinion but merely held, in effect, that the defendant was entitled to take its case to the jury on the question of accuracy—which is just what later occurred (App. 48). Thus, the admittted assassin of Rasputin came within one vote of a virtual judgment on the pleadings because the television description of the actual

event, drawn from several historical texts (App. 51), contained imaginary dialogue, gestures, etc. In the face of *Youssoupoff* (and for that matter *Sutton* v. *Hearst, supra*), the *amicus curiae* nevertheless asserts (p. 8) that where newsworthiness and truthfulness are apparent as a matter of law the case will not be submitted to the jury!

On the question of standing, both opposing briefs essentially take the position that the exception to the judicial rules as to standing is available only to certain litigants such as civil rights groups. Support for this unusual doctrine, says appellee, stems from the operation of the New York statute which is "completely unrelated to any area of political or social controversy" (p. 14). But this cannot be so when the statute by its terms and as construed applies to all publishers in the state and to all publications containing a name or likeness without consent where the account is inaccurate, sensational, or dramatized. Appellee goes on "there is not a scintilla of evidence that the threat of sanctions has ever had any deterrent effect whatsoever on the exercise of First Amendment freedoms" (p. 15). It is impossible, of course, to assess the inhibitory effect of such decisions as *Binns, Blumenthal, Sutton, Youssoupoff,* and the one at issue here, and it is rare when the likes of the Profumo Affair come to public attention in such a way as to make crystal clear that press timidity had actually bottled up news for some time. In any case, there is no evidence that publishers are more immune to harassment than any "politically unpopular group" (p. 14) or that the unpopular causes of the latter cannot be visited upon the former. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266, 271.

The *amicus curiae* argues (p. 11) that appellant's standing should be restricted in this case because the amended remittitur of the Court of Appeals indicates the constitutional issue was drawn in question only as applied.

Apart from the standing exception, which we submit is applicable here as explained in our main brief (pp. 7-10), the amended remittitur must necessarily be deemed to have included consideration of an attack on the overbreadth of the statute because the Court of Appeals upheld the validity of Section 50 of the Civil Rights Law, the companion criminal section. As the opposing briefs themselves pointed out last Term, this case is very definitely not a criminal prosecution. In order to uphold the validity of the criminal statute, therefore—which it did over vigorous objection by appellee that Section 50 was not involved—the Court of Appeals must have passed on the validity of both sections as written. Presumably it did so because it recognized that, the liability-creating words being the same in both statutes, an indictment could be returned by virtue of its decision under Section 51, and appellant could be convicted under the adopted alternative holding of Mr. Justice Rabin even if the second jury were to find the LIFE article entirely accurate.

Thus, the portion of the concurring opinion in the Apellate Division quoted in the Court's second question is a further ground for recognizing appellant's standing to challenge this application of New York's privacy law. The opposing briefs concede that the Court of Appeals adopted the concurring opinion as its own, arguing only that the portion quoted constituted a "dictum." However the statement might conceivably be characterized, it has to be part of the present New York law because it is the only conclusion of law in the concurring opinion distinguishable from the majority opinion. It is an unusual case when the Court of Appeals will adopt a lower court opinion, and rare when it will adopt two lower court opinions in tandem; hence the conclusion is inevitable that the Court of Appeals chose to adopt the distinguishing feature of the concurring opinion

as an alternative holding.* Because the purported error in the LIFE article was so slim, that is, "re-enacted" instead of "reminiscent of," "similar to," or "inspired by," it is probable the Court of Appeals wanted to bolster the majority opinion by the alternative holding that the article was actionable even if entirely true, under Mr. Justice Rabin's hypothesis that the primary rather than incidental reference to the Hills converted the piece into a bit of sensationalism and thus solely an effort to increase circulation (R. 442).

2. *Fictionalization.* Appellee's analysis of the New York doctrine of "fictionalization," this Term and last, is derived from Webster's Third International Dictionary and not from the privacy law of New York. It is argued the concept necessarily includes intent to make false statements because of Webster's definition of "fiction." As we said in our main brief (p. 25), the label "fictionalization" as a matter of first impression might in some cases connote intentional tampering with facts, but it has not been so invoked by the New York courts which have limited themselves to a mechanical examination to the publication at issue—the end product. See Note, 51 MICH. L. REV. 762, 764-65 (1953). Appellee is unable to cite a single opinion in which the question of intent is discussed much less required as an element of the tort. Indeed, the only case containing a specific discussion of intent is *Thompson* v. *Close-Up, Inc.*, 277 App.

*The dissenting opinion in the Appellate Division also followed an unusual course when it responded to the concurring opinion as well as to the opinion of the court. As regards the former, Presiding Justice Botein's response was directed to the portion of the concurring opinion quoted by this Court in its second question, squarely posing the issue of liability for truthful accounts for the Court of Appeals (R. 444). That court decided to take a stand on the issue by adopting the concurring opinion notwithstanding the dissent. Judge Fuld's dissent, in turn, concluded by quoting precisely this dissenting response to the concurring opinion (R. 455).

Div. 848, 98 N. Y. S. 2d 300 (1st Dep't 1950), where the court stated unequivocally that liability could rest upon a mistake. The attempt to distinguish that case (brief for appellee, p. 21) is, at least to us, incomprehensible.

Principal reliance is placed upon *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 260 N. Y. S. 2d 451 (1st Dep't 1965), cited repeatedly in appellee's brief (13, 19-20, 22, 23). That opinion, however, does not support the suggested definition of "fictionalization." Instead, it appears *in fact* to have involved deliberate misstatement. Again, this merely underscores what we have said before (*e.g.*, main brief, p. 3), that a number of the New York cases undoubtedly involved deliberate falsification and hence were rightly decided, albeit unwittingly, under the First Amendment. Moreover, appellee has overlooked the concluding statement of law contained in the *Spahn* opinion:

> ". . . . If the publication, however, by intention, purport, *or format,* is neither factual nor historical, the statute applies, and if the subject is a living person his written consent must be obtained." 23 App. Div. 2d at 222. (Emphasis added.)*

What appellee has attempted to do here is to create a presumption: the word "fictionalization" sounds like it includes deliberate fiddling with the facts and, anyway, on what other basis could a publisher print misstatements when his design is to increase circulation? Such a presumption, of course, would have to be grafted upon the already existing legal presumption in New York that is just as fallacious—that certain newspaper and magazine items are

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*The only other decision cited by appellee to support his definition is *Binns* v. *Vitagraph Co. of America, supra,* where intent was not discussed and the defendant readily testified that its scenario was based on all the newspaper accounts it could find reconstructed with the aid of the imagination. 210 N. Y. at 56.

designed to increase circulation and profits and others are not. (The criteria of "trade purposes" have obviously been the result of the statutory language, originally drafted with the false endorsement situation in mind. How the existing presumption could be applied in any event to the facts of this case, where the article appeared on page 75 of the particular issue of LIFE and was not mentioned on the magazine's cover, remains a mystery.)

Appellee's new presumption—that "fictionalization" denotes intentional falsification—is analogous to the common law presumption of malice in defamation, previously rejected by the Court in *New York Times,* 376 U. S. at 283-84. It is particularly inapt in the context of privacy because, as the present case illustrates, the publisher will have less reason to be on guard. A defamatory falsehood, whether or not he is aware of its falsity, is a red flag to the publisher to proceed cautiously. Here, on the other hand, we find a laudatory publication on a subject that had already been discussed prominently in the press just a few years before. And non-defamatory language about public issues would seem to be just as important, if not more important, than defamatory language about the conduct of second-rank public officials; presumptions should be as objectionable in the one case as in the other.

The most troublesome feature of appellee's presumption* is found in the context of the present case and, specifically, the state of mind of the LIFE editor. That is a subject receiving scant attention in the opposing briefs, no attention at the trial, and only a passing reference (by way of implying

*The *amicus curiae* appears to recognize as well that appellee's argument is grounded on a presumption when he speaks of a finding of fictionalization based on inferences, "the greater the departure from truth, the stronger the inference" (p. 16). Moreover, in another section of his brief (p. 29) appellee argues that "there is no basis for application of the *New York Times* test of actual malice . . . to the New York statute. . . ."

carelessness) in the majority opinion of the Appellate Division. Viewed in the light least favorable to appellant, the facts here at the very least support a reasonable claim of good faith. Confronted with such a claim, trial counsel for appellee made no effort to rebut it and no effort to cross-examine the LIFE editor with regard to his state of mind, and, indeed, objected when counsel for appellant attempted to raise the subject with the same witness and in summation (R. 246, 530).

Most of appellee's belated claim of intentional fabrication is founded upon an article written by Hayes, entitled "Fiction Out Of Fact" and introduced at the trial by appellant, in which the author said THE DESPERATE HOURS was based on four news stories, one the Hill incident (R. 382-85). (No mention is made of another article written by Hayes in which he noted that THE DESPERATE HOURS was based on two news stories, the Hill incident and another quite different occurrence in New York, R. 143-44, 427-28.) Surely this is an inadequate ground for a determination of intentional falsehood or reckless disregard as a matter of law, in the absence of pertinent jury instructions and in the absence of evidence tending to show the LIFE editor was specially aware of the Hayes article or believed it to be in any way inconsistent with his own. See *New York Times Co.* v. *Sullivan, supra* at 287-88. In addition, it ignores the other examples of good faith, *e.g.,* the connection made by the Philadelphia reviewers, the similarities between the play and the event, the unusual two-story stage setting, and the arrangements made by Hayes himself for the off-stage photographs at the Hills' former home. If Hayes did not approve of a substantial connection being drawn between his play and the Hills when he assisted in taking photographs of scenes from the play in the actual home, then his conduct was deceitful to say the least. In view of his conduct, there was no reason for the LIFE editor to question him in

detail about the real-life connection and, in any event, the failure to do so under the circumstances can at most be deemed negligent, precisely the implication of the majority opinion in the Appellate Division (R. 439).*

The instructions to the jury in this case are just as barren of reference to intentional misstatement as is appellee's definition of "fictionalization." Except on the final question of punitive damages, put to the jury on an alternative theory of negligence, that is, failure to make a reasonable investigation, the charge is silent on state of mind and standard of care. It can only follow that the instructions dealing with compensatory damages, which do not even contain a negligence criterion, permitted a verdict for non-negligent or, at the most and only by implication, negligent, misstatements. It follows even more inexorably in light of appellant's sixth request to charge which specifically contained a requirement that the jury find knowledge of falsity (R. 311).

Appellee still insists (pp. 26-27) that the court included a standard of recklessness on the question of punitive damages. But a reckless disregard of "plaintiff's rights" (R. 566) simply does not satisfy the actual malice test. Indeed, in *Rosenblatt* v. *Baer,* 383 U. S. 75, 84, even an "intention to injure" was held to be "constitutionally insufficient where discussion of public affairs is concerned." Furthermore, in the context of this statute, a reckless disregard of the plaintiff's rights can only mean that the defendant went ahead and knowingly published the plaintiff's name without first ob-

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*The Appellate Division appeared to overlook the testimony concerning the initial conversation between Hayes and the LIFE editor (which followed, in turn, the conversation between the latter and Hayes' friend, Bradley Smith, when the "substantial connection" to a family in the Philadelphia area was disclosed, R. 173-74, also 144). Hayes confirmed, in answer to a specific question, that there had been a similar incident in Philadelphia. He then agreed to contact the occupants of the house at the site of the incident for the purpose of photographing scenes from the play there (R. 108, 145).

taining his consent (*e.g.,* R. 304). Appellant's knowledge that it lacked consent, conceded from the outset, can hardly be equated with knowledge of falsity or reckless disregard of the truth or falsity of statements of fact.

Appellee attempts to draw support from the language in this and the *Youssoupoff* charge relating to alteration of the true facts. Unfortunately, in his paraphrase of those instructions (pp. 22, 24) appellee has left out the key words "as published" in the charge here and ignored the words "as televised" in *Youssoupoff* (R. 300, 307; App. 48).* Again, appellee moves from the actual words used in the instructions to his own definition, "alteration or changing of facts to create fiction" (p. 22) and "alteration of facts to create a fiction" (p. 24). Whatever may be the meaning of this rather ambiguous definition, it was not invoked by the trial court here or in *Youssoupoff*. The focus in both was on the end product. If the LIFE article or the television program contained something more than incidental misstatements, the jury was obliged to find fictionalization. The New York Times, it should be remembered, "altered or changed the true facts" when it published an advertisement containing misstatements. See 376 U. S. at 286-87.

Finally, the significance of the failure to explore the subject of good faith and the trial court's silence on that subject in its charge can only be fully apprehended upon an examination of what it is that appellant did. If this were a case of a "hoax executed with painstaking preci-

*The paraphrase of the key portion from the *Youssoupoff* charge is particularly revealing. Appellee states the jury was required to find "that the *defendant* 'altered or changed the true facts concerning the plaintiff's relationship to the events of Rasputin's death so that the play as televised constituted substantial fiction or a fictionalized version of what actually did take place'" (p. 22) (emphasis added). Actually, the charge permitted a finding of liability if "the *television program* 'If I Should Die' altered or changed the true facts. . . ." (App. 48) (emphasis added).

sion," perhaps the failure to discuss intent would not be so important. In fact, appellant's article contained a single error, and an ambiguous error at that. Every word in the account is literally true both in terms of its faithfulness to the play and its faithfulness to the real-life connection. The author testified that the Hill incident triggered THE DESPERATE HOURS in a very direct way (R. 129-30, 151); the thrust of the article is that the play was inspired by the actual event and that word is used twice in the article, the first time, most significantly, in the headline ("TRUE CRIME INSPIRES TENSE PLAY") (R. 15). Only in one sentence out of the entire article is there a possible inaccuracy where the word "re-enacted" may suggest that the play constituted a reenactment of the Hill incident, although the reference more probably is to the novel being reenacted in play form:

> "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." (R. 15.)

Moreover, and apart from the ambiguity, the error is only substantial if we must assume that "re-enacted" necessarily means a documentary-like reproduction of what actually occurred. That interpretation, of course, does not at all jibe with the thrust of the remainder of the article where the emphasis is upon "inspired" rather than "re-enacted." Similarly, the captions accompanying the photo-

graphs taken at the Hills' former home (as well as the text of the article) refer to the actors having been transported from the stage to do scenes from the *play* (*e.g.*, R. 16). The captions and text might have instead read "where scenes from the *crime* were re-enacted" but they did not. The purported misstatement of fact is limited, but even if considered substantial, there was absolutely no evidence to show that appellant had any ulterior motive for its ambiguous use of the word "re-enacted" as distinguished from a repetition of the word "inspired," or that the substitution of the latter word would have made the total article any less interesting or destined to sell fewer copies of the magazine. Nor was there any attempt to explore *why* (as opposed to *whether*), in the editorial revision process, the words "somewhat fictionalized" were deleted from an earlier draft, so that one is left with the impression that the change was approved because of the obvious tautology in a review of a melodramatic work that is nowhere described as a documentary.*

3. *First Amendment.* The opposing briefs offer no constitutional criteria of their own by which to measure the New York statute; they contend that the status quo should not be altered because most of the New York cases have been decided on equitable if not constitutional grounds. They argue that the statute is a regulatory measure, reasonably worded and reasonably applied, to protect an individual's feelings at no loss of information to the public (*e.g.*, brief for appelleee, pp. 27-28). That description hardly fits the whimsical and capricious operation of the statute. For

*Actually, the LIFE editor on cross-examination attempted to explain before he was interrupted that all dramatic works are fictionalized (R. 201). Compare the Herald Tribune review of INHERIT THE WIND, described as a "semi-documentary" despite the fictionalization of characters, dialogue, and setting. N. Y. Herald Tribune, April 22, 1955, p. 10, col. 1.

example, the Hills would have been equally disturbed if the article had been the same except to say the play was reminiscent of their incident (R. 441). And, had the article been so worded, the pictures taken at their former home would not have been enough to sustain liability under the majority opinion (unlike the concurring opinion) in the Appellate Division. On the other hand, as written, the article is actionable because of the erroneous word "re-enacted"; hence it would make no difference if there had been no pictures at all in the article or if the pictures had been confined to the stage. The "name" limitation is another example of the arbitrary nature of the statute. Here the Hills' ire was originally directed at Hayes, the one most familiar with the facts and the one who had originally connected them with THE DESPERATE HOURS (R. 278-86), yet liability was avoided only because "Hill" became "Hilliard."

As we have shown in some detail, and as conceded by counsel for appellee at the oral argument last Term, the substitution of a single word would have saved the article and made it, according to the New York courts, newsworthy and within their news exemption. But the article's importance is scarcely diminished because it contained the verb "re-enacted" instead of another verb merely suggestive of strong similarities between the play and the incident. The point of the article would remain the same.

Nor does it make much sense, in a constitutional context, to rely on the doctrine that what is familiar is what is right. Although the New York statute has been abroad for some sixty-three years (brief for appellee, p. 16n.), as of 1964 most of the state criminal libel laws had been extant much longer. See *Garrison* v. *Louisiana,* 379 U. S. 64, 70n.7. FANNY HILL, recently found to be constitutionally protected unless *utterly* without redeeming social importance, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure* v.

Attorney General of Massachusetts, 383 U. S. 413, 418-20, was first suppressed in the United States nearly 150 years ago. See 383 U. S. at 425n.1 (concurring opinion).

The opposing briefs repeatedly point out that "incidental mistake" is not enough to incur liability in New York and that the instructions here included that statement of New York law (R. 301). We could not have demonstrated the harshness of this strict-liability statute any more vividly ourselves. A test that warns a publisher to print anything save incidental mistake at his peril is plainly deficient.

It has already been established that "no matter how gross the untruth," even when defamatory, the possibility remains that the statement may have been honestly uttered. See *Rosenblatt* v. *Baer,* 383 U. S. 75, 92 (concurring opinion). By contrast, we have here a statute that feeds on anything other than incidental mistake in a non-defamatory report and without inquiry into the publisher's state of mind or what he had reason to believe. But the awards under the statute have been modest, says appellee (p. 33), overlooking the original judgment here of $175,000 in punitive as well as compensatory damages (R. 308). The ultimate award ($30,000) was such smaller, because of the "substantial prejudicial error" in allowing the jury to view the film version of THE DESPERATE HOURS and other inflammatory material (R. 439-40) and because upon remand the action was discontinued as to Mrs. Hill (R. 446-47). At no time in this case have the New York courts said or suggested that an award of punitive damages was impermissible, and the trial judge upon remand was free to enter such an award.

Finally, the opposing briefs advance no "compelling" need why the statute should be permitted to continue unchecked under its present construction. See *Bates* v. *City of Little Rock,* 361 U. S. 516, 524. They merely point to cases that involved intentional fabrication as a matter of fact,

such as *Spahn, supra,* in which knowledge of falsity was conceded, or where the particular lower court reached a correct result, for example, *Koussevitzky* v. *Allen, Towne & Heath, Inc.,* 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct.), *aff'd no op.,* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947). Nor do they explain why Utah, one of the two states having a statute almost identical to New York's, has, under the First Amendment, expressly rejected the results of such New York decisions as *Binns* and *Blumenthal* and limited its privacy law primarily to cases of false endorsements.* See *Donahue* v. *Warner Bros. Pictures Distrib. Corp.,* 2 Utah 2d 256, 272 P. 2d 177 (1954). The *Donahue* decision of the Utah Supreme Court provides a guidepost for this Court comparable to that furnished for the *Times* decision by the Kansas Supreme Court in *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908). The Utah court, in construing a statute nearly identical to the one now drawn in question, articulated constitutional premises very like those advanced by appellant. See 272 P. 2d at 183-84.

Turning to the constitutional test suggested by appellant,** the opposing briefs indicate that the discussion at stake here did not involve a public issue. Essentially their

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*The other state is Virginia whose privacy statute, VA. CODE ANN. § 8-650 (1957), has received virtually no interpretative gloss. See Woodbridge, *Some Needed Changes in the Tort Laws of Virginia,* 3 WILLIAM & MARY L. REV. 3, 4 (1961).

**Appellee misconceives the scope of the test proposed in our main brief. It is not a standard limited to criteria of "redeeming social value" (brief for appellee, p. 30). We cited the language of the obscenity cases merely to show the outer limits of constitutional protection. As the Court has already made clear, criticism of government is "at the very center of the constitutionally protected area of free discussion." *Rosenblatt* v. *Baer, supra* at 85. The subject of appellant's publication may not have been at the very center of free discussion, but unquestionably it was closer to the center than to the outer fringes.

argument runs that the First Amendment only protects criticism of official conduct and that, in any event, the LIFE article could not be considered part of a "debate" on public issues (brief for appellee, p. 31n.; brief for *amicus curiae,* pp. 18-19). Appellee does not spell out this rather parochial view of debate, but it is apparently limited to an exchange between two individuals either face to face or in print. Such a view excludes the possibility of an artistic contribution to public debate and a reviewer's commentary on that contribution.

While not exploring the significance of drawing a real-life parallel, the opposing briefs suggest that there is no substantial public interest in learning of such a connection. (They convey this idea without actually saying it—perhaps out of understandable lack of conviction.)

The opposing briefs seize upon a bit of journalistic jargon—"gimmick"—in the testimony of the substitute researcher who worked on the article for a short time (R. 161-64), not, as the opposing briefs would have one believe, from the words of the LIFE editor. The "gimmick" of tying the review to the Hills, on whose story the play was actually based, was an attempt to convey through the medium of photo-journalism some of the message of Hayes' play. So often the difficulty in artistic communication stems from its lack of verisimilitude, from its inability to relate to meaningful events of the day. Where a connection to a real-life event or person exists, journalists and reviewers almost invariably point it out. Arthur Miller's play, AFTER THE FALL, powerfully chronicled the self-destruction of a young woman. The review in every major New York paper linked the play to

Marilyn Monroe.* Even after Miller denied the play told the story of his former wife,** the critics continued to see Marilyn in "Maggie."*** Miller's first wife, Mary Slattery

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*"As everyone must surely have heard long before this, much of the play is based on the dramatist's marriage to Marilyn Monroe. . . ." N. Y. Post, Jan. 24, 1964, p. 59, col. 1.

"Actually, there are no unimportant relationships. The most vivid, of course, is Quentin's second marriage, to a highly successful popular singer who is inescapably Miller's second wife, Marilyn Monroe." N. Y. World-Telegram and Sun, Jan. 24, 1964, p. 16, col. 5.

"The author is one of our most gifted playwrights, but it seemed regrettable that he chose to consider at such length the tragic frustrations of a character, quite obviously fashioned after Marilyn Monroe, which led to her suicide. . . ." N. Y. Journal-American, Jan. 24, 1964, p. 20, col. 1.

"The less important reason is its patent use of the author's relationship with the late Marilyn Monroe. We are given no cause for doubt here, not in calling her Maggie or in describing her as a cabaret singer. . . ." N. Y. Herald Tribune, Jan. 24, 1964, p. 11, col. 1.

". . . . The long, searing relation between Quentin and Maggie, the sexy, popular entertainer, who inescapably will be equated with Marilyn Monroe, is described with the tenderness and anguish it meant for both." N. Y. Times, Jan. 24, 1964, p. 18, col. 2. See also Daily News (N. Y.), Jan. 24, 1964, p. 49, col. 1.

**". . . . The character of Maggie, who in great part seems to underly the fuss, is not in fact Marilyn Monroe. . . .

". . . . I would only say now that despite appearances, this play is no more and no less autobiographical than *All My Sons, Death of a Salesman, The Crucible* or *A View from the Bridge*. . . ." Miller, *"With respect for her agony—but with love,"* Life, Feb. 7, 1964, p. 66.

***". . . . Although Mr. Miller does not want us to regard the play as biographical, its events so resemble what the public knows of the playwright's own life that it becomes difficult for us not to believe that we are seeing exactly what went on behind the closed doors. Take the instance of Quentin's marriage to Maggie, the sex-generous star who eventually dies from an overdose of barbiturates. Can one not regard her as the late Marilyn Monroe, who was Mr. Miller's second wife, particularly since, after a brief first-act appearance as a quite different-looking girl, Miss Loden switches in Act II to something that it as much like Marilyn's public image as she can possibly make her? . . ." Saturday Review, Feb. 15, 1964, p. 35.

"Another part has to do with Miller's marriage to Marilyn Monroe. . . ." The Reporter, Feb. 27, 1964, p. 46.

(not a public figure), and Elia Kazan, who had directed the play, were also mentioned in commentary about it.* Edwin O'Connor, like Miller, denied his novel, THE LAST HURRAH, told the story of James M. Curley: "I know very little about Mayor Curley. My man is far different." Saturday Review, Feb. 4, 1956, p. 12. But Howard Mumford Jones, reviewing the novel on the same page in the Saturday Review where O'Connor's disclaimer appeared, playfully but clearly identified the Irish Mayor in O'Connor's book: "J-m-s M-ch- -l C-rl-y." *Ibid.* Similarly, INHERIT THE WIND was commonly discussed as the story of Bryan and Darrow at the Scopes trial.** Even WINTER-

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*Many theatregoers have found similarities in the lives of the characters on stage and in Mr. Miller and the people in his life.

". . . .

". . . . [Mr. Miller's] first wife was Mary Slattery. . . . They were divorced in 1956. That year Mr. Miller married Miss Monroe. . . ." N. Y. Times, Jan. 31, 1964, p. 14, cols. 1, 3.

". . . . Some of the more juicy turns in this exhibition include his arguments with his parents, and his mother's emasculation of his father; his quarrels with his first wife over her coldness in bed and his suspected infidelities; his continuing loyalty to his ex-Communist friends, one of whom throws himself under a subway train; his break with Mickey (Elia Kazan) over the latter's decision to name names to a Congressional committee; his affair, marriage, and tortured life with Maggie (Marilyn Monroe), concluding with her suicide; and, finally, his decision to build a new marriage with Holga, a German woman he met abroad." The New Republic, Feb. 8, 1964, pp. 26-27.

**"Because of legal niceties, I suppose, the place, characters and time of the drama are fictionalized, so that Muni appears as a character named Henry Drummond and Begley is called Matthew Harrison Brady. But Muni and Begley are, of course, Clarence Darrow and William Jennings Bryan, and the events at the National Theatre are a representation of what happened when these two notable men clashed in the historic Scopes 'monkey trial' in Tennessee." Daily News (N. Y.), April 22, 1955, p. 59, col. 1.

"In 'Inherit the Wind', the semi-documentary play that Jerome Lawrence and Robert E. Lee have based on the Scopes 'monkey trial' of 1925, Mr. Muni has one of those parts that actors have been known to hock their wives and children for." N. Y. Herald Tribune, April 22, 1955, p. 10, col. 1.

SET, Maxwell Anderson's prize-winning verse play about the son of an executed anarchist and his quest to establish his father's innocence, evoked reviews grounding the play in the far-different Sacco-Vanzetti incident.* Reviewers at a revival thirty years later made the same link.** Connections are sometimes made by photographs as well. Martin Dain's collection, FAULKNER'S COUNTY (1963), combines pictures of places and people in northern Mississippi with paragraphs from Faulkner's novels about Yoknapatawpha County.

In each of these examples the writer or photographer used the "gimmick" of tying a dramatic work to a real-life person or event. By this "gimmick" these writers, along with the LIFE editor, were not perpetrating a "hoax executed

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* "In 'Winterset' Mr. Anderson has not only turned his back on the tragedies of the Tudors but given vent in poetic form to some of that resentment which the Sacco-Vanzetti case left smoldering in his heart and which he stated in prose with Harold Hickerson's aid in 'Gods of the Lightning.'" N. Y. Post, Sept. 26, 1935, p. 12, col. 1.

". . . . (There is here an echo of the Sacco-Vanzetti case, but Mr. Anderson's purpose is not this time political protest, as it was some years ago in 'Gods of the Lightning,')" N. Y. Sun, Sept. 26, 1935, p. 28, col. 1.

" . . . . Obviously its main impulse springs from that old bitterness over the Sacco-Vanzetti case, only here he reaches beyond the immediate facts in a quest for the truth of justice, and takes for his narrative outline the attempt of a young man, who believes his executed father innocent, to find vindication." N. Y. Evening Journal, Sept. 26, 1935, p. 18, col. 1.

"Maxwell Anderson's 'Winterset', I think, must be the tragedy of Vanzetti's son. Or Sacco's son. Not as it happened, but as such a son's life might have been visioned by a poet-dramatist who was very deeply stirred by the case of Massachusetts against those men." Daily News (N. Y.), Sept. 26, 1935, p. 59, col. 1.

". . . . Newspaper headlines flash by, there are street discussions, it is the Sacco-Vanzetti case in thin disguise." N. Y. Times, Dec. 4, 1936, p. 31, col. 3.

**"Its basis was the Sacco and Vanzetti case, the rallying point for leftists in the '30s. . . ." N. Y. Journal-American, Feb. 10, 1966, p. 15, col. 6. See also N. Y. Post, Feb. 10, 1966, p. 24, col. 3.

with painstaking precision" but rather were following the natural journalistic instinct to make such works more meaningful to the public. Readers and members of his audience could not lightly dismiss Miller's message about a woman destroying herself when they were told it was based on the life of a real person (although for some reviewers it thereby became somewhat embarrassing, another critical reason they felt for pointing out the connection to Miss Monroe and others in the author's life). In the same way, a LIFE reader might not readily dismiss Hayes' theme that an American family, living in a comfortable suburb, could actually be held hostage for a prolonged period in its own home and yet, through its self-reliance, survive such an ordeal.

We recognize that not all items published in the press are compelled by public interest, for example, gossip for gossip's sake or private defamation. *Cf. Afro-American Publishing Co., Inc.* v. *Jaffe,* No. 18, 363 (D. C. Cir. August 23, 1966) at 11-12. But the publication here did not trade on the Hills' private life; rather it dealt with the one public event in which, apparently, the family had ever been involved. See Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error,* 75 YALE L. J. 642, 648-49 (1966). By comparison, the references to Marilyn Monroe in the reviews of AFTER THE FALL admittedly concerned a public person, but the play which they discussed dealt with intimate details of her private life.

Even in the context of defamation it has already been acknowledged that the free press privilege "must include a very great deal more" than honest attacks on public officials. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L. Q. 581, 591 (1964). Professor Pedrick emphasizes that the public judgment requires enlightenment on a multitude of subjects:

> ". . . If a qualified 'good faith' privilege is needed to better assure open debate then the privilege ought to extend as stated by Judge Burch of Kansas to 'all matters of public concern.' The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. It is therefore the function of the first amendment to protect the freedom of speech and press on all those matters as to which there is some element of public participation. At least on those issues where the public judgment can make itself felt through official or unofficial communication it can be said that the matter is one of proper public concern. The determination of 'matters of public concern' should thus become the key to the application of the privilege recognized in the *Times* decision." *Id.* at 592.

In a non-defamatory context the public issue test is particularly compelling. See Note, 12 CATHOLIC LAW. 235, 246-47 (1966), where the Court's third and fourth questions for reargument are discussed and a constitutional privilege for fictionalized, non-defamatory statements about private persons approved. Out of the welter of words used to describe this long and confusing litigation about a non-defamatory publication there remains one simple, incontrovertible fact: a substantial connection existed between the play and the actual event which LIFE was entitled to point out (R. 441). In the absence of intentional fabrication or reckless disregard, we submit that the First Amendment allows and indeed encourages LIFE MAGAZINE to decide for itself how best to report that connection.

The public interest in that reported connection was not morbid, lurid, or prurient, and hence the publication drawing it was not merely "dressed up as speech." See *Ginzburg* v. *United States,* 383 U. S. 463, 474n.17. Appellant's publication contributed to the public judgment about the home and the community, as affected by the far-reaching ramifications of a specific and thoroughgoing crime. It recognized the understandable public interest in learning that something like THE DESPERATE HOURS could actually happen in American life but that, depending upon the persons involved, those desperate hours could be endured and survived:

> ". . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102.

CONCLUSION

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

Respectfully submitted,

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October 12, 1966.