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## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No.

TIME, INC.,
*Appellant,*

*—against—*

JAMES J. HILL,
*Appellee.*

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

## JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Court of Appeals of the State of New York, entered on April 15, 1965, as amended on May 27, 1965, affirming a judgment of the Supreme Court of the State of New York, Appellate Division, which affirmed as to the issue of liability a judgment of the trial court in favor of appellee. In the Appellate Division Presiding Justice Botein dissented and in the Court of Appeals Judges Fuld and Bergan dissented, all being of the opinion that appellee's complaint should be dismissed.

### OPINIONS BELOW

The court below affirmed on the majority and concurring opinions of the Appellate Division. Its memorandum decision of affirmance and the accompanying dissenting

opinion of Judges Fuld and Bergan, reported at 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965), are set forth in Appendix A, *infra,* pp. 1a-5a. The majority and concurring opinions of the Appellate Division are set forth in Appendix B, *infra,* pp. 1b-8b, the dissenting opinion of Presiding Justice Botein in Appendix C, *infra,* pp. 1c-3c. The opinions of the Appellate Division are reported at 18 App. Div. 2d 485, 240 N. Y. S. 2d 286 (1st Dep't 1963).

## JURISDICTION

This action for damages was brought under Sections 50 and 51 of the New York Civil Rights Law for invasion of privacy and resulted in a jury verdict for $125,000 compensatory damages and $50,000 punitive damages. The judgment as to the issue of liability was affirmed by the Appellate Division but was reversed on the question of damages and remanded for a reassessment of damages. The judgment entered after the proceedings on remand was affirmed by the court below by its judgment entered on April 15, 1965, as amended on May 27, 1965. Notice of appeal to this Court from that judgment was filed on July 14, 1965. The jurisdiction of this Court to review the judgment below is conferred by Title 28, United States Code, Sections 1257 and 2101(c). The following decisions sustain the jurisdiction of the Court to review on appeal the judgment below: *Garrison* v. *Louisiana,* 379 U. S. 64; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282.

## QUESTION PRESENTED

Whether Sections 50 and 51 of the New York Civil Rights Law abridge the freedom of the press guaranteed by the First and Fourteenth Amendments when they are

construed to permit the award of damages for invasion of privacy by the publication of a review of a play that resembled a prior incident involving a private person, the review and accompanying photographs being inaccurate in some particulars.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, U. S. Const. Amend. I, Amend. XIV § 1. The statutory provisions involved are Sections 50 and 51 of the 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."

## STATEMENT

Appellee and his wife commenced this action on October 28, 1955, to recover damages because their name was mentioned in the February 28, 1955 issue of LIFE Magazine. They asserted that the reference in the LIFE article to them and their family constituted an invasion of their privacy in violation of Sections 50 and 51 of the New York Civil Rights Law. The jury returned a verdict against appellant in the amount of $175,000 in compensatory and punitive damages (R. 335). The Appellate Division, the presiding justice dissenting, affirmed the judgment of the trial court on the question of liability, but directed a new

trial on the issue of damages (Appendix B, *infra,* p. 6b). Upon remand, the action was discontinued as to appellee's wife and judgment in the amount of $30,000 in compensatory damages was awarded to appellee (R. 507). That judgment and the order of modification of the Appellate Division were affirmed by the court below, two judges dissenting.

In the fall of 1952 appellee and his family (the Hills) were held captive in their home in a Philadelphia suburb by three escaped convicts (R. 76-77). After a period of nineteen hours, the convicts released their hostages, unharmed, and departed (R. 413-14). The incident provoked widespread local and national attention in the press (R. 37-43, 348-49, 410). Thereafter, appellee and his family sought to retreat from the public eye and did not attempt to capitalize on the occurrence (Appendix B, *infra,* p. 1b).*

In the spring of 1953 there appeared a book entitled "The Desperate Hours", which dealt with three escaped convicts holding the members of a family (the Hilliards) as hostages in their suburban home (R. 92). According to the book, the father and son were assaulted, profanity was used, and in other ways the story differed from the account given to the press by appellee, who stated immediately after the actual incident that the convicts had been courteous, save for the restraint (Appendix B, *infra,* p. 1b). On the other hand, the book, and the ensuing play of the same name, were strikingly similar to the actual incident in terms of the names and relationships of the characters, the setting, many events occurring during the period of restraint, and the denouement (Exs. 15, B, D; Appendix A, *infra,* p. 3a; Appendix D, *infra,* pp. 1d-3d).

In 1954 "The Desperate Hours", in drama form, began pre-Broadway tryouts in Philadelphia. Following confer-

*The statement of facts has been taken in the main from the majority opinion of the Appellate Division.

ences with the producer and the author, appellant decided to review the play by means of a pictorial article (Appendix B, *infra,* p. 2b). Arrangements were made by the author to permit the taking of photographs in the home in which appellee and his family had been held captive (and which at the time of publication was no longer in their possession) (*ibid.*). Appellant transported members of the cast of the play to appellee's former home, where it photographed actual scenes from the play, and thereafter published those photographs in connection with the accompanying review (*ibid.*). The portion of that review which was quoted in the majority opinion of the Appellate Division is as follows:

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

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

> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. *Life* photographed the play during its Philadelphia try-out, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from

the play are re-enacted on the site of the crime." (R. 18-20.)

**How the Federal Question is Presented**

A challenge to Sections 50 and 51 of the New York Civil Rights Law, as applied, was asserted in the trial court (R. 507), and in the appellate courts below, under the guaranty of freedom of the press in the First Amendment, as embodied in the Fourteenth. The court below affirmed the judgment of the Appellate Division on the majority and concurring opinions of the latter court. By amendment of its remittitur (judgment), the court below added the following:

> ". . . Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether sections 50 and 51 of the Civil Rights Law of the State of New York, as applied to defendant, were invalid under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that sections 50 and 51 of the Civil Rights Law of the State of New York, as so applied, were valid." (Appendix A, *infra,* p. 1a; 16 N. Y. 2d 658, 209 N. E. 2d 282 (1965)).

## THE QUESTION IS SUBSTANTIAL

The law of privacy in New York (articulated by the majority and concurring opinions of the Appellate Division on which the judgment of the Court of Appeals rests), now imposes damages and criminal and prior restraints upon members of the press who mention a private person in a news article to which that person is relevantly connected, whenever the article is factually inaccurate, that is, in the court's view, "fictionalized". This is startling doctrine to be abroad in a nation that prides itself on freedom of expres-

sion and, specifically in this case, freedom of the press. It has come about because the law of privacy, although a late starter, has been the product in New York and elsewhere of a common law development, subject to the discretion and varying content furnished by judges in a climate that did not feel the presence of the First Amendment. Like the common law rule of *Coleman* v. *Mac Lennan,* 78 Kan. 711, 98 Pac. 281 (1908), rendered constitutional by *New York Times Co.* v. *Sullivan,* 376 U. S. 254, the tort remedy for invasion of privacy was created before there was full appreciation that the First Amendment guarantees even applied to the states. See *Gitlow* v. *New York,* 268 U. S. 652.

Messrs. Warren and Brandeis recognized in 1890 that the imposition of damages for invasion of privacy was a limitation upon the press, *The Right to Privacy,* 4 Harv. L. Rev. 193, 214 (1890), but the subsequent decisions have been based by and large upon a common law balancing in which the public's right to know is weighed against the utility of the news involved, the degree of fictionalization, the motive of the publisher, and the like. New York, for example, has greatly expanded the tort in the sixty years since it sought to remedy exploitation of a name or photograph in an advertisement. See *Robertson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902). The time has come for a decision making it clear that the First Amendment is present in what has traditionally been considered "tort territory". See Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact,* 16 Stan. L. Rev. 107, 139 (1963). As in *New York Times* v. *Sullivan, supra,* we start with "a clean slate", 376 U. S. at 299 (concurring opinion), except that the law of privacy is infected with considerable confusion resulting from the wide swings of this balancing

process, unfettered so far by constitutional mandate. And as in the *Times* case, the occasion for a "confrontation is at hand", Petition for Certiorari, p. 20, on this direct appeal involving the validity of both civil and criminal restraints upon the press.

*First.* Because of the balancing process out of which the law of privacy has grown, there have developed a number of doctrines which are either constitutionally impermissible or at least vulnerable to reexamination in light of the First Amendment. For example, judges have felt free to evaluate the content of matters reported in the press in terms of decency, profit motive, fictionalization, and involuntary participation in the event described. See, *e.g., Binns* v. *Vitagraph Co.,* 210 N. Y. 51, 103 N. E. 1108 (1913); *Sutton* v. *Hearst Corp.,* 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950); *Blumenthal* v. *Picture Classics,* 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't 1932); *Leverton* v. *Curtis Pub. Co.,* 192 F. 2d 974 (3d Cir. 1951); *Mau* v. *Rio Grande Oil Company,* 28 F. Supp. 845 (N. D. Cal. 1939). On the other hand, from the beginning there has been recognition that the tort had limitations. Warren and Brandeis noted that the new right should not prohibit a publication of public or general interest, but they appeared to limit matters of public interest to those involving the public activities of public or quasi-public officials. 4 Harv. L. Rev. 193, 214-16. In the leading case to date, the Second Circuit went further and denied recovery to a former child prodigy, hardly a public official and one who had long since been removed from public notice. See *Sidis* v. *F-R Pub. Corp.,* 113 F. 2d 806 (2d Cir. 1940), *cert. denied,* 311 U. S. 711. But Judge Clarke's opinion in *Sidis* did not speak in constitutional terms, except implicitly by its reference to the public's interest in the news; nor has the decision come to enjoy the kind of respect, at least in the three states within the Second Circuit's jurisdiction, that

one would expect of a court of appeals decision bottomed on the Constitution where there has been no further elaboration from this Court.

Similarly, in New York, some of the opinions have struck out emphatically in favor of the public's right to know and in defense of items that were newsworthy. In *Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 435, 106 N. Y. S. 2d 553, 557 (1st Dep't 1951), *aff'd* 304 N. Y. 354 (1952), Mr. Justice Shientag noted the "over-riding social interest in the dissemination of news." See also *Sarat Lahiri* v. *Daily Mirror,* 162 Misc. 776, 782, 295 N. Y. Supp. 382, 388 (Sup. Ct. N. Y. County 1937). And in *Humiston* v. *Universal Film Mfg. Co.,* 189 App. Div. 467, 474, 178 N. Y. Supp. 752, 757 (1st Dep't 1919), the court indicated that the publisher's motive, whether instructive, or whether to satisfy morbid curiosity, was irrelevant. Nevertheless, because of the lack of a controlling constitutional rationale, the courts have often ignored these policy restrictions where their sensibilities were offended or they found little social utility in the publication. The New York decisions, cited *supra,* p. 9, are examples. Another example is *Melvin* v. *Reid,* 112 Cal. App. 285, 297 Pac. 91 (1931), where recovery was permitted to a reformed prostitute who complained of the distribution of a movie depicting her in her former occupation. The California court affirmed the award after assessing the value of the publication as weighed against the societal interest in rehabilitation of the plaintiff. That decision has recently been criticized, but upon policy rather than constitutional grounds, namely, that the standard of good taste is not a viable rule to impose upon the working press. See *Barbieri* v. *News-Journal,* 189 A. 2d 773, 776 (Del. 1963).

Most of these cases have involved restriction of the press and of freedom of expression. Where the press has

been successful in court the stated explanation is usually that of newsworthiness, as in *Gautier* v. *Pro-Football, Inc., supra.* Where the press has been curtailed, newsworthiness is often found to be lacking or outweighed by other social interests, commercial motive, or factually inaccurate reporting which the courts have described as "fictionalization", *e.g., Sutton* v. *Hearst Corp., supra.* These are remarkable doctrines when one stops to realize that freedom of the press is at stake. Indeed, it is a rare privacy opinion where the First Amendment is even cited, nor was it mentioned in the majority and concurring opinions below.* Now that the tort territory of defamation has been made to yield to the First Amendment by the decision in *New York Times* v. *Sullivan, supra,* the tort territory of privacy at the very least demands a searching constitutional examination.

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

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

face of appellant's challenge (Appendix A, *infra,* p. 1a). *Cf. N. A. A. C. P.* v. *Button,* 371 U. S. 415, 432-33*.

*Second.* The law of privacy should receive no special protection merely because of the state label:

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

For nearly seventy-five years there has been some murky understanding that freedom of expression is involved in the law of privacy, and yet to this day that body of law has still to be "measured by standards that satisfy the First Amendment."

The *Times* case involved a form of liability for defamation that amounted to a penalty for sedition, because the award of damages impaired the citizen's ability to criticize elected public officials. It is hardly necessary to assert now

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*"Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

that the analogue to defamation, the law of privacy, is as central to First Amendment considerations as the problem faced in the *Times* case. There are, nonetheless, important similarities. The Court stressed that the advertisement about which the police commissioner complained did not carry a commercial message but rather a message of social protest on one of the major questions of our times. The present case is also concerned with a non-commercial message, and the First Amendment draws no distinction between reports from Broadway and reports from Montgomery. *Cf. Hannegan* v. *Esquire,* 327 U. S. 146, 157-58. The Court in the *Times* opinion pointed out that the authors of the advertisement were not members of the press but were still entitled to exercise their freedom of speech. Here we *are* dealing with members of the press. The press, after all, is specifically singled out for protection in the First Amendment and that protection involves something more than the public's right to know. It involves not only the right of the press to report the news, but also the right to investigate, to analyze, to criticize, to characterize, and even to exaggerate. The Court emphasized that "the constitutional protection does not turn up 'the truth, popularity or social utility of the ideas and beliefs which are offered.' *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' " 376 U. S. at 271.

It is true that in the typical privacy case a public official will not be involved; instead, as here, often a private person is unwillingly catapulted into the news by events over which he has no control. In the past, because of the lack of federal mandate, certain of those situations have produced constitutionally dubious results. See, *e.g., Wagner* v. *Fawcett Publications,* No. 13541 (7th Cir. June 18, 1962), *rev'd on rehearing,* 307 F. 2d 409 (1962), *cert. denied,* 372 U. S. 909,

where there was publication of stories of the rape-murder of the plaintiff's daughter two months after the crime had occurred and the Seventh Circuit originally imposed liability before reversing itself on rehearing. See also *Mau* v. *Rio Grande Oil Co., supra.* The essential point overlooked in each case is that the victim or unwilling participant is "functioning in the public arena." See Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L. J. 877, 923 (1963). His identification, or his relationship to the event or a related event, is part of the information sought by the public.

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

Application, therefore, of the rationale of the *Times* case to the present situation does not derive from case-matching to ascertain how far down the line it will extend beyond criticism of public officials. See *Garrison* v. *Louisiana, supra* at n. 8. *Cf. Rosenblatt* v. *Baer,* 380 U. S. 941; *Pauling* v. *News Syndicate Co.,* 335 F. 2d 659, 671 (2d Cir. 1964). The publication involved here was not defamatory and dealt with a public event in the community; it is surely entitled to some constitutional protection. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 Cornell L. Q. 581, 592 (1964). The real problem is the reconciliation of appellee's right to privacy—a seminal right, possibly comparable to the Fourth and Fifth Amendment guarantees against government action—with the rigorous demands of the First Amendment.

Privacy and the sanctity of the home and bedroom have been stressed by the Court in recent decisions. See *Mapp* v. *Ohio,* 367 U. S. 643; *Griswold* v. *Connecticut,* 381 U. S. 479. "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U. S. 438, 478 (dissenting opinion). Because of the policies emanating from the Fourth and Fifth Amendments, it is a right, even as against a non-governmental agency, that is entitled to a momentum of constitutional respect, and we do not try in any way to belittle it. Indeed, we submit that because of the importance of appellee's right to be let alone, guarded so far by New York's tort and criminal law, the question of its confrontation with the First Amendment takes on added significance. See Pedrick, *supra* at 594 n. 44. Ironically, resolution of the question presented will require a form of balancing, but this time, at last, it will be a balancing of constitutional rather than common law interests.

In evaluating the constitutional propriety of the protection that New York extends to privacy, it is also necessary to take a hard look at the part of that protection which is criminal. The Court in *Garrison* v. *Louisiana, supra,* sharply curtailed Louisiana's brand of Sedition Act. Section 50 of the New York Civil Rights Law likewise is a criminal restraint upon expression:

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

Whether or not the words of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech," are to be applied literally, under any approach to

the First Amendment there will be great difficulty in accommodating it to the plain language of this New York statute.

The majority and concurring opinions of the Appellate Division have stated, in effect, that appellant's conduct was such as to subject it to criminal liability under Section 50 and that an indictment based on the facts of this case would be legally sufficient. What a frightening prospect for any publisher! Now, in New York, if a news report involving a non-public person is partially inaccurate, Section 50 of the Civil Rights Law will apply in all its rigor and, apparently, the burden of establishing complete truth is to be borne by the publisher. Finally, this criminal sanction is not even aimed at a form of expression that stretches the outer limits of constitutional protection, such as defamation or obscenity. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 217-18. Ordinary news, not motivated by malice, can be the subject of the statute's proscription, so long as the news reporting is partially inaccurate or "fictionalized" (Appendix B, *infra,* pp. 3b, 4b). Purported fictionalization is a slim reed on which to rest this criminal curtailment of the press; at the least, it demands scrutiny under the First Amendment:

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

*Third.* In the present case, appellant reported on a current news event, to which appellee and his wife were

logically and relevantly connected. There is no dispute about this fact and it was expressly conceded by Mr. Justice Rabin (whose concurring opinion in the Appellate Division was also adopted by the majority of the court below and has thus become part of the law of New York) (Appendix B, *infra,* p. 7b). The subject of the publication was a current news event to which the prior incident was relevant. See Prosser, *Privacy,* 48 Calif. L. Rev. 383, 414 (1960). The degree to which the play and the actual incident were identical should not be constitutionally important, so long as there was some similarity, and some relevant connection between the two. In order to make absolutely clear there was a similarity, however, we have set forth in Appendix D, *infra,* pp. 1d-3d, a columnar comparison of the play and the actual incident—taken from our brief below—that was cited by Judge Fuld in his dissenting opinion (Appendix A, *infra,* p. 3a).

Conceding that appellee and his family could properly have been mentioned by appellant in its review, the courts below nevertheless imposed liability because they were offended by the manner of presentation, which somehow converted a news story into an attempt to increase circulation, the purpose of which was not to disseminate news but "solely" to enhance sales of the magazine (Appendix B, *infra,* pp. 6b-7b). Apart from the constitutionality of such judicial omniscience in the area of freedom of expression, it now should be plain that the significance of a publisher's commercial motive has been laid to rest. See *New York Times Co.* v. *Sullivan, supra* at 266. Of course part of the purpose in the present case was to sell magazines; undistributed, uncirculated, and unread journals hardly serve to promote the dissemination of information or the advancement of ideas:

> ". . . And, once it be established that the reported matter is newsworthy, I query whether the fact that

> the article may also have been intended to advertise or promote the play is, in and of itself, sufficient basis for subjecting the defendant to a cause of action under the provision of the Civil Rights Law. If the article is of such a nature as not to come within the proscription of section 51—because it is, on its face, an account of newsworthy information—it is not brought within its coverage by virtue of the fact that it may, incidentally, have been written with an eye toward promoting the play or, as is the underlying purpose of every article, in the hope of bolstering the magazine's own appeal and circulation. . . ." (Dissenting opinion of Judge Fuld below, Appendix A, *infra,* pp. 4a-5a.)
>
> "To hold . . . that a violation of section 51 may be established by a showing that a newsworthy item has been published solely to increase circulation injects an unrealistic ingredient in the complex of the right to privacy, and would abridge dangerously the people's right to know. In the final analysis, the reading public, not the publisher, determines what is newsworthy, and what is newsworthy will perforce tend to increase circulation." (Dissenting opinion of Presiding Justice Botein in the Appellate Division, Appendix C, *infra,* pp. 2c-3c.)

Whatever may have been the commercial motive for photographing scenes from a play on location rather than on the stage and for describing the play as a reenactment of a prior incident when in fact it was merely "stimulated", "inspired" and "triggered" by that incident (R. 142-143, 166; Appendix A, *infra,* p. 3a), it is of no constitutional moment:

> "For present purposes news need be defined as comprehending no more than relatively current

> events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertainted by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447, 451 (3d Cir. 1958).

In the courts below, appellant argued its report was essentially accurate, and one that could hardly be described as fictionalized or sensational. Because we believe those characterizations are not constitutionally relevant, however, we are willing to concede in this Court that appellant's review and accompanying photographs were inaccurate to the extent they suggested the play was a reenactment of

the prior incident. Similarly, appellant argued it had every reason to believe the author of the play considered his work to have been a reenactment of the prior incident.* But the majority opinion of the Appellate Division indicates appellant was negligent in not directly putting this question to the author and because it had in its files an earlier newspaper article in which the author said his play was fictionalized (Appendix B, *infra,* p. 4b). *Cf. New York Times Co.* v. *Sullivan, supra* at 287-88.

The question, then, is whether New York can properly impose criminal and tort liability upon a publisher who connects without malice a non-public figure to a current news event in a report containing factual errors that could have been obviated by a more diligent investigation. The recital of that question suggests its inevitable answer under the First Amendment. To require the press to be totally accurate at its peril is precisely the kind of "self-censorship" that was so roundly condemned in the *Times* opinion, *supra* at 279. Under such a rule, the press, like the citizen-critic, will also "steer far wider of the unlawful zone" (*ibid.*). Like the citizen-critic, who has a duty to judge his government (*id.* at 282), the fourth estate has a duty to report the news. If that duty is encumbered by liabilities arising out of factual error or exaggeration, then it will not always be fully discharged, and the entire community suffers. Especially is this so where publication occurs only at the risk of criminal sanctions or of crippling damage awards which hinge on the ability to persuade twelve persons, after the event, of the whole "truth". As Presiding Justice Botein warned in his dissenting opinion in the Appellate Division, "we are in a domain where 'the lines may not be drawn so tight as to imperil more than we protect' . . ." (Appendix C, *infra,* p. 2c).

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*See R. 189, 197, 287-88, 297-98.

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

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

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

reviewing the play without subjecting the defendant to liability despite the fact that to do so would consitute an invasion of the Hills' privacy and might cause them grief and distress" (Appendix B, *infra,* p. 7b). Some involuntary participation in the news is perhaps the only answer if the press is to be left free to "discuss public affairs with impunity." See *New York Times Co.* v. *Sullivan, supra* at 296 (concurring opinion).

The constitutional protection afforded the defamatory statements involved in *Garrison* v. *Louisiana, supra* at 75, will yield only upon proof of the "calculated falsehood". In contrast, in the present case we find a non-defamatory report about a public event, inaccurate in some particulars because the publisher failed to unearth all of the facts. The contrast, and the long standing immunity of this branch of tort territory from constitutional examination, requires review now so that a *federal* rule can be established. See *N. Y. Times Co.* v. *Sullivan, supra* at 279. Even where the privacy tort has been confined in a way that would appear to satisfy constitutional requirements, for example, *Sidis* v. *F-R Pub. Corp., supra,* there has been insufficient check on the variant directions taken by other courts in their common law development. Long before the *Times* decision, the Supreme Court of Kansas in *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908), had worked out a rule which, as it eventually turned out, was the right one. A number of jurisdictions had followed that decision, but the Court felt obliged, nonetheless, to make it crystal clear there was but a single federal rule on the subject, and that it was the First Amendment being expounded.

We submit that the decision below, upholding the validity of the New York statutes in the face of appellant's constitutional challenge, requires that a comparable federal rule be announced, this time for application to the law of

privacy. It is possible to anticipate that such a rule might not be too different from that established for libel. So long as there is some "social value" in the matter published, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572, it should be constitutionally protected from tort or criminal sanctions for invasion of privacy. The protection would yield upon proof that the non-public figure was connected to the news item because of actual malice on the part of the publisher toward that person or because of the publisher's flagrant and reckless disregard for the truth. Such a rule would protect the press from self-censorship, but at the same time would not destroy the privacy tort, especially in cases where advertisers make use of names for endorsement purposes without consent, the precise situation for which the tort remedy was created. See *Robertson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442 (1902); *cf. Valentine* v. *Chrestensen,* 316 U. S. 52.

In any case, the proper rule to be articulated is the task for the Court; it can be more fully considered by the parties if there are to be briefs on the merits. Suffice it to say, at this point, the question is substantial.

Respectfully submitted,

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September 13, 1965.

# APPENDIX A

**APPENDIX A**

STATE OF NEW YORK
COURT OF APPEALS

| | |
|---|---|
| JAMES J. HILL, *Respondent,* *vs.* TIME, INC., *Appellant.* | Sup. Ct. No. 244 |

[MEMORANDUM DECISION OF AFFIRMANCE]

Judgment affirmed, with costs, on the majority and concurring opinions at the Appellate Division. All concur except Fuld, J., who dissents in an opinion in which Bergan, J., concurs.

[AMENDMENT OF REMITTITUR]

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

*Appendix A*

STATE OF NEW YORK
COURT OF APPEALS

| | |
|---|---|
| JAMES J. HILL,<br>*Plaintiff-Respondent,*<br>*vs.*<br>TIME, INC.,<br>*Defendant-Appellant.* | Sup. Ct.<br>No. 244 |

FULD, J. (dissenting):

The article, published (in 1955) by the defendant in its magazine *Life,* on which the plaintiff's cause of action is predicated, read in this way:

"TRUE CRIME INSPIRES TENSE PLAY

"The ordeal of a family trapped by convicts gives Broadway a new thriller,

'The Desperate Hours'

> "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's novel, *The Desperate Hours,* inspired by the family's experience.. Now they can see the story reenacted 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 has a chance to pay off.

*Appendix A*

> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. *Life* photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

The article also contained photographs of an actual news headline relating to the plaintiff's experience (of three years previously), of the house in which the plaintiff and his family then lived and in which they were held captive and of actual stage settings of the play.

I do not believe that section 51 of the Civil Rights Law may be availed of to create a cause of action against those who published an article reporting a new play, unquestionably a subject worthy of press comment, and pointing out that there was a relationship between the play and an actual event, also concededly newsworthy, in which the plaintiff some years before had been involved. There can be no doubt that the play certainly bore a close and legitmate relationship to the real-life incident as, indeed, the columnar comparison made by the defendant in its brief strikingly reveals. Moreover, the author of the story (Joseph Hayes), called as a witness for the plaintiff, testified that the real-life Hill case "stimulated" and "inspired" his writing of the play, that it "triggered the book in a very direct way" and that the *Life* magazine heading, "True Crime Inspires Tense Play", was "certainly correct, that true crime did inspire my play".

Section 51 of the Civil Rights Law does not, of course, proscribe the use of an individual's name or picture in con-

nection with a news article of general interest. (See, e.g., *Binns* v. *Vitagraph Co. of America,* 210 N. Y. 51, 56; *Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, affg. 278 App. Div. 431; *Booth* v. *Curtis Pub. Co.,* 11 N Y 2d 907, affg. 15 A D 2d 343.)[1] Accordingly, since the experience of the Hill family in 1952 was newsworthy and since there was a substantial relationship between that experience and the play, which was also a matter meriting news coverage, it would seem to follow that the defendant did not, by its article in *Life,* violate or offend against the provisions of the statute.

Three years had elapsed between the Hill incident and the publication of the article. That, however, cannot be said to render the story about the Hill experience stale news, particularly when it was related to the reporting of a current play which, according to its author, was inspired and triggered by the real-life event. And, once it be established that the reported matter is newsworthy, I query whether the fact that the article may also have been intended to advertise or promote the play is, in and of itself, sufficient basis for subjecting the defendant to a cause of action under the provisions of the Civil Rights Law. If the article is of such a nature as not to come within the proscription of section 51—because it is, on its face, an account of newsworthy information—it is not brought within its coverage by virtue of the fact that it may, incidentally, have been written with an eye toward promoting the play or, as

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[1]In the *Gautier* case, the Appellate Division, speaking through Shientag, J., declared (278 App. Div., at p. 435): "Cognizant of the over-riding social interest in the dissemination of news, an almost absolute privilege has been extended to the use of names and pictures in connection with the reportage of news. * * * Once an item has achieved the status of newsworthiness, it retains that status even when no longer current".

is the underlying purpose of every article, in the hope of bolstering the magazine's own appeal and circulation. As Presiding Justice Botein wrote, in dissent below, "To hold * * * that a violation of section 51 may be established by a showing that a newsworthy item has been published solely to increase circulation injects an unrealistic ingredient in the complex of the right to privacy, and would abridge dangerously the people's right to know".

In short, it is my judgment that the plaintiff failed to make out a case and, accordingly, I would reverse the order appealed from and dismiss the complaint.

# APPENDIX B

**APPENDIX B**

APPELLATE DIVISION

FIRST DEPARTMENT

JAMES J. HILL, *et al.*,
*Respondents,*
*v.*
JOSEPH HAYES, *et al.*,
*Defendants,*
and
TIME, INC.,
*Appellant.*

May 14, 1963

STEVENS, J. This is an appeal from a judgment entered after a jury trial which resulted in a verdict for the plaintiffs. The action is one for damages based on a violation of plaintiffs' right of privacy under section 51 of the Civil Rights Law. This section, in pertinent part, provides: "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 * * * to prevent and restrain the use * * * and may also sue and recover damages for any injuries sustained".

On September 11, 1952, the plaintiffs and their children were held captive in their own home in Whitemarsh, Pennsylvania, for 19 hours by three escaped convicts. Sometime in the early morning of September 12, 1952, the convicts departed, leaving plaintiffs and their family unharmed. The incident received wide publicity at the time and was given extensive press coverage. Plaintiff James J. Hill, in a

statement given to the press almost immediately after the occurrence, stated the family had not been molested or harmed and, save for the restraint, had been treated courteously.

Plaintiffs sought to forget their ordeal, and a few months later plaintiffs and their family moved to Old Greenwich, Connecticut. The move, a result of job promotion, was accelerated because of the September, 1952 incident. Opportunities to capitalize on the occurrence were rejected. The record reveals plaintiffs' refusals in an attempt to avoid further publicity for the sake of their children.

In the Spring of 1953, a book, "The Desperate Hours", was written by Joseph Hayes, which was later made into a play and also a picture bearing the same title. The story dealt with three escaped convicts holding a family as hostages in their surburban home. Some of the members of the family were assaulted, profanity was used and in other ways the story differed from the account given by Hill of what had occurred in their home.

In 1954, the play opened for a tryout in Philadelphia, Pennsylvania. Following conferences with the producer, *Life* magazine decided to do an article on the play. Thereafter *Life* arranged to have the Whitemarsh home made available for photo coverage, and chiefly at its own expense transported members of the cast to the house where it shot actual scenes from the play. It must be remembered this was the house where the real Hill incident occurred. In connection with and accompanying the article *Life* featured these scenes. The article, which appeared in *Life's* February 28, 1955, issue under a heading "True Crime Inspires Tense Play", read, in part, 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'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 has a chance to pay off."

Thereafter plaintiffs instituted suit. It is from a judgment in their favor that this appeal is taken.

The right of privacy is purely statutory (*Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 358). The section is designed "to prevent the use of an individual's name for commercial purposes without his consent" (*Orsini* v. *Eastern Wine Corp.*, 190 Misc. 235, 236). It is immaterial whether the use by defendants of the name holds the party up to ridicule or contempt since the action is not one for libel (*Binns* v. *Vitagraph Co. of America*, 210 N. Y. 51, 54; *Callas* v. *Whisper, Inc.*, 198 Misc. 829, 831).

"The test for legally protected privacy may involve either the decency of the public interest in the events involved or the fame or notoriety of the person asserting his privacy interest or both" (1 Harper and James, Torts, § 9.7, p. 687). So too "either or both of two factors may be involved in justifying a breach of the seal of privacy; the propriety of public information as newsworthy, in the light of the habits, customs and values of our society and the extent to which the plaintiff, either by his voluntary conduct or because it was thrust upon him, has achieved the position of a 'public figure' and thus become newsworthy" (*ibid.*, pp. 686-687). 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).

In September, 1952, when the incident occurred, plaintiffs were projected unwillingly into the limelight and, under the test enunciated, had no legally protected privacy so far as legitimate, accurate reporting and fair comment were concerned. They were newsworthy. The passage of time tended to dim the public interest both because of other events, actually or apparently of greater public interest or significance, and because plaintiffs themselves avoided capitalizing on the occurrence. In other words, the occurrence had been relegated to the outer fringe of the public consciousness.

When the defendant, in its article of February 28, 1955, revived or intensified interest in the ordeal which plaintiffs had experienced, the use of plaintiffs' name was primary and not merely incidental to the article (cf. *Wallach* v. *Bacharach,* 192 Misc. 979, affd. 274 App. Div. 919). Although the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest.

Hayes, the author of the play " The Desperate Hours", in an article which appeared January 30, 1955, in *The New York Times,* had stated the play was fictionalized. This article was available to, and, in fact apparently in the pos-

session of the defendant when its publication of February 28, 1955, appeared. Defendant did not seek to ascertain from Hayes if his play was an account of what happened to the Hills. Defendant merely concluded that basically the play was a re-enactment and so stated. The contention of defendant that it found points of similarity in the book and the occurrence of September 11, 1952, justified neither the identification nor the commercial exploitation of plaintiffs' name and family with the play.

While there is sufficient evidence to support a jury verdict on the question of liability, prejudicial error was committed which undoubtedly influenced, improperly, the jury's determination as to the quantum of damages. Accordingly, a retrial is directed, limited solely to that question.

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

The plaintiff James J. Hill was permitted to testify in broad general terms about comments and questions directed

to him by various persons, not otherwise identified, concerning his connection with or relation to the characters portrayed in "The Desperate Hours", and their reaction to his responses. The incidents were not specifically related or, as pointed out, the persons identified. This was error. Defendant could neither disprove the assertions by calling such persons nor could it cross-examine the alleged speakers. "The better practice would be to call as witnesses for plaintiff, subject to cross-examination, the persons who were supposed to have spoken or acted adversely to plaintiff and to demonstrate, if such demonstration be possible, a connection to the libel" (*Macy* v. *New York World-Tel. Corp.*, 2 N Y 2d 416, 422). It is true the observation quoted was made in a libel case. However, it is equally applicable in a case of this nature because of the evil it is designed to prevent. It is the fact of wrongful intrusion on privacy and the state of mind and effect on the Hills which is important. For the right sought to be protected by statute is the right to be left alone.

Equally improper is it to place into evidence articles which appeared subsequently when no direct causal connection to the offending article is shown either by competent supporting testimony, or by some proof of identity of language sufficient to permit, if not compel, an inference of causal relationship. Defendant is thus charged with the transgressions of others, if such there were, without any proof of its responsibility therefor.

We find the verdicts grossly excessive. In passing it might be noted the briefs are inordinately and unjustifiably lengthy, and no costs are awarded.

The judgment appealed from should be modified on the law and in the excercise of discretion, and a new trial di-

rected on the sole issue of damages. As so modified, the judgment appealed from should be otherwise affirmed, without costs to either party.

RABIN, J. (concurring). The use of the "name, portrait or picture of a living person in truthfully recounting or protraying an actual current event" is not proscribed by section 51 of the Civil Rights Law (*Binns* v. *Vitagraph Co. of America,* 210 N. Y. 51, 56). The same is true with reference to a past newsworthy event if it bears some relationship to the current event protrayed. The difficulty with the position of the defendant *Time* is that it 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. It was fictionalized and the jury so found. Consequently it violated section 51 of the Civil Rights Law (see *Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 435; *Molony* v. *Boy Comics Publishers,* 277 App. Div. 166, 169; *Lahiri* v. *Daily Mirror,* 162 Misc. 776).

Properly presented, the Hill incident could have been referred to in the article reviewing the play without subjecting the defendant to liability despite the fact that to do so would constitute an invasion of the Hills' privacy and might cause them grief and distress. The right of privacy must give way to the public interest in having newsworthy material disseminated albeit the presentation of such newsworthy material increases the publisher's circulation and a trade benefit flows therefrom (see *Gautier* v. *Pro-Football, Inc., supra,* p. 435; *Thompson* v. *Close-Up, Inc.,* 277 App. Div. 848).

However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but rather for the sole purpose of increas-

ing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstance the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalized and fictionalized. Such a rule would accomplish the purpose sought to be achieved by the section and furthers the attempt to curb the evils these sections seek to avoid (see Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 [1890]; *Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538; *Lahiri* v. *Daily Mirror,* 162 Misc. 776, *supra*).

This concept is not unusual or foreign to our law. It is analogous to the theory upon which liability is imposed in defamation actions upon a defendant who asserts a qualified privilege. Such privilege is held to be no defense where it is demonstrated that the defamatory material was published with malice. Thus, in this case the defense that the article treats with a newsworthy event is to no avail if it was published, not for the purpose of disseminating news but rather for the sole purpose of enhancing appellant's sales of its magazine. The record in this case permits of such a finding and such a finding would be well supported by the evidence. It is quite obvious that the reference to the Hill incident was not incidental to the review of the play. It would seem that the converse is true and it is quite apparent that its portrayal in such a sensational and fictional manner was not for its newsworthy content but for the purpose of trade.

# APPENDIX C

**APPENDIX C**

APPELLATE DIVISION

FIRST DEPARTMENT

| | |
|---|---|
| JAMES J. HILL, *et al.*, *Respondents,* v. JOSEPH HAYES, *et al.*, *Defendants,* and TIME, INC., *Appellant.* | May 14, 1963 |

BOTEIN, P. J. (dissenting in part). The article complained of was a report upon a new play, traditionally a newsworthy subject, and one that may be reported by "pictorial reproductions of scenes therefrom" (see *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 437, affd. 304 N. Y. 354). To point out, in an article of that nature, a relation between the play and the concededly newsworthy incident in which plaintiffs had been involved creates no cause of action in their favor under section 51 of the Civil Rights Law unless they can show that the incident "has so tenuous a connection with the news item or educational article that it can be said to have no legitimate relation to it" (*Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 782, SHIENTAG, J.; and see, also, *Dallesandro* v. *Holt & Co.*, 4 A D 2d 470, 471). This cannot be said here. As plaintiffs had been held prisoners in their home by escaped convicts, with consequent widespread publicity, and as such an occurrence formed the basic

theme of the play, which was news in itself, obviously references to this common feature in the report of the play were of " some relevance to the reporting of news" (*Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 435, *supra*). Such relevance was confirmed by the admission of the playwright —a witness called by plaintiffs—that "the Hill incident—unconsciously—triggered the book [which he had written and from which he contrived the play] in a very direct way".

Overstrained, in my view, is the court's conception of the article as a fictional recreation of the Whitemarsh incident. Had a review of the play in a daily newspaper summarized some of the scenes and then stated that the play was inspired by the Hills' misadventure, I question that section 51 would have been considered applicable. Yet that is the tenor of the instant article, except that the scenes were depicted by pictures instead of words, a permissible substitution as above stated. To be sure, a searching eye can detect elements of inaccuracy or exaggeration in the article. By taking the pictures in the Whitemarsh house, as well as by words, defendant indicated that the incident there inspired the play. Though the incident happened in September, 1952 and the novel on which the play was based was written the following Spring, perhaps it is an overdrawn inference from their common features above mentioned that the one inspired the other; and perhaps it is erroneous to say that an occurrence is the inspiration of a work when it is only the unconscious trigger. Perhaps the word "story" in the last sentence of the excerpt quoted in the majority opinion can be construed as a reference to the Whitemarsh incident rather than to the word "novel" in the preceding sentence. But, especially when it is recalled that "[t]ruth or falsity does not, of itself, determine whether the publication

comes within the ban of sections 50 and 51" (*Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 484, SHIENTAG, J., affd. 272 App. Div. 759), can it be said that such flaws are of so extravagant a nature as to convert into fiction an informative presentation of legitimate news? In my opinion not; we are in a domain where "the lines may not be drawn so tight as to imperil more than we protect" (*Oma* v. *Hillman Periodicals,* 281 App. Div. 240, 245; cf. *D'Altomonte* v. *New York Herald Co.,* 154 App. Div. 453, mod. 208 N. Y. 596; *Goelet* v. *Confidential, Inc.,* 5 A D 2d 226).

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

I would dismiss the complaint.

VALENTE and MCNALLY, JJ., concur with STEVENS, J.; RABIN, J., concurs in opinion; BOTEIN, P. J., dissents in part in opinion.

Judgment modified on the law and in the exercise of discretion, and a new trial directed on the sole issue of damages. As so modified, the judgment appealed from is otherwise affirmed, without costs to either party.

# APPENDIX D

## APPENDIX D

| | The Desperate Hours (Samuel French edition, Ex. 15) | The Whitemarsh Incident (as reported in the press, Exs. B, D) |
|---|---|---|
| | **SETTING** | |
| *Season:* | Early fall. | Early fall. |
| *Time:* | Approximately 8:30 a.m. | Approximately 8:30 a.m. |
| *Place:* | Isolated suburb of a large city. | Isolated suburb of a large city. |
| *House:* | Two-story suburban home. | Two-story suburban home. (Although the Hill residence was actually a three-story house, the Associated Press photograph of the front of the house appearing in The New York Times article of September 13, 1952, disclosed only two stories.) |
| | **CHARACTERS** | |
| *The Convicts:* | Glenn Griffin, elder of the two convict brothers, in his mid-twenties. Acted as spokesman for the three while in the Hilliard home and had previously been familiar with the area in which that home was located. | Joseph Nolen, elder of the two convict brothers, in his mid-twenties. Acted as spokesman for the three while in the Hill home and had previously been familiar with the area in which that home was located. |
| | Hank Griffin, younger brother of Glenn. | Ballard Nolen, younger brother of Joseph. |
| | Samuel Robish. | Elmer Schuer. |
| *The Family:* | Mr. Hilliard, a man in his early forties. | Mr. Hill, a man in his early forties. |
| | Mrs. Hilliard, an attractive woman in her early forties. | Mrs. Hill, an attractive woman in her early forties. |
| | Their teenage daughter. | Their teenage daughter. |
| | Their ten-year old son. | Their eleven-year old son. (The Hills' younger children were not depicted by the play.) |

## *Appendix D*

| | The Desperate Hours | The Whitemarsh Incident (as reported in the press, Exs. B, D) |
|---|---|---|
| | ACTION | |
| *The Opening:* | Play opens with a scene in which local and state police, together with FBI agents, are working on the case. | The New York Times article of September 13, 1952, opens with a statement that local and state police, together with FBI agents, are working on the case. |
| *The Convicts' Escape from Prison:* | Federal prison break, sometime before dawn. | Federal prison break, sometime before dawn. |
| | Convicts steal a car from a farmer. | Convicts steal a car from a farmer. |
| *Scenes at the House:* | Mr. Hilliard and daughter leave for the day. | Mr. Hill and daughter (together with other children not depicted by the play) leave for the day. |
| | Mrs. Hilliard turns on the radio to hear a news broadcast reporting the search for the escaped convicts. | Mrs. Hill turns on the radio to hear a news broadcast reporting the search for the escaped convicts. |
| | Convicts arrive. | Convicts arrive. |
| | The elder brother among the convicts warns Mrs. Hilliard to remain silent so as to avoid injury to herself and family. | The elder brother among the convicts warns Mrs. Hill to remain silent so as to avoid injury to herself and family. |
| | Convicts conduct a search of the premises for firearms and find a gun in a drawer in the master bedroom. | Convicts conduct a search of the premises for firearms and find none. |
| | Mr. Hilliard and daughter return home and are also held as prisoners by the escaped convicts. | Mr. Hill and daughter (together with other children) return home and are also held as prisoners by the escaped convicts. |
| | Convicts play dance music on the radio. | Convicts play dance music on the radio. |

## *Appendix D*

| | The Desperate Hours | The Whitemarsh Incident (as reported in the press, Exs. B, D) |
|---|---|---|
| | Convicts steal Mr. Hilliard's clothes (mention is made of the fact that those clothes are of the finest quality). | Convicts steal Mr. Hill's clothes (mention is made of the fact that those clothes are of the finest quality). |
| | Telephone calls and visits by acquaintances play dramatic part in the experience. | Telephone calls and visits by acquaintances play dramatic part in the experience. |
| *The Convicts' Escape from The Home:* | One of the convicts steals the Hilliard's automobile. | The convicts steal the Hill's automobile. |
| | The family emerges from the incident unharmed. | The family emerges from the incident unharmed. |
| | The brothers among the convicts are killed during their escape in a gun battle with the police. | The brothers among the convicts are killed during their escape in gun battles with the police. |
| | The third convict is captured alive. | The third convict is captured alive. |