

IN THE SUPREME COURT OF THE
UNITED STATES

TIME, INC.,
Appellant,
v.
JAMES J. HILL,
Appellee.

No. 22

Washington, D. C.
Tuesday, October 18, 1966

The above-entitled matter came on for reargument
at 1:11 o'clock, p.m.

BEFORE:

- EARL WARREN, Chief Justice of the United States
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- TOM C. CLARK, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON H. WHITE, Associate Justice
- ABE FORTAS, Associate Justice

APPEARANCES:

- HAROLD R. MEDINA, JR., ESQ., 1 Chase Manhattan
Plaza, New York, New York 10005, for Appellant.
- RICHARD M. NIXON, ESQ., 20 Broad Street, New York,
New York 10005, for Appellee.

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Number 22, Time, Inc.,
v. James J. Hill.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Medina.

ORAL ARGUMENT BY HAROLD R. MEDINA, JR., ESQ.,

ON BEHALF OF APPELLANT

MR. MEDINA: Mr. Chief Justice, may it please the
Court, we start this term where we left off last term, with
Mr. Justice White's question concerning intentional falsehood.

I think your questions are directed to that, and our
simple position is that New York has not created a cause of
action for intentional falsehood, and that the omission of
intent and falsity is fatal. We start with a standard that
nondefamatory language about a public fact, which we have here,
is protected by the Constitution unless there is both falsity
and knowledge of falsity.

Let me turn to the New York cases, attempting to
discuss them in the order that the Court's questions were put
to us.

First, on the question of truth, the New York courts
have enjoined truthful and newsworthy accounts without intent,
and I turn to the case of Mrs. Blumenthal, and this case went
to our Court of Appeals; and Mrs. Blumenthal, in the early 1930's,
was selling bread on Orchard Street. She was pictured in a

travelogue for approximately 6 seconds out of a 17 minute travelogue. The court enjoined that presentation.

MR. JUSTICE STEWART: That is the one they made kind of a comedy out of, isn't it?

MR. MEDINA: The appellant's brief said there were "ethnic comment, gags," and derisive commentary.

Let me read what two of the Justices of the Appellate Division, Mr. Justice O'Malley and Mr. Justice Finch, who viewed the picture, said took place:

"It is further shown that at no time does plaintiff's picture appear alone; but, on the contrary, 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."

MR. JUSTICE STEWART: It sounds as though those were dissenting members of the Court.

MR. MEDINA: These are two members of the Court. The Court viewed the picture, Your Honor.

MR. JUSTICE STEWART: Yes.

MR. MEDINA: And there is a description by the two dissenting members as to what they saw.

MR. JUSTICE STEWART: Yes. As to what they saw.

MR. MEDINA: The comments in appellee's brief, taken from the complaint, were rebutted by an actual scene from the picture.

If you need anything further on that, you can turn to the comment by the Court of Appeals in 1952 in the Gautier case concerning Mrs. Blumenthal and her selling bread on Orchard Street, and there the court said: "The Blumenthal case, supra, illustrates the area of privacy which may not be invaded even in this modern era of television. One traveling upon the public highway may expect to be televised, but only in the incidental part of the general scene; so one attending a public event, such as a professional football game, may

expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of the crowd alone, thrust upon the screen, and unduly featured for public view."

Let me illustrate what I think that means. Here is the New York Times a couple of Sundays ago. There is one picture here of a race riot in San Francisco. There is another picture down here of a soldier in Vietnam. Those two pictures -- to use the language of Gautier -- "may not be picked out of a crowd alone, thrust upon the screen, and unduly featured for public view."

So, strictly under the language covering Mrs. Blumenthal's case, as going again into the Gautier case of 1952, these two pictures are subject to the same injunction which issued in the Blumenthal case, and the person publishing them is subject to a crime.

MR. JUSTICE STEWART: Apparently the New York Times doesn't agree with you.

MR. MEDINA: Well, it may well be they will take their chance on that. But as of the present, on a strict reading of that case, that is precisely what it means.

MR. JUSTICE WHITE: There is a rather obvious difference, though, isn't there? Would you say there is something newsworthy about Mrs. Blumenthal?

MR. MEDINA: A travelogue of New York City which

took up 17 minutes showing scenes throughout the city happened to have had her in one scene for 6 seconds. If that suffice, the Court issued an injunction -

MR. JUSTICE WHITE: What is newsworthy about it?

MR. MEDINA: The word "newsworthy" is not only current news -

MR. JUSTICE WHITE: You would say there is a major difference in the pictures you showed us in the newspaper and Mrs. Blumenthal with regard to newsworthiness?

MR. MEDINA: I don't know when this picture of a soldier in Vietnam -

MR. JUSTICE WHITE: Would you agree in terms of newsworthiness?

MR. MEDINA: There are different degrees of newsworthiness, Your Honor. A matter of general interest comes within the normal term "newsworthy." If you are going to limit that term solely to current news events, that is one thing. I do not think that the term can be so limited.

Certainly a matter of general interest, such as what goes on in New York, should be covered by the Constitution and nondefamatory language.

MR. JUSTICE WHITE: If 6 seconds in Mrs. Blumenthal's life was newsworthy, so would two hours be. And if they followed her around for two or three hours, or two or three days or two or three weeks, and made a travelogue of Mrs. Blumenthal,

I suppose you would say the same thing?

MR. MEDINA: That is the question you put last time, Your Honor, --

MR. JUSTICE WHITE: Yes.

MR. MEDINA: -- following a truck driver around.

I may first say I think it extremely unlikely that any picture which resulted would be such that it would be of enough interest so that you would show it. Secondly, I do think that you are limited, that you cannot by lawful means do harm to someone, go repeatedly taking pictures of him right and left. It may get up to the disinterested malevolence of Mr. Justice Holmes in actually using lawful means to so harrass somebody that he is harrassed. But absent that, if you are going to take a picture of someone in a public street on a public fact and put that on the screen, I think you are entitled to - absent intentional falsehood.

MR. JUSTICE FORTAS: You think harrassment would be an exception to the proposition then?

Let's say if they took pictures of Mrs. Blumenthal frequently, with excessive frequency, then you think that that might be an invasion of her right under the statute?

MR. MEDINA: I think you might reach the point where you would have that disinterested malevolence that you are intentionally trying to do harm to her, even though by legal means; so that you would have another tort created --

the same tort that Mr. Justice Holmes referred to in the Atlanta Bank case, 256 U.S. ---

MR. JUSTICE FORTAS: She apparently thought that there was intentional harm being done to her here, or reckless harm, because she didn't like the way she was being presented.

That might be a jury question; but in your theory, that would bring it within the statute?

MR. MEDINA: I don't follow Your Honor.

MR. JUSTICE FORTAS: Well, let's do. I suggested to you that if you say that harrassment of a person by repeated picture taking might bring the statute into play without---

MR. MEDINA: No, I didn't say the statute. That is an entirely different tort, Your Honor.

MR. JUSTICE FORTAS: What? What is the tort?

MR. MEDINA: The tort would be a prima facie tort of intentional infliction of harm when you know what you are doing. That is entirely separate---

MR. JUSTICE FORTAS: What kind of tort do you call that? What right is being invaded?

MR. MEDINA: The right recognized in this Court in Atlanta Bank, 256 U.S. 350-358.

MR. JUSTICE FORTAS: How would you state -- what is it? What right is being protected, other than the right of privacy?

MR. MEDINA: Anyone who uses lawful means with the

sole intent of harming someone else.

MR. JUSTICE FORTAS: That is not the case I put to you, though. I put to you the Blumenthal case with the element which you added, which was the element of harrassment.

Let's take another situation. Talk about this statute, privacy statute of New York. Let's suppose the New York Times -- this is inconceivable to anybody who knows that paper - let's take, for example, suppose the New York Times published a boudoir picture of certain people taken in their own bedroom.

MR. MEDINA: Then we are dealing with a private fact. I was careful to state --

MR. JUSTICE FORTAS: Would that be a breach of this statute, violation of this statute?

MR. MEDINA: I don't know whether it would or not on this question of trade or advertising.

MR. JUSTICE FORTAS: This is our problem.

MR. MEDINA: That's right, because this statute is so broad, it literally covers anything on the trade.

MR. JUSTICE FORTAS: You wouldn't call that news, would you?

MR. MEDINA: I certainly would not. And I think that the normal privacy case, outside of this statute, Your Honor, stops at going into a person's home. But you have a non-public fact then, and that's why I said nondefamatory

language as to a public fact is entitled to Constitutional protection.

MR. JUSTICE FORTAS: Suppose a picture were taken in somebody's office? I gather what you are now saying is that a person in his home is entitled to protection as a matter of his right to privacy; is that what you are saying or not?

MR. MEDINA: Yes, sir, I would think he would be entitled to protection of his privacy.

MR. JUSTICE FORTAS: That does not conflict with any Constitutional prohibition?

MR. MEDINA: I think there is a Constitutional prohibition, Your Honor, going into someone's home.

MR. JUSTICE FORTAS: I say, you can assert cause of action for that tort without running counter to the Constitution of the United States?

MR. MEDINA: I think that's right, Your Honor.

MR. JUSTICE FORTAS: All right. Now, how about the office? Somebody's office.

MR. MEDINA: It depends on whether the public is allowed in the office.

MR. JUSTICE FORTAS: Private office. Your private office.

MR. MEDINA: Certainly when you get to the outer reception room, yes. When you get to the next office back, I have a more difficult problem as to whether that is part of the

public or your private office.

MR. JUSTICE FORTAS: I don't want to press this unduly, Mr. Medina, but I do want to get the theory that you are asserting here.

What you are asserting, as I understand it, is that there are in certain circumstances rights of privacy, invasion of which gives rise to a cause of action, and that cause of action in those circumstances is not foreclosed by Article I of the United States Constitution?

MR. MEDINA: That's right. That's right.

I think what we have come down to here, that this phrase "privacy" is a misnomer. Because we are really talking about intentional falsehood, rather than privacy, even though the statute has that label. And investigating as to -- which it could do Constitutionally, whether you have created a cause of action for intentional falsehood under the guise of this statute. Because I am limiting myself to public facts, the fact we have here as to the Hill family was a public fact as opposed to a private fact, and all I am saying here is that when you have nondefamatory language about a public fact that is Constitutionally protected unless and until you have both falsity and knowledge of falsity.

MR. JUSTICE BRENNAN: Incidentally, Mr. Medina, I notice that the title of Section 50 is "Right of Privacy."

MR. MEDINA: Yes, sir.

MR. JUSTICE BRENNAN: That word nowhere appears in the text.

MR. MEDINA: That is correct.

MR. JUSTICE BRENNAN: How does it get to be that? Is it in the original enactment?

MR. MEDINA: I don't know the answer to that. But obviously the original enactment was passed in order to prevent you publishing the young lady's photograph with a bag of flour, but then it was expanded beyond that.

MR. JUSTICE WHITE: You wouldn't permit recovery for falsity?

MR. MEDINA: No.

MR. JUSTICE WHITE: You wouldn't permit recovery for negligent falsity?

MR. MEDINA: Let me put it this way, if you have nondefamatory language about a public fact that is the typical free-speech, free-press language you are talking about, as opposed to defamatory language.

At that point, absent falsity and intentional falsity, I say it's protected, because both your libel and privacy, in a way, come under the one thing. The Constitution does not protect intentional falsity.

MR. JUSTICE WHITE: You are really not talking much about a public fact if you state a nonfact, are you?

MR. MEDINA: But a public fact -

MR. JUSTICE WHITE: If it is false, it is not a fact at all. And so how do you get around to saying that that is protected by the First Amendment?

MR. MEDINA: I am saying the language concerning this public fact, even though it might have been erroneously reported, if it is nondefamatory, must be tested both by falsity and by knowledge of falsity.

MR. JUSTICE WHITE: You think it is true but it isn't.

MR. MEDINA: I am saying if you are talking about negligent falsity, at that point that is when the Constitution interposes, because the public discussion of nondefamatory nature is of sufficient importance so that you should not impose a check on this unless there is both falsity and intent.

MR. JUSTICE WHITE: How about reckless?

MR. MEDINA: I include recklessness with that intentional falsity, of course. That goes without saying.

So that that is the standard that I am supposing here that is being followed.

Now, with the New York Courts, first we start with something true, as with Mrs. Blumenthal, which has been enjoined. The very test of fictionalization is not one of truth or falsity; it is embellishment or exaggeration. So that you will have articles which are basically true, but which involve elements of embellishment, which have been prohibited or liability found.

The Sutton v. Hearst case, which we have in our brief, the red rose case, the gift of the red rose, there the majority found there was fictionalization. But the dissenting opinion, by the presiding Justice and Justice Shientag, said: "The fact before us, the article is basically true even though there is embellishment." So I suggest to you with the fictionalization cases by themselves, it is not a test of truth or falsity.

And even in the Binns case, again, which started this fictionalization, at the end of the case they had a very significant little passage: "It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute now under consideration, it is the duty of the legislature to repeal such part thereof or so modify it as to define with greater particularity what it intends should be prohibited."

But the statute was never amended, despite that suggestion by the Court.

I might say in that regard that just as this Court, in the New York Times case, used Coleman v. MacLennan in the Supreme Court of Kansas as a guide to the common law, that I would suggest that a similar use may be made of Donahue v. Warner

Bros. in the Supreme Court of Utah. That case construed a Utah statute, practically identical with the New York statute here, and for the very reasons which I have been putting forward to this Court, found that it is to be construed to mean use of a name or picture solely in connection with the sale of the commodity; because otherwise they found the same Constitutional difficulties which I am urging upon you here.

So I suggest that that Donahue case, which is cited in our brief, can be used as the model much as you did with the Supreme Court of Kansas and New York Times.

MR. JUSTICE BRENNAN: When was that decided?

MR. MEDINA: That was decided in 1954. And they end up by saying that "Twilight areas of uncertainty between the alternatives as such that a publisher would have to be constantly negotiating a hazardous course between educational and noneducational, fact and fiction, public and private character, from one quandry to another, so that the situation would be both impracticable and intolerable," and go right along the same Constitutional theory that I am following here.

So I merely suggest that that would be of possible utility to the Court on this question.

MR. JUSTICE BLACK: Is that cited in your brief?

MR. MEDINA: Yes, sir.

MR. JUSTICE STEWART: In your reply brief, pages 2 and 22.

MR. MEDINA: Yes, sir.

Now, in the question of standing on this matter of truth, I say we have standing for two reasons: First, we had, up to the time we got to this Court, throughout all of the New York Courts, stated the Life article was true in the broader sense of the word "true."

Surely there was the ambiguous inaccuracy on the word "reenactment," but aside from that, the fact that the play was the heart and soul of the Hill incident as testified to at the trial, and the fact that it basically merely was a picture of a family being terrorized by three convicts, we made the point throughout, the article was basically true.

I think myself that is the reason why the Court of Appeals affirmed on both opinions below, including the opinion by Mr. Justice Rabin, which said even if it is true, you are still going to be liable. It was in answer to that contention of ours.

So that I say on that broader test of truth, having put that forward throughout the courts below, we have standing to raise this question of truth.

I may say on this broader question of truth, this question of standard, to illustrate, the people say the British and American libel are the same and each has the defense of truth. That is true, and yet it is completely false, in a way.

If I should write that Johnny Jones stole a watch

last Tuesday, and I come into court and prove Johnny Jones stole a clock last Tuesday, that is a defense under our law; it is not a defense under British law. Or if I prove that Johnny Jones stole a watch last Wednesday instead of last Tuesday, that is a defense under our law; it is not a defense under British law. And you can refer to Gatling 257 in that regard.

So it depends on whether you are using a narrower or broader stretch of truth in defining these standards.

In any event, we did raise that, and it seems to us it does give us standing to raise the point of view.

Secondly, under Buchanan and Dombrowski, in this Court, when you have a statute that has been applied to enjoin, as in Mrs. Blumenthal's case, a truthful account, and in other cases which we cite in our brief, when you have this statute, it does have an inhibitory affect. And I say that at that point, this Court should raise the point and go into it.

I am sure that ever since the Youssouppoff case, which is cited in our brief and which I will go into in a minute, the CES has been more than careful in trying to hold back in some of the things it has done.

It is impossible to really appraise the effect of these decisions, but we do know that they do take place, and the smaller publishers just can't afford to be coming up to this Court. In this case alone, this is the fifth appeal we have argued in two trials, and we have been at it for eleven

years.

MR. JUSTICE FORTAS: Mr. Medina, did you say, or did I correctly understand you to say, you thought negligent mis-statements would not Constitutionally permit imposition of sanction, that a statement that was grossly negligent or willfully negligent would Constitutionally permit the imposition of sanction?

MR. MEDINA: Willfully -- all I am saying is you need both falsity and intent if you have nondefamatory language, because intentional falsity has no Constitutional protection and shouldn't have. And the law of libel is part of that, except you allow the states to presume both intent and falsity, except when you are dealing with a public official, when you yank that presumption back and say, "Go back and prove intent and prove falsity." Because it is important when you are talking about public officials.

MR. JUSTICE FORTAS: You don't believe the First Amendment provides federal inhibition upon state law of libel?

MR. MEDINA: I do not. No. Except that you may-- if the libel is concerning public officials, and perhaps you will extend it to public figures and public issues; that will ultimately be coming up in other cases, of course. But you still come back to intentional falsehood.

MR. JUSTICE FORTAS: Right.

MR. MEDINA: All I am saying is you have to prove it.

MR. JUSTICE FORTAS: All right. Then our problem in one respect, in a way, would be to draw the line for the transitory moment of history between negligence and willful negligence on your theory; is that right?

MR. MEDINA: On my theory, I think that is so.

MR. JUSTICE FORTAS: Let me ask you one specific question. Let me put to you a specific question. Let us suppose that there is presented to a publisher, to the editor of a publication, a story of a conspicuous type, which says: "This is a fictionalized version based upon an incident that happened to Joe Jones and his family." "This is a fictionalized version." And then the editor, for reasons known to himself, without any inquiry whatsoever, strikes that sentence and publishes the article as it is, so that the article is no longer represented to be fictionalized, now is that negligence, willful negligence, or an intentional misrepresentation?

MR. MEDINA: Well, it is probably a question for the jury as to whether it is reckless--

MR. JUSTICE FORTAS: And if the jury -- suppose the jury imposes liability, would the First Amendment of the United States Constitution operate to supervene the judgment in the case?

MR. MEDINA: If the jury found falsity, based on the facts you stated found reckless indifference to whether it was false or not, I think that verdict would be upheld and that

would be the end of the matter.

MR. JUSTICE WHITE: There would be prior instruction?

MR. MEDINA: Yes, of course.

And that brings me to the question of intent, first on the cases other than our case, and secondly, to our case.

I think it is clear, beyond a peradventure of a doubt, that this question of intent or knowledge of falsity, or even malice, but certainly knowledge of falsity, is utterly foreign to this question of privacy as interpreted by the New York Courts. And the clearest example I can give you is the Thompson v. Close-up case, which we cited in our brief, where a magazine used a wrong picture and summary disposition of the case was denied because, said the court, "it may be found that the publication, although perhaps by mistake, was published in order to increase circulation," so that the intent end of it was totally thrown out.

The Youssoupoif decisions and case with the admitted assassin of Rasputin coming into court and saying "You didn't tell it correctly," intent was foreign to that case throughout.

It reached the point initially where there was a motion for summary judgment by the plaintiff which was almost granted. Two concurring judges in our Appellate Division said he should have gotten it because there was embellishment, but

no discussion of intent whatsoever.

It went back to trial, and we found in the Supreme Court of New York County, trying as to whether the admitted assassin of Rasputin had his story correctly told, and the matter was put to the jury -- I have attached the charge to the jury as an appendix to my brief -- no question of intent was raised throughout, and the only question given the jury was truth or falsehood, and on the motion to dismiss, the trial judge specifically said malice is not a part of this.

So that I say it clearly appears, from the Yousoupoff case and those decisions, that intent is not a necessary element, no scienter, under this New York statute.

The most recent decision of that is the Spahn case by our Appellate Division in 1965, and at the end of that it said:

"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."

So that it is clear from other cases that intent is not a portion of this crime. And this is a crime we are talking about.

Now, let's see what happened in this case. I got my first indication of what was going to happen when I made a motion to dismiss, based specifically on the grounds that intent

had not been proved, and the trial judge denied that and said: I think we had better put up to the jury whether the article is true or false.

Then we got to summation, and my second point in summation dealt with intent, and that they should prove that we knew what we were doing. And immediately counsel for appellee got up -- interrupted my summation -- and said, "This is quite erroneous." And the trial judge said, "Well, I will instruct on that."

Then we got to the charge. I had a specific request to charge on intent, request number 6.

MR. JUSTICE WHITE: Where is that?

MR. MEDINA: Page 311, Your Honor.

Even if you do find that the statements in the Life article concerning plaintiffs were wholly fictitious, you must, nevertheless, return a verdict for the defendant, Time, Inc., if you also found Time, Inc., had published those statements in the belief they were true.

Stated conversely, you may not return a verdict in favor of either plaintiff against Time, Inc., having used their names for either trade purposes or advertising purposes, unless you are satisfied by a preponderance of the evidence that the Life article was pure fiction regarding plaintiffs and that Time, Incorporated's employees knew it was fiction at the time the article was published.

MR. JUSTICE FORTAS: But there are two different things in there. One, you say that the charge you were requesting implies that Time, Inc., would be exonerated if it knew, if it believed that the statements were true?

MR. MEDINA: Yes, sir.

MR. JUSTICE FORTAS: Was there any evidence in the record, any evidence in the record to the effect that the editor above Mr. Prideaux, the man above Mr. Prideaux in the hierarchy, knew, thought, believed, or had any reason to think or believe that the statements were true; namely, that this was a true life version of what had happened to the Hill family?

MR. MEDINA: Your Honor, we put both the writer who wrote the article and the researcher who checked it on the stand.

MR. JUSTICE FORTAS: I am talking about the editor.

MR. MEDINA: There was no testimony by anyone else. I had one editor, I announced to the Court that he was in the courtroom if anybody wanted to examine him. No one did.

I thought we would have the writer and researcher, the two people who had to do with the article, both of whom testified in their judgment, at the trial, the article was true, and at the time they wrote it, they thought it was true and correct.

MR. JUSTICE FORTAS: Was the objection to your requested instruction there was no basis for the first half of it in the record?

MR. MEDINA: No, sir. There was no objection to the instruction. The Court just didn't charge it. I specifically excepted to the failure to charge.

MR. JUSTICE FORTAS: The second part of your requested instructions, as I remember it, required affirmative proof, did it not, of knowledge of falsity?

MR. MEDINA: That defendant, Time, Inc., employees knew it was fiction at the time it was published.

MR. JUSTICE FORTAS: The obverse of the coin.

MR. MEDINA: That's right.

MR. JUSTICE FORTAS: Now, is it your position, in this sort of case, in order to avoid an impact of the First Amendment, that the plaintiff has the burden of proving that the statement was known to be false?

MR. MEDINA: Yes, sir, that is precisely it.

MR. JUSTICE FORTAS: Your point is it is not merely a matter of defense, but it is part of the plaintiff's affirmative burden?

MR. MEDINA: That is right. We are talking about Dean Prosser's cases. That, in essence, is what we have reduced this case to. And as he said, it is high time we realize what we are doing and give some consideration to the question of

where, if anywhere, we are to call a halt. And he characterized those cases, and I am reading from my original brief, page 23: "Gone is the defense of truth and the defendant is held liable for the publication of entirely accurate statements of fact without any wrongful motive."

MR. JUSTICE WHITE: Mr. Medina, the Trial Court might have refused to give this instruction because he had already instructed on it.

MR. MEDINA: But he had not, your Honor, and I am just getting to that, because what the trial court said, "I give it to you, the jury, to pass on whether the statements in the article constituted fiction."

MR. JUSTICE WHITE: And whether there was fictionalization, or whatever you call it?

MR. MEDINA: That's right, but whether statements in the article constituted fiction, and that isn't a question of intent there.

And then the jury came back. They were confused with this word "trade," and they said, "We would like to know some more about it," and I think at that time Mr. Garment, representing the appellee, made two statements pointing out his position and the court told them-- he said first, "Our claim is that the total article must be read and the jury must determine whether it conveyed a basically false impression as to the relationship of the Hill family to the 'Desperate Hours,'" page 306 of the record.

Then the court said, "Well, we are going to charge that, I think it's covered," and then Mr. Garment said, "Your Honor, if they are telling news, if they are telling news, purporting to tell news, but have as the basis for the use of the individual's name something that is spurious or essentially false that, we contend-- and I think the law is clear-- it is for trade purposes."

Medina

So it is purely a falsity test, and it is the same falsity test that was applied in Youssouppoff, and indeed it is the falsity test which is called for under the prior appellate decisions in New York.

So all I am really saying is that the question of intent never entered this case and doesn't enter New York law so far as this question of privacy is concerned, and that is a fatal omission.

When we got to the Appellate Division, again on intent, we had Mr. Justice Stevens saying the defendant merely concluded that basically the play was a reenactment, and so stated: "Again, there is no question of intent. We conclude that it was a reenactment, and so stated."

MR. JUSTICE WHITE: But fictionalized in itself meant to the jury, or means by the law of New York that a person deliberately falsifies, or deliberately fictionalized-- that word in and of itself carries that import, why perhaps this law is put in a different way. Isn't it?

MR. MEDINA: But the charge to the jury, your Honor, was, "You must find that the statements concerning the plaintiffs in the article constituted fiction." It is a question of truth or falsity on that and, sure, fiction connotes in a way some fiddling with the facts, but there is nothing in any of the appellate decisions in New York on this question of intent.

Intent is entirely disregarded, and I think the Spahn case, which I have read to you, the Youssouppoff case, which we have gone into, and Thompson v. Close-Up. They may have perhaps published something by mistake. This was a wrong picture case.

MR. JUSTICE WHITE: The jury had to find this fiction to award compensatory damages?

MR. MEDINA: The court knew perfectly well how to charge knowledge--

MR. JUSTICE WHITE: What did they have to find for punitive damages?

MR. MEDINA: When they got into punitive damages, he got knowledge all right, that this was done knowingly and failure to make a reasonable investigation. We got punitive damages.

MR. JUSTICE WHITE: The jury awarded punitive damages?

MR. MEDINA: Yes, sir, they did.

MR. JUSTICE WHITE: So in this case, how can you really complain if the jury was instructed on compensatory and punitive damages? Compensatory on your view required--

MR. MEDINA: The award on damage was set aside, because the evidence which was put in went against us so far--

MR. JUSTICE WHITE: So you say the punitive damage thing is out of this case as it comes to us?

MR. MEDINA: I do, and all you have is compensatory.

MR. JUSTICE WHITE: There has never been any review as to whether the jury verdict was sustainable?

MR. MEDINA: That was set aside.

MR. JUSTICE WHITE: So only the compensatory matter is up here.

MR. MEDINA: That's right, because the new trial, in a new trial the sole award by Judge Klein was for compensatory damages, so the question of punitive damage is no longer here.

MR. JUSTICE WHITE: In any event, I suppose you would say that instruction on punitive damages doesn't go far enough to satisfy you anyhow?

MR. MEDINA: Because it was won on negligence.

MR. JUSTICE WHITE: It was won on negligence?

MR. MEDINA: Yes, and it is a strange doctrine you are going to have punitive damage on negligence, and that is what we have here.

MR. JUSTICE BRENNAN: Are you saying that fictionalization under New York law is synonymous with embellishment--

MR. MEDINA: It is synonymous with embellishment and exaggeration. It is a funny type of falsehood, not really true or false.

MR. JUSTICE WHITE: But it is nonintentional?

MR. MEDINA: It is nonintentional. There are cases

in general, and applied in our case, intent is not a factor, and I say we need that protection under the Constitution.

MR. JUSTICE WHITE: It can be fiction if it is intended, and it can be if you don't--

MR. MEDINA: If you don't intend to, it would still be fiction. The charge was, was the article fiction, not did the defendant create fiction, which might connote knowledge, and the charge in Youssouppoff was the television program fiction, was it true or was it false, and this--

MR. JUSTICE FORTAS: Mr. Medina, haven't the New York courts said-- I'm not suggesting that New York courts in this branch of the law have been clear--

(Laughter.)

MR. JUSTICE FORTAS: --but haven't the New York courts said that fictionalization means the creation of a story or narrative or motion picture really without regard to its factual accuracy, and for the purpose of presenting a story of romance, or whatever it may be, without reference to its coincidence to the facts of life? Isn't that about what they've said?

MR. MEDINA: I don't think that is so. It comes down to a case, the Sutton v. Hearst; the red rose case is a good illustration of embellishment, of exaggeration, where the facts they start with are basically true facts, and that is what caused the split in the court there. In that case

there was a very violent split in the court there, and Presiding Justice Sheintag said, "These facts are basically true, even though they have been broken up."

Even in the Binns case, that original telegraph operators, everything-- there were several different rules, and the only thing that was condemned was the last one that had a picture of him and a title, "With His Big American Smile," and they said this has gone too far.

So it is not a truth or falsity test, it is an in-between type of thing, so that you don't know quite what you are talking about, really. Even if you say this is truth or falsity, they still haven't got intent in this.

MR. JUSTICE FORTAS: I gather, and this may be quite wrong, but I gather from-- as much as I can gather anything specific on these New York cases on the subject of fictionalization-- that the New York courts were trying to convey the idea of, is a work of fiction in the ordinary sense of that term-- that is to say, that something presented is primarily a product of the imagination, whether or not it has a basis or a kernel of truth, as most works of imagination do.

MR. MEDINA: I am suggesting that the difference in some of these cases comes down to the individual judgments of judges involved as to whether they like the story or not, which is precisely the type of censorship that the First Amendment is intended to do away with, and to try to make sense

out of the cases on any assumption other than that is practically an impossibility, so if you are trying to get some judgments to give the editor of Life of what can you publish, and you try to make sense of these New York cases, you have a darn tough job.

Even on this New York Times illustration I gave, you come within the precise language of Gautier, and maybe you will say, "All right, we'll take a chance and do it," but I say we shouldn't be in that position, that a decent journalist should have some test when they are deciding what to publish.

MR. JUSTICE FORTAS: Don't you have that problem all the time, practically every day, with respect to the laws of libel?

MR. MEDINA: No, sir. Your simple test is whether it is true or not, and if it is true you can publish it.

MR. JUSTICE FORTAS: And in between?

MR. MEDINA: No, it is not so much in between. And there is very little error, and once you know something is true, you know you can publish it.

In this field of privacy, I merely suggest that when it is nondefamatory and when you are talking about a public fact, we should have the protection that the fellow who comes in to sue us must prove both falsity and knowledge of falsity, or recklessness, and that this is a minimum, because, mind you, this article here, the dissent in the Appellate Division

found it was an informative presentation of legitimate news.

In the Court of Appeals, it was said, "The article on its face is an account of newsworthy information."

Certainly this is something more than having redeeming social importance that this Court has protected in the average obscene cases. We are a long way away from that. We are contributing something to public discussion--

MR. JUSTICE BRENNAN: What do you want us to do with this New York statute, Mr. Medina?

MR. MEDINA: I think the statute should be struck down, your Honor.

MR. JUSTICE BRENNAN: Completely?

MR. MEDINA: Yes, sir, because in nondefamatory language of public events, you should have a sine qua non, just as you have in dealing with defamatory language of public officials you have a sine qua non of falsity plus knowledge of falsity plus recklessness.

MR. JUSTICE BRENNAN: I take it if we did that, this case could not be retried.

MR. MEDINA: That's correct, your Honor.

MR. JUSTICE HARLAN: You are asking us to strike the statute down on its face?

MR. MEDINA: Yes, sir, or as applied to us either way. I think the statute is before you.

MR. JUSTICE HARLAN: It makes a difference. It

doesn't necessarily mean that we have to deal with it on its face.

MR. MEDINA: Well, you have before you--

MR. JUSTICE HARLAN: You say either way?

MR. MEDINA: I would urge upon you strongly to strike it down as being, on its face and as interpreted, directly against the Constitution.

MR. JUSTICE WHITE: Even if we didn't agree that it applied to truthful statements?

MR. MEDINA: That's right.

MR. JUSTICE WHITE: You would still say that on its face it's bad that it applies to false statements that you didn't know were false?

MR. MEDINA: On its face it is clearly bad, but that construction does not involve intent and at times has involved truthful statements.

MR. JUSTICE WHITE: What if we read New York statutes not to cover truthful statements, but if we construed the statute to the cases that way, then the statute would be construed that way, but you would still say it is bad on its face, because it still covers negligently false statements?

MR. MEDINA: That's right, or non-negligent false statements. You may be just plain wrong with no negligence whatsoever.

MR. JUSTICE HARLAN: What your argument comes down to

is, is the Constitutional measure privacy. The New York Times public official rule case--

MR. MEDINA: Well, it isn't quite-- it does come down to that, and the word "privacy" is what throws us all off, because this isn't a privacy law, it is an intentional falsehood, maybe, law, with neither of those elements, and I am saying that intentional falsehood is not protected by the Constitution.

When you are talking about defamation, except the states have given you a little aid and make the defendant a sitting duck by presuming both intent and falsehood.

You yank out of the presumptions defamatory language dealing with public officials as entitled to the protection-- the plaintiff must prove his case. I'm saying that non-defamatory language which is the run-of-the-mill language of freedom of speech and freedom of the press, nondefamatory language of public facts deserves the same protection as certainly as the defamatory language about public officials if you are going to have free public discussion.

MR. JUSTICE HARLAN: Whether you call it a privacy statute or something else, it adds up to the New York rules being a test--

MR. MEDINA: As a--

MR. JUSTICE FORTAS: How about private?

MR. MEDINA: That isn't involved here, and that's why

I have been careful, because if you are going to get into the private area, you have some entirely different problems.

MR. JUSTICE FORTAS: But would you agree that we have a question here as to whether on facts of this particular case we're dealing essentially with something in the public area, or essentially with something in the private area, or something that is half one and half the other?

MR. MEDINA: You are dealing with something that was a newsworthy event two and a half years before our article. It was on the front pages of every paper of the country. At that point, you are no longer dealing with a private fact.

MR. JUSTICE BRENNAN: And that is your test, whether it is a newsworthy item?

MR. MEDINA: I'm talking about whether public or private.

MR. JUSTICE BRENNAN: That's what I say, that is your test, if it is a public fact, it has been in the past a newsworthy item, and I take it that newsworthy item means it got into the news.

MR. MEDINA: Now, I think you have to define what is newsworthy, general interest.

MR. JUSTICE BRENNAN: Who's going to decide?

(Laughter.)

MR. MEDINA: Dr. Michael John, whom you know, said that the citizens have not delegated their right as to what they

will read or write, and when you are talking about non-defamatory language, that is precisely my point, and precisely mine, that you cannot have freedom of discussion of non-defamatory language unless you give the protection of saying if you are false, and you know you are false, you will get hit, but up to that point you should be able to discuss matters.

MR. JUSTICE BRENNAN: You drew a line on something called a private area. What is that?

MR. MEDINA: All right. You are going to put a camera into someone's bedroom. You are going to invade his home, you have a multitude--

MR. JUSTICE BRENNAN: How about Mrs. Blumenthal?

MR. MEDINA: She was in the public street.

MR. JUSTICE BRENNAN: What if she had been in her store?

MR. MEDINA: That is still public. Now, the number of different privacy problems are illustrated best by-- excuse me, Mr. Justice White.

MR. JUSTICE WHITE: You are saying there is no tort of privacy, there are just intentional torts, just intentional invasions of somebody's interest?

MR. MEDINA: I'm saying forget the lable "privacy," and I think correctly so, if you have nondefamatory language a bout a public event or a public fact, that you can use that language all you want as long as you don't falsify, intention-

ally falsify.

Now, that is what you have said in the New York Times case is applicable to defamatory language about public officials, and I say the same rule should apply to non-defamatory language. That's the bread and butter to us in our normal speech, our normal talking, and you don't have the red flag of defamatory language. If an editor has something where he is really saying something really bad about someone, he knows he has a red flag there.

MR. JUSTICE BRENNAN: And there is your distinction between public fact and private fact, a very, very narrow one and limited indeed, isn't it?

MR. MEDINA: No, there is a great area of public law dealing with the electronic spying in someone's bedroom, going into someone's home.

You would have a much more difficult case if Mr. Hill had said nothing, he just sits in his home, knows these convicts have been there, and did nothing.

I still think we might have a right if it is tied into the play to say nothing about it, but it is a much more difficult case.

I am trying to suggest that you restrict yourselves in this case to the false light cases of Dean Prosser and to non-defamatory discussion of public facts. You may want to go beyond them later on, but that is all this case involves, and I am

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suggesting that with that type of a fact, the non-defamatory
discussion, that we should have both intent and falsehood.

Thank you very much.

[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a multi-paragraph letter or report.]

MR. CHIEF JUSTICE WARREN: Mr. Nixon?

ORAL ARGUMENT OF RICHARD M. NIXON, ESQ.

ON BEHALF OF APPELLEE

MR. NIXON: Mr. Chief Justice, may it please the Court:

We have come far afield from the first time that we argued this case this spring. Then the question before the Court was whether or not the judgment in this case impinged on the First Amendment.

Now we have the problem of whether or not the judgments in all of the New York cases, going back over 63 years, may have impinged upon the First Amendment.

I am not going to make a point of arguing the standing question, because I believe that not only this judgment, but the interpretations of the courts of New York of this statute over 63 years can be sustained on First Amendment grounds.

But to bring the whole matter into context, I think it is vitally important to see first, and to come back to, the case that this Court must decide in this proceeding.

Now, counsel for the appellant has stated here, as he stated previously, that this account was basically true. His back-up position to that is if there was falsehood, it was at most negligent falsehood. He also contends that as far as the law is concerned, as applied in this case, that law did not require proof of intentional falsehood.

It is our contention that in this case it was argued by the plaintiff, it was established by the evidence, it was charged by the court, it was found by the jury, and it was held by the courts of New York in their appeals courts, that Life magazine lied, and that Life magazine knew that it lied. That is the proposition that I contend for here.

Let us look at the facts in this case--

MR. JUSTICE HARLAN: They didn't put it quite that strongly, I think.

MR. NIXON: They didn't.

In the case presented before the Court-- Life magazine by what I would call a device of a verbal picture--Life magazine presented to its millions of readers the proposition that the Hill incident was the same as the "Desperate Hours" play. That was not true. We argued that proposition previously in the spring, but the best and most eloquent proof that it was not true is that Life tells its pictures not only by its words, but primarily by its pictures, and in telling its story by pictures, the six pictures that it selects on this play presents incidents, none of which occurred to the Hills; all of which, of course, had happened in the play.

This was not simply incidental falsity. It was substantial falsity, and it was complete falsity in every one of those instances.

Now, the contention is made by the appellant that the

only error involved here is the use of the word "reenacted," and that that was at best negligence, but appellant had to use the word "reenacted" by reason of what it had done in the terms of the presentation of the photographic story, because if it had said what was the truth, that the Hill incident was one of several hostage instances about which the author had read, and that it was reminiscent of this incident, this would not have been editorially in keeping with the picture story which Life presented to its readers.

The second proposition is that not only did Life make this false statement, but that its editors, and in this case its picture editor, made the statement with knowledge that it was false. What information did he have before him? And here, Mr. Justice Brennan, I would like to distinguish the information that was available to Life magazine from the information that was available to the New York Times in the case of New York Times v. Sullivan.

In that case, there was information in the Times' general files, as you pointed out in your opinion, which proved the falsity of some of the materials in the ad.

In that case, the New York Times was printing an ad which had been submitted to them by others, rather than printing what was in effect a statement that had been authored by the New York Times staff itself.

In this case, we have a story that was originated by

the defendant, and we have the truth about this story, not in the general files of the defendant, but in the story files of the defendant, and in the story file of the defendant there were not only the current statements and stories that had been carried at the time the Hill incident occurred, but there was an article by the author himself in which he specifically stated that his play was not based on any specific incident, but was based on many instances occurring in several different situations, and that when he had completed his story it was different from any of the hostage instances about which he had read.

The defendant said that Prideaux was questioned on this point; in his testimony he agreed he had that story in his possession and that he had read it, and in his brief in the appellate court, the appellant indicated and conceded that the defendant witness, Prideaux, had read this story.

And so we have first falsity; second, knowledge of falsity and then third, how did the defendant, with knowledge of this falsity, proceed to use the facts?

Let us now understand another point: In the 63 years of the history of this statute, there has never been an instance of an application of a privacy finding, a finding of liability, with regard to a current news story. In this entire 63-year period, these stories have always involved either magazines with lead times like Life magazine, or television, or motion picture stories, all of which involve creation, and

time for creation, rather than the kind of misstatement that may occur, for example, as was mentioned in the New York Times in the heat of debate, or because of having to meet a deadline.

Let's look at the Life magazine story. That story had a lead time of three months. During that three-month period, the appellant's editors had the opportunity to question the Hills as to whether the story was true-- they did not; to ask the author as to whether the story was a reenactment-- they did not.

MR. JUSTICE BLACK: Didn't he go with them to make the picture?

MR. NIXON: The author did go with them to make the picture.

MR. JUSTICE BLACK: In the house?

MR. NIXON: He did. But they did not question the author, and the author in his testimony in this trial made it clear that that question had not been asked and that he had not told them that it was a reenactment of that story.

They not only did not do that, but in the light of the testimony that they had and the evidence that they had in their own files, they nevertheless then proceeded to write a story and in each successive draft, they removed, deliberately, every qualifying phrase which would indicate that the Hill experience might be different from the "Desperate Hours."

They struck out the words "somewhat fictionalized,"

they struck out the house in which the pictures were made was the Hills' former home, they struck out the words "former home."

They changed the running head of the article from "The Story of the Play, the 'Desperate Hours,'" to "The Story of the Hills, True Crime."

All of this was done deliberately. All of this was done with knowledge from evidence that they had in their own files that this was not the story of the Hills, and that the "Desperate Hours," as the author himself had written, was based on several instances, and when he had completed his story it was different from any one of the hostage instances about which he had written.

MR. JUSTICE BLACK: It seems to me like the first statement this author made about explaining what was meant by the novel or the play was that it was inspired by two instances, one down in Pennsylvania and another in New York.

Is that right?

MR. NIXON: As a matter of fact, the statement by the author--

MR. JUSTICE BLACK: I'm talking about his first statement.

MR. NIXON: The first statement. I have it here in front of me. "The novel and play were based on various news stories, in California, in New York State, in Detroit, in

Philadelphia."

This was what was in the files to which I have been referring.

MR. JUSTICE BLACK: Was there not one in which he said two incidents?

MR. NIXON: He mentions four.

MR. JUSTICE BLACK: But was there not another one in which he mentioned two?

MR. NIXON: What I am referring to, Mr. Justice Black--

MR. JUSTICE BLACK: I'm talking about the first statement he made when this was to be given to the public as to what he based it upon.

MR. NIXON: And what I am referring to, Mr. Justice Black, is to the knowledge of the defendant, Time, and what the defendant, Time, had knowledge of was this article which had appeared in the New York Times news magazine, written by the author, and this is what this, how this reads--

MR. JUSTICE BLACK: What I wanted to know about-- maybe you don't know it-- is wasn't the first statement he made in reference to this publication referring to two instances which had disseminated on that subject, one in Pennsylvania which was very much like what this turned out to be, and the other one in New York, wholly unlike it?

MR. NIXON: I recall no testimony, and I don't

believe the appellant has any testimony to that effect. In fact, the only testimony that we have here is what the appellant had in its files, and, of course, this bears on the question of knowledge and the question of intent.

It says, "In California, in New York State, in Detroit, and in Philadelphia, a frightened and dangerous man entered the house. . . I found it best to let my imagination play with the idea. In the end, even the plot itself became something quite distinct from all the hostage incidents I had ever encountered."

That was the statement that the author of the play had made, and that was the statement which Life magazine had in its files and which Mr. Prideaux, its picture editor, testified that he had read, and it is on that particular statement that I make the charge here that not only did Life misstate the facts, make the false statement, but that it had knowledge when it made that statement that it was false.

MR. JUSTICE BRENNAN: May I ask, Mr. Nixon--

MR. NIXON: Yes, sir?

MR. JUSTICE BRENNAN: Are you in agreement with Mr. Medina that Constitutionally a statute like this has to be limited to intentionally or reckless false statements?

MR. NIXON: Mr. Justice Brennan, as far as the application of the New York statute is concerned, it is limited to intentional false statements. Now, on that score, I think it

is important to refer to the charge, and to point out that Mr. Medina did not read that portion of the charge which refers to the point that Mr. Justice White had made a moment ago.

The charge over and over again uses the term "alter and change the true facts." It is for you to determine whether in publishing the article the defendant, Time, altered or changed--

MR. JUSTICE BRENNAN: May I ask on which page?

MR. NIXON: On page 300 of the trial record.

"It is now for you to determine whether in publishing the article the defendant, Time, altered or changed the true facts concerning plaintiff's relationship to the 'Desperate Hours' so that the article as published constituted fiction or a fictionalized account for trade purposes."

MR. JUSTICE WHITE: So you think it was the intent part, knowing that falsehood was wrapped up in that?

MR. NIXON: Mr. Justice White, alter and change connote deliberate action. To say deliberately altered and changed, in my opinion, would be redundant, and particularly to say deliberately altered and changed in the light of the record in this case, because there are 87 pages of testimony of the cross-examination of Prideaux in this case, which go into his reasons for making the changes in the article, for his reasons for striking out the words "fictionalized, somewhat fictionalized," which also go to the knowledge he had when he made that statement.

MR. JUSTICE WHITE: On that basis, you would get punitive damages by only proving negligence, and it would take intention to get compensatory damages.

MR. NIXON: I think if you read the charge on punitive damage, that it requires not only what you have referred to as just negligence, but it does require in effect negligence, because if you turn to page 566 of the record, there are two particular qualifications.

"You may award exemplary damages if you find from the evidence that the defendant or defendants knowingly referred to the plaintiffs without first obtaining their consent and falsely connected plaintiffs with the "Desperate Hours" and that this was done knowingly or through failure to make a reasonable investigation."

MR. JUSTICE WHITE: That latter part--

MR. NIXON: But we go on to the rest: "You do not need to find there was any actual ill will or personal malice toward plaintiffs if you find a reckless or wanton disregard of the plaintiffs' rights."

In my view, both of these conditions are necessary in order to find punitive damages, and the jury did find that both did exist in this particular case.

MR. JUSTICE WHITE: But you could have liability here under this instruction without finding recklessness?

MR. NIXON: Excuse me?

MR. JUSTICE WHITE: You could have liability without recklessness under this construction, if you found just ill will?

MR. NIXON: On the contrary, while I agree that the charge might leave that implication, the words "ill will" are used here without any reference to anything in the record. The ill will was not pled, and I believe that in this particular instance that what the court in effect was saying to a jury of laymen was that the issue here is not ill will in a personal sense, and incidentally, ill will in a personal sense is never involved in privacy cases as it sometimes is in defamation cases, but the rule here is wanton--

MR. JUSTICE WHITE: In any event, the penalties for compensatory damages are no greater than for punitive damages?

MR. NIXON: That is correct.

Let me also point out, as far as the finding of punitive damages is concerned it was set aside by the court not because the court questioned the jury's finding, but because the court questioned the admission in evidence of the motion picture.

MR. JUSTICE WHITE: But the judgment of punitive damages is out of the case?

MR. NIXON: It is out of the case, and no punitive damages were awarded.

MR. JUSTICE BRENNAN: May I ask, Mr. Nixon, if the

New York statute only reached knowing or intentional falsehood, what are we to do with this affirmance by the Court of Appeals of that concurring opinion by the Appellate Division, and that sentence in that concurring opinion that is quoted, Question 2 that we asked to be discussed today?

I think it's at page 5 of your brief, at the bottom of that page.

MR. NIXON: Yes, sir. What you are referring to is the opinion of Mr. Justice Rabin?

MR. JUSTICE BRENNAN: Yes.

MR. NIXON: And the opinion as it deals particularly with his declaration that even if the item was true, even if the item was not-- was true, that then there should be liability.

Let me point out first of all that there has never been a New York case in which there has been a finding of liability where a newsworthy item has been true, and I would be glad to answer questions on Blumenthal or any of the other cases that have been raised in that respect. Blumenthal was not newsworthy.

MR. JUSTICE BRENNAN: Assuming that that is so, although there has never been a case within the terms of that sentence, liability was visited upon the defendant nevertheless. What are we to do here with the affirmance of an opinion which includes that sentence, an affirmance by the Court of Appeals, an order we are bound by the interpretation of the

statute that the highest court of the state pronounces?

MR. NIXON: Mr. Justice Brennan, as I understand it, the Court of Appeals affirmed on both opinions, and therefore both opinions are the law of New York, but opinions in New York, just like opinions in the Supreme Court, not only may make a holding as to a particular case, but also may have a dictum. This is a dictum in this case. It has not been applied, and as far as the future is concerned, it may not be applied.

MR. JUSTICE BRENNAN: It may very well be a dictum. Indeed, if this were an opinion of one of my brethren, I would say that it was.

(Laughter.)

MR. JUSTICE BRENNAN: But I wonder if we are in that position, if we are in that position with regard to the state court's interpretation of a state statute. I wonder if we are free to disregard it as merely dictum?

MR. NIXON: It would seem to me that this Court could affirm the decision in this case on what was found in this case.

MR. JUSTICE BRENNAN: And not Dombrowski and--

MR. NIXON: And this Court could point out what I have just pointed out, that as far as this dictum is concerned that it has not been applied in the State of New York, and if this Court feels it should not be applied, it would not apply.

Excuse me.

MR. JUSTICE BRENNAN: No, go right ahead.

MR. NIXON: Let me say that as far as the Rabin dictum is concerned, it would be very difficult to find the case to which it would apply. If it can be clearly demonstrated a newsworthy item is presented not for the purpose of disseminating news, but rather for the sole purpose of increasing circulation, then the rationale for exception from Section 51 no longer exists and the exception should no longer apply.

If it is for the sole purpose of circulation--

MR. JUSTICE BRENNAN: Indeed, if that were the law, what would you think? Could it withstand the First Amendment if it were?

MR. NIXON: I would say first we're talking about a hypothetical case. It is not the law of New York, it is not the law of this case. Let me give--

MR. JUSTICE BRENNAN: Really, I wish I could be sure of that, Mr. Nixon. That is my difficulty.

MR. NIXON: Yes, and I would be glad to answer further questions on it, but let me give a case involving a true state of facts.

In the previous argument here, Mr. Justice Warren questioned me about the case of Melvin v. Reid under the California law, which was raking up long-forgotten misconduct,

somewhat akin to the old law of criminal libel, and the court of California found that there was liability in that case.

I indicated in answer to questions that I did not believe that the court of New York would find liability in the case of Melvin v. Reid.

There was another case in Missouri in 1942, Barber v. Time.

The facts in that case were tried under a common law jurisdiction, and in that case what happened was that a woman, a very attractive young woman, had contracted a disease in which, during the previous year, she had eaten enough to feed a family of ten, and yet had lost 25 pounds.

Time magazine in its medical section ran a story on this woman. The story was entitled "Starving Glutton," and "The Eater, Barbara," I think was the heading on the picture, and it used the picture of the woman taken in the hospital. Liability was found; punitive damages were not allowed because Time pled that it had used the picture, taken it from wire services, and did not have knowledge of what was the fact.

The fact was that reporters some way got into the hospital room, asked the woman if they could use the story, she said, no, she did not want it used, and then her picture was taken surreptitiously.

The Missouri court held that there was liability, and then pointed out that as far as this particular case was

concerned, it did not believe that the use of her name and her picture was necessary for a discussion of this medical matter.

Now, I would suggest that a case of that type, while I doubt it would meet the Rabin dictum, I would suggest that a case of that type would present a very difficult problem for the Supreme Court of the United States in holding that the doctor-patient relationship, the right of an individual not to have his physical disabilities published to the world, that that does not involve a violation of privacy in which a privacy statute or common law holding could reach.

MR. CHIEF JUSTICE WARREN: We will recess.

(Whereupon, at 2:30 p.m., the argument was recessed, to reconvene at 10:00 a.m. the next day.)

IN THE SUPREME COURT OF THE

UNITED STATES

TIME, INC.,

Appellant,

v.

JAMES J. HILL,

Appellee.

No. 22

Washington, D. C.

Wednesday, October 19, 1966

The above-entitled matter came on for further reargument at 10:06 o'clock, a.m.

BEFORE:

EARL WARREN, Chief Justice of the United States
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 TOM C. CLARK, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON H. WHITE, Associate Justice
 ABE FORTAS, Associate Justice

APPEARANCES:

HAROLD R. MEDINA, JR., ESQ., 1 Chase Manhattan Plaza, New York, N. Y. 10005, for Appellant.

RICHARD M. NIXON, ESQ., 20 Broad Street, New York, N. Y. 10005, for Appellee.

First Addressee

Richard L. Nixon, Esq., on behalf of American
(Name)

Second Addressee

Harold R. Medina, Jr., Esq., on behalf of American

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 22, Time, Inc.,
Appellant, v. James J. Hill, Appellee.

Mr. Nixon, you may continue.

MR. JUSTICE HARLAN: Mr. Nixon, at some stage, either now or later on, I wonder if you would summarize what you understood the jury thought it had to find in order to return a verdict for your client.

ORAL ARGUMENT BY RICHARD M. NIXON, ESQ. (CONTINUED),

ON BEHALF OF APPELLEE

MR. NIXON: I will be glad to do that, Your Honor.

Preliminary to that, may it please the Court, could I respond to two questions and elaborate on them that were raised yesterday, one by Mr. Justice Black and another raised by Mr. Justice Brennan, and also, incidentally, by Mr. Justice Fortas.

With regard to the question that was raised by Mr. Justice Black, you will remember, in my opening argument, I referred to the article, "Fiction Out of Fact," which appeared in the New York Times magazine, in which the author of the play, "The Desperate Hours," Mr. Hayes, had stated that there were four different incidents which had inspired the play, and that as far as the final product was concerned, that it was unlike any of the incidents about which he had read. One of those incidents was the incident in Philadelphia.

Mr. Justice Black questioned me about what he said was

an earlier article referring to two instances.

The earlier article I have before me, and I refer the Court to that article which appears on page 427 of the record, that article was not in the file of the defendant. It, therefore, does not bear on the knowledge that the defendant had when he wrote the play, or the book. But the article is significant, it seems, on the basic point as to the question of whether "The Desperate Hours," the article on "The Desperate Hours" in Time magazine and the book and the play, were reenactments of the Hill incident.

For example, if the Court will turn to that page, they will find that Mr. Hill refers to three different instances which he said caught his imagination. One was the fact that he lived near a correctional institution in Danbury, Connecticut, and he wondered: What if there were a prison break and one or more of these desperate men escaped in that direction? Then, he said, he had read newspaper accounts the year before describing an occurrence in New York State, not so far away. In this occurrence there was a hostage instance in which there was "subsequent and inevitable violence in which a man had stabbed a child to death."

Then I quote: "Shortly after this, or perhaps a month or two before, three men escaped from a prison even farther away from my secure and comfortable home. Holding the family hostage, they hid there, eating and sleeping, and then

left, without violence, without the inevitable bloodshed."

MR. JUSTICE BLACK: You say this related to three incidents?

MR. NIXON: It related to two hostage incidents, and then the fact the defendant -- well, Mr. Hayes was the defendant; liability was not found in this case -- that he lived near a prison and referred to the fact that he had thought of the possibility of prison breaks.

MR. JUSTICE BLACK: Two incidents?

MR. NIXON: Two incidents, that is correct. But the significant point is that as far as this particular item is concerned, that it was an item, first, that was not in Life's file, as was the other item.

MR. JUSTICE BLACK: Whether it was there or not, it showed where he got his inspiration?

MR. NIXON: The question, Mr. Justice Black, is not a question of inspiration. The question is whether the Life article is false or true in stating that the Hill incident was a reenactment, not only in terms of the one word but --

MR. JUSTICE BLACK: That word "reenactment" -- you could use many other words. If it would have said "reminiscent," it would have been all right?

MR. NIXON: I would beg to qualify that by stating that in answer to the Chief Justice's question on reminiscent -- his question was quite explicit, his question was in the event

that they had used the word "reminiscent" and then had described the Hill incident as it occurred, would there have been liability, and my answer was no. But that is not what happened here.

In this particular instance, they said the Hill incident was a reenactment, and said it not only by one word, but said it by all of the pictures, including the six pictures. And my point is that those six pictures do relate to -- what? Violence and bloodshed.

And I come again to the article, and the author's own words that as far as the particular incident to which he refers in this particular article is concerned, that it was distinguished from the incident in New York because they hid there, eating and sleeping, and then left without violence and without the inevitable bloodshed.

It has been our argument and our contention throughout this case that "The Desperate Hours" -- the heart of "The Desperate Hours" -- is a story of violence and bloodshed; that the heart of the Hill incident was the fact that it was one that was distinguished by a lack of violence and bloodshed. And here we have it in the author's own words.

Now, the second point that Mr. Justice Black raised, however, I think also should be commented upon. He referred, quite properly, to the fact that Mr. Hayes had been present at the time that the pictures were taken in the house.

When those pictures were taken in the house, however,

it is significant to note what went on in terms of whether the representatives of the defendant discussed with Mr. Hayes the basic question as to whether the article, which was eventually to be written, or at that point "The Desperate Hours" about which pictures were to be taken, whether "The Desperate Hours" was a reenactment.

On that score I refer the Court to page 124 of the record to these questions:

"Question. Very briefly, Mr. Hayes, will you tell the jury whether or not 'The Desperate Hours' is the story of or reenactment of the life episode?

"Answer. It is not a story of-- it is not a reenactment of that episode.

"Question." - this is the significant one --
"Did anybody from Life magazine ever ask you whether it was?

"Answer. No, they did not.

"Question. Did you ever tell anyone from Life magazine that it was?

"Answer. I did not.

"Question. And you never told anyone of Life magazine about any similarities?

"Answer. I did not."

MR. JUSTICE BLACK: Did he not testify in another place, yes, he had? When asked whether he told Prideaux

whether there had been a reenactment, Hayes replied, "I told them there had been an incident in Philadelphia?"

MR. NIXON: Exactly. As a matter of fact, he told Prideaux that and--

MR. JUSTICE BLACK: And arranged to get the house?

MR. NIXON: Exactly. And further in this testimony, it will be pointed out that Mr. Hayes, in answer to questions, indicated that the reason that this house was selected was because the play was opening in Philadelphia, and that he could have used any house in Detroit or in California or in New York, or in any other place.

MR. JUSTICE BLACK: Yet, in Philadelphia they picked out this house -- it was some distance from Philadelphia -- and used it?

MR. NIXON: The play was opening in Philadelphia, sir. That was the point. The play was opening in Philadelphia, not in New York.

MR. JUSTICE BLACK: How did they happen to select the one the Hills had lived in?

MR. NIXON: Because that is where the hostage incident in Philadelphia had occurred. But my point is that as far as the selection of the house was concerned, that it was selected because the play was opening in Philadelphia; and Hill testified had the play opened in another city where a hostage incident had occurred, that he could have used -- and

he, of course, would have been delighted in order to get publicity for the play, he could have used any other house.

MR. JUSTICE FORTAS: You don't mean Hill?

MR. NIXON: I am sorry, Hayes. Hayes would have been delighted to get publicity for the play and would have used, of course, any other house.

If I could go further, the point to be made is, during this process, the three-month period in which the article was being written, and during the day in which the pictures were being filmed at the house, in which Mr. Hayes was present, not once did the representatives of the defendant question him as to whether those scenes occurred in that house, whether they had been --

MR. JUSTICE BLACK: Why should he ask him that question? They both understood it had occurred there, and they went there for that reason.

MR. NIXON: The reason, sir, that they should have questioned him was that -- is the heart of this case; the heart of this case is that the violent episodes pictured in six pictures in Life magazine did not occur to the Hills, and Life magazine stated, by pictures and by words, that they did.

This is the question that Life magazine, the defendant in this case, has not been able to answer, and it has not been able to answer it because it had knowledge; even before they went to the house, may I say, it had knowledge that began from

an article in its file -- in its file which Prideaux, the picture editor, had read. They had knowledge that as far as this particular incident was concerned, it was one of several that had been read about Mr. Hill, and that the final product was different from any one of them.

The point that we are making in this case is that the Life article is false, false in stating by picture, by every editorial device -- with no qualification whatever -- that the Hill incident was reenacted in "The Desperate Hours"; that "The Desperate Hours" family is the Hill family; that the violence that occurred in "The Desperate Hours" - the father beating the son; the violence in respect to the murder of the trashman; the participation, for example, of the father in a plot - unwillingly, of course -- for the purpose of murdering the deputy sheriff; the wounding of a boyfriend -- as a matter of fact, there was no boyfriend. All of these incidents, all of them that were in "The Desperate Hours" and made it the hit that it was, did not occur to the Hills.

MR. JUSTICE BLACK: That was a blending of fiction with fact.

MR. NIXON: It was stating fiction was fact. It was more than that; it was fictionalizing the Hills. It was using the Hills as commercial props for the purpose of selling more magazines. It was creating a story, rather than reporting a story. And that is the heart of the tort under the New York

law. If it had stated--and Mr. Chief Justice Warren very precisely hit this point in his question, if it had stated that this was reminiscent of this item, and then had described the Hill incident as it occurred, then Life article--Life magazine would not have been liable. But I should also point out, Life magazine would not have had a story.

MR. JUSTICE BLACK: Why wouldn't it?

MR. NIXON: Why, it wouldn't have had the story because it wouldn't have been newsworthy.

MR. JUSTICE BLACK: They could certainly have referred to other things in this play?

MR. NIXON: Let us go, then, to why? Why Life magazine -- when I refer to "Life magazine," I am referring, of course, to an institution, 24 senior editors, 41 other managing editors, and 208 --

MR. JUSTICE BLACK: You don't think they are all liable?

MR. NIXON: But what I am suggesting is, I am referring to any one of the individuals who may have worked on the article; but in this particular instance, Life magazine, as far as checking on this item, did not do so. And they did not do so because Life magazine knew what the truth was. The reason --

MR. JUSTICE BLACK: Maybe they didn't do so because any reasonable person would have thought, as I read this

record --

MR. NIXON: Yes, sir.

MR. JUSTICE BLACK: -- from what this man said, the author, that he did find it on the Hill incident.

Any reasonable man would have reached that conclusion, particularly when they took him down to the house and made the pictures.

MR. NIXON: Any reasonable man can disagree. And I would say that any reasonable man reading the Hayes article, "Fiction Out of Fact," which Prideaux did, and which stated specifically that "The Desperate Hours" was different from any hostage incident, that then that certainly put him on notice that "The Desperate Hours" was not a reenactment. And certainly it would indicate that the editors of Life should check to see whether or not editorially they should strike out the words "somewhat fictionalized", or they should strike out the words "this is the Hill's former home"; whether or not they should change the article to be "The story of the Hills" rather than the story of the play. In other words, the head being "True Crime" rather than "The Desperate Hours."

Understand, this is editorial changing and altering the facts substantially for the purpose of making the article, and I quote from Life's own editorial staff, "more newsy."

It was a gimmick, an editorial gimmick. And the

question is: Are private persons, involuntarily drawn into the vortex of a public issue, as counsel for the appellant has indicated--are private persons by this Court to be allowed, in effect, to be used as gimmicks for commercial purposes in a falsified situation in which, I would suggest here, an editorial organization, the largest in the world with more resources to question the facts than any other, to be allowed to be used here in a fictionalized situation?

MR. JUSTICE BLACK: The commercial purpose you refer to is selling magazines?

MR. NIXON: The commercial purpose I refer to is--

MR. JUSTICE BLACK: Selling magazines for profit?

MR. NIXON: Magazines are sold for profit.

MR. JUSTICE BLACK: Is there anything wrong with that?

MR. NIXON: Not at all.

Let me refer, sir -- I am also quite familiar with Mr. Justice Black's -- not only his various opinions, but also the dissenting opinions. In Greer v. Alexander, that dissent--which I think is perhaps, if I may use the semantics of this particular case, while not a "reenactment," is "reminiscent" -- in Greer v. Alexander, Mr. Justice Black, in dissenting from a holding of this Court which held an ordinance to be valid providing for regulation of salesmen for magazines, Mr. Justice Black said: "If this had been a case of a salesman

of pots and pans, it would have been a different situation."

What was he referring to?

MR. JUSTICE BLACK: That was in a prior case decided by this Court.

MR. NIXON: Yes, sir. What I am suggesting here -- and I am using it only by analysis -- I am suggesting Mr. Justice Black was putting his finger on the heart of this case and the heart of this law.

What he was saying, even though that was a dissent, what he was saying there was if the purpose was commercial, that is one thing. If the purpose is to sell magazines -- and not to sell pots and pans -- that is something else.

Now let's come to this particular act. We have here, true, the selling of magazines, and the use of the Hills, reporting on the Hills as news to sell magazines -- they can have no objection to that if they are newsworthy, using the Hills in a news story.

MR. JUSTICE BLACK: No doubt about this being newsworthy? Is there?

MR. NIXON: Absolutely, there is doubt about news -- the question here is whether or not we are going to say a fictionalized account -- a fictionalized account -- has a newsworthy privilege. This is the question.

We talk about newsworthy privilege in the one sense, and we are talking here about whether a fictionalized

account is entitled to that privilege. What we are saying here is that this was a commercial use and not a news use, and the commercial use under the rules of the courts --

MR. JUSTICE BLACK: They ran a magazine for profit?

MR. NIXON: Yes. They were running a magazine for profit.

But what I am saying is calculated falsehood, whether it is calculated falsehood which injures reputation or calculated falsehood which injures privacy, should not be used for profit in selling magazines. That is the heart of this case.

Now, the other question that I would like to comment upon, if I may, refers to a question of Mr. Justice Brennan, which allows me to comment on a colloquy between Mr. Justice Fortas and counsel for the appellant.

It would be more comfortable for counsel, in any case, to say that his case and all cases under the law are black and white. That is not the case here, and it is not the case in libel.

I would suggest, Mr. Justice Fortas, that the libel law going back in the common law, goes back between 400 and 500 years; and still today, even in this Court, there is debate between the definers and those who believe there should be a balancing test as far as libel is concerned, as Mr. Justice Brennan pointed out in his Meiklejohn lecture. That decision has not yet been made, and this Court has other cases on the

question of libel, as to what the rules should be. There are gray areas in libel. There are also gray areas in the field of privacy.

This field started -- when? Sixty years ago. In the State of New York, 63 years ago.

What I am saying here is here is an interest of privacy, like the interest of reputation, which is involved in libel, which a state should have the right to protect. There is, of course, the interest of the First Amendment, and if this interest is to be protected, it must be consistent with, of course, the First Amendment.

That is the problem in the libel case. That is the problem this Court considered and ruled upon in Sullivan, Rosenblatt v. Baer, Lynn, and Garrison. It is also the problem in this privacy case.

Now, there have been statements made to the effect that the law in New York, clearly apart from its application to this case -- and this is Mr. Justice Brennan's point -- that the law of New York is too uncertain. It leaves hanging over prospective publishers in the future doubt as to what the law is. And that, basically, would raise a very grave First Amendment problem. Also it leaves a question as to whether the law might be applied in a future case in an unconstitutional way, even though this Court might find, under the facts of this case, it was applied Constitutionally.

Now let me comment on that briefly. In 63 years the Courts of New York, in interpreting this statute, have recognized the newsworthy privilege. In 63 years there has never been a reported criminal conviction under this statute. In 63 years there has never been a reported holding of liability for a current news story. And in 63 years, there has never been a case reported in which liability was held for a truthful account of a newsworthy item.

Now let me refer to the last part, which has been questioned -- the first two I do not think have been questioned. A truthful account of a newsworthy item, the leading case there is the one Mr. Medina has mentioned, the Blumenthal case.

Let's look at Mrs. Blumenthal, if we may -- not for 6 seconds, but maybe for two minutes.

Mrs. Blumenthal goes back to an era in movies before we had the great three-hour features in which it was not necessary to have any added inducements to bring people into the motion picture theaters. In those days, in the early theaters, in the early 'thirties, as you may recall, when you went to the movies, usually there was a feature movie of about an hour and a-half, then there was a newsreel, and third there was the comedy.

Now, what is it the New York Courts hold on this particular instance? And here I think we have an indication of the precision and the great care which the New York Courts

have exercised in applying this statute. You cannot read Blumenthal without reading Humiston, Humiston decided in 1919. Humiston was a newsreel case, and there a lawyer, subject of a newsworthy item, saw his picture in front of a movie theater advertising the newsreel. The Courts held because it dealt with the newsworthy item, that there was no liability. That was the newsreel.

Now we come to Blumenthal. What was Blumenthal? It was not a travelogue, not a newsreel. Blumenthal involved four comics and the pictures were advertised in the theater as Nick and Tony, Ace Fundsters. Four comics. Two of them played the parts of guides and two the parts of school teachers who traveled for 15 minutes around New York and made comments about what the passing scene showed. And for 6 seconds, they put Mrs. Blumenthal on the screen.

Now, there may be questions as to whether comments were made by Mrs. Blumenthal. Counsel for the appellant suggests there were not. That is not the heart of the point.

In a production which is not a reported news -- in other words, a newsreel--or in the cases of Gautier, in a production, television production, which is not showing the plaintiff in the particular capacity in which he attended the particular event which was involved, but in what is strictly a commercial venture having nothing to do with news -- are we going to say that Mrs. Blumenthal is to be used as a prop for

commercial purposes as an extra, without her consent? I don't think so.

And that is what this case has said, and I think it is a good precedent.

MR. JUSTICE BRENNAN: May I suggest, Mr. Nixon --

MR. NIXON: Yes, sir.

MR. JUSTICE BRENNAN: -- my difficulty is this, I do not think it is the responsibility of this Court -- indeed, I have some serious questions whether we even have the power -- to resolve conflicts among the New York cases, who arrive at an independent conclusion of what the New York law is.

Whatever may be so with Blumenthal or Humiston, we do have the adoption, as I read what the Court of Appeals did in this case, they said that in the circumstances even of a newsworthy item, the privilege to use one's name should not be granted even though a true account of the event was given, let alone when the account was sensationalized and fictionalized.

If that is the law of New York, if that is the interpretation of the New York statute which we have to take in deciding this case, number one, I have serious difficulty whether that interpretation can stand in the face of the First Amendment; and secondly, if it can, whether under ombrowski and Button and that line of questions, even though this is an intentionally false statement you are arguing, Time doesn't have standing to ask us to strike down the statute on the First

Amendment. That is my difficulty: Whether that is to be resolved by our decision or whether we ought to send it back to the Court of Appeals of New York and ask the Court of Appeals of New York whether actually they meant this to be the interpretation of the statute. This is the kind of thing I am trying to worry through.

MR. NIXON: Yes, sir. And I want to come to that point now, because that was the other question that I realize Mr. Justice, that you had asked yesterday.

First, as far as the Rabin opinion is concerned, the Rabin opinion with regard to this case states this: "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. The jury so found. Consequently, it violated Section 51 of the Civil Rights Law."

And so far as the Rabin opinion is concerned and as far as the law of vindication is concerned, that is what Rabin says.

Now, he goes on to a dictum, a dictum which, as we have it briefed, has been adopted as the opinion of the Courts of New York.

MR. JUSTICE FORTAS: Mr. Nixon, what you read is on page 441 of the record?

MR. NIXON: Yes, sir. What I read from is on page

441 of the record. The Rabin opinion begins then and carries on to page 449.

Now, the dictum says if it can be clearly demonstrated a newsworthy item is presented not for the purpose of disseminating news but rather for the sole purpose of increasing circulation, then the rationale for exemption no longer exists, and in such circumstances the privilege to use one's name should not be granted even though a true account of the event be given, and that is what concerned Mr. Justice Brennan.

Let me point this up, firstly, it is not the law of this case. It has not been applied in any New York case in 63 years.

Your question, of course, goes to whether it might be applied in some future case.

MR. JUSTICE BRENNAN: May I say --

MR. NIXON: Yes, sir.

MR. JUSTICE BRENNAN: -- I don't think that is vital. My question goes to whether the Court of Appeals said the judgment is affirmed for the reason stated in the majority and concurring opinions.

The Court of Appeals, whatever may have been the law laid down in the prior cases, has now adopted this as the law of New York, that recovery can be had in the circumstances of the report of a newsworthy account if its purpose is not to report news but merely increase circulation.

MR. NIXON: Mr. Justice Brennan, for this Court to send back this case in which Mr. Justice Rabin specifically upholds the judgment on the "right" ground, assuming it is the "right" ground or Constitutional ground, on the basis of a dictum, I think certainly would not be appropriate because the Court has another course of action. The Court can affirm this case on its facts and it can reject the dictum.

MR. JUSTICE FORTAS: Mr. Nixon, -

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: -- isn't the position before us as follows: It's as if the New York Court of Appeals had itself written a majority opinion and a concurring opinion?

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: So that all the Justices -- I suppose maybe that is not right. It is as if the entire New York Court of Appeals had written an opinion which contains everything that is in the majority and the concurring opinion of the Appellate Division.

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: Now, I would, myself, have the greatest difficulty in sustaining any holding of the State Court or any other Court to the effect of the sentence you have just read.

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: And I gather that is not foreign

to your attitude?

MR. NIXON: I tried to make it clear.

MR. JUSTICE FORTAS: What you said here. But your position is that if we look at the majority and the concurring opinion of the Appellate Division - at least, I think your position is, if we look at the majority and the concurring opinion of the Appellate Division, that we are entitled or we should come to the conclusion that the holding of the Court is not embraced in this single sentence or the two sentences from Judge Botein's unhappy concurring opinion --

MR. NIXON: Justice Rabin's, sir.

MR. JUSTICE FORTAS: Justice Rabin's -- which has been causing us a lot of trouble? Is that your position?

MR. NIXON: It is my position stated better than I --

MR. JUSTICE FORTAS: And that the opinion of the Court below -- I am assuming the Court of Appeals has written all of this stuff that is in both opinions?

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: If we started reversing cases on the basis of dictums and opinions, I suppose we would be having a merry old time up here.

MR. NIXON: Mr. Justice Fortas, what I say also is at stake here is this 11-year-old case. This is a burden, of course, for the defendant, Time. This 11-year-old case has also been a burden for this private citizen. After 11

years for this case to be reversed, not on the facts of this case but to be reversed on a dictum, a dictum which this Court could specifically disallow, it seems to be -

MR. JUSTICE FORTAS: I don't know, the question is awfully important. Perhaps it is too important to turn on that.

MR. NIXON: Understand, I was only mentioning it as a fact.

MR. JUSTICE FORTAS: Most of this -- actually, do I correctly recall there are really very few opinions of the New York Court of Appeals? I have forgotten at the moment. Is Blumenthal a Court of Appeals opinion?

MR. NIXON: No, sir. Most of them are in the Appellate Division.

MR. JUSTICE FORTAS: And Blumenthal is in the Appellate Division, isn't it?

MR. NIXON: Yes, sir.

MR. JUSTICE FORTAS: And this is true of most of the cases here, when you start looking to the New York Court of Appeals, they have not honored us or helped us very often with opinions. What is their latest Court of Appeals opinion, do you remember in what case?

MR. NIXON: Excuse me, I couldn't hear.

MR. JUSTICE FORTAS: What is the latest case?

MR. NIXON: On privacy?

MR. JUSTICE FORTAS: In which the New York Court of Appeals actually wrote an opinion on this statute.

MR. NIXON: Yes, sir. In Flores v. Mosler Safe.

MR. JUSTICE FORTAS: What year was that?

MR. NIXON: It is a late opinion, 1964-65. 1964 or 1965, which involves, incidentally, an advertising use, and which, of course, is the clear one.

MR. JUSTICE FORTAS: I am sorry to have taken so much of your time. You still have Justice Harlan's question.

MR. NIXON: Yes.

MR. JUSTICE BRENNAN: I am sorry, too, Mr. Nixon, but as you can see, this point bothers me more than anything else in this case.

MR. NIXON: Yes, sir.

MR. JUSTICE BRENNAN: It has from the beginning. When the Virginia Court of Appeals in Button stated, without qualification, interpretation of the statute thereinvolved, as you say, was the First Amendment. We there held that even though a correct interpretation, limiting interpretation of the statutes on the facts of that case might have justified sustaining -- I think it was conviction in the Button case, whatever that was -

MR. NIXON: Yes, sir.

MR. JUSTICE BRENNAN: -- that could not be so, since we knew the interpretation given the statute on the First

Amendment. And similarly, in Dombrowski,

Here my problem is we have had other instances where we have been unsure what the interpretation of the state statute was as expressed in an opinion in the highest court of the case -- a whole raft of cases-- Irwin and Dow. In some of them what we have done is send them back to the Court of Appeals, the highest state court, and clear it up for us.

We did it in a case of your own state a couple years ago. I have forgotten -

MR. NIXON: My State of California?

MR. JUSTICE BRENNAN: Your state now.

MR. NIXON: Thank you. I am proud.

MR. JUSTICE BRENNAN: At that time we sent it back and asked the California Supreme Court to tell us what they meant.

We did it with the State of Washington a few years ago.

Now, I don't understand why this situation doesn't call for the same. If this is a mere dictum, then let the Court of Appeals --

MR. NIXON: May I answer that?

MR. CHIEF JUSTICE WARREN: Yes.

MR. NIXON: Mr. Justice Brennan, Button and Dombrowski were both new statutes in which declaratory judgment relief was requested, at least in one case. In neither Button nor

Dombrowski did you have a 63-year history of legislative interpretation completely contrary to the dictum. Therefore, a chilling effect, I think, could be seen there.

I think that distinguishes this case.

Thank you.

MR. CHIEF JUSTICE WARREN: You may answer Justice Harlan's question if you wish now.

MR. NIXON: I don't want to take Mr. Medina's time.

MR. CHIEF JUSTICE WARREN: That is all right.

MR. NIXON: Would you state the question again, sir?

MR. JUSTICE HARLAN: I would like to know what your view is, what it is as to what the jury understood from the Judge's charge it had to find in order to return a verdict for your client.

Frankly, I find the Judge's charge more difficult than the Rabin dictum.

MR. NIXON: Mr. Justice Harlan, the Judge's charge, it seems to me, has to be read in connection with the record in the case, the record of testimony. It is based on the record of testimony.

In that connection, the Judge's charge -- and I turn briefly to it --

MR. JUSTICE FORTAS: I think it is 565 of the record.

MR. NIXON: Yes, sir.

The heart of the charge:

"It is for you to determine whether in publishing the article, the defendant, Time, altered or changed the true facts concerning plaintiff's relationship to 'The Desperate Hours' so that the article as published constituted fiction. An incidental mistake in the statement of facts does not render the defendant liable. Before the plaintiffs can be entitled to a verdict against the defendant, you must find the statement concerning the plaintiffs in the article constituted fiction."

Now looking at the record of the case, the case had been argued on the basis of intentional fictionalization, and in that connection let me quote from the appellee's closing argument to the jury:

"In this case, the defendant, Time, Inc., is charged with something of enormous gravity. We charged Time, Inc., with having published a false article, falsely dragging the plaintiffs into the news, falsely linking them with a violent melodramatic work of fiction for commercial purposes, pure and simple.

"We charged this most powerful of all news publications in the world with having done this deliberately, 'with knowledge of falsity,' and we charged them with having brought about the permanent disability of a human

being by reason of their action."

Now, the Judge's charge, "altered or changed the facts substantially in order to create a more interesting story for commercial purposes," was the heart of this case and was what the jury found.

Sorry.

MR. CHIEF JUSTICE WARREN: Mr. Medina.

REBUTTAL ARGUMENT BY HAROLD R. MEDINA, JR., ESQ.,
ON BEHALF OF APPELLANT

MR. MEDINA: Mr. Chief Justice, may it please the Court, I started the argument intent on my summation.

Mr. Garment got up and said: "Your Honor, with great deference, I rise at this point to object to this statement." So intent, even when I strove to argue it in summation, was objected to by the other side.

A couple of quick --

MR. CHIEF JUSTICE WARREN: What does the Judge conclude?

MR. MEDINA: The Judge said: "I will take care of it in my charge." And then, of course, the charge, as it came out, as I have already discussed, said "were the statements in the article a matter of fiction" -- nothing to do with intent, again.

MR. CHIEF JUSTICE WARREN: But you did argue intent?

MR. MEDINA: I started to argue intent to the jury.

MR. CHIEF JUSTICE WARREN: Did you quit?

MR. MEDINA: I kept on arguing it; but after starting the argument, with objection by the other side, the Judge said, "You are very right; I will take care of it in my charge."

The obvious inference in that is intent is out of the case, and indeed that is what happened, as I detailed in my main argument yesterday.

MR. JUSTICE HARLAN: You asked for a supplemental charge?

MR. MEDINA: I specifically requested a charge on intent.

MR. JUSTICE HARLAN: Intent or negligence?

MR. MEDINA: On intent. Charge Number 6 that I read to the Court yesterday.

MR. JUSTICE HARLAN: Yes.

MR. MEDINA: And I excepted to the failure to make that charge, excepted specifically.

First, on the Court of Appeals, the Blumenthal case was affirmance without opinion in the Court of Appeals, and the Redmond, Franklin, and Gautier cases were all in the Court of Appeals. We have more from the Court of Appeals than perhaps Mr. Nixon indicated.

MR. JUSTICE BRENNAN: Well, Mr. Medina, I put the same question I put to Mr. Nixon to you: Why should we try to resolve what the New York statute means?

Why should we not send it back to the Court of Appeals?

MR. MEDINA: That is my next point, Your Honor.

At the time Mr. Justice Rabin's opinion was written and at the time when it was specifically affirmed in the Court of Appeals, on the basis of that opinion, we were saying that the article was true. Until we reached this Court, our position throughout has been that this was a true article in the broad sweep of it.

So that this was specifically in answer to our contention that the article was true. When the Court of Appeals affirmed on both opinions, what they, in effect, were doing was precisely the same thing they did in the Gautier case in 1952, referring back to Blumenthal and saying: "This is true; we will not allow it." But it was in answer to our contention it was true. This was no dictum.

Moreover, the dissent in the Appellate Division by Mr. Justice Botein dealt specifically with this point of Mr. Justice Rabin's, and the dissent in the Court of Appeals by Mr. Justice Fuld, joined in by Mr. Justice Bergan, dealt specifically with that point.

So I say this is no different, this is a direct holding in answer to our contention the article was true.

MR. JUSTICE BRENNAN: You are saying to us what we ought to do is decide it wasn't a dictum? Mr. Nixon says it was a dictum.

I still suggest between the two of you--why don't we ask the Court of Appeals to decide whether it was a dictum or not?

MR. MEDINA: It was an answer to our specific contention the article was true; it seems to me it is no longer a dictum.

MR. JUSTICE WHITE: What if we said it was, and that we ought to find out - even if the Court of Appeals told us, we still have the instructions, then, of the Appellate Division?

MR. MEDINA: That's right.

MR. JUSTICE WHITE: It doesn't, still, handle all the problems in the case to remand.

MR. MEDINA: I still think I am entitled to win, whether you have a dictum or not. That is just one point, one ground. I still have my basic intent point in this whole case.

MR. CHIEF JUSTICE WARREN: I understood you to say that until you came to this Court, you argued that it was true?

MR. MEDINA: Yes, sir.

MR. CHIEF JUSTICE WARREN: You don't argue that now?

MR. MEDINA: I am saying we have an error in the use of the word "reenacted."

Now, I still say the article can be interpreted as basically true in that it is a story of a family terrified by convicts. That is the sting of it.

MR. CHIEF JUSTICE WARREN: Were those horrendous things detailed in the article and in the picture true?

MR. MEDINA: Of course not, Your Honor. It is a question --

MR. CHIEF JUSTICE WARREN: How can the article be true?

MR. MEDINA: It is a question of which test of truth you use.

(Laughter)

There is a difference between British and American viewpoint I gave you yesterday as to whether you are saying, basically, the net effect of this is a family terrified or not.

I do have to say we have error in the word "reenactment." That is why I am in this Court on the error and saying it was unintentional error. But I come back again on the question of standing, that we, throughout the lower courts, said this article was basically true. And if this true crime didn't inspire this tense play, I am an Eskimo. It certainly did. That's the basic point.

Now, lastly, I just want to thank you for the courtesy of allowing us this reargument, because I think this case is of great importance in an endeavor to do in privacy what you did in libel.

We have gone through this case for 11 years. I have been talking about the Constitution throughout the New

York Courts. Until we got to this Court, no one realized the Constitution of the United States had anything to do with this case. And I say it is time that this Court made it quite clear to the state courts that the Constitution does have something to do with this, and that when you have nondefamatory language about a public fact, that you shouldn't be held accountable unless you have falsity and knowledge of falsity or recklessness. And I state --

MR. CHIEF JUSTICE WARREN: What do you have to say about Mr. Nixon's statement that the falsity of these statements was evident to you? It was in your files?

MR. MEDINA: There was no such evidence in the files at all, Your Honor.

MR. CHIEF JUSTICE WARREN: Well, somebody is just not stating the facts.

MR. MEDINA: That's right.

Of course, that is the point of our reply brief. If you want to go through the record page by page, as Mr. Justice Black did and said any reasonable person would think that the play was inspired by this incident, if you go through the record on that, the papers in the file upon which this article was based show no such thing.

MR. JUSTICE FORTAS: Are "reenactment" and "being inspired by" exactly the same?

MR. MEDINA: No, sir, they are not, of course.

MR. JUSTICE FORTAS: Are they substantially the same, either under American or British law?

MR. MEDINA: The word "reenactment" has an ambiguous frame of reference in the article. It is that ambiguity -

MR. JUSTICE FORTAS: To you?

MR. MEDINA: I have to accept the ambiguity being decided against me in this Court. They did not in the New York Court, Your Honor.

MR. JUSTICE FORTAS: And there were findings below?

MR. MEDINA: I think the finding in the Appellate Division was that the word "reenactment" was inaccurately used.

MR. JUSTICE FORTAS: Inaccurately used?

MR. MEDINA: Inaccurately used -- what precludes me, when I get to this Court, I have to accept that as a statement of fact.

MR. JUSTICE FORTAS: I want to ask you about something you said a minute ago. Assuming that a publication is false, assuming that it is knowingly false, this particular publication, I don't understand your Constitutional position.

Assuming that the article is false, that it was known to be false, now can we sustain the application of a New York statute to this situation in view of the First Amendment? What is your position?

MR. MEDINA: There is no knowingly false. That was

my last point, the last argument.

MR. JUSTICE FORTAS: I said assume that. Will you please assume that?

MR. MEDINA: If you assume there was falsity and we knew there was falsity, of course we should be held. And that has been my point from the start. There is no Constitutional protection for that.

MR. JUSTICE FORTAS: All right, that is what we want to find out.

MR. MEDINA: That's right.

Thank you very much.

MR. JUSTICE BLACK: Now, assuming that one comes to the question of malice, do you believe that they can get damages here without proof of maliciousness as well as falsity?

MR. MEDINA: The test under the New York statute has nothing to do with falsity. It is a malice test in terms of presuming intent to increase circulation.

MR. JUSTICE BLACK: It is a Constitutional question. In the New York Times case in which it was held that there couldn't be any flogging down of protection of the First Amendment unless there was proof of actual malice, do you think that was written for that case alone or should it fit all cases under the First Amendment?

MR. MEDINA: I think it should fit all cases under the First Amendment, and specifically nondefamatory language

we have used about a public fact.

MR. JUSTICE BLACK: What was the charge about malice in this case?

MR. MEDINA: There was no charge on intent or malice whatsoever, except with punitive damages, whether we had done it knowingly or negligently; but so far as libel or not, the charge had nothing to do with intent or malice.

MR. JUSTICE WHITE: So, Mr. Medina, really, when you say that certainly you should be liable if it is assumed that this story is false and you knew it, you don't mean to say that if we could glean from this record that we thought, upon examination of the record, that it was false and that you knew it, that wouldn't end up in liability for you?

MR. MEDINA: The Appellate Division decision found specifically we did not know.

MR. JUSTICE WHITE: Because the case -- if you also thought that the jury was not instructed this way, the case wasn't tried on that theory.

MR. MEDINA: It was not tried on intent whatsoever.

MR. JUSTICE BRENNAN: You reiterated that a couple of times. That is your principal point?

MR. MEDINA: That is right.

MR. JUSTICE BRENNAN: Whatever may be Constitutionally, you will agree that liability could be visited for intentional knowing falsity?

MR. MEDINA: No question about that.

MR. JUSTICE BRENNAN: But you say the question was not submitted to the jury under instructions which would have limited liability to intentional knowing falsity?

MR. MEDINA: That's right. And, indeed, the whole record shows there was no intent.

MR. CHIEF JUSTICE WARREN: Mr. Medina, if we should agree with the statements of Mr. Nixon as to the knowledge of your people, as shown in the record, and disagree with you on that question, should you win or lose?

MR. MEDINA: You are precluded by the finding of fact of the Appellate Division, Mr. Justice.

MR. CHIEF JUSTICE WARREN: No, I didn't say whether we would conclude it. I say if we found that, if the record disclosed the fact, should you win or lose?

MR. MEDINA: It still is not a question that was ever put to the jury. It hasn't been passed upon by the jury.

MR. CHIEF JUSTICE WARREN: Your answer is you still should win?

MR. MEDINA: I still should win.

MR. CHIEF JUSTICE WARREN: You still should win?

THE WITNESS: Yes, sir.

(Whereupon, at 10:56 o'clock, a.m., the reargument was concluded.)