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PRIVACY AND THE FIRST AMENDMENT

ISIDORE SILVER

IN New York Times Co. v. Sullivan, the United States Supreme Court held that state tort law and its judicial enforcement is "state action" within the fourteenth amendment. Thus, where such law unduly interferes with freedom of speech or press under the first amendment, it cannot be enforced.

Although the Times case arose out of a libel suit, there can be no doubt that any tort or other action cognizable in state courts will be subject to future constitutional test. The next tort action to undergo constitutional scrutiny will undoubtedly be that of invasion of privacy. Indeed, the Supreme Court has recently accepted a privacy case arising out of a judgment awarded to an individual publicized in Life magazine. As the Court stands poised at the brink of entry into yet another state domain, it would be propitious to clearly understand the problems posed by the present law of privacy and the possible resolutions to these problems.

Since libel is an ancient, well-developed area of law, which the Supreme Court's decision recognized, we need not unduly tarry at Times. While libel "interests" are known, privacy is a bit more mysterious. Invasion of privacy, at least by communications media, is a relatively new area of law, with its own amorphous principles, and some clearing of the mystery concerning the interest it is designed to protect is necessary. It is only then that constitutional problems can be fruitfully analyzed.

Most states recognize invasion of privacy as a common-law tort. Several states have adopted statutes designed to deal with the subject (or at least certain aspects of it). Despite literally hundreds of cases in

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For a review of some of the profuse literature on privacy, see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962 (1964).
volving invasions by press, radio, or television, surprisingly few have dealt with the constitutional problems of free speech; and these few cases have limited themselves to general expositions rather than discrete analysis. Now that the Supreme Court has entered the area, more hard thinking is necessary.

Where a communications medium has publicized an individual, he may feel that his rights to live a secluded life and to protect his identity and dignity have been rudely shattered. His first problem is to determine (a) whether his state recognizes privacy as a tort and (b) whether the publicity presents an actionable form of that tort.

State courts, when confronted with privacy claims of this sort, have attempted to strike a balance between the right of the individual to live his life free of notoriety and the rights of the press to publish information of public interest and of the public to know that which concerns it. If the balance falls upon the side of publication, the publisher is deemed to have a "privilege" akin to that found in libel. If the balance tips the other way, there is no "privilege," and an actionable invasion of privacy has occurred.

Complicating matters is the fact that privacy may be a statutory right, and any suit, to be successful, must fall within the terms of the statute. In New York, the concept is governed by Sections 50 and 51 of the Civil Rights Law. In summary, those provisions prohibit the use of a living person's name or portrait "for purposes of advertising or trade" without

8. Although New York's definition is statutory, the body of case law built around the statute serves as precedent for common-law jurisdictions. "Except as the statute itself limits the extent of the right, the New York decisions are quite consistent with the common law ... in other states, and they are customarily cited in privacy cases throughout the country." Prosser, Torts § 112, at 830 (3d ed. 1964).
Although the term "advertising" presents few significant problems, New York courts have had difficulty in determining whether and when publicity in communications media is for "trade" rather than communication.

New York has refused to adopt the attitude that newspapers and other communications media, although they are published for profit, are solely items in trade, and that all uses of names are per se in furtherance of that purpose. Neither has New York adopted Utah's interpretation of its statute which excludes communications media entirely. Rather, New York has attempted to establish a primary test against which to measure a particular publication. The primary test may be broadly defined as that of "fictionalization in character."

If a person is a "public figure" or has become one by accidental involvement in a public event, he may be written about, and no actionable invasion of privacy exists. Even former celebrities are subject to the rule of endless and continuing public interest in them. Thus, mere publication of information about such persons is not actionable. Whether information about one who is neither a public figure nor an involuntary participant in a public event would be privileged has not been clearly resolved—generally because it has not been faced.

The next logical question, of course, is whether everything about a public figure is within the public domain. The courts have tended to hold that even private information about a public figure is a matter of public interest. Thus, the relinquishment of privacy is almost complete in a public figure, at least where the information published is true.

What is "fictionalization" under the New York statute (the general standard applied even in common-law states)? Formerly, when New York courts were exceedingly concerned with limiting privacy, "fictionalization" had to be substantial and offensive. Thus, one famous case,
Koussevitzky v. Allen, Towne & Heath, Inc., held that a biography containing "stories and comments...some avowedly apocryphal, others of doubtful reliability" was not thereby converted into a work of fiction. Indeed, the court chose to emphasize the element of offensiveness rather than that of fictionalization per se.

There are however no so-called revelations of any intimate details which would tend to outrage public tolerance. There is nothing repugnant to one's sense of decency or that takes the book out of the realm of the legitimate dissemination of information on a subject of general interest.

Thus, declared the court, the book is not "fictional or novelized in character." Perhaps the best statement of the rule was to be found in the dissenting opinion of Judge Peck in Sutton v. Hearst Corp.: The question is whether the account is fictional or novelized and whether if to some extent it varies from the truth the variance is repugnant to one's sense of decency. We must take into account whether what is alleged to be the variance or literary embroidery is harmless in nature or whether it gives the article a character or impression out of line with the truth and is offensive.

The standard was deemed necessary, in part, by the constitutional problems posed by restrictions upon publication (especially since the New York statute permits an injunction). This general standard was thought to settle the law. However, increased judicial concern for privacy, evinced in two cases, has both changed the standard and created the constitutional problem which the Supreme Court is now facing. The first case, Hill v. Hayes, involved James J. Hill and his family and Life magazine. Mr. Hill became a public figure quite involuntarily when three desperadoes held his family captive for several hours. A book, a movie, and a play, all entitled "The Desperate Hours," were inspired by the incident. None of them used Mr. Hill's name, and numerous changes were effected in the fictionalized depiction of the incident, obviously for dramatic effect. Physical assaults were related in the novel although none had occurred in the real life incident. Several years after the incident, Life printed an article discussing the

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17. Id. at 484, 68 N.Y.S.2d at 784.
18. Id. at 485, 68 N.Y.S.2d at 784.
19. Id. at 484, 68 N.Y.S.2d at 783. (Emphasis added.)
21. Id. at 164, 98 N.Y.S.2d at 241 (dissenting opinion).
imminent arrival of the play to the Broadway stage. Actors from the
play were photographed at the original Hill household, and the article
noted that the incident had been captured in the literary medium of a
novel. The article contained some ambiguous language about the rela-
tionship of the play to either the incident or the novel. The appellate
division held that the term "re-enacted," as used in the article, referred to
the incident rather than to the events of the novel. Thus, the statement
was untrue since the play was not a re-enactment of the original incident
but, rather, a sensationalized version thereof. The court came to the
"inescapable conclusion that this was done to advertise and attract
further attention to the play, and to increase present and future magazine
circulation as well."

The court also stated that "the occurrence had been relegated to the
outer fringe of the public consciousness" and that the information
purveyed was not news or newsworthy per se. Thus, a novel test of
newsworthiness was imposed, at least in the light of the leading decision
of Sidis v. F-R Publishing Corp. That case had implied that "stale"
news was always revivable. In addition, distinctions between "news-
worthy" and "unnewsworthy" and "current" and "stale" news pose
constitutional problems, which will be discussed below.

A concurring opinion in the appellate division is also of interest, since
the court of appeals expressly based its affirmance on it as well as on the
majority's opinion. Judge Rabin had noted:

However, if it can be clearly demonstrated that the newsworthy item is presented,
not for the purpose of disseminating news, but rather for the sole purpose of increas-
ing circulation . . . the exemption [to the privacy statute] should not apply.

The United States Supreme Court has noted probable jurisdiction and
the case will be argued in the Spring.

While Hill involved an individual suddenly thrust into (embarrassing)
prominence, Spahn v. Julian Messner, Inc. stands for the proposition
that one who courts publicity may sue for invasion of privacy, even as
to misstatements about his "public" activities. Plaintiff was a prominent

26. Ibid.
27. 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940). In this case, the court
held that a former public figure is always interesting to the public and his present activities
(although embarrassing) are newsworthy.
28. See note 62 infra and accompanying text.
30. 18 App. Div. 2d at 491, 240 N.Y.S.2d at 293 (concurring opinion).
31. The appeal has been docketed and probable jurisdiction has been noted. 39 Sup. Ct.
392 (1965).
32. 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), aff'd, 23 App. Div. 2d 216, 260
N.Y.S.2d 451 (1st Dep't 1965).
baseball player. Defendant published a "typical" children's biography of him. Plaintiff chose to sue for invasion of privacy, rather than for libel (although one or two of the offending passages might possibly have qualified under the latter rubric) or for unfair competition. Plaintiff could presumably have argued that any unauthorized biography would have reduced his ability to publicize himself. Although the "right of publicity" has been nascently recognized by the Second Circuit Court of Appeals, it cannot fairly be said to be established in New York law.

Plaintiff argued that the biography was "designed primarily and exclusively for entertainment value" and was "fictionalized," "dramatic," "fanciful, and sensational in nature." The language of the complaint obviously was designed to overcome the obstacles caused by the Koussevitsky case. At trial, plaintiff testified that many episodes depicted in the book were untrue. When defendant introduced evidence of previous writings on plaintiff's life (some of them co-authored by plaintiff himself), plaintiff argued that they were not true, and that he had not seen those portions of the articles that he had allegedly co-authored.

The trial judge, in awarding plaintiff damages and injunctive relief, inferred that he did not necessarily feel bound by previous decisions in privacy cases, by stating that the law of New York should not be relegated "to a petrified and outmoded position in a dynamic society." The judge believed that the evidence revealed certain instances of fictionalization and that there were "all-pervasive distortion [and] . . . inaccuracies" which resulted in a "nonfactual novelization of plaintiff's alleged life story and an unauthorized intrusion into the private realms of the baseball pitcher's life—all to Spahn's humiliation and mental anguish." The court cited several instances of such fictionalization: Plaintiff did not win the Bronze Star during World War II, and he did not inspect all of his squad before an important battle (he only made a random inspection), so that, "consequently, the whole description thereof is imaginary . . . ." Plaintiff and his father did not have daily baseball sessions when plaintiff was a child and plaintiff was not guilt-ridden over

34. 43 Misc. 2d at 220, 250 N.Y.S.2d at 531.
35. See text accompanying notes 16-19 supra.
36. 43 Misc. 2d at 223, 250 N.Y.S.2d at 534.
37. Id. at 230, 250 N.Y.S.2d at 541.
38. Id. at 232, 250 N.Y.S.2d at 543.
39. Id. at 228, 250 N.Y.S.2d at 539.
his father's illness. Plaintiff's marital life, too, was fictionalized: He
did not surprise his fiancee and sweep her into his arms when he re-
turned from the Army and, after marriage, he was not "frantic" over
the birth of their son. In addition, certain aspects of plaintiff's baseball
career were found to be fictionalized.

The court created what it felt to be a clear dichotomy between plain-
tiff's "public" and his "private" life, and noted:

The subject purported biography trangresses the bounds of legitimate public
interest by its breadth of reportorial coverage of those areas of plaintiff's life which
defy classification as public . . . .

This language would indicate that even a truthful report of plaintiff
would have been actionable if the subject matter were deemed private.
Yet, in the Sidis case, the New Yorker mercilessly reported the present
private life (and peculiar habits) of a former public figure, without
liability. The Spahn court did not venture into these shoals, but pru-
dently found "fictionalization."

The court dismissed defendant's argument that much of the biography
(exactly how much is not clear from the opinion) was based upon sec-
ondary sources, the "customary practice" in the juvenile biography
trade, by stating:

That the foregoing procedure [relying on the secondary sources] outlined by the
author constitutes the customary practice affords no basis for legal justification of
defendants' transgression and appropriation of plaintiff's name, portraiture and picture
for purposes of trade.

Plaintiff was, therefore, awarded damages and injunctive relief.

In unanimously affirming the decision, the appellate division held that
"defendants made no effort and had no intention to follow the facts
concerning plaintiff's life, except in broad outline and to the extent that
the facts readily supplied a dramatic portrayal attractive to the juvenile
reader." The court concluded: "[S]urely, [a public figure] . . . should
not be exposed, without his control, to biographies not limited sub-
stantially to the truth." The appellate division accepted the trial court's
findings of fact and concluded that "there was unabashed fictionalization,
using some factual background and the identity of plaintiff only because
otherwise there would be no interest in the purchase of the book."

Although the trial court characterized the fictionalization as offensive

40. Id. at 232, 250 N.Y.S.2d at 543.
41. See also Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951).
42. 43 Misc. 2d at 231, 250 N.Y.S.2d at 542.
43. 23 App. Div. 2d at 219, 260 N.Y.S.2d at 454.
44. Id. at 221, 260 N.Y.S.2d at 456.
45. Id. at 222, 260 N.Y.S.2d at 456.
and distasteful to plaintiff,\textsuperscript{46} the appellate court felt that the untruths were laudatory.\textsuperscript{47} It found that even laudatory fictionalization is embarrassing, thus disregarding the rationale of \textit{Koussevitzky}\textsuperscript{48} and \textit{Youssoupoff v. Columbia Broadcasting Sys., Inc.}\textsuperscript{49}

Another argument that did not impress the appellate judges was defendant's contention that the nature of the juvenile audience demanded that biographies written for it must be fictionalized and dramatized. Nor will the children who read suffer unduly if the biographies purveyed for their reading are restricted to the duller factual ones or only to the livelier ones for which the subjects, if living, have given their written consents.\textsuperscript{50}

New York had previously treated the defendant's contention with more respect. In \textit{Goelet v. Confidential, Inc.},\textsuperscript{51} the court held that the allegedly sensationalized article which appeared in \textit{Confidential} and which revealed intimate (and titillating) information was protected under the rubric of newsworthiness. What is newsworthy is determined by the "reading habits of the American public,"\textsuperscript{52} whatever its debased quality.\textsuperscript{53}

Since many of the privacy suits involve defendant's claims of use of secondary sources, as in the \textit{Spahn} case, the status of such sources in the law is of interest. In \textit{Spahn}, there was no issue of admissibility, but plaintiff attacked their truth—and the judge believed him.\textsuperscript{54} In the apparently omnipresent \textit{Youssoupoff} case, defendant attempted to introduce secondary sources to substantiate a defense of truth. The \textit{New York Times} reported:

Accounts by historians of the assassination of Rasputin in Russia 49 years ago were legally discounted as "hearsay" in court here yesterday when matched against the testimony of a living participant in the slaying.

\textit{[C]ounsel for C.B.S. had planned to make extensive use of six history books that the co-authors of the script [for the CBS production] had consulted to establish the contention that they used reliable historical accounts of the events.}\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{46} 43 Misc. 2d at 232, 250 N.Y.S.2d at 542-43.
\item \textsuperscript{47} 23 App. Div. 2d at 221, 260 N.Y.S.2d at 456.
\item \textsuperscript{48} For a discussion of the rationale used in this case, see notes 16-19 supra and accompanying text.
\item \textsuperscript{49} 41 Misc. 2d 42, 244 N.Y.S.2d 701 (Sup. Ct.), aff'd mem., 19 App. Div. 2d 865, 244 N.Y.S.2d 1 (1st Dep't 1963). In \textit{Youssoupoff}, the court found that innocuous fictionalization, insofar as the plaintiff's reputation was concerned, was not actionable, and that only fictionalization which tended to outrage public opinion or decency would result in a violation of the statute.
\item \textsuperscript{50} 23 App. Div. 2d at 222, 260 N.Y.S.2d at 456.
\item \textsuperscript{51} 5 App. Div. 2d 226, 171 N.Y.S.2d 223 (1st Dep't 1958).
\item \textsuperscript{52} Id. at 229, 171 N.Y.S.2d at 226.
\item \textsuperscript{53} Id. at 229-30, 171 N.Y.S.2d at 226.
\item \textsuperscript{54} Evidently, the only proof of untruth came from plaintiff himself. 43 Misc. 2d at 228-32, 250 N.Y.S.2d at 537-42.
\item \textsuperscript{55} N.Y. Times, Oct. 30, 1965, p. 13, col. 1.
\end{itemize}
The judge in *Yoassoupoif*, apparently following the "substantial truth" criterion of *Spahn*, charged the jury as follows:

"Where the use of the person's name, portrait or picture is made in connection with a substantial accurate retelling or showing of a historical event," no prior permission is required.58

*Spahn*, *Hill*, and *Yoassoupoif* represent three aspects of the invasion of privacy problem. Spahn chose to become a celebrity—or at least to go into a field where public attention is focused. Hill was an involuntary actor in a "public event." Yoassoupoif was a voluntary actor in such an event. To these three categories, we may yet add a fourth. Sidis was a person of unusual talents, and such talents were the object of substantial public curiosity. In addition, Spahn was still active and his career was replete with substantial present interest. Hill had been largely forgotten (in accordance with his own desires) before becoming republicized. Sidis, also, had dropped out of the public eye for a lengthy period. Youssoupoff was involved in an event which was still the object of considerable public interest.

Other factors, whatever their importance, serve to distinguish these cases. Sidis was written up in the *New Yorker*; his present life was depicted with the painstaking accuracy for which that publication is noted. The event which made him famous was contrasted with the scope of his present, unnewsworthy life. Youssoupoff was depicted in a television play and the question of the accuracy of the depiction was hotly contested. Hill was discussed in an article in a feature magazine and both sides conceded that the play discussed was not an entirely accurate representation of his ordeal. Indeed, much of the play was created out of the writer's imagination. Spahn was the subject of a biography based largely upon secondary sources.

Probably *Sidis* would be good law in New York today, since, under all the recent decisions, truth—or even substantial truth—would render the presentation "newsworthy" (although Sidis' public figure status was stale at the time of presentation). The problem, in constitutional terms, relates to (a) areas of alleged untruth involving secondary sources (*Spahn* and *Youssoupoif*), and (b) dramatic use of interesting events in which plaintiff was an involuntary actor (*Hill*).

New York and its common-law counterparts could conceivably have taken the Utah view. Invasion of privacy is solely a question of "obvious" commercial use in connection with the sale of a collateral product. Thus, the use of a book to sell itself (*Spahn*), or the mere use in a magazine of general circulation, rather than in advertising the magazine (*Hill*), or in a television play, when not seen in conjunction with the commercials

56. N.Y. Times, Nov. 9, 1965, p. 34, col. 4.
for the sponsors (Youssoufioff), would fall outside the statute. Since New York law has progressed well beyond this simplistic view, the approach holds little practical merit, whatever its intellectual soundness. We are confronted with the proposition that, according to state law, at least some of the aforementioned uses are for purposes of commerce rather than for the dissemination of information. We are also confronted with the inescapable fact that the Supreme Court will have to decide the constitutional limitations upon the state's power to define "commerce" in this context.  

There are few extant standards to guide the Supreme Court. State courts have not analyzed the issues in constitutional context. This is strange, especially since Spahn involved an injunction against distribution of a book. Normally, such a vital consideration would dictate some sort of explanation, or at least some mention. Of course, the appellate division's determination that the book was published for "purposes of trade" rather than for the dissemination of ideas would inevitably lead the court to conclude that it was "commerce" rather than "speech" which was being enjoined. 58 The New York Court of Appeals or the United States Supreme Court may well view the question otherwise.

Under New York Times Co. v. Sullivan, 59 there can be no doubt that judicial enforcement of a state tort statute not invalid on its face is "state action" within the fourteenth amendment. 60 Thus, the fact that freedom of speech is affected (if that be true here) by judicial restraint rather than by action of another governmental agency is legally irrelevant. We then pass to the next crucial question. If the question is truly one involving commerce and only incidentally involves freedom of speech, is the incidental inhibition on speech significant enough to call into play the first amendment? 61 Indeed, is the Supreme Court bound by a state court's findings, whether they be denominated ones of fact or law, that a particular form of speech is truly commerce; or may the Court make its own determination when freedom of speech is involved? The question

57. See note 3 supra.
58. For discussion of the constitutional distinction between "commerce" and "speech," see Comment, 64 Colum. L. Rev. 81, 96-98 (1964).
60. "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." Id. at 265. (Citation omitted.)
61. The Supreme Court, in the Times case, noted that commercial advertising, though normally not constitutionally protected, will be so protected where "it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." Id. at 266.
answers itself. The Supreme Court (or, indeed, the New York Court of Appeals), under applicable principles of constitutional law, is empowered to make the determination for itself. What factors are likely to affect such determination?

Clearly, the biography of Warren Spahn is not speech designed to further public discussion of public issues. Neither is it purely an advertisement for itself, even with "all-pervasive" fictionalization. In form, the book purports to be a biography. It purports to depict the life story of a person of great interest to a considerable portion of the American public. Even if it is written in a racy and informal style which entertains as well as informs, it would still be entitled to some sort of constitutional protection. In *Winters v. New York*, the Supreme Court stated:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

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62. Hill clearly involved no questions of fact. It was conceded that plaintiffs were not harmed in the original incident, and that the novel and play differed from the incident in that respect. The appellate division's determination that the term "re-enacted" referred to the incident rather than the novel, 13 App. Div. 2d at 459, 240 N.Y.S.2d at 290, would also be binding upon the Supreme Court. The only question here would involve the importance of such an inaccuracy under the first amendment.

Spahn involves more substantial problems. It appears that the trial court chose to accept plaintiff's version of his life. 43 Misc. 2d at 225-32, 250 N.Y.S.2d at 537-42. In *Feiner v. New York*, 340 U.S. 315, 316 (1951), the Court observed that the trial judge's decision "indicated generally that he believed the state's witnesses, and his summation of the testimony was used by the two New York courts on review in stating the facts. Our appraisal of the facts is . . . based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true." The characterization of those facts as "all-pervasive distortions" and a "novelization" of Spahn's life may well be deemed conclusions of law or conclusions of law and fact, either of which are reviewable when constitutional rights are involved. See *Truax v. Corrigan*, 257 U.S. 312, 324-25 (1921). In the *Times* case, the Court stated: "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech . . . which may legitimately be regulated."" 376 U.S. at 235, quoting from *Spizer v. Randall*, 357 U.S. 513, 525 (1958). The Court further noted: "In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character [to warrant protection] . . . ?'" 376 U.S. at 235, quoting from *Pennebaker v. Florida*, 323 U.S. 331, 335 (1946).

63. See text accompanying notes 37 & 38 supra.
64. 333 U.S. 507 (1948).
65. Id. at 510. (Citations omitted.)
The Supreme Court, in *Winters*, as the New York court in *Goelet*, obviously refused to regard itself as the arbiter of public taste. Accordingly, we can expect that juvenile biographies will be accorded constitutional protection—presumably at least as much protection as was afforded to detective magazines.

In the *Times* case and subsequent cases, the Supreme Court decided that state libel laws could not be interpreted to permit suit by a public official for criticism of his conduct in that capacity, absent actual malice. The *Times* decision discussed, at great length, the social interest involved in permitting free and unhampered discussion of public issues, and noted the plethora of libel suits in southern state courts in connection with civil rights matters. The Court noted that substantial damage awards in such cases would inevitably have the effect of inhibiting newspaper discussion of a burning social issue. Indeed, the Court's most recent pronouncement appears to shift the focus from the technical problem of just who is a public official to the substantive ones of what is a public issue and who may be the subject of legitimate public interest in connection with such an issue.

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67. For a discussion of the rationale by which the Times rule could be extended to (a) candidates for public office and (b) participants in debates on public issues, see Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965); Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964) (dictum), cert. denied, 379 U.S. 968 (1965).

68. 376 U.S. at 270-72. The Court's view of the test of permissible restriction of speech continues the trend toward abandonment of the "clear and present danger" test and the substitution of a "balancing of interests" criterion. See Comment, 64 Colum. L. Rev. 81, 100-04 (1964).

69. Rosenblatt v. Baer, 86 Sup. Ct. 669 (1966). After restating the fundamental proposition of the Times case—that attacks on government are not to be deemed attacks on any particular governmental official—the Court noted that "whether or not respondent [a manager of a state-owned sports facility] was a public official, as a member of the group [administering the facility] he bears the same burden [of demonstrating specific reference to himself]." Id. at 674. (Footnote omitted.) The Court remanded the case for determination of whether plaintiff was a public official and held that a "'public official' designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility or for control over the conduct of governmental affairs." Id. at 676. (Footnote omitted.) (Emphasis added.) Other statements in the opinion clearly evince the Court's readiness to extend the scope of the Times case. Thus, where "interests in public discussion are particularly strong, as they were in [the Times] . . . case, the Constitution limits the protections afforded by the law of defamation." Ibid. Also, there is "a strong interest in debate about those persons who are in a position significantly to influence the resolution of [public] . . . issues." Id. at 675. See also Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), cert. denied, 379 U.S. 968 (1965), where the court, in dictum, noted that, although the Times case held that the first amendment privileged only criticism of official conduct, it is doubtful whether the privilege should be limited to cases involving public officials. 335 F.2d at
Whatever its fears concerning potential inhibition on freedom of the press in libel suits, the Court is not yet ready to forbid all such suits, even by public officials against critics of their public conduct. We may expect that privacy claims against the press will be treated with careful consideration, especially in light of *Griswold v. Connecticut*. Indeed, eminent civil libertarians see no grave threats in allowing "balancing" between some privacy claims and freedom of the press.

It is obvious that the Supreme Court will carefully weigh the social value of the speech which state tort law seeks to inhibit. It is equally obvious that the discussion of Warren Spahn's life and deeds or the play involved in *Hill* occupy no position analogous to civil rights in the firmament of vital social issues.

What is the interest to be protected in *Spahn* and in *Hill*? If we can answer this question with even a minimum of certainty, perhaps we can foretell the Supreme Court's attitude on the question of how much constitutional protection is to be afforded juvenile biographies and magazine articles. We can surmise initially that juvenile biography serves the function of fostering admiration and presumed emulation of socially worthwhile conduct. An "inspirational" biography of a public figure is designed to demonstrate that hard work and fair play in the "American" tradition can overcome obstacles. Such a biography will putatively instill certain ideals in youth, and such ideals are worth instilling. Certainly, a "boy's life" of John F. Kennedy, for instance, would be regarded as a valuable

671. In determining whether the privilege would attach, the court stressed that primary consideration should be given to whether a grave public or social issue was involved, rather than just a public official. Id. at 664-65, 671. See also Restatement, Torts § 605 (1934).

70. 381 U.S. 479 (1965). Here, the Court struck down a state criminal statute prohibiting dissemination of information concerning contraceptives, on the ground that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." Id. at 483. Of course, different considerations are present when private actions, rather than state prohibitions, are involved. Yet, there can be little doubt that recognition of privacy as a protected interest against state invasion implies such recognition for purposes of state protection. Indeed, privacy—the true interest at the heart of several provisions of the Bill of Rights, according to Justice Brandeis—may yet attain significant constitutional stature. See Olmstead v. United States, 277 U.S. 435, 474-79 (1923) (Brandeis, J., dissenting).

71. "In certain rather specific situations [when] . . . a person living in seclusion has been, without justification, publicly identified with long past events of a damaging or disturbing nature—some courts . . . have allowed [recovery] . . . . The considerations involved are very similar to those governing the problem of private defamation. . . . And so long as the interest of privacy is genuine, the conditions of recovery clearly defined, and the remedy left to individual suit, it is most unlikely that the balance will be tipped too far toward restriction of expression. . . . In summary, the formulation of legal doctrines, under the first amendment, to reconcile the right to freedom of expression with the private interests of the individual does not appear to pose insuperable problems." Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 927-28 (1963). (Footnote omitted.)
lesson in personal accomplishment, worthy of being chronicled. If the moral education of youth is an interest to be recognized, it should supersede certain other interests. For instance, if the New York statute had required written consent (usually given for a price) before any juvenile biography of a public figure could be published, the commercial interest of the individual would be clearly outweighed by the social interest of publication.

It would also seem that a biography based entirely upon secondary sources, at least those normally conceived of as reliable, should be protected. The subject of the biography has already been chronicled, either voluntarily or because public attention has been focused upon him. He has relinquished, or the publicity has forced him to relinquish, any theoretical right of privacy. A biography which collates and repeats such information merely synopsizes what is already known. May such a biography be intentionally and knowingly “glorified” for purposes of achieving greater interest among young readers? In Spahn, the appellate division stated that biographies which are not “substantially true” can avoid the effect of the statute only if the subject’s permission is obtained. Applying the “interest to be protected” test, might not some emotional coloring be permissible to heighten the effect of the lessons instilled? In fact, is not biography itself, as an art form, a selection of certain “meaningful” portions of someone’s life to “illustrate” the primary qualities of that life? Often, “truth” is elusive, especially when the biographer attempts to assess character, which is the heart of the average biography. To require “substantial truth,” at least in this realm, would be to require too much—at least by constitutional standards.

If the foregoing considerations are relevant to a determination of constitutionality, then the Spahn decisions must be found wanting. Neither the trial court nor the appellate division explained what social interest the biography was meant to serve and what were the legitimate boundaries of that interest. Neither decision distinguished between information obtained from secondary sources and that invented by the author.

By these standards, Hill is also inadequate. Clearly, Life magazine is a medium of information. Although the information about the play was “stale,” there was an undeniable social interest in discussing the event. What exactly the boundaries of that interest were may be open to dispute, but the question was not discussed in either the appellate division’s

72. The use of secondary sources in a biography of a deceased public figure is currently at issue in a suit to enjoin distribution of a book under a Pennsylvania statute which appears to encompass both privacy and libel concepts. The trial judge required the defendant to submit original source materials to substantiate the book’s claims. See N.Y. Times, Aug. 3, 1965, p. 36, col. 1.

73. 23 App. Div. 2d at 221, 260 N.Y.S.2d at 455-56.
or the court of appeals' decision. Instead, it was held that the word "re-enacted" did precisely describe the event, so that fictionalization followed. From that premise, it was relatively easy to find that plaintiff's name was used to sell both the magazine and the play.

Although the Times case cannot be fully applied here (obviously, there was no malice in either Spahn or Hill), its spirit can be. If constitutional tests are to be devised where plaintiff, either a public figure or one involved in a public event, sues for invasion of privacy, these tests should consider the nature of the interest served by the publication. In neither Spahn nor Hill was plaintiff defamed. Certainly, at least in Hill, embarrassing information was published. How are we to judge whether such publication served the interests of "commerce" more than the interests of dissemination of information?

Interestingly enough, there is a broad test available. It has evolved in many privacy cases involving use of plaintiff's picture to illustrate a story. It has worked well in that situation and could be valuable here. New York courts, as well as common-law jurisdictions, have traditionally held that a photograph illustrating a story, even a news story, is actionable under New York's privacy theory where the photograph has no reasonable relationship to the story. The only conceivable purpose of the photograph is to "hypo up" the story for sales purposes, and this purpose brings it within the ambit of "purposes of trade." Judge Shientag succinctly stated the test in Laiiri v. Daily Mirror, Inc.:

\[74\]

The only question is whether the picture complained of has so tenuous a connection with the article that it can be said to have no legitimate relationship to it.\[75\]

If we substitute the words "biography" for "picture" and "subject" for "article," the question of relevancy, rather than "fictionalization," becomes crucial. Of course, the test would involve analysis of the biography "taken as a whole," rather than a discussion of specific portions.

Thus, where a biography (and a Life article could be considered a partial biography) of a public figure is involved, it is "fictionalized in character" (the "old" New York standard enunciated in Koussevitzky) only where, when taken as a whole, it has such a tenuous connection with the subject matter that it can be said to have no legitimate relationship to it. Subsidiary factors might well include problems of use of secondary sources, nature of the audience for which the publication is intended, and burden of proof on the issue of fictionalization.\[76\]

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\[75\] Id. at 783, 295 N.Y. Supp. at 389.

\[76\] Utah, which enacted a statute modeled on New York's enactment, has refused to follow New York's interpretation in "publication" cases, partially in the belief that distinguishing between dissemination of information and use in trade is difficult and poses too
Does this standard adequately account for the problem of the dramatic presentation of a public, though not necessarily historical, event involving an involuntary public actor? Obviously, a truthful depiction must give way to injured sensibilities. The public interest in knowing is simply too great. Is the *Lahiri* test applicable to untruthful presentations? If the dramatic work itself uses the name of the living character, then it would appear that an invasion has occurred. The name is not particularly essential to the human interest story involved. If the public is to be reminded that the event depicted actually occurred, such reminder could easily be given in other forms. Advertisements for the presentation could state “Based upon a true life story.” That would be sufficient to serve the true ends of both art and commerce.

But, the *Hill* case involved a discussion of the play in a normally accepted media of information—and that discussion used the term “re-enacted” to link the play with the event. Certainly, the article was not, in appearance, an “advertisement” for the play, whatever the appellate division’s belief in its “true” purpose. As in *Spahn*, the discussion was in form a “biography” of the event—and such form cannot be disregarded for constitutional purposes. Indeed, this analysis specifically includes form as a determining factor. To argue that “form” conceals “function” and that we must investigate the true motives of the publisher is to enter a difficult and constitutionally forbidden domain. Since popular biographies (and even scholarly ones, at least in the heart of the author), whatever the truthful content, are written to make a dollar, the search will also be fruitless.

Perhaps the suggested standard is inadequate. Even if adequate, it might not offer clear solutions to the problems posed by *Spahn* and *Hill*. The standard is only offered as a possible solution to the problems opened up by the recent New York cases. We are now in the no man’s land where the right to publish newsworthy information intersects with the right of the individual to be free from commercial exploitation. The “interests” test of the *Times* case, if carefully applied in the privacy realm, may be the compass needed to navigate to constitutional safety.

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77. The Spahn case would certainly have to be retried.
78. The thicket will, in time, be navigated. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).