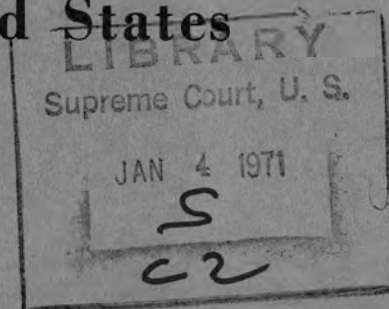


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

TIME INCORPORATED,

Petitioner,

VS

FRANK PAPE,

Respondent.

Docket No. 109

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Place Washington, D. C.

Date December 16, 1970

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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TIME, INCORPORATED,

Petitioner

vs

No. 109

FRANK PAPE,

Respondent  
-----

The above-entitled matter came on for argument at  
10:42 o'clock a.m., on Wednesday, December 16, 1970.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

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On behalf of Petitioner

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On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 109, Time, Incorporated against Pape.

Mr. Reuben you may proceed whenever you are ready.

ORAL ARGUMENT BY DON H. REUBEN, ESQ.

ON BEHALF OF PETITIONER

MR. REUBEN: Mr. Chief Justice and may it please the Court:

This suit for libel had its inception in a raid led by the Respondent on the West Side apartment of a Black family in the City of Chicago in the year 1958. The family's name was Monroe and at that time the Respondent was the deputy chief of detectives of the City of Chicago.

Shortly after the raid the Monroe family brought an action in the Federal District Court in Chicago, alleging that the raiding party, and specifically that the Respondent, Captain Pape, broke the doors down, woke the Monroe couple with flashlights, forced them at gunpoint to leave their bed and stand naked in the center of the living room; roused the six children that were in the apartment at that time; herded them into the living room; that the Respondent struck Mr. Monroe several times with a flashlight, calling him "nigger," and "black boy;" that another officer pushed Mrs. Monroe; that the children were hit and kicked and that the police ransacked every room, throwing clothing from closets to the floor, dumping



1 drawers and ripping mattress covers and the like.

2 The cause ultimately reached this Court and this  
3 Court held in 1961, in Monroe versus Pape, that the cause of  
4 action was stated on behalf of Monroe and against Captain  
5 Paper.

6 Then, in November of 1961 the Civil Rights Commis-  
7 sion issued its fifth report, which is entitled: "Justice."  
8 Pertinent excerpts of justice appear in Appendix 323.  
9 Chapter II of Justice deals with police violence, and it's  
10 headed, "Unlawful Police Violence."

11 The Commission says in Chapter II that the allega-  
12 tions of misconduct are supported in several cases by criminal  
13 convictions and findings by impartial agencies and others by  
14 sworn testimony, affidavits from eyewitnesses or by staff field  
15 investigations. In no case has the Commission determined  
16 conclusively whether the complaints or the officers were  
17 correct in their statements. This is the function of a court.

18 The Commission said it was of the opinion that the  
19 allegations appeared substantial enough to justify discussion  
20 in this study. There was a heading, "Patterns of Police  
21 Brutality;" a subheading, "Enforcement of Segregation or  
22 Subordinate Status; Punishment," the Third Degree in Coercion of  
23 Confessions."

24 And the fourth section was "Initial Contact and  
25 Arrest," and under the heading "Search, Seizure and Violence,

1 Chicago, 1958," the Commission discussed the actions of  
2 Captain Pape. The Commission did so by using the language of  
3 the dissent of Justice Frankfurter in Monroe versus Pape and  
4 the Commission's lead was to say: "The Supreme Court of the  
5 United States decided the case of Monroe versus Pape on  
6 February 20th, 1961. Although decision did not finally dispose  
7 of the case, it did permit the Plaintiff to sue several  
8 Chicago police officers for violation of the Federal Civil  
9 Rights Act on the basis of a complaint which that," and then  
10 Justice Frankfurter's opinion was quoted.

11 Time, Incorporated, upon receiving the Commission  
12 Report, wrote an article and published it in the ensuing edition  
13 of Time. That article appears in haec verba in our brief,  
14 page 8, called "Civil Rights."

15 The Respondent sued for libel. The case was decided  
16 by the District Judge on motion prior to this Court's decision  
17 in New York Times. The District Judge dismissed the cause. The  
18 Court of Appeals, with no judge dissenting, reversed. There-  
19 after, when the case was remanded, the Plaintiff's deposition,  
20 Pape's deposition was taken, the Court's decision in New York  
21 Times had come down. A motion for summary judgment was made;  
22 was granted on the basis of New York Times; the case went back  
23 to the Court of Appeals; it was again reversed.

24 The third time the case was remanded, the District  
25 Court empaneled a jury; and a full hearing was had, and the

1 pertinent evidence to this cause shows that the author or the  
2 man that originally wrote the story, dropped the word  
3 "alleged," or did not indicate in his reporting of the event  
4 that this material that came from the Civil Rights Commission  
5 Report was in turn, a statement of Justice Frankfurter's  
6 statement of the complaint.

7 He was asked specifically and it is at page 12 of  
8 our brief and it's Appendix 208 and 209, why he dropped the  
9 word "alleged." He said: "The word alleged cannot be taken  
10 just in that context; it has to be taken in the context of the  
11 entire chapter." He says, "It means to me that the Commission  
12 in this case is reporting this incident in terms of the claim  
13 being made in the court by the Monroes. But you can't stop  
14 there. In the context of the entire chapter it is not a  
15 simple allegation because the Commission has also said that  
16 'we will not include just an allegation that we have not veri-  
17 fied in some fashion.'"

18 Q It wasn't just a negligent omission, then;  
19 was it? It was a thoughtful, knowing, deliberate omission of  
20 the word "alleged?"

21 A Well, I think Captain Pape would call it  
22 "deliberate;" I call it "conscious " omission.

23 Q Well, it was knowing, anyway?

24 A Yes; absolutely.

25 Q He knew exactly what he was doing.

1 A Absolutely.

2 After --

3 Q After this Court's decision in Monroe against  
4 Pape, did Mr. Monroe proceed in his action against Mr. Pape?

5 A Yes, he did, Mr. Justice Stewart. He ob-  
6 tained a verdict and judgment, which was paid and was not  
7 appealed. However, in candor, the author at Time, Incorporated,  
8 didn't know at the time, because it hadn't happened yet. And  
9 it has happened while this libel suit was pending.

10 Q It happened, however, after the institution  
11 of this libel suit?

12 A Yes, sir. And that was called to the  
13 Seventh Circuit's attention and they said that it would not  
14 have any relevance in this cause.

15 Q Well, despite the chronology, do you think  
16 it's of any relevance?

17 A I certainly do. I think it would be a  
18 travesty to say that the Respondent here has a right to sue for  
19 libel when he's been found guilty of the ultimate sting(?) of  
20 the article of violating Monroe's civil rights.

21 Q Well, not guilty, perhaps, but --

22 A Well,--

23 Q -- not beyond the preponderance of the  
24 evidence to be civilly liable.

25 A We used the term guilty in the Circuit Courts



1 in Chicago.

2 Q I suppose it might be argued contra that  
3 the article contributed to that result --

4 A Well, I suspect that that was something that  
5 Captain Pape would have addressed to the Court in the Monroe  
6 versus Pape case, or taken an appeal if he had thought that  
7 that was truly the result.

8 Q Well, of course, the officer might have been  
9 found guilty of, or found liable for violating civil rights,  
10 without having committed the acts which are alleged in the  
11 story.

12 A That's true, Mr. Justice White.

13 Q You are conceding a rather critical point --

14 A Well, I suggest to you that the courts looked  
15 to the sting of the article and the sting of the article was:  
16 he violated the civil rights of the Monroes, which is the sting  
17 of the verdict.

18 Q Well, I know, but, I mean, to recover at all  
19 on a libel suit you just don't find whether somebody was stung  
20 or not stung. You find whether the statements were true or  
21 untrue, for another thing.

22 A Well, as I understand the law of libel, a  
23 substantial truth is allowed and if the gist of the libel is a  
24 violation of the civil rights of Monroe --

25 Q I gather the way they found in this case that

1 at least it can be said, that the report that was published  
2 was a false report of what was said in the Civil Rights Report.

3 A This is what the Court of Appeals --

4 Q Well, that's one of them and secondly, it was  
5 -- must have been found by the jury that the statements sub-  
6 stantively were false; some of them, anyway.

7 A But the case never went to the jury. The  
8 District Judge took the case from the jury and dismissed it.  
9 It was the Court of Appeals that made that.

10 The article after --

11 Q It has never been found in this case sub-  
12 stantively --

13 A That's correct.

14 Q -- whether any of the statements in the  
15 Civil Rights Report are true or false?

16 A That's correct.

17 Now, I want to go on to the editorial process, be-  
18 cause it didn't just stop with the article being written by Mr.  
19 Magnuson.

20 Q Excuse me. May I ask about -- do you concede  
21 or do you not concede that the report as published did state  
22 a falsehood -- did make a false statement?

23 A I do not concede it, but the District Judge  
24 assumed it for the purpose of deciding the motion at the close  
25 of all the evidence --

1 Q Well, I know, but I would like your position.

2 A My position is I do not concede that it is  
3 false.

4 Q In other words, you say there is no false  
5 statement in the article?

6 A That is correct, but I don't think that's  
7 before the Court at this moment --

8 Q We treat the case then as though there were  
9 some false statements?

10 A I think you have to. I have to be candid.  
11 After the --

12 Q I don't follow that. Why do we have to --

13 A Because the District Judge did not -- no trial  
14 of fact has decided this. The tryer of fact, the District --

15 Q I know, but we never get to the New York Times  
16 rule unless there is a false statement; do we?

17 A That's why you have to assume it's false.  
18 And of course that there's actual malice. That's the issue that  
19 the District Judge went off on here.

20 Q Yes, but we don't have to assume it's false,  
21 do we? All we have to assume was there was enough there to  
22 submit the issue of falsity or not to the --

23 A That's correct.

24 Q That's a very different proposition.

25 A That is correct.

1 Q Well, don't you have to assume, if not con-  
2 cede, that it's an inaccurate report of the Commission Report  
3 that it was purporting to be reporting?

4 A No, I do not. I do not. And the author, I  
5 think, made it very clear that as he read the entire Civil  
6 Rights Commission Report it was not an inaccurate report. The  
7 Civil Rights Commission, and that's the thrust of his testimony;  
8 the Civil Rights Commission was not merely reporting Mr.  
9 Monroe's allegations in the complaint, but the Civil Rights  
10 Commission, by its open statement, by its headlines, by the  
11 mere inclusion of the Pape case, was making a, if you will, an  
12 independent finding that this was a case of substance that  
13 merited discussion and that this was precisely the view of the  
14 dissenting judge in the first opinion, pre New York Times  
15 when the case was decided on state law.

16 Q If we affirm will this case go to trial all  
17 over again?

18 A No, sir. The case is over.

19 Q What went to the jury?

20 A Nothing went to the jury. The District --

21 Q Well, why is the case over?

22 A Because the District Judge dismissed the  
23 case at the close of the evidence --

24 Q -- that there was sufficient evidence to  
25 prove Time's malice.



1           A           If you reverse the case is over; if you  
2 affirm then the case goes back to the jury.

3           Q           That's what I asked --

4           A           I'm sorry. I misunderstood you.

5           Q           Could I ask you a question: does the record  
6 show what the considerations were that led Time to deliberately  
7 omit the word "alleged"? In other words, I guess what I'm  
8 getting at is: what is the difference between the news value of  
9 one and the less news value of the other; put it that way.

10          A           Well, I guess that the best answer to that  
11 is to review what Time did here. Mr. Magnuson, as his  
12 testimony I read to the Court indicated that he thought, from  
13 the reading of the Civil Rights Commission Report as a whole  
14 that this was, as he said, "There is more than an allegation  
15 of a complaint being reported here."

16                   Additionally, after the article was written and I  
17 think the Court has to look at this article as though it was  
18 uttered by Time, Incorporated -- you would have to look at the  
19 whole editorial process. The article was sent to a research  
20 department and the morgue on Captain Pape or the reference file  
21 which they had was taken by an independent researcher and there  
22 was discovered a number of material on Monroe versus Pape, in-  
23 cluding a New York Post article which is in the record, and  
24 including Time's own in-house dispatches, which indicated that  
25 the incidents reported by the Civil Rights Commission, in the

1 words of Justice Frankfurter, "were true," and a combination of  
2 the researcher's independent judgment, plus the editor's judgment,  
3 plus the writer's judgment, resulted in an editorial  
4 decision; in an editorial decision to publish this material in  
5 the form that's before the Court.

6 And, in the New York Times case, and in the St.  
7 Amant case, the test is, of actual malice, is whether there was  
8 a publication made by one who published, knowing it was false  
9 and intending to do harm through a falsehood or as Justice  
10 White said in St. Amant: "A high degree of awareness of falsity,  
11 and nevertheless, publishing, intending to do harm by publishing  
12 falsehood."

13 There is not one thing in this record that indicates  
14 that this author or this researcher or Time, Incorporated, had  
15 any knowledge of falsehood or had any awareness of falsehood.  
16 Rather, what we believe and what the District Judge held, and  
17 what two judges, or at least the first dissenting Circuit Court  
18 Judge held was that a fair reading of the Civil Rights material  
19 alone could lead to the conclusion that the report about Pape  
20 in the Civil Rights Commission was true. And I suggest if you  
21 read the dissent in the first Pape case decided pre New York  
22 Times, and you see there a Court of Appeals Judge looking at  
23 the four corners of justice, and saying in his dissent that a  
24 reasonable person could read "Justice," and conclude that  
25 Time's report was an accurate report of "Justice." That, if an

1 independent judgment like that can be made then it's passing  
2 strange to say that the author had either knowledge of falsity  
3 in reading "Justice," or had a high degree of awareness of  
4 falsity.

5 Now, the Seventh Circuit, which reversed Judge  
6 Robinson's holding: to allow this case to go to the jury  
7 would have a chilling effect on the First Amendment, singled  
8 out -- singled out the word "alleged," or the dropping of the  
9 word "alleged," and on that basis and on that basis alone, held  
10 that the case had to go to the jury on the issue of actual  
11 malice. It was that single facet that prompted every reversal  
12 and what you see, I submit to Your Honors, is a majority by  
13 any court in the country to give lip service to Your Honors'  
14 decisions in New York Times and its progeny, St. Amant and the  
15 cases in between, and nevertheless, within the framework of  
16 giving all the pious utterances possible to New York Times, to  
17 hold that a libel occurred or that actual malice occurred by  
18 singling out one factor and at least three vices in what the  
19 Court of Appeals did and what occurred here.

20 Q Then I think that part of your submission  
21 isn't that the First Amendment would preclude a holding that  
22 leaving out the word "alleged," would be libelous?

23 A No. My --

24 Q If the underlying statements were false,  
25 leaving out the word "alleged," you would say could fairly be

1 libelous per se?

2 A It might. I say not in this case. In this  
3 case I think it cannot --

4 Q I mean wholly aside from malice?

5 A That's correct, because of the contents of  
6 "Justice." I think, and when the first case was decided, of the  
7 four judges that heard it: one District Court and one Court of  
8 Appeals Judge, they held that under the state law pre New York  
9 Times, that it was not a libel, that it was a fair report of  
10 "Justice," within the four corners.

11 Now, I'm not sure that that rises to the dignity --  
12 I have to -- of a First Amendment right, but we - it was an  
13 incorrect decision, in my judgment, and it is not libelous. I  
14 think that the Time, Incorporated article was a fair report of  
15 "Justice."

16 Q But, absent other things in the "Justice"  
17 article, which would take the edge off of the word "allege,"  
18 if that's all there was, was the report, the "Justice," report  
19 saying "allegedly" so and so happened, and that word were left  
20 out you would say that there wouldn't be anything unconstitu-  
21 tional in holding that to be libel?

22 A Although it would be, in my judgment, wrong,  
23 because the mere act of putting it into a section on police  
24 brutality and using those incidents, collective incidents all  
25 over the country, and using those incidents as a basis for a



1 recommendation to Congress concerning how remedial legislation  
2 should be enacted, takes it out of the category of just the  
3 mere allegation of a complaint --

4 Q I gather you -- you're here solely on  
5 malice?

6 A That is the issue that I think has come  
7 before the Court the way the case was pitched; that's correct.

8 Q We're assuming libelous falsity, falsehood --

9 A You would have to; yes, sir.

10 Q And really whether it's malicious or not?

11 A Yes, sir; you have to do that, absolutely.  
12 And it is our position, if you will, that the record shows that  
13 based upon all of the facts of the contents of "Justice," and  
14 the morgue clips, would suggest to any reasonable person that  
15 this is true; that it is incorrect for the Court of Appeals, to  
16 if you will, second guess the editorial practice and the  
17 editorial decision of Time, and to say that use -- or no use of  
18 language is tantamount to uttering deliberate falsehood; or is  
19 tantamount to ordering -- well, the Court of Appeals didn't  
20 even suggest there was a high degree of awareness; they pitched  
21 it solely on the grounds of deliberate falsehood.

22 Furthermore, I suggest the Court of Appeals only  
23 went one step and said, well, you -- well, in their view you  
24 misstated a report or government. But, if Time, Incorporated,  
25 believed that the ultimate facts were true then there can be no

1 malice, under the test of New York Times.

2 And the record shows here --

3 Q Yes, but then -- on that assumption they  
4 borrowed the authority of the Civil Rights Commission instead  
5 of their own. They were saying the Civil Rights Commission was  
6 stating this as a fact, rather than just alleging it. And if  
7 Time was relying on its own belief and investigation, why didn't  
8 it say so or avoid saying the Civil Rights Commission said so?

9 A Well, I'm suggesting to you that in some  
10 respects they did make their own investigation by going to --

11 Q That isn't what the story says.

12 A No; that's correct. That is correct.

13 Q So far as the reader is concerned, it was the  
14 Civil Rights Commission that was saying this as a matter of  
15 fact.

16 A And I'm suggesting to the Court that whether  
17 the Civil Rights Commission -- whether Time states it on its  
18 own authority, or on the Civil Rights Commission's authority,  
19 that Time, Incorporated believed the ultimate fact to be true,  
20 that the test for actual malice is not satisfied.

21 That if Time, Incorporated, believed the ultimate  
22 fact to be true, whether it says it on its authority or the  
23 Civil Rights Commission's --

24 Q Although in this case it's conceded that the  
25 writer knew he was leaving out the word "alleged," and he did

1 it thoughtfully and knowingly and if he was wrong in assuming  
2 that that's what the Civil Rights Commission meant he knowingly  
3 misstated the Civil Rights Commission.

4 A I think you have come to the heart of the  
5 matter. I don't think that the fact that he misread or was  
6 wrong in misreading the Civil Rights Commission is enough. I  
7 think you have to have him deliberately intending to falsify  
8 what the Civil Rights Commission said. It is not error, but  
9 it's an intention to cause harm through the uttering of false-  
10 hood. And that's not in this record.

11 And I suggest to you that the analysis made by the  
12 Court of Appeals to reach that very result was a myopic  
13 analysis and it was made by singling out that fact, not looking  
14 at the author's testimony; not look at the District Court's  
15 finding; not looking at the clips of the morgue and not looking  
16 at the full contents of "Justice."

17 And, just as this Court has held, that the failure to  
18 investigate,-- and that was in the New York Times -- does not,  
19 with convincing clarity -- and that's the test as I read the  
20 case, turn this into actual malice. So the mere misreading,  
21 the mere error in stating the report is not actual malice as  
22 this Court has annunciated actual malice.

23 I would like to save five minutes for reply.

24 MR. CHIEF JUSTICE BURGER: Thank you Mr. Reuben.

25 Mr. Dunne.

ORAL ARGUMENT BY PATRICK W. DUNNE, ESQ.

ON BEHALF OF RESPONDENT

MR. DUNNE: Mr. Chief Justice and may it please the Court:

President Nixon last summer made certain remarks in regard to the Manson trial and in regard to the Mylai matters, and the press attacked him very vehemently for failure to use the word "allege."

A week ago Saturday night, President Nixon had a press conference and he said he was wrong. Time magazine read the report of a high governmental group which used the word "allege." They reported what the Commission said as fact, but Time magazine will never say they are wrong.

The author of this article --

Q I thought the posture of the case had finally moved to the point where they said, "Yes, we're wrong, but we have no malice."

A They said that they intentionally said something different than the Commission Report, but that they had a right to do it and could do it and were not wrong. Because, I suppose, based upon an argument that in some way the end justifies the means that because, I suppose after 306 pages, which was the Commission's report, the Commission finally came to the conclusion that there was police brutality in the United States, having reviewed many, many cases.



1 I suppose that is the ultimate truth or the ultimate  
2 which Time feels justifies its improper means of saying,  
3 eliminating, omitting words like "allege" and "complaint."  
4 The author clearly says he read the words "alleged" in the  
5 complaint; he understood them, but he chose to omit them. The  
6 omission of words, we submit, is a known falsity and meets the  
7 test of malice in your terms.

8 Q Well, then you distinguish this from a case  
9 where the writer had put the word "allege" in but the fellow  
10 who put the print together down in the print shop, inadvertently  
11 dropped it because it was at the end of a line?

12 A It makes all the difference in the world, Mr.  
13 Chief Justice.

14 Q And what is the difference? What would that  
15 do to the case?

16 A The man who inadvertently in a print shop,  
17 drops out the word "allege" is doing an act -- an unintentional  
18 act, an unintentional act, whereas --

19 Q But it bears only on the malice.

20 A It bears only on malice; true, but it bears  
21 only on malice. But that is an unintentional act.

22 Here the man knew what he was doing, new it, intended  
23 to do it and left it out and of course the thing comes out to be  
24 something quite different then.

25 What the Commission said, first of all, and what

1 Time was ostensibly reporting. I might --

2 Q Doesn't it come exactly the same as far as the  
3 reader is concerned?

4 A Oh, it comes out quite the same, but my  
5 point is that we do agree -- we do agree that this -- we do  
6 agree with New York Times -- when this Court said that there  
7 must be malice and malice is, of course, the known falsity, or  
8 the right to disregard or whether the falsity is true or not.

9 Q So then we move from there, do we not, to  
10 the question of whether the conscious choice to drop the word  
11 "allege," is proof of malice or evidence of malice; don't we?

12 A Sure, sure; and what could be a better proof  
13 of malice, then have someone knowingly -- knowingly, report  
14 something different from another document.

15 I might say that this is quite similar to --  
16 the contentions here are quite similar to the contentions  
17 that Time Magazine has made in the recent District Court case  
18 of Ragano, which recently has been sent back and the denial of  
19 the motion for summary judgment was upheld by the Circuit  
20 Court of Appeals.

21 In the Ragano case, the same contentions were made.  
22 The Court there, after having reviewed other motions for summary  
23 judgment where the question was investigation and so on, and  
24 so forth, the motion had been granted, the court said: "The  
25 present case differs. however, because Time had actual

1 malice, knowledge of the fact that the plaintiff was an  
2 attorney yet decided to disregard or omit this fact.

3 The First Amendment does not require that the  
4 plaintiff show knowledge of falsity and then, as Time contends,  
5 bad faith in the publisher's choice of disregarding the truth.  
6 Where the plaintiff presents evidence to show that the  
7 publisher chose to substitute his opinion for facts actually  
8 known by him in an article, that is capable of defamatory  
9 meaning, he has come forward with sufficient evidence to show  
10 reckless disregard.

11 This case --

12 Q Would you say that the Time article was an  
13 accurate representation, fair representation of the Commission's  
14 Report?

15 A Absolutely not. Absolutely not.

16 Q In what respect --

17 A The Time article, the Time article first of  
18 all selected its couple of examples: one being the example of  
19 an instance in Georgia employing not names, but initials, and  
20 a very flamboyant instance, coming out of the Commission's  
21 Report; one involving murder -- more of this then they go on  
22 down from the South to the North and talk about the incident  
23 of Pape and they leave out the word that the Commission said,  
24 "as alleged in a complaint." And say "the Commission found a  
25 high -- "the Commission found this police officer guilty of

1 these acts of police brutality, destroying his effectiveness  
2 in his own field of work.

3 So, absolutely it did not say, did not report what  
4 that Commission Report said.

5 Q Do you think the editorial judgment of the  
6 author was in any way vindicated or aided by the subsequent  
7 jury finding in the civil case by the preponderance of evidence?

8 A In no way. First of all, I believe that even  
9 the consideration of that in this instance is wholly wrong.  
10 First of all, this -- these facts -- these allegations of the  
11 complaint set forth in Justice Frankfurter's opinion, will not  
12 the allegations set forth in the complaint, which was the sub-  
13 ject matter of the jury verdict.

14 The complaint, after the Frankfurter opinion, was  
15 amended twice and watered down completely. There is no such  
16 thing in the complaint as "Pape having hit Monroe with a flash-  
17 light; Pape having called Monroe 'black boy,' or anything of  
18 that kind." That was the complaint that the jury verdict  
19 brought in, was much, much different. It said all kinds of  
20 innocuous things. Who am I to say what the jury came to in  
21 that case. It has no credibility here.

22 Q What was the evidence?

23 A The -- in Monroe versus Pape?

24 Q Was there any evidence of brutality?

25 A Well, if the Court please, I don't know what

1 went on in Monroe versus Pape. The City of Chicago offered  
2 the service of this -- to defend Captain Pape, as well as the  
3 other police officers involved. They handled it and they did  
4 it. I don't know, nor does this record know if the evidence  
5 went in here.

6 I do know, insofar as this record is concerned,  
7 which I believe this Court and all of us are bound by, that in  
8 order forego, Your Honor -- in order to satisfy Your Honors,  
9 of what happened in the incident Monroe versus Pape, that we  
10 produced eight eyewitnesses to that incident, whose testimony,  
11 of course, are in this proceeding. And each one of those  
12 witnesses denied that the police officers broke in doors;  
13 denied that there were 13 police officers; denied they assaulted  
14 anyone; denied that they had the Monroes in the living room  
15 naked; all these things that Time said.

16 The only evidence as far as the incident is con-  
17 cerned, in this case, are the eyewitnesses who testified to a  
18 completely different approach.

19 Q Well, what did the report say? Did the  
20 "Justice" report say that these events occurred?

21 A No, no; the Justice report said that a  
22 complaint was filed in which it was alleged that these events  
23 occurred. But Time Magazine said that the "Justice" report or  
24 the Commission found that these things occurred. And therein  
25 lies the libel and therein lies the malice. Because



1 it did it knowingly and with intention.

2 I might go on to make comment upon this great and  
3 extensive investigation and verification made by the worldwide,  
4 2,500,000 circulation publication, the great investigation that  
5 they thought they should do. They, of course, as Mr. Reuben  
6 said, did hand it over to a researcher, a Miss Booth or Mrs.  
7 Booth, who is in the record. Mrs. Booth, of course, did get  
8 their morgue files on the Monroe versus Pape incident. She  
9 did testify, however, that her testimony and that of Magnuson  
10 clearly indicates that this morgue file was never brought to the  
11 author's attention.

12 In New York Times versus Sullivan just exactly that  
13 made the Court disregard the morgue file, because it was not  
14 brought to the author's attention, the person who wrote the  
15 story.

16 I might further say that if you look at that one  
17 of the morgue file you will find there were many, many articles  
18 about the incident of Monroe versus Pape in the morgue files.  
19 Every one of them, except one -- every one of them does what  
20 the Commission did -- they say "Mr. Monroe said," and tells what  
21 Mr. Monroe's side of the story was, couching and cautioning in  
22 all instances that they are telling the one side, which is fair  
23 enough, as far as Pape is concerned.

24 Everyone except one. And one, not a newspaper  
25 article, nothing that anyone else had the nerve to publish,

1 just a dispatch from one of Time's Chicago correspondents.  
2 Only one, Exhibit J -- exhibit J is the only one that repeats  
3 it as fact and not as a "complaint was filed," or "a rule of  
4 this court in Monroe versus Pape," or a story which Monroe  
5 told.

6 I submit that the I do not find and I don't believe  
7 this Court would find by the reading of the Circuit Court of  
8 Appeals' opinion below, that they -- that the majority opinion  
9 stays with just one element. The Circuit Court of Appeals does  
10 look at the full record.

11 Malice, which is this Court's standard, is the  
12 knowing of falsity or the reckless disregard of falsity. This  
13 case is presented to Court on a motion for directed verdict.  
14 What this means, usually, is that if there is any evidence, not  
15 a scintilla, of course, but, any evidence, any substantial  
16 evidence from which a jury could find that Time Magazine was  
17 guilty of a known falsity or reckless disregard of the truth,  
18 then the case should have gone to the jury.

19 There is no weighing the evidence or looking upon  
20 credibility of the witnesses or this kind, but was there any  
21 evidence. And what is evidence of malice? I suppose that's  
22 what this case is all about and that's what this Court or the  
23 Circuit Court of Appeals is called upon to say. What is  
24 evidence of malice?

25 We submit that evidence of malice is many things.

1 It's like almost any question that comes to a jury; all kinds  
2 of ingredients go into, and hopefully, from which the jury  
3 draws its inferences and comes to its conclusions.

4 With malice the nature of the article can be an  
5 ingredient, maybe not the only one, but it's something to be  
6 considered; something the Court considered in, in New York  
7 Times versus Sullivan, which was an article that the Court  
8 looked at and it had difficulty identifying the elected of-  
9 ficial who was libeled. Not to mention him by name; he is  
10 here.

11 But, the nature of the article can be of some  
12 evidence of malice. Here the article is dawdling on the  
13 corner; it incorporates Father Hessburg's catchy remarks about  
14 "Why do we go to the moon when we don't take care of our own  
15 house?" Yet again, uses a rather brutal first paragraph about  
16 a situation in the south by initials. Yet it goes into, of  
17 course, the Pape incident.

18 By the way, in the course of all these things, the  
19 author did read the whole commission report. The commission  
20 report itself, was a very circumspect document. There were  
21 headnotes like "Searches and Seizures," but the Commission,  
22 throughout its report, speaks of alleged instances and alleged  
23 this and alleged that. The Commission Report uses initials for  
24 the most part when talking about the persons who are supposedly  
25 guilty or alleged to be guilty of certain facts.

1           This article, of course, starts out with the words  
2       "The new paperback book has 307 pages and it is simply titled:  
3       'Justice.' It is the last of the volumes in the second report  
4       of the U. S. Commission on Civil Rights, first created by  
5       Congress in 1967.

6           "Justice carries a chilling text about police  
7       brutality in both the south and the north. Justice carries an  
8       indictment and it stands as a grave indictment since the facts  
9       were carefully investigated by field agents and it was signed  
10      by all six of the noted educators."

11          With that prelude it says, "The Commission found  
12      that Pape did these things," but Pape didn't so find.

13          Q       Mr. Dunne, why do you think, or do you think  
14      that Time Magazine could have had a good faith, nonmalicious  
15      faith in the truth of the underlying allegations, but neverthe-  
16      less, be liable in this case because it knowingly misstated it  
17      the commission's report by leaving out the word "alleged."

18          A       Well, if the Court please, I don't believe --

19          Q       Let's just assume for the moment, though,  
20      that Time had a good faith, nonmalicious belief in the truth  
21      of the allegations about -- that it made about Pape. Let's  
22      just assume that.

23          Now, would Time nevertheless, be liable because  
24      it left out the word "alleged," and misstated the Commission?

25          A       Yes. For a number of reasons. First of all,

1 Time wasn't reporting its own judgment on the incident of  
2 Pape versus Monroe; it was rather reporting, so it says, what  
3 the Commission found; that's something different. That's first  
4 of all.

5 They could certainly, good faith-wise, make an  
6 investigation, do whatever they care to do; of course, using  
7 the facilities and I hope, talking to somebody; I hope, talking  
8 to -- at least talk to somebody who was at the incident, but  
9 certainly with if they investigated, they went out there and  
10 they talked to Monroe and they talked to Pape and if they  
11 talked to anybody that might have been present, they can say  
12 anything they want as far as I am concerned, and as far as  
13 Pape is concerned, about the Monroe incident.

14 So, to answer your question, they surely could  
15 come in say there was on such and such a day at Trumbull Park  
16 an incident where a police officer came in and beat a suspect.  
17 They could certainly say this; even though it was not true,  
18 they could say it, so long as they did something and had some  
19 basis for saying it. They had talked to people, if they had  
20 made a judgment, made an investigation, did something.

21 Q So you think it would be -- let's assume you  
22 wanted to say something about someone that you felt was true  
23 and you had investigated and you had a reasonable ground for  
24 thinking it was true. And you wouldn't be malicious in saying  
25 it and you say "so and so," and then you add another paragraph



1 and "by the way, the Civil Rights Commission thinks just like  
2 I do, also," and do you suppose that you would be -- that you  
3 could be held to be malicious just because it was untrue that  
4 the Civil Rights Commission agreed to -- ?

5 A Yes. If the Civil Rights Commission here,  
6 which all it said was "alleged," couched its remarks in the  
7 form of complaint and allegations.

8 An omission, an omission, can be just as malicious  
9 as anything else, and to knowingly do it -- knowingly, and I  
10 understand was that your premise was that I knew when I was  
11 reporting that the Civil Rights Commission --

12 Q (Inaudible) . . . . they would still have to  
13 say "our own investigation shows that this is true and we're  
14 satisfied it's true. The Civil Rights Commission investigated  
15 it and it says that it's alleged to be true, but we don't agree  
16 it's merely alleged; we think it is true."

17 If they had said something like that --

18 A Perfectly all right; perfectly all right and  
19 as a matter of fact, it was not the Time Magazine which is not  
20 a purveyor of hot news, necessarily, or someone who is up  
21 against deadlines constantly. I would even feel that an investi-  
22 gation on their part could be rather slight. But they had a  
23 week here to do something.

24 The only thing that they did do in the course of this  
25 so-called investigation, the author did, and he is the one

1 whom we've got to look to toward malice though we can't look  
2 toward the researcher who doesn't call anything to the atten-  
3 tion of the author.

4 The only thing the author did is he wired to  
5 Chicago and said, "What's the first name of Pape, and what's  
6 the address of the apartment and was he punished?" And of  
7 course, therein comes the article again as an element of proof  
8 of malice. The article concludes with: "and Pape was not  
9 punished."

10 They drop the words "alleged," and drop the words,  
11 "complaint," and they say the Commission found Pape guilty of  
12 these things and Pape was not punished. I mean the text of  
13 that itself is pretty inflammatory. And then you come down to  
14 the fact that they knew what they were doing; they knew they  
15 were eliminating something.

16 This, we submit, is malice. This is a known --

17 Q I gather on your premise, Mr. Dunne, even if  
18 this case goes back to trial and as part of their defense if  
19 Time were to prove in fact that all these things that were said  
20 about Captain Pape were true; even if they were to establish  
21 it you would still say you were entitled to go to a jury on the  
22 issue of malice because they had -- I gather you would put it  
23 . falsely stated what the Civil Rights Commission said.

24 A Well, if the the Court please, we have been  
25 trying to get to the jury for like nine years, and having been

1 in --

2 Q Wouldn't that be your position?

3 A My point is that I would defend the Pape  
4 incident no matter how it's couched, as far as the incident  
5 itself is concerned. Not the --

6 Q Now, won't you answer my question? My  
7 question was: even if Time established that in fact all these  
8 events occurred that the article mentioned, I take it you would  
9 still think you were entitled to go to a jury because in  
10 reporting what the Civil Rights Commission had said they had  
11 not used the word "alleged?"

12 A Mr. Justice, this is exactly true. This is  
13 my position.

14 I will say, however, and I will add one caveat to it,  
15 that we already put on eight eyewitnesses to the Pape incident  
16 so that Time can't prove that what happened in the incident of  
17 Monroe was true, as they say in their article.

18 Q But, what if Time Magazine produced seven or  
19 nine to dispute those eight, would that conceivably form a  
20 reasonable basis for Time's editorial judgment?

21 A It certainly would; it would do the one thing  
22 that I say should have happened anyway. It certainly would  
23 say that the matter should be left to the jury.

24 Q So that the impact of the holding of a ver-  
25 dict in a civil rights case could in that situation have some

1 play? (Somewhat inaudible)

2 A Well, of course I feel that the verdict, as  
3 a matter of technical rules of evidence which I certainly don't  
4 want to get into before this Court, the verdict of Monroe  
5 versus Pape basically, as far as I am concerned, has no place  
6 in, as a matter of evidence in this case in Pape versus Time,  
7 Inc., for the simple reason that in this instance it's not on  
8 the same complaint. And I suppose, and we did feel when we  
9 tried the case that it was necessary to put on evidence of the  
10 incident of Monroe. We did put on such evidence. The Court of  
11 Appeals didn't feel that that was even necessary. They felt  
12 that what we were dealing with is not what happened on that  
13 night in Trumbull Park, but what was happening in the Commission  
14 Report and I agree with the Circuit Court of Appeals. But we  
15 did put it on. We probably would put it on again and Time, of  
16 course, could put on any that it cares to. And the jury can  
17 draw any conclusions it cares to, insofar as the incident is  
18 concerned.

19 Q Would you tell me rather briefly exactly what  
20 it is they accused this man of to the two and a half million  
21 people?

22 A Yes, sir; insofar as the incident is concer-  
23 ned.

24 "Shifting to the north, the report cites Chicago  
25 treatment of Negro James Monroe and his family who were awakened

1 in their West Side apartment at 5:45 by 13 police officers  
2 ostensibly investigating a murder. The 'police,' says Justice  
3 'broke through two doors, woke the Monroe couple with flash-  
4 lights and forced them at gunpoint to leave their beds and  
5 stand naked in the center of the living room.

6 "The officers roused the six Monroe children and  
7 herded them into the living room. Detective Frank Pape struck  
8 Mr. Monroe several times with a flashlight, calling him nigger  
9 and black boy; another officer pushed Mrs. Monroe, et cetera,  
10 et cetera."

11 Q That's the whole basis?

12 A This is the --

13 Q You say because they left out the word  
14 "alleged" that they are bound to find it malice?

15 A In the complaint.

16 I say because they left out the words "alleged,"  
17 and "complaint," that there is sufficient evidence in this  
18 matter to warrant the case to go to the jury.

19 Q There is no way that they could -- well you  
20 would say that that was a question wholly for the jury. And  
21 your case really gets down to that --

22 A It really does, Mr. Justice; it really does.  
23 It gets down to -- into: should the case go to the jury? I  
24 certainly agree and to sum up, I agree with the Court that  
25 freedom of the press is a precious thing. It's something that



1 we should protect and this Court should protect and this Court  
2 has nurtured through the years.

3 I think that a detective, police officer, also like  
4 all other people, have the right of privacy. These things do  
5 come into conflict, and they have here. I think they also  
6 have a right to trial by jury, as we also have here.

7 Q Well, that's your basic final charge; isn't  
8 it?

9 A That there is enough evidence to go to a  
10 jury on the question of malice. That is, knowledge of falsity  
11 and --

12 Q The court should not have taken it away  
13 from them?

14 A The court should not have taken it away  
15 from the jury.

16 Thank you, gentlemen.

17 MR. CHIEF JUSTICE BURGER: Mr. Reuben, neither you  
18 nor your friend have said anything about whether this man is  
19 a "public figure," or "public official," or do you consider  
20 that irrelevant?

21 REBUTTAL ARGUMENT BY DON H. REUBEN, ESQ.

22 ON BEHALF OF PETITIONER

23 MR. REUBEN: I do not consider it irrelevant. I  
24 would consider it highly pertinent and indisputable that he is  
25 a public official. He was the --

1 Q Is every policeman a public official?

2 A I would think so, but I don't think you have  
3 to reach it here. The record shows he was the Deputy Chief of  
4 Detectives. He had a chauffeur; he had people under him; he  
5 had an office; he had all the trappings, and when he was on  
6 duty he was the chief of detectives, because I think he had the  
7 night shift and the day shift was the chief of detectives. I  
8 think if ever there was a public official, going back to  
9 Rosenblatt, Captain Pape was a public official.

10 Mr. Dunne --

11 Q You say we don't have to say whether the  
12 driver of the car was a public official?

13 A Not in this case, although I think he is.

14 Mr. Dunne argues malice from the tone of the article.  
15 As I read the cases of this Court, it usually is: what was the  
16 editorial process? What was done by those who prepared and  
17 authored the material? Not what was the final work product,  
18 and it's an objective-subjective inquiry, if you will.

19 I read in my opening statement, the testimony of  
20 Mr. Magnuson and what he believed. I think also highly per-  
21 tinent is the testimony which appears at Appendix 224 of the  
22 researcher, who had the article and had the morgue and who had  
23 said, "The writer had chosen, in conjunction with the editor,  
24 which material will they use out of this particular quotation,  
25 and checking back with my own editorial reference files I

1 believe that what we printed was an accurate representation  
2 and we were not taking anything out of context."

3 I think what the Court of Appeals and Mr. Dunne have  
4 done is to confuse consciousness of the act, consciousness of  
5 what they wrote and consciousness of what they did, with  
6 knowledge of falsity. The two are miles apart.

7 Q Knowledge of falsity of what, Mr. Reuben?

8 A Knowledge of falsity of the ultimate facts.  
9 The ultimate facts --

10 Q Mr. Reuben, why would he take out the word  
11 "allegedly," other than he believed that they were wrong?

12 A He believed and his testimony is he believed  
13 that in the context of "Justice," that the word "alleged" was  
14 simply a device, an editorial device of the Civil Rights Com-  
15 mission to introduce or discuss the Pape case in the language  
16 of Mr. Justice Frankfurter, which the Commission was apparently  
17 smitten with -- at least that was an accurate --

18 Q Why is there this imperative need of him to  
19 take out the word "allegedly?" What is the imperative need?  
20 For truth?

21 A Mr. Justice Marshall, I don't think there was  
22 an imperative need, but I suggest to you that if the case is  
23 going to go on on whether there was an imperative need, then  
24 you surely have a chilling effect on printing it if a court  
25 can come back after some years -- in this case, ten years after

1 the fact and say, "Well, there's a better way to say this --

2 Q You mean it's a chilling effect to tell  
3 Time Magazine that when they are printing a direct quote they  
4 should leave it as it is?

5 What's chilling about that?

6 A I suggest to you that the chilling effect is  
7 to say to Time Magazine that although you honestly felt this  
8 was true, you should have stated it in a different way and  
9 because you didn't state it a different way, because we dis-  
10 agree with your editorial judgment, that you are guilty of  
11 actual malice; you are guilty of knowledge of falsity.

12 You may disagree with their penmanship; you may dis-  
13 agree with their choice of words; but I say that under the  
14 cases of this Court unless the record shows with convicting  
15 clarity that those choices of words reflect knowledge of  
16 falsity and an intention to do malicious harm by publishing that  
17 falsity; that there is no actual malice.

18 Q Mr. Reuben, in this case is Time Magazine  
19 not only was conscious of what it was doing, but knew that it  
20 was misstating the Commission Report, but it believed in the  
21 truth in this case of the underlying allegations. What then?

22 A I say there is no liability; there is nothing  
23 submissible to the jury because --

24 Q So that Time Magazine is perfectly free, as  
25 long as it says, "We had good faith belief in the underlying

1     allegations, Time Magazine is free to say anything it wants to  
2     about the Civil Rights Commission's report?

3             A         Within the context of what it believes to be  
4     true; within the context of -- of course that isn't this case.  
5     But, within the context of what it believes to be true it --  
6     it can't go on and say that "Captain Pape," according to the  
7     Civil Rights Commission, "did many other incidents." But if  
8     it's -- if it believes the ultimate facts are true and there  
9     was a deliberate attempt here to misstate the Commission's  
10    report, which I deny. I say there is no liability. There is  
11    nothing to go to the jury; there is no actual malice.

12            Q         Is that critical to your case or not?

13            A         No; I don't think it is in this case;  
14    absolutely not.

15                    I think in this case I don't even concede it was  
16    false. I think in this case that the first District Court  
17    decision and the first dissent was correct and this under  
18    common law, prior to New York Times, was a fair report of a  
19    governmental utterance and I say that when two judges say so  
20    it is passing strange to say that when an author so believes  
21    he is guilty of publishing knowing falsity.

22                    Thank you.

23                    MR. CHIEF JUSTICE BURGER: Thankyou Mr. Reuben; the  
24    case is submitted.

25                    (Whereupon, at 11:40 o'clock the argument in the  
above-entitled matter was concluded)