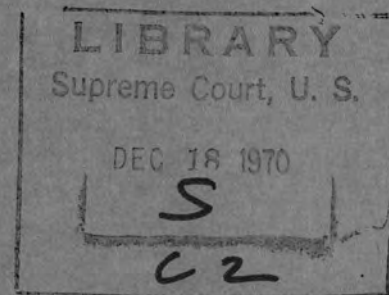


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 66

*pt 2.*

----- X  
: GEORGE A. ROSENBLOOM, :  
: :  
: Petitioner, :  
: :  
: VS. :  
: :  
: METROMEDIA, INC. :  
: :  
: Respondent. :  
: :  
----- X

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Place Washington, D. C.

Date December 8, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

GEORGE A. ROSENBLOOM,

Petitioner,

vs.

No. 66

METROMEDIA, INC.,

Respondent.

Washington, D. C.,

Tuesday, December 8, 1970.

The above-entitled matter came on for continued argument at 10:14 o'clock a.m.

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  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HENRY BLACKMUN, Associate Justice

APPEARANCES:

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Philadelphia, Pennsylvania  
Counsel for Respondent

RAMSEY CLARK, ESQ.,  
Washington, D. C.  
Counsel for Petitioner

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1 salutary policy of reviewing de novo the cases to find whether  
2 the standard for constitutional protection pronounced by the  
3 Court has been met in the opinion below, whether jury or court.

4 In the first place, Mr. Clark creates an erroneous  
5 impression when he says that there was a series of 21 broad-  
6 casts -- a series of 21 broadcasts on WIP about Mr. Rosenbloom.  
7 There was no series at all. We are not dealing here with a  
8 feature story. We are not dealing with a documentary. We are  
9 not dealing with a campaign, and we are not dealing with a  
10 crusade, and we are not dealing with a series.

11 We are dealing with statements which occupied mere  
12 seconds, the four sentences at the maximum in newscasts by a  
13 highly oriented station, which every half hour of the day, 24-  
14 hours a day, 48 times a day, 320 times a week, every week of  
15 the year, every day of the year, broadcasts every half hour of  
16 the year. And every statement before Your Honor is that cate-  
17 gory. It is a one-sentence statement, a two-sentence statement,  
18 or a four-sentence statement, and there is no longer one there.

19 Now the second thing my friend Mr. Clark did is he  
20 began with a statement of facts which said that on October 1st  
21 there were arrests, twenty of them he said, and Mr. Rosenbloom  
22 was one. Well, they were news dealers, they were store opera-  
23 tors, and they were the distributors who supplies these opera-  
24 tors and news dealers, Mr. Rosenbloom.

25 And then he says the next event was on October 4 when

1 WIP had a broadcast to which he objects. Well, Your Honors, a  
2 great, great deal happened between October 1 and October 4 to  
3 which Mr. Clark did not advert.

4           What happens here is that as a result of complaints  
5 from the public, and after a two-month investigation, Mr. Howard  
6 Leary -- not Captain Ferguson -- Mr. Howard Leary, I think,  
7 acknowledge at that time as perhaps America's leading police  
8 commissioner, later Commissioner of New York, ordered the arrest  
9 by Captain Ferguson, and he ordered a crackdown on what he then  
10 regarded as obscene material.

11           I might say to Your Honors that Mr. Clark has made a  
12 good deal of Captain Ferguson's definition and has ridiculed  
13 it and has said that this would make the finest paintings in  
14 the museum obscene. But I suggest to Your Honors that just a  
15 few years ago, a few years before that -- we are now talking  
16 about 1963 -- a chief justice of the United States District  
17 Court for the State of Washington stated that predice defini-  
18 tion of what he thought a majority of the people in the State of  
19 Washington considered obscene. And a very advertent United  
20 States Court of Appeals for the Ninth Circuit, consisting of  
21 three judges, every one of whom served as chief judge of the  
22 Ninth Circuit, affirmed on the opinion below, stating that the  
23 judge had found a fact.

24           So there isn't any shocking finding here. It was  
25 erroneous, erroneous under the decisions of this Court.

1 Well, on October 1st, when the arrest came, all of  
2 the city newspapers had headlines about it, and necessarily head-  
3 lines about Mr. Rosenbloom, who was the supplier. And the  
4 station CBS-TV had headlines about it, and that happened on the  
5 1st, and it happened on the 2nd. It happened on the 3rd. There  
6 are events to which Mr. Clark did not advert.

7 And those newspaper articles and that CBS-TV telecast  
8 said that Mr. Rosenbloom's products were smut and were obscene.  
9 And what did Mr. Rosenbloom do about that? I mention, just in  
10 passing, he brought a law suit about two weeks later, and he  
11 didn't name WIP in that law suit. I am going to show he didn't  
12 know there was a broadcast on WIP until October 27, weeks later.  
13 He didn't even know there was a broadcast.

14 But he brought a suit against all of the newspapers,  
15 against the police commissioner, against the District Attorney,  
16 one for a million dollars in damages, and against CBS-TV -- not  
17 WIP -- one for a million dollars in damages and a second to  
18 enjoin the police commissioner and District Attorney from  
19 prosecuting him for criminal violation of the obscenity law,  
20 and against the newspapers for calling his products smut and  
21 obscene and calling him a smut peddler and a peddler of obscene  
22 material.

23 He did not name WIP and he averred there that so  
24 great was his damage by virtue of those broadcasts by those  
25 people that all -- nearly all of his customers is the language

1 he used -- nearly all of his customers returned all of his  
2 material to him, which he had supplied to them, and --

3 Q That suit that he filed was a suit for defamation,  
4 was it?

5 A That suit was a suit for defamation and for in-  
6 junction.

7 Q And for damages?

8 A Damage, I would say -- it is a little hard to tell,  
9 Your Honor, but I would say it had to be defamation, because I  
10 don't know what else it could be. It is not a complaint  
11 grounded elegantly for libel, but I think it is.

12 Q What was the outcome of it?

13 A The outcome, Your Honor, is that shortly after  
14 November 1, when we broadcast an innocuous statement that the  
15 judge would decide in ten or eleven days -- he did decide, he  
16 dismissed as to all of the newspapers, he dismissed as to  
17 CBS-TV, and a little later he dismissed as to the two city  
18 officials.

19 Now --

20 Q Was the end of that?

21 A That is the end of those suits.

22 Q The state court sued?

23 A The federal court sued. I might say to Your  
24 Honors that it was because of that that Judge Lord ruled in  
25 this case that the plaintiffs could not recover special damages



1 against WIP for any loss of business of any kind. He said he  
2 has no right to special damages.

3 Now, I suggest to Your Honors --

4 Q Was he the judge in both cases?

5 A No, I might say to Your Honor that though our  
6 friends have the strongest condemnation for our newscaster be-  
7 cause he confused the judges, my distinguished friend did the  
8 same thing yesterday when he said they were the same. They are  
9 different. The judge who heard this case is Judge John Lord,  
10 that is the complaint. The Judge who heard this case is Joseph  
11 S. Lord. Judge John Lord has since become the Chief Judge of  
12 the District Court. And there has been a good deal of amuse-  
13 ment at our bar, constant confusion.

14 Well, now what then happened? On October 4 Mr.  
15 Rosenbloom was rearrested, and that was the day of the first  
16 broadcast of which my friends complained about WIP.

17 Now, I would like to get one thing straightened out.  
18 My friend says that there was a headline to that broadcast  
19 which read "City Cracks Down on Smut Business." I submit to  
20 Your Honors that he is in error.

21 In the first place, the station doesn't have head-  
22 lines. And I have asked my friend, one of the counsel who had  
23 all of the original records, because the clerk had sent them to  
24 him for reasons neither he nor I can understand -- I have asked  
25 him to give one of our boys who brought down to me yesterday

1 all of the original records, and I am going to submit them to  
2 the Court.

3           They will show Your Honors that most of them don't  
4 have anything about headlines. And even this one, on the front  
5 cover, apparently for the advice of the announcer, is called  
6 "Repeating the headline news." It was testified to by nobody  
7 as having been broadcast. The manager said five years later,  
8 he wouldn't say it was or wasn't. But he pointed out that on  
9 the same day of the broadcast to which I am going to refer, the  
10 one complained of, there was another item in the news about  
11 two people unconnected with this crackdown who were arrested  
12 and held in \$35,000 bail for transporting hard-core pornography.  
13 He didn't even know whether in advising the newscaster that  
14 this was what was in there in the evening news, whether it  
15 referred to the Rosenbloom group or whether it referred to the  
16 other group, and there is not a word of testimony in the record  
17 by anybody on the subject.

18           Now, what was the offensive broadcast, Your Honors?  
19 It says, at page 350 of the record, that a jury of six men and  
20 six women -- it is the third paragraph, if Your Honors are  
21 looking at it, 350A -- it says a jury of -- it says that the  
22 special investigation squad -- the second item -- the special  
23 investigation squad raided the home of Mr. Rosenbloom. That  
24 is a factual statement.

25           The second is police confiscated one-thousand

1 allegedly obscene books in Rosenbloom's home, and arrested him  
2 on charges of possession of obscene literature. My friend says  
3 they don't object to those two sentences. Then comes the third  
4 and the one they object to. The special investigation squad  
5 also raided a barn in the 2000 block of Welsh Avenue, near  
6 a bus stop, and confiscated 3,000 obscene books.

7 I suggest to Your Honors that if that is read in con-  
8 text, then the alleged two preceeding sentences apply there, and  
9 if it is read out of context, my friend, Mr. Clark, is again  
10 in error in having said expressly that this said that Mr.  
11 Rosenbloom rented the barn. It doesn't. If it is read out of  
12 context, it doesn't even apply to Rosenbloom. It is just an  
13 independent barn at an independent address.

14 Q What page is that?

15 A This is page 350A, Your Honor, paragraph two.  
16 So read in context, the word "allegedly" simply carries over.  
17 Read out of context, it doesn't apply to Rosenbloom at all. It  
18 turns out later, it was Rosenbloom's barn.

19 The final sentence, they don't object to, and that is  
20 that Captain Ferguson says he believes they have hit the supply  
21 of a main distributor of obscene material in Philadelphia, and  
22 that is the whole broadcast, Your Honors.

23 Now, then, what happened? Within an hour it was  
24 corrected. There were six more broadcasts, there was one on  
25 the half hour, and then there were six more broadcasts up to

1 8:00 a.m. in the morning -- every one of them put the word  
2 'allegedly' in. So I suggest to Your Honors that it is quite  
3 apparent at the very worst a slip of the pen to have left it  
4 out, and at the very worst it was corrected within the hour.  
5 Mr. Clark said some of the later broadcasts included it --  
6 every one of them, starting with 7:00 p.m. -- this was a 6:00  
7 p.m. broadcast -- had the word "allegedly" in it.

8 Now, after this series of broadcasts, I emphasize this  
9 to Your Honors: There was never again a broadcast that men-  
10 tioned Mr. Rosenbloom, never again a broadcast that mentioned  
11 Mr. Rosenbloom. Indeed, there was never again a broadcast on  
12 the subject for 17 more days, not until October 21.

13 What happened was that on October 15 this complaint  
14 was filed that I have told Your Honors about, which WIP was not  
15 named in. But the suit drew no attention. For some reason,  
16 our friends chose not to publicize it. The first public notice  
17 of suit was on October 21. Why? Because on that date the court  
18 set it down for hearing. And when the court announced it was  
19 set down for hearing, everyone learned for the first time. No  
20 one knew about the suits except the plaintiff, and presumably  
21 if the defendants were served, no papers had been filed yet.

22 Q This was in the federal court, wasn't it?

23 A Federal court, yes, sir.

24 Q You don't have a similiar process to that of New  
25 York?



1 A Yes.

2 Q This was a public -- this complaint is a public  
3 document?

4 A The complaint was a public document, if you went  
5 down and looked at it.

6 Q Yes.

7 A You had the right to see it if you knew it was  
8 there.

9 Q Right.

10 A Now, Mr. Clark --

11 Q There were no broadcasts after this?

12 A There were no broadcasts that named Mr. Rosenbloom  
13 after the ones I have told you about, starting --

14 Q After what?

15 A After the ones starting October 4 and continuing  
16 through to the next one announcing the arrest.

17 Q On the 5th?

18 A Right, at 8:00 a.m., it ended. Mr. Clark said  
19 yesterday that this was not hot news, since the complaint had  
20 been filed several days before. Well, I suggest to you it was  
21 not news at all until October 21, when people got to know about  
22 it, and then surely it was hot news because it was the first  
23 notice anyone had.

24 Now, that hearing was postponed to October 25. And  
25 the next reference to the case -- now there were these

1 broadcasts on the 21st setting the hearing. On October 25 was  
2 the next set of broadcasts, and the last of which complaint was  
3 made. There were these three, the October 4th arrest, the  
4 October 21st case set down for argument, the court announced  
5 a postponement to October 25. And so on that day there are two  
6 newscasts reporting the developments on that date. There is  
7 only one other broadcast, on November 1, to which I referred in  
8 reply to a question by Mr. Justice Stewart, and that simply no-  
9 body objects to it. It said that this alleged charge was to be  
10 decided by the court within ten or eleven days. There it is.

11           None of these broadcasts on October 21 or 25 named  
12 the defendants. If anyone had a recollection back to October 4  
13 of these arrests, there is no way he could know whether it was  
14 Mr. Rosenbloom or whether it was these two other fellows who  
15 it was announced were held in \$35,000 bail for the sale of  
16 pornographic literature.

17           Nothing in the record shows that a single individual  
18 listened or heard the WIP broadcast. We know that after the  
19 most offending of them, a suit was filed, WIP was not even men-  
20 tioned. We know that the plaintiff said that he never heard  
21 any of the broadcasts. And not a witness was produced who  
22 heard any of the broadcasts to this day, except one that I want  
23 to refer to in just a moment. Indeed, I think it would be well  
24 if I refer to him right now out of the order of my argument.

25           Mr. Rosenbloom nor his attorney -- and he obviously,

1 had an attorney very early in this matter -- ever contacted the  
2 station. They never asked for a retraction. They never asked  
3 for the right to say anything. I think I know why and I will  
4 tell Your Honors why.

5           There was one contact. Now, Mr. Clark was mistaken as  
6 to what brought about the contact. The record is extremely  
7 clear on that and has two witnesses on it. Mr. Clark said that  
8 there were complaints from many friends as to the WIP broad-  
9 casts. And so on October 27, he said, Mr. Rosenbloom went to  
10 WIP, was not permitted to see anyone but had one tape played  
11 back. That isn't the story in the record at all.

12           The story in the record is that he went to a restaur-  
13 ant where he met a friend named Chews who testified. Both he  
14 and Chews testified as to this. And Chews said to him, "Say, I  
15 heard a" -- you see, he was in the magazine business -- "Say, I  
16 heard a broadcast. They didn't mention any names. I heard a  
17 broadcast about somebody arrested, and they said that they  
18 ought to put that guy in jail and throw the key away."

19           First, let me say, there is no such broadcast by WIP.  
20 Every transcript of every broadcast was brought into the room  
21 and, adlibbing, was testified was not permitted. But he said  
22 that he heard this. Rosenbloom said, "Oh, that's me." Now, I  
23 suggest to Your Honors it probably wasn't our broadcast because  
24 if you look at the broadcasts on October 21 and 25, they don't  
25 mention arrests. But nevertheless this upset him and he made a

1 beeline to the station. That is what sent him to the station.

2 And when he came to the station, he said he wanted to  
3 talk to somebody about a newscast, and they have a regular line  
4 right in the lobby right to the newscasters for anybody who in-  
5 quires about newscasters. He wasn't denied anything. He was  
6 given a line and he called the newscaster, a man named Nate  
7 Wright, and he said to the newscaster, "I have been told there  
8 was something about me on WIP." According to the record, he  
9 didn't tell him what actually happened. And the newscaster  
10 said, "Well, you have to tell me the broadcast," and he said,  
11 "Well" -- and he must have just picked the 21st, because that  
12 was the day of the hearing -- "give me the one at noon."

13 So the newscaster went and got him the one at noon.  
14 Now, the testimony in the record of what was read, admittedly  
15 it was this one, so I would like to read Your Honors what was  
16 read to him. This is the broadcast at noon on November 21st:

17 "The United States District Court" --

18 Q What page is that?

19 A Page 387A, the first item, was the 90 second broad-  
20 cast. These broadcasts run from 90 seconds to 10 minutes.  
21 It reads as follows:

22 "In Federal Court today, two publishers and a dis-  
23 tributor of alleged smut literature will go before Judge Gould"  
24 -- that was in error, it wasn't Judge Gould -- "claiming they  
25 are suffering economic and financial hardship because of a



1 recent crackdown on such material."

2 I suggest to Your Honors that there was nothing in  
3 that to upset him. But his response that the court spoke about  
4 what he said concerning the United States Attorney is entirely  
5 true. He said to the newscaster -- rather the District Attorney,  
6 that the District Attorney had said something, and here is what  
7 he said. The District Attorney says that my publications are,  
8 and I quote him, "absolutely legal, absolutely nothing obscene  
9 about them" -- that is at 137A of the record -- "absolutely  
10 legal, absolutely nothing obscene about them."

11 Well, here was a newscaster, he said there was a  
12 public statement by the District Attorney; he knew, one, there  
13 was no public statement. He knew the District Attorney was  
14 prosecuting him at that moment, far from saying they were ab-  
15 solutely legal, there was nothing obscene about them -- he was  
16 under criminal prosecution and, number three, he knew there was  
17 a law suit by this very man who enjoined the District Attorney  
18 from proceeding with a criminal prosecution.

19 By that time, I suggest to Your Honors, this man was  
20 up to half-hour broadcasts. He had the conversation, he had  
21 gone back and searched out this, he found it, he read it to  
22 him, he had this other discussion, and then he hung up the  
23 phone. Now, I suppose he might have said, "Excuse me," before  
24 he hung up the phone. My friend says he didn't say excuse me.

25 But it is on that particular finding, that particular

1 incident that Judge Lord said that there was a request for re-  
2 traction or even worse, and it is on that that Judge Lord said  
3 he could sustain actual malice, and that is the only failure  
4 that Judge Lord found in the whole record, to sustain malice.

5 I suggest to Your Honors that if you read Mr.  
6 Rosenbloom's testimony there, if that is malice under any rule  
7 of law, then I haven't read the case that would sustain it.

8 Now, there never was request for retraction. The  
9 court of appeals, by the way, this is what it said about that:  
10 The evidence of the incident lacked both sufficient substance  
11 and clarity to meet the standards of actual malice and it  
12 amounted to little more than argument and a difference of  
13 opinion between plaintiff and one of defendant's employees, who  
14 I add was a part-time newscaster.

15 Now, Your Honors, here are the facts. I suggest to  
16 Your Honors that it is entirely clear that they involve matters  
17 of substantial public interest. These magazines are displayed  
18 on news stands. They are not obscene. But this particular  
19 magazine, the only one in the record -- my friend said the jury  
20 read several, he is in error -- there is only one in the record  
21 the magazine, this one was devoted to youth, youth and nudism.  
22 It has a big article to teenagers. It was displayed in drug  
23 stores. It was displayed on news counters, and I suggest to  
24 Your Honors that many parents would object to having their  
25 children go into a drug store for a bar of chocolate and see

1 this magazine, its inside cover just simply has a nude woman,  
2 with all parts exposed, other inside cover has the same.

3 Now, I know that is not obscenity, but I know an  
4 awful lot of the public consider that a matter of public con-  
5 troversy as to whether it should be displayed. And the charge  
6 was against display and sale.

7 Q What is the number of that exhibit?

8 A I am going -- by the way, it is not in the record  
9 I am going to supply it to the Court. It is D-2. I brought it  
10 down with me. I find none of the original records are here,  
11 curiously. It is D-1. It is marked D-2 for identification,  
12 D-1 finally, Mr. Justice Harlan.

13 Q When you say not in the record, do you mean not  
14 in the record here? It is not in the record --

15 A Oh, absolutely, Your Honor, or I wouldn't be  
16 presenting it. The petitioner advances that in this situation,  
17 in this situation a test of reasonable care is adequate, and  
18 this is what the judge below said. The plaintiff is protected  
19 by Pennsylvania libel laws without First Amendment strictures.  
20 And that is what the petitioner argued in the court below.

21 Now here he shifted his argument. He said you are  
22 entitled to constitutional protection, but only for reasonable  
23 care. In the court below there is not a mention by the peti-  
24 tioner of that, and the court adopted his view. But I think  
25 that is possibly academic because under either event, I think I

1 can show Your Honors that newscasters could not survive, at  
2 least under the present method of giving the public what I  
3 think the public has a right to know.

4 This Court decided that in an appropriate case thus  
5 far public official, public figure, the First Amendment protec-  
6 tion is needed to insure free press, to insure uninhibited  
7 robust and wide-open discussion, to prevent self-censorship, to  
8 prevent the chilling effect of knowing what this judge said --  
9 let me just tell Your Honors what this judge said was the obli-  
10 gation.

11 The judge said the news medium has the privilege,  
12 this is the charge, to report that event -- but the word "event"  
13 I supplied.

14 Q Was there a Pennsylvania state law used and ap-  
15 plicable only to the news media?

16 A No. No, Your Honor. Now, he says --

17 Q Is there a special Pennsylvania rule applicable  
18 to reporting of police court actions?

19 A There is of court action, it is not as liberal  
20 as the common law rule, less liberal than the common law rule.

21 Q What is the Pennsylvania rule?

22 A The rule is that you are charged with truth.

23 Q When you report there is no -- if you report the  
24 truth as to what some complaint said, you are privileged to do  
25 that?



1           A     You are privileged to tell the truth.

2           Q     Even though it is a repetition of what otherwise  
3 might be a libel?

4           A     I would say so.

5           Q     And how about reporting arrests, the charge?

6           A     Well, it just says the initial proceedings

7           Q     Well, can that be arrest and the charge or not?

8           A     I would doubt it, Your Honor. I would doubt the  
9 arrest in any event.

10          Q     Well, if you report an arrest --

11          A     But the test the court applied here was the cor-  
12 rect Pennsylvania rule, a rule of reasonable care, but subject  
13 to state standards.

14          Q     Well, what is that --

15          A     And let me read you what he said, I think this  
16 may give you --

17          Q     What does that rule apply to in Pennsylvania?

18          A     Well, it applies to --

19          Q     What kinds of actions generally?

20          A     Well, here is what he said: The news medium has  
21 the privilege to report an arrest, but the news media must do  
22 so in the exercise of reasonable care. It must check its ac-  
23 curacy and it must determine whether or not it's true or false.  
24 This was the charge that went to the jury. Apparently it was  
25 checked at the source with Captain Ferguson, said he. Should

1 the defendant have gone further, and that is the question he  
2 left to the jury.

3 Q Do you know, Mr. Segal, whether that rule of  
4 reasonable care that the judge said applies to reporting  
5 police actions applies to reporting of other events?

6 A Yes, it does, Your Honor.

7 Q You mean generally a newspaper should use its  
8 reasonable care in reporting news of any kind, is not subject  
9 to --

10 A I really don't know the answer to that It was  
11 not involved here and I am not a libel lawyer. I would say  
12 that when I was in law school that was the rule.

13 Q It was the rule?

14 A Yes.

15 Q Newsworthiness, any newsworthy items, if the  
16 newspaper uses reasonable care, it can tell a lie? A libelous  
17 lie?

18 A No, I would have to recant on that. I would say  
19 that -- first of all, we have the fair comment rule. Second, I  
20 would say that you are held to a high degree in Pennsylvania,  
21 and I think -- I am thinking of a case now in which -- no, I  
22 can't think of a case. I can't think of a case in which a  
23 newspaper was held, after reasonable care.

24 Q The reasonable care rule applies to the reporting  
25 of public activities?

1           A     Yes, I think so, in Pennsylvania.

2           Q     Otherwise if you tell a lie and it is libelous,  
3 you are liable?

4           A     Otherwise you are liable.

5           Q     You can be prosecuted and --

6           A     Right.

7           Q     -- are obligated to make amends?

8           A     Right.

9           Q     But none of that -- I just want to make sure. Mr.  
10 Segal -- has any constitutional underpinning, either state or  
11 federal?

12          A     No, the judge made that crystal clear. He said  
13 that --

14          Q     I know as for federal, but how about state?

15          A     Well, he was talking about federal -- about  
16 state. He said the plaintiff is protected by Pennsylvania  
17 libel laws without First Amendment strictures, because  
18 Pennsylvania libel laws recognize --

19          Q     Don't you have something comparable to the First  
20 Amendment in your state constitution?

21          A     We have a more innocuous clause but it has never  
22 been held to be a stricture on the application of our libel  
23 laws. I am sure there is no case in Pennsylvania that so holds.

24                Now, I say to Your Honors that the record will show  
25 the way these broadcasts are gotten up. Little pieces are

1 pasted in in a hurry. It doesn't show in the fine way it is  
2 printed. There are all sorts of things crossed out. I needn't  
3 tell Your Honors that time pressures when people have to go on  
4 every half hour -- I have asked that these now be put in the  
5 record so Your Honors can see them.

6 Well, now, I have very little time left, and therefore  
7 I should like merely to say to Your Honors as to access, this  
8 man had access. Anybody arrested in a headline item, the radio  
9 stations are averse to have them appear, but Mr. Ross, the manager,  
10 testified that they find they can't get people who have been  
11 arrested to testify. Their lawyers tell them to say nothing.  
12 That is why he didn't want to come on the radio here. That is  
13 why he never complained. That is why his lawyer never con-  
14 tacted not only us or anybody else.

15 I want to say, in conclusion, that I believe that  
16 when he got into this highly controversial area of items which  
17 a substantial number of the public objects to, he assumed the  
18 risk that if he became involved in a public controversy, that  
19 the newspaper, if it was to survive with our modern method of  
20 newscasting, then he would have to be subject to the rule that  
21 unless there was calculated falsehood by the newspaper, unless  
22 it acted with reckless disregard of the truth, unless it acted  
23 with a high degree of knowledge of the likelihood of the  
24 falsity, that having become the subject of a public controversy  
25 in an area which he entered, knowing of its substantial public

1 interest, he, different from the other 200 million members of  
2 the public, became subject to a rule which is necessary if the  
3 freedom of the press in this kind of broadcast is to survive  
4 without which I suggest to Your Honors that with verdicts  
5 today going to three-quarters of a million dollars to a man  
6 whose highest income in his lifetime was \$5,700, would have to  
7 stop giving their present kind of broadcast and find some  
8 other way to meet the public's right and need to know if the  
9 public is to meet the obligations of a modern society today.

10 Q You recount from the record, from what you say,  
11 I assume you didn't try the case below?

12 A No, I did not, Your Honor. We were not in it  
13 at all. Our firm was not.

14 Q Do the records indicate, can you account for  
15 this \$750,000 verdict?

16 A Yes, I can very clearly, Your Honor. The judge  
17 gave complete and abysmal emphasis to the fact that this man  
18 came to the station and the phone was hung down on him. The  
19 judge said that that was worse than a retraction. His opinion  
20 shows how hotly he felt about it. I suggest to Your Honors  
21 that the court of appeals was right and Judge Lord was wrong.  
22 I have a high regard for Judge Lord. He was in our office  
23 before he went on the bench. But he was just in error in this  
24 situation, and that exuded to the jury.

25 Q Could Pennsylvania have any law especially



1 applicable to publications available to children or to teen-  
2 agers, like some states?

3 A Gee, I don't know, Your Honor. I am told by my  
4 associate that we do.

5 Q So that perhaps there is some evidence in our  
6 cases anyway that perhaps the states are free to deal with  
7 publications designed for young people?

8 A Oh, I would say that under --

9 Q For example, that this particular magazine that  
10 you have could be banned in New York or Texas under their  
11 special statutes relating to publications displayed or sold to  
12 people under 16?

13 A I would have doubt whether this Court would sus-  
14 tain it under the laws of --

15 Q Under the statutes?

16 A Yes. I would doubt whether this Court would sus-  
17 tain it. But under the laws of many states I believe that a  
18 magazine, all four covers of which have nudes, might be re-  
19 stricted to people under a certain age, and a display might be  
20 restricted --

21 Q Well, Mr. Segal, the statute we sustained was  
22 limited to distribution to persons under 17.

23 A But I think --

24 Q The specific terms lead precisely to that kind  
25 of --

1           A     But Ginzberg's publications were far worse than  
2 these.

3           Q     This is a different Ginzberg.

4           A     In the case, yes. Well, I would say--

5           Q     I was just wondering if you have -- there has  
6 never been certain in this litigation whether that particular  
7 magazine would actually be held to be obscene with respect to  
8 younger children?

9           A     No, and indeed the judge in this case dismissed  
10 a year later the criminal prosecution on the ground that it did  
11 not violate the Pennsylvania obscenity laws and also that it  
12 would be proscribed by the decisions of this Court.

13           I would change my mind. I would say that this maga-  
14 zine as it stands today directed particularly at youth, with  
15 articles for teenagers so labeled, would be proscribable by  
16 many state statutes and those statutes would be supported by  
17 this Court insofar as they apply to children of whatever tender  
18 years are.

19           Q     I would like to ask you one more question be-  
20 fore you sit down. I am not clear, are you claiming that the  
21 Times in the Sullivan rule should be extended to this case?

22           A     I am saying, Mr. Justice Harlan, that when Your  
23 Honors extended the Times case from the public officials, for  
24 the public figure, that what all of the scholars have said, and  
25 what all of the lower court judges have said is the fact, that

1 Your Honors are necessarily extending it to where issues of  
2 what Your Honor called substantial and important public interests  
3 were involved, that in those issues the actual malice standard  
4 would be applied.

5 Now, Your Honors have used the word "or" and you have  
6 used the word "and," and I don't stand on that. I would rather  
7 stand on the fact that anyone who reads those opinions would  
8 conclude what the scholars have uniformly concluded, what this  
9 court of appeals concluded, what the court of appeals in the  
10 McLean case concluded, what the court of appeals in United  
11 Medical concluded, that Your Honors, when you left the post of  
12 public official and went to public figure, you were in effect  
13 saying that the public's right to know extended to public  
14 issues of importance of significant matters.

15 Q Then that means that any newspaper or radio  
16 station can pick out any one of the 200 million Joe Dokes and  
17 justify the fact that they have printed a news story that is  
18 false, a false comment, as long as it is not malicious within  
19 the terms of the rule, that they would be protected as long  
20 as --

21 A No, I would not say that, Your Honor.

22 Q Because the newspaper itself creates a public  
23 figure, take any Joe Dokes in the country and create an immunity  
24 for itself under the statute in publishing a false story.

25 A May I give you the corollary of that and then

1 come back, Mr. Justice Stewart. Take the Walker situation.  
2 Suppose, instead of just Walker suing, you had a university  
3 authority suing on the same story, you had a student leader  
4 suing on the same story, and then you had an anonymous student  
5 who because of articulateness and his leadership he merged from  
6 that incident as the man who really thereafter was able to lead  
7 the riot.

8 Now you have these four people, admittedly one was  
9 completely anonymous. If I were to answer your question to the  
10 affirmative, I would have to say that this newspaper in pub-  
11 lishing that same story had to say, "Well, we can publish safely  
12 as to Walker, maybe as to the university official if he is high  
13 enough to be a public figure, probably not as to the student  
14 leader, but certainly not as to the anonymous man." How could  
15 the newspaper operate?

16 Now, I say that if Your Honors could show that in  
17 order to involve an individual they created a public issue, I  
18 think probably that might demonstrate actual malice. But if  
19 you have an individual who becomes involved in something the  
20 public has the right to know, then freedom of the press under  
21 the First Amendment demands that it be held for fault but that  
22 that fault be calculated falsehood or a reckless disregard.

23 Q Well, under our system of free enterprise and  
24 free press, it is up to each newspaper publisher to decide  
25 what he thinks the public has a right to know, including I suppose

1 how many showers Joe Dokes took this afternoon or when he  
2 brushed his teeth.

3 A I suggest to Your Honor that he does at his  
4 peril, because I would accept the test that this Court has set  
5 down in different language. It happens that the language that  
6 Mr. Justice Harlan used, in which he said that it had to be a  
7 matter of significant and important interest to the public, I  
8 think that is right. I think backyard gossip is not. I think  
9 if you want to engage in backyard gossip, it may be even with-  
10 out a public figure, you may be liable. This Court hasn't yet  
11 said that if you discuss backyard gossip about a public official  
12 -- I know a case is coming up on a matter that was spoken thirty  
13 years before or more -- this Court hasn't yet said that the  
14 incident Your Honor presented, the actual malice will apply  
15 even as to a public official, let alone a public figure. I  
16 would say it certainly wouldn't apply as to Joe Dokes.

17 Q Supposing your argument is not accepted that the  
18 New York Times rules ought to be accepted, what would be your  
19 position then?

20 A My position --

21 Q The state libel laws control or that there should  
22 be some special constitutional protection which has to be im-  
23 plicit in what Mr. Clark argued?

24 A I start with a certainty, Mr. Justice Harlan.  
25 that if this Court holds under present conditions where half a



1 million verdicts and million dollars and three-quarters of a  
2 million have become par for the course, no station and no  
3 newspaper can operate as it today operates. I think they have  
4 got to sit down and decide what they are going to do. I am  
5 sure that if I were counseling WIP, I would say you would  
6 have to give up your hot news, you have to find a different  
7 way to do it, because this judge has said that every time there  
8 is an arrest, you owe an obligation of investigation. You are  
9 handed an arrest two minutes before broadcast. What do you do?  
10 You call the policeman; he's not there. You call the D.A.;  
11 he's not there. You let it go until the next day; the next  
12 day it is not hot news, so you let it go entirely.

13 I suggest to Your Honor that with twenty items on a  
14 broadcast in a single day, I looked at twelve of them under  
15 the judge's standard we would owe an obligation of investigation  
16 before we ran the newscast. Can you operate that way? I  
17 suggest not.

18 So I say to Your Honor that it looks as if the public  
19 interest in its time -- and I suggest that there has never been  
20 a time when news has been as important -- dissent, protest,  
21 counterprotest, people are avid for news, they act more quickly  
22 on news than ever before in the history of our country. I  
23 think news is more important today than ever -- that at such a  
24 time, and the jury showing what they have indicated -- and I  
25 suggest to you these verdicts are more than some newspapers

1 cost. They are more than most radio stations cost -- that at  
2 such a time the public interest is served by protecting the  
3 individual if he becomes involved in a matter of significant  
4 and important public interest, protecting him against calculated  
5 falsehood, protecting him against reckless disregard and giv-  
6 ing the newspapers what they need and the radio stations to  
7 operate.

8 Q Are you saying -- the Pennsylvania law has been  
9 in being for a long time?

10 A Yes.

11 Q And you simply say that the reasonable care  
12 standard is not sufficient protection?

13 A Under modern conditions, Your Honor. I sit on  
14 an insurance company board where --

15 Q It is not in your view?

16 A Yes. It is not in my view under the developments  
17 of this day, Your Honor, the developments of this day.

18 Thank you, Your Honors.

19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Segal.

20 Mr. Clark, we will make an adjustment to your time in  
21 relation to Mr. Segal's argument in chief, after all of the in-  
22 terrogation. You may get enlarged on the same basis.

23 ARGUMENT OF RAMSEY CLARK, ESQ.,

24 ON BEHALF OF PETITIONER -- REBUTTAL

25 MR. CLARK: Thank you, Mr. Chief Justice.

1           Let me say a word or two about the facts first. I  
2 don't argue facts. The record can speak for itself But some  
3 review is indicated in the nature of the argument on rebuttal.

4           Mr. Segal complains about our reference to headline.  
5 on these broadcasts. There has been no complaint with refer-  
6 ence to headlines before. It is clearly in the record, page  
7 26A. It is in our briefs. It was testified to at the trial,  
8 and it characterized the nature of the broadcasts.

9           He complains our describing the broadcasts as series.  
10 They were clearly series. They would go on every thirty  
11 minutes after they began. I describe them not as a single  
12 series but as two series that over a period of time occupied  
13 almost a month, beginning October 4 and 5 and picking up again  
14 October 21 and going to November 1.

15           I think his reference to the record where Mr.  
16 Rosenbloom met someone in a cafe who described the broadcast  
17 that he heard and his reaction shows the real problem of the  
18 little man. If you are Edwin Walker or if you are Wally Butts  
19 or someone and there is something derogatory said about you,  
20 your phone rings all night, the press wants to get your views  
21 about it, and they are anxious to hear from you. If you are  
22 George A. Rosenbloom, nobody calls. You find out from your  
23 friends. You find out when you go back around to service an  
24 account and they won't buy from you any more. You find out  
25 you're ruined and then you have got to find out why, and you

1 are going to have to do it on your own because you're a little  
2 man and nobody is going to take care of you. You are not a  
3 public figure.

4 Q Mr. Clark, there may be a difference between a  
5 newspaper and a radio in this respect, because of the obliga-  
6 tion of radio to give equal time, an obligation that is not  
7 shared by a newspaper, and that obligation means that your  
8 client would have, or his friends and supporters, would have  
9 access to the radio, wouldn't it?

10 A I think the equal time theory in the law shows  
11 that we are prepared to require the radio to try to be fair,  
12 but equal time refers to opinions really, the editorialization.  
13 Now, this did smack of sensationalism, in the views of the  
14 trial judge, and it was editorializing. But I don't think  
15 there has been any extension of equal time to the idea that in  
16 news reporting, people as to whom news is reported have an op-  
17 portunity to come on and say something. If a commentator has  
18 an editorial and he discusses you in an issue, then you have an  
19 opportunity, but certainly in my experience there has been no  
20 equal opportunity time on the factual news broadcasting, and I  
21 am not sure how you would function with something like that.

22 Mr. Rosenbloom couldn't even get them to discuss the  
23 issue with him, how he would have gotten -- they hung up on  
24 him. That is how he can reach the --

25 Q Well, I understood Mr. Segal to say, and perhaps

1 he was just commenting on his general knowledge, but I under-  
2 stood him to say that the record showed that the radio stations  
3 are very anxious to have people like your client come on their  
4 news broadcasts and that they can't --

5 A I think he was commenting that reporters find --  
6 my understanding of his comment was that reporters find that  
7 people who are charged with crime don't want to discuss that  
8 with them, that their lawyers advise them not to discuss that  
9 with them, and that may be generally true. What that has to do  
10 with this case, I --

11 Q Well, it may have to do with the difference be-  
12 tween a radio and a newspaper. A newspaper, we all know, if it  
13 so wishes, has the last word. It prints an editorial and it  
14 has no obligation to give equal time, equal space to an oppos-  
15 ing point of view. But a radio station and a television station  
16 is in quite a different legal position. It has an obligation  
17 to make its own facilities available for an opposing point of  
18 view.

19 A I don't believe there is any law that indicates  
20 that there isn't a right to equal time for news broadcasting,  
21 but even if there were I think Mr. Rosenbloom's plight is  
22 clearly illustrated in this situation. Even Mr. Segal said it  
23 was October 21 that he first discovered about the broadcasts.  
24 That doesn't mean he wasn't hurt. He was deeply and desperately  
25 hurt, but how could he know? He can't listen to every station



1 that is broadcasting. How is he going to find out? He finds  
2 out when somebody tells him, and then he goes down and he tries  
3 to talk. He is a little man. The people at the station, they  
4 get a part-time man to talk to him on the telephone that he  
5 can't even see, and that person hangs up. It is very import-  
6 ant, too, I think, that we realize that this was submitted to  
7 the jury on a single charge. There was no effort by the  
8 defense in the trial of this case to say was this allegation  
9 true or false or obscene. It was all submitted on a single  
10 charge. The whole period of time, had there been some distinc-  
11 tions there, then I think maybe this Court could try to make  
12 some distinctions between the separate allegations. But when  
13 you take them all as a whole, they wind up leaving the impres-  
14 sion that the man in the cafe gave to George Rosenbloom. They  
15 want to lock that guy up and throw the key away, and that is  
16 the best he can find out as an individual.

17 Q But do you think the alleged libel is to be  
18 evaluated from what someone thought was said or what was  
19 actually said?

20 A No, the libel is to be evaluated on what the jury  
21 had before it in the record, all of this material. I am just  
22 saying that the impression that was left, as the trial judge  
23 showed in his opinion. I don't say his charge to the jury --  
24 he didn't say anything about retraction in his charge to the  
25 jury. That all came after the jury verdict, when he wrote his

1 opinion.

2 Q On what theory did the trial judge admit in  
3 evidence the statement of this friend whom he met at the  
4 restaurant as to what he thought he had heard?

5 A Apparently there was no objection to it, and  
6 certainly the respondent shows no concern about it at this time  
7 because he is the one that injected it into this hearing, and  
8 not us. But I assume it was to show how it was that Mr.  
9 Rosenbloom came to inquire of the radio station, why he went  
10 down to the radio station to see what they played.

11 I think it is interesting to note, too, that the  
12 eight women on this jury, that they saw that magazine and we  
13 can tell what impression it had on them by the verdict they  
14 gave.

15 Q There were eight women on the jury?

16 A Yes, sir. Let me now state again my view of the  
17 law. Before I do, I think it is important to realize that Mr.  
18 Rosenbloom was put out of business. He lost 34 of 60 accounts  
19 right away, and he subsequently had to go out of business.

20 I think there are going to have to be some lines  
21 drawn on New York Times, and I think the First Amendment will  
22 require these things, that where the discussion is of an issue  
23 that it uninhibited, robust, wide open, you can discuss nudism,  
24 you can discuss magazine distribution; that to have actionable  
25 defamation, though, of a public official or public figure,

1 because public figures are part of the story, they are part of  
2 the process of learning the truth, there it can be done only  
3 where there is actual malice, only where there is actual  
4 malice can recovery be made for damatory actions.

5 But where you come to the individual, the private  
6 person, who has no chance to engage really in robust or wide  
7 open discussion of these issues with Metromedia, that the  
8 power of technology and communication, the power to debate  
9 these issues in the marketplace of public opinion for private  
10 citizens in this country is very, very limited, and they can  
11 be crushed, as was Mr. Rosenbloom.

12 So actual defamation of a purely private person such  
13 as he can be maintained only where there is a lack of reason-  
14 able care. That happened to be the Pennsylvania standard, it  
15 was a standard that was applied here. But to support the  
16 punitive damages, there was also a charge of malice, and the  
17 jury found actionable damages and it found malice under the  
18 Pennsylvania law, and that charge was very similar to the  
19 charge in the Butts case, and as you know the Butts case to  
20 recover was allowed to stand. I think that would be here be-  
21 cause there was no way for the attorney for Mr. Rosenbloom at  
22 that time to ever believe that New York Times vs. Sullivan  
23 could be extended from the commissioner of police in Montgomery  
24 County to George A. Rosenbloom when he was confronted by both  
25 the police and the press in opposition to his livelihood

1           Q     Could I go back to something you said yesterday  
2 in colloquy with Mr. Justice Brennan. You started off, as I  
3 got it, by saying that you recognize that sometimes a consti-  
4 tutional rule, federal constitutional rule, independently of  
5 state law is necessary in a case like this.

6           A     That's my opinion of where the law could go. It  
7 is not there at this time, in my judgment.

8           Q     So you don't stand on the proposition that --  
9 which was his question, as I understood it -- that whatever  
10 the state law may be in this non-public figure attitude, state  
11 laws should be allowed to take their course? You don't argue  
12 that?

13          A     I don't argue that. I think Time vs. Hill shows  
14 the problems there, but I think there is immense difference  
15 between defamation --

16          Q     What you are really arguing for then is the  
17 constitutional rule, the Butts rule?

18          A     No, sir, I am really arguing the constitutional  
19 rule that you have expressed in at least two opinions, that  
20 negligence be the standard, where it is a private individual.  
21 As to the masses of our people, they don't have any opportunity  
22 to really debate. There is no marketplace in which their  
23 opinions can be tested against Metromedia, and therefore anyone  
24 who will defame them must use reasonable care to ascertain the  
25 truth of what he says. The purpose of the First Amendment is

1 truth.

2 Q Then the circumstance that Pennsylvania has the  
3 reasonableness test is just a circumstance. You accept that as  
4 the constitutional rule?

5 A It would fall within what I would consider an  
6 acceptable federal constitutional rule and therefore it would  
7 be any lesser rule any state wanted to impose or would be  
8 adequate. But this rule requires reasonable care, even for  
9 the private citizen.

10 Q A less rule would be adequate?

11 A That is any rule that didn't impinge more great-  
12 ly on free speech.

13 Q Don't you think it is just sort of coincidence  
14 that the Pennsylvania common law rule happend to meet your  
15 view of what the federal constitutional standards should be?

16 A No, sir, I don't --

17 Q I thought your argument was -- well, I didn't  
18 think so, but you have certainly made the argument that in  
19 cases of purely private -- suits for defamation of private  
20 citizens, the federal constitution is not involved at all. But  
21 if it is, if it is, then it certainly requires no more, no  
22 different or higher, no more stringent a standard than the  
23 Pennsylvania common law rule as it now does provide. That was  
24 what I thought your argument was before --

25 A That would perhaps be my argument as an advocate



1 in this case. Mr. Rosenbloom's judgment here would be affirmed  
2 under any of those tests. Mr. Justice Brennan asked me my  
3 view as a lawyer, my view of it as a lawyer is that the con-  
4 stitution does provide some protection to freedom of the press  
5 and freedom of discussion, even of the little people. That is  
6 important to the discovery of truth, too. But where you are  
7 going to discuss the little people, you are going to have to  
8 exercise reasonable care, because the little man can't show  
9 actual malice.

10 How can George Rosenbloom show that there was actual  
11 malice in Metromedia? They never heard of him before. They  
12 don't know him. They never met him. He can't see them face to  
13 face. He has to talk to them over telephones.

14 Q Do I correctly infer from what you said that  
15 your suggested test where the private citizen is involved  
16 would be a test applicable only where the alleged libeler is  
17 a newspaper or other member of the news media? Would it apply,  
18 for example, between private citizens where a libeler is, say,  
19 my nextdoor neighbor?

20 A Yes, it would, Mr. Justice. My view is that  
21 the central purpose, as you stated so beautifully, the First  
22 Amendment is the activities of government, that they really be  
23 open to full, vigorous discussion and debate so that the truth  
24 may be known. But there is some value, too, in discussion in  
25 knowing the little things about little people. But if you

1 discuss them in a way that does more than invade their privacy,  
2 that actually defames them and injures them and puts them out  
3 of business, you are going to have to use reasonable care, be-  
4 cause we do have that regard for the individual here, too.

5 Q Why should there be any constitutional rule at  
6 all, federal constitutional law at all as between private  
7 persons, whereas one person is liable to another person? Why  
8 shouldn't just the existing law of libel be permitted to stand?

9 A Well, I don't think the Court needs to reach  
10 that case here, and I am sure that it won't feel that duty it-  
11 self. In my judgment, though, the discussion of the issues  
12 is valuable. That is how you find the truth, and we need to  
13 have some room there, but we do need reasonable care, because  
14 it is awfully important that the press exercise care, too, it  
15 is a concentration we have there, if there is no standard of  
16 care, if you have to show actual malice, how will we get ex-  
17 cellence or professionalism in our efforts to report the truth?

18 Q Mr. Clark, in your colloquy with Justice Harlan,  
19 I thought you said something to the effect that the First  
20 Amendment was only intended to protect the truth.

21 A No, Your Honor, I said that the purpose of the  
22 First Amendment is the truth. I think discussion has to have  
23 wide breathing room, and certainly everything I have tried to  
24 argue indicates that. But there is nothing in the First  
25 Amendment that says that our purpose is to permit untruthful

1 statements, purposeful untruthful statements, malicious state-  
2 ments.

3 The purpose of the First Amendment is the truth, to  
4 be sure that the truth can be discovered because it is very  
5 difficult to find. We have to give it a wide, wide breathing  
6 room. Where public officials or public figures are involved,  
7 actual malice should be a rule, as has been stated by this  
8 Court in Butts and Walker and New York Times. But when it is a  
9 private individual, if you feel you have to comment on them  
10 rather than the issues which they are engaged in, and you have  
11 got to have a very vigorous discussion of the issues without  
12 defaming an individual. But if you go to the private individual,  
13 then you must reasonable care.

14 Q Of course, your premise, unconstitutional rule  
15 is called for, the federal rule is called for, carries with it,  
16 I think, the obligation of this Court, whatever the rule is,  
17 to take a look at this record and assess it for itself, doesn't  
18 it?

19 A The --

20 Q That is what we said in New York Times vs.  
21 Sullivan, and that is what we did.

22 A We cherish free speech and I think that is in-  
23 dicated here.

24 Q That carries with it.

25 A I think the fact that the defendants did not ask

1 for special charges or special instructions or special findings  
2 on the various broadcasts indicates that the court will have to  
3 look at the thing as a whole, too, as I am sure some of the  
4 customers, the buyers from Mr. Rosenbloom did, because they  
5 heard them all and they knew that this was Mr. Rosenbloom, the  
6 man they knew.

7 Q Suppose the remitterer had not been awarded, do  
8 you think that this record would sustain under any constitu-  
9 tional rule a \$750,000 verdict?

10 A Well, I think we have sustained verdicts of that  
11 dimension. I think it is impressive that the jury felt that  
12 an individual had been so offended.

13 Q The New York Times verdict, as I recall it from  
14 recollection, was \$500,000, which led obviously to the chain of  
15 events that resulted in that particular constitutional rule  
16 that ended up with public officials.

17 A That is true. And I think the biggest verdict  
18 of all was in the Butts case, which this Court permitted to  
19 stand.

20 Q Did I understand, Mr. Clark -- I'm sorry, had  
21 you finished your answer?

22 A Yes.

23 Q Did I understand you to be -- that your view  
24 is that there is no constitutional difference between defama-  
25 tion published or uttered by a newspaper or radio station on

1 its news program, on the one hand, and defamation uttered by a  
2 private citizen on the other? In other words, if I say my  
3 neighbor up the street, Mrs. Jones, is a prostitute, that I  
4 am protected by the First Amendment even though that is false,  
5 so long as in the exercise of ordinary care I heard she was  
6 and just casually and untruthfully repeated that, that I am  
7 protected --

8 A I think that may be somewhat implicit there. We  
9 talk about free speech and we talk about free press, and we  
10 don't --

11 Q You don't distinguish in --

12 A I think they are both valuable and important,  
13 and I think that reasonable care though, where the private in-  
14 dividual is concerned in mass society, it is going to be es-  
15 sential to human dignity. I just don't know how the little man  
16 can survive if the press decides to go after him. You never  
17 show actual malice.

18 Q Or the little woman?

19 A Or the little woman. We need a word that covers  
20 both -- the little "it."

21 Q Mr. Clark, I am interested in that testimony on  
22 page 26A. Could you put your eye to that for a moment. That  
23 is the testimony relating apparently to the first broadcast.  
24 Taking the first sentence, that is the sentence in which they  
25 refer to confiscating 1,000 allegedly obscene books. If that



1 is all they had said, the end of that sentence --

2 A The next sentence, Your Honor, says and confis-  
3 cated --

4 Q I'm talking about the first one, well, the  
5 first two sentences, particularly the one "police confiscated  
6 1,000 allegedly obscene books at Rosenbloom's home," and so  
7 forth. Would that be lieblous?

8 A The first --

9 Q Or is it a recital of a fact?

10 A The first two sentences would probably be all  
11 right under the protection of the First Amendment. I think  
12 they are reporting a news story, the police did do these things.  
13 But the second two involve quite different considerations, but  
14 the headline begins with the characterization "Crakdown on  
15 Smut Merchants," there were on that date seven or eight arrests  
16 and material received on October 1. Mr. Rosenbloom was only a  
17 smart of that, a very small part of the material seized. There  
18 were twenty people arrested that day.

19 Q Well --

20 A And this enlargement of his role, this character-  
21 ization of him is not going to raise him in the esteem of his  
22 customers or his fellow man.

23 Q If you say that the first two sentences are  
24 probably protected utterance, the next sentences in which they  
25 are describing this whole episode, involving, as you say,

1 twenty men, the next two sentences don't describe Rosenbloom  
2 at all.

3 A Well, I am not sure that the listener, having  
4 heard of George A. Rosenbloom and having heard this all run  
5 together is going to assume that they are talking about anyone  
6 else. I think even Mr. Segal said if you take that sentence  
7 out of context, can we really assume that the radio audience  
8 takes it out of context? You are driving along in your car  
9 and you hear George A. Rosenbloom and that they seized 3,000  
10 obscene books, and they are cracking down on smut merchants.

11 Q You state at the end of your brief "for the  
12 foregoing reasons, the court of appeals decision should be  
13 reversed and the case remanded and direct a judgment be  
14 entered for the plaintiffs." How much?

15 A For the actual damages or general damages, as  
16 they are called in Pennsylvania, \$25,000, and the punitive  
17 damages, as reduced by the miniature to \$250,000.

18 Q You are not asking for the entire \$750,000?

19 A No, sir.

20 Q On what basis do you think the court had a right  
21 to reduce it to \$750,000, if your argument is --

22 A Your Honor, we haven't really raised in our pe-  
23 tition for certiorari the power of the court to reduce it, and  
24 in -- or in the court below, so if that is -- that is something  
25 that is really not here on the record.

1 Q Do you think evidence should be admitted as to  
2 the worth of a radio company when a suit like this is against  
3 them, a suit for damages? Other than some in the country,  
4 some coun't pay a \$250,000 judgment and continue to exist.

5 A Well, I imagine there are, Your Honor, that  
6 was a ruling of the trial court and it is here without objec-  
7 tion at this level.

8 Q Well, you are accepting then the \$250,000?

9 A That is the status of the case in this posture,  
10 yes, sir.

11 Q The only way you could have challenged that is  
12 cross-appeal, I assume?

13 A I think we would have an obligation to raise  
14 that as a basis for our --

15 Q You don't think this Court should adopt some  
16 kind of rule, do you, that would limit the amount that can be  
17 recovered in damages?

18 A Well, I haven't really considered that, Your  
19 Honor, and I think I would have to to be helpful to the Court.  
20 That may be something down the road if -- I don't think you  
21 can abridge free speech. I think we have to live by the First  
22 Amendment. In fact, I think we are going to be a lot better  
23 off if we insist on it.

24 Q Of course there might be something better than  
25 trying to decide between the mythic public figure and the

1 mythic public official.

2           A     Well, there may be another test. The only  
3 other test I can see is the newsworthy test, the issue test,  
4 and I don't believe distinctions can be made there. I think  
5 when the news broadcasts something, it is ipso facto news-  
6 worthy, and I think really what defamation is about is people  
7 and reputations, and that is where the hard line will have to  
8 be drawn between the private people -- we are not within the  
9 original contemplation really of the First Amendment in this  
10 sense. We are not scrutinizing the conduct of public of-  
11 ficials here, and the mass power of the media that they can't  
12 answer or really debate with.

13           Q     How do you think -- what kind of rules do you  
14 think should be established for juries to be told that they  
15 have got to decide whether the man is a public figure?

16           A     Well, at first, if he is a public official, I  
17 think that is pretty clear. I think if he is a public figure,  
18 then the test might be whether his history has been such that  
19 the story could not have been meaningfully reported without  
20 his inclusion, where there is something about it -- how could  
21 you report the University of Georgia football story without  
22 referring to the coach. Clearly, General Walker's involve-  
23 ment was of the most important newsworthiness at Old Miss.  
24 Here is a man who had been a commander in Germany, who had  
25 been at Little Rock at the time of the integration-desegregation

1 of Central High School, who had been on television a week be-  
2 fore in Dallas advising Governor Ross Barnett on how to act.

3 I think the question is whether the person has an  
4 identification in the public view in the community involved,  
5 among the people whom he is defamed, that makes his inclusion  
6 in the story newsworthy.

7 Now, here there were many other people arrested.  
8 They are not mentioned by WIP, just George A. Rosenbloom.

9 Q Well, a football coach is usually a pretty  
10 public figure.

11 A Yes, I think so. I don't see how you could  
12 have reported the story on the University of Georgia without --  
13 and the football team and the allegations there as to --

14 Q He is nearly as public as General Walker.

15 A Well, maybe moreso in some parts of the country.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Clark.  
17 Thank you, Mr. Segal. The case is submitted.

18 (Whereupon, at 11:22 o'clock a.m., argument in the  
19 above-entitled matter was concluded.)

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