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# THE FIRST AMENDMENT IN THE SECOND CIRCUIT: REFLECTIONS ON *EDWARDS v. NATIONAL AUDUBON SOCIETY, INC.*, THE PAST AND THE FUTURE

FLOYD ABRAMS\*

## INTRODUCTION

So often in its first century has the Court of Appeals for the Second Circuit led the nation in the articulation of legal principles that it comes as no surprise to us when it does so again. But we pay a price for our expectations. As readers of Second Circuit opinions, we become jaded by the court's accomplishments—as if Ricky Henderson added one more stolen base to his record or Pete Rose eked out yet another hit.

Some decisions that are recognized in their own field as being of the highest significance consequently fail to receive the more general legal recognition they deserve. In this offering I discuss one such case—a ruling, both creative and controversial, of the Court of Appeals in 1977 which remains a landmark in both libel law and first amendment law and which typifies, in my view, the extraordinary vision of the Second Circuit.<sup>1</sup>

### I. *Edwards v. National Audubon Society, Inc.*

*Edwards v. National Audubon Society, Inc.*,<sup>2</sup> was a libel case that addressed an intriguing constitutional issue: when a newspaper publishes an article containing a false and defamatory charge made by one prominent public figure about another, can the newspaper itself be held liable if it did not endorse the charge *and* if it did not believe it? The last element of the question brings the is-

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<sup>1</sup> Cynical readers may be slow to accept my assurance that my role as victorious counsel in the case had nothing to do with my selection of it for adulation in this offering. The case, as lawyers say, speaks for itself; so, I hope, will this piece.

<sup>2</sup> 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

sue outside the realm of *New York Times Co. v. Sullivan*,<sup>3</sup> for all the constitutional protection afforded by that case to vindicate this nation's "commitment" to "uninhibited, robust" debate,<sup>4</sup> one type of defamatory speech *not* protected by *Sullivan* is a false statement of fact voiced with knowledge of its falsity or with serious doubts as to its truth. The moment a journalist testifies that he did not believe what he wrote was true, or the moment a jury decides, regardless of what the journalist testifies, that he wrote something he knew or suspected was untrue, *Sullivan* protection ends.

But that is the background for *Edwards*, not its resolution. What if the false statement was published simply because of the position or authority of the speaker? Or because of the newsworthy character of the charges? And suppose the newspaper does not endorse the charge at all, but simply reports it, fairly and dispassionately? It is these questions that *Edwards* addressed and answered.

The facts of *Edwards* involved little dispute.<sup>5</sup> The litigation originated in the heated controversy over the effects of the insecticide DDT. Officials of the National Audubon Society (the "Society") were concerned that pro-DDT scientists were distorting an increase in the Society's annual "Christmas Bird Count" statistics in an effort to minimize the apparent impact of DDT. In a foreword to an issue of the Society's magazine reporting the latest bird-count results, the Society stated that anyone relying on such results as suggesting that there were more birds (rather than more bird watchers) "is being paid to lie, or is parroting something he knows little about."<sup>6</sup> A *New York Times* reporter read the foreword, and asked the Audubon official for the names of those the Society considered "paid liars." A second Audubon official furnished five names,<sup>7</sup> under circumstances that were disputed at trial.

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<sup>3</sup> 376 U.S. 254 (1964).

<sup>4</sup> *Id.* at 270.

<sup>5</sup> The factual summary of *Edwards* here is similar to that in an article a partner of mine and I wrote analyzing *Edwards*' first half-decade. See Abrams & Ringel, "Edwards" After 5 Years - Neutral Reporting and Libel Law, N.Y.L.J., April 26, 1982, at 1, col. 2.

<sup>6</sup> *Edwards*, 556 F.2d at 117.

<sup>7</sup> The issues at trial were whether the second official had cautioned the first that the individuals he named were simply persistent misusers of bird count data rather than paid liars, and whether the first official passed this along to the *Times*' reporter. In returning a verdict against the official who originally provided the names, but not the official passing them on to the reporter, the jury seemingly concluded that no such limitation had been placed on the description of the individuals.

The reporter then made an effort to contact the scientists in question. He reached three of them and each hotly denied the charges, one referring to the charges as "almost libelous."<sup>8</sup> The *Times* article, as published, summarized the foreword and stated that the Audubon official subsequently had identified five scientists. The article noted that those scientists reached had "ridiculed the accusations as 'emotional,' 'hysterical,' and unfounded" and quoted, as well, the remark that "they were 'almost libelous.'"<sup>9</sup>

A libel suit was brought against the *Times*, the Audubon Society and the two Audubon officials on behalf of three of the scientists. The district court held that the scientists were public figures and, applying the *Sullivan* standard, refused to grant summary judgment to the *Times*, finding that the *Times* could be liable if the reporter "had serious doubts about the truth of the statement that the appellees were paid liars, even if he did not have any doubt that he was reporting [the official's] allegations faithfully."<sup>10</sup> The jury returned a verdict for the plaintiffs against the *Times* and one Audubon official, and an appeal was taken.

The Second Circuit reversed, holding the judgment against the *Times* to be "constitutionally impermissible." In the pivotal paragraph of the opinion (holding, additionally, that actual malice, as defined by *Sullivan*, had not been proved), Chief Judge Kaufman wrote:

Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.<sup>11</sup>

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<sup>8</sup> *Edwards*, 556 F.2d at 117.

<sup>9</sup> *Id.* at 118.

<sup>10</sup> *Id.* at 119.

<sup>11</sup> *Id.* at 120 (citations omitted). Chief Judge Kaufman's opinion was joined by Tom C. Clark, Associate Justice of the Supreme Court (retired) and William I. Jameson, Senior

The court went on to note that "[l]iteral accuracy is not a prerequisite," merely that the "journalist believe[d], reasonably and in good faith, that his report accurately conveys the charges made."<sup>12</sup> Conversely, "a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own . . . cannot rely on a privilege of neutral reportage" and "assumes responsibility for the underlying accusations."<sup>13</sup>

Applying these principles, the court held that the *Times*' report of the charge was fair and accurate and did not espouse the Society's position. The opinion noted that the *Times* article reported the scientists' "outraged reactions in the same article."<sup>14</sup> Concluding that the article "was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps," it "held that it was privileged under the First Amendment."<sup>15</sup>

## II. POST-*Edwards* CASE LAW

The core principal of *Edwards* seems self-evidently correct. Why, for instance, should a journalist or newspaper be at any risk of being held liable simply for reporting on the reckless charge made by Senator Alan Simpson that CNN reporter Peter Arnett was an Iraqi "sympathizer"?<sup>16</sup> Why should this law review be subject to a libel action because I have, in my last sentence, repeated the charge without believing a word of it?

Of course, real lawsuits arise out of more mundane events. Consider the following: a journalist reports about criminal charges said to have been brought against the son of an incumbent Town Supervisor then being challenged for reelection by a councilman. According to the councilman (as quoted by the journalist), the Supervisor had removed him from the police-liaison role he had been playing for "political reasons and possibly because the town police had arrested [the Supervisor's] son last month."<sup>17</sup> The Chief of Police confirms the supposed arrest to the reporter, who is also told

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District Judge, both sitting by designation.

<sup>12</sup> *Id.* (citations omitted).

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See N.Y. Times, Feb. 12, 1991, at A18, col. 1.

<sup>17</sup> Hogan v. Herald Co., 84 A.D.2d 470, 472, 446 N.Y.S.2d 836, 838 (4th Dep't), *aff'd*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982).

by the Town Justice that the case will be heard in a few weeks. These matters are reported, as is the denial of the Supervisor that he had intervened to influence the outcome of the case or whether his son would face any trial at all.

The truth, it turns out, is this: although an appearance ticket charging the son with criminal mischief in the fourth degree had been issued by the police, affidavits had been filed denying the charge, the appearance ticket was *never* served, and the son was *never* arrested. All this, according to the Supervisor, he had told the newspaper prior to publication.

On these facts, the Fourth Department of the Appellate Division affirmed the trial court's denial of summary judgment. It concluded that by publishing without sufficient investigation the charge of one candidate over the denial by the other, in a bitterly contested election, the newspaper opened the determination of its culpability to jury scrutiny. *Edwards* itself was rejected as authority, a rejection apparently affirmed by the New York Court of Appeals.<sup>18</sup> In good part, the rejection of *Edwards* seemed based on the notion that it was unacceptable that there should be no remedy for the Supervisor in a situation in which he could have lost the election based upon false charges made against him.<sup>19</sup>

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<sup>18</sup> The Court of Appeals affirmed simply "for reasons stated" by the lower appellate court. See *Hogan*, 58 N.Y.2d at 630, 444 N.E.2d at 1002, 458 N.Y.S.2d at 538. *Edwards* has met both acceptance and rejection around the country. It has been approved in, for example, *Ward v. News Group Int'l, Ltd.*, 733 F. Supp. 83, 84 (C.D. Cal. 1990); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1510 (D.S.C. 1989); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1124-25 (N.D. Cal. 1984); *McCracken v. Gainesville Tribune, Inc.*, 146 Ga. App. 274, 275, 246 S.E.2d 360, 362 (1978); *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 747, 375 N.E.2d 1362, 1363 (1978); *J.V. Peters & Co. v. Knight Ridder Co.*, 10 Media L. Rep. 1577, 1580-81 (BNA) (Ohio Ct. App. 1984). Among the decisions rejecting the notion of a neutral reportage privilege are *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225-26 (3d Cir. 1978) (dictum) (modified somewhat in dictum in *Medico v. Time, Inc.*, 643 F.2d 134, 145 (3d Cir.), cert. denied, 454 U.S. 836 (1981)); *Tunney v. American Broadcasting Co.*, 109 Ill. App. 3d 769, 777-78, 441 N.E.2d 86, 92 (1982); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886-87 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); *Postill v. Booth Newspapers, Inc.*, 118 Mich. App. 608, 622, 325 N.W.2d 511, 517-18 (1982); *Janklow v. Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985); see also Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. Rev. 853, 863-65 (1983) (collecting pre-1983 cases embracing, disavowing, limiting, or otherwise interpreting *Edwards*).

<sup>19</sup> See *Hogan*, 84 A.D.2d at 476, 446 N.Y.S.2d at 840-41. As a factual matter, the outrage of the court at this prospect was thoroughly misplaced, as it was not the Supervisor himself, but the Supervisor's son who was the plaintiff in the action. Ironically, had the court kept its eye on the true plaintiff, it could have disposed of the defendant's claim of privilege with the simple observation that because the Supervisor's son was a private figure (a fact found by the court), *Edwards* was irrelevant. See *Edwards*, 556 F.2d at 120 (privilege

*Edwards* takes a different tack, maintaining that a critical function of the press, at best, is to report charges and counter-charges made by candidates for public office and that the press should not be obliged to decide between them in order to be safe from potential libel liability.

The division of post-*Edwards* authority about whether to adopt the ruling seems based on a variety of factors. One, exemplified in *Hogan*, is the reluctance of some courts to leave a defamed libel plaintiff with no remedy at all against the press. A related one is the sense of some courts that the press has already received sufficient—perhaps more than appropriate—protection in *Sullivan*.<sup>20</sup> A third is that *Edwards* deviates too starkly from the hoary common-law rule that one who republished a libelous statement is as responsible as the original publisher.<sup>21</sup>

My own view is that although any republication (let alone magnification) of a libel may inflict grievous harm on the unjustly wounded party, a rule of law which prevents the public from learning about the frequently overheated debate of powerful individuals and forces in our society inflicts unacceptable harm on society itself. The charges in *Hogan* were important; they bore upon the competence of both candidates for public office. For the press to ignore these charges—or, worse yet, to refuse to publish them because one or another of the candidates seemed unpersuasive—requires an unacceptable form of press censorship on candidates.

As for the contention that *Sullivan* already provides the press with more than ample protection, the reality is that in this area it provides none at all. *Sullivan* itself may be the subject of attack; if so, the solution is to deal with *Sullivan*-caused problems, not to refuse to extend first amendment protection when it is needed and otherwise justifiable.

As noted earlier, *Edwards* itself was limited in its protective scope to charges made by a “responsible prominent organization” against public figures. While these elements of *Edwards* have led

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protects accurate, disinterested republication of charges against public figures).

<sup>20</sup> See, e.g., *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 70 (2d Cir. 1980)(press adequately protected by *Sullivan* burden of proof); *Postill*, 118 Mich. App. at 622, 325 N.W.2d at 518 (same); *Janklow*, 378 N.W.2d at 881 (same).

<sup>21</sup> See RESTATEMENT (SECOND) OF TORTS § 578 (1977); RESTATEMENT OF TORTS § 578 (1938); Note, *supra* note 18, at 853-55.

to a debate of their own,<sup>22</sup> it plainly reflects an effort to protect private figures from unjust attacks and even to limit the category of individuals who may be freely quoted by a journalist in a disinterested manner without fear of libel damages.

### III. *Edwards* AND FIRST AMENDMENT JURISPRUDENCE

Perhaps the most striking reality suggested by *Edwards* is that its central issue was novel when decided in 1977 and remains unresolved today. Although efforts have been made to raise the issue before the Supreme Court,<sup>23</sup> the Court has yet to grant certiorari in any such case. In fact, in the one case in which *Edwards* might have been argued to the Court, counsel expressly disclaimed any reliance on it.<sup>24</sup>

Like *Sullivan* itself, *Edwards* is best understood as a first amendment ruling rather than one rooted in libel law. The interre-

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<sup>22</sup> Courts disagree about whether the *Edwards* privilege is limited by the characteristics of the original defamer. Compare *Postill*, 118 Mich. App. at 622, 325 N.W.2d at 517 (defendant invoking neutral reportage privilege must prove original defamer was "responsible and prominent organization") and *Rand v. New York Times Co.*, 4 Media L. Rep. 1556, 1558 (BNA) (N.Y. Sup. Ct. 1978) (privilege inapplicable because defendant himself is not responsible prominent organization) with *Ward*, 733 F. Supp. at 84 (trustworthiness of original defamer not issue; privilege granted though some of original defamers were individuals) and *Barry*, 584 F. Supp. at 1126 ("neutral reportage privilege does not depend solely upon the 'trustworthiness' of the individual or organization making the allegedly defamatory statements") (emphasis added).

There is also a split in the courts with respect to the required characteristics of the victim. Compare *Dixon v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (privilege inapplicable because plaintiff not public figure) and *Crane v. Arizona Republic*, 729 F. Supp. 698, 710 (C.D. Cal. 1989) (same) with *April v. Reflector-Herald, Inc.*, 46 Ohio App. 3d 95, 98, 546 N.E.2d 466, 469 (1988) ("no legitimate difference" exists between public and private figure plaintiffs for purposes of privilege).

<sup>23</sup> See *Celebrezze v. Netzley*, No. 53864-53865 (Ohio Ct. App., Aug. 4, 1988)(LEXIS, States library, Ohio file)(granting privilege to defendant newspaper and reporter), *rev'd in part on other grounds*, 51 Ohio St. 3d 89, 554 N.E.2d 1292, *cert. denied*, 111 S. Ct. 428 (1990); *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 545, 544 A.2d 1345, 1363 (1988) (if privilege does exist, it would not apply to defendant newspaper on facts of this case), *cert. denied*, 109 S. Ct. 3216 (1989).

<sup>24</sup> In *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 694 (1989) (Blackmun, J., concurring), the Court reviewed a district court decision, affirmed by the Sixth Circuit, that, *inter alia*, declined to apply the neutral reportage privilege to the defendant newspaper because the alleged original defamer was an individual rather than a "responsible, prominent organization." See *id.* at 660 n.1. Inexplicably, the newspaper elected not to argue the point in its appeals of its libel conviction. See *id.* at 694 (Blackmun, J., concurring). In his opinion concurring with the majority's decision to affirm the judgments below, Justice Blackmun observed that the defendant's choice not to rely on the privilege "appears to have been unwise . . . . Were this Court to adopt the neutral reportage theory, the facts of this case arguably might fit within it." *Id.* at 694-95 (Blackmun, J., concurring).



relationship of first amendment principles to other areas of law remains controversial.<sup>25</sup> In *Edwards*, the principle established by the Second Circuit seems so essential to the preservation of first amendment rights that even a judiciary disinclined to take expansively protective views of the Bill of Rights should—or, at least, ought to—find it persuasive.

That *Edwards* should be of such significance is, as I have said, consistent with the Second Circuit's leadership role in legal development. Perhaps surprisingly, it is less consistent with the court's previous perspective in first amendment cases.

In libel law, in the days well before *New York Times Co. v. Sullivan*<sup>26</sup> placed first amendment limits on libel recoveries, a Second Circuit ruling of Judges Chase and Learned Hand in an action commenced by a member of Congress, sternly rejected the notion that any degree of error was worthy of first amendment protection.<sup>27</sup> "Freedom of speech," the court concluded (in terms precisely contrary to *Sullivan*'s later holding)<sup>28</sup> "is, as it has always

<sup>25</sup> See, e.g., *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 585-96 (2d Cir. 1989) (Oakes, J., concurring) (disagreeing with majority's fair use analysis), *cert. denied*, 110 S. Ct. 1168 (1990); *Herbert v. Lando*, 568 F.2d 974, 977-80 (2d Cir. 1977) (affording first amendment privilege to journalists exercise of editorial control and judgment), *rev'd*, 441 U.S. 153 (1979); *Abrams, First Amendment and Copyright*, 35 J. COPYRIGHT Soc'y OF U.S.A. 1, 1-12 (1987) (reconciling first amendment with copyright principles); *Miner, Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT Soc'y OF U.S.A. 1, 6-8 (1989) (advocating total elimination of fair use doctrine for unpublished or undissemated works).

<sup>26</sup> 376 U.S. 254 (1964).

<sup>27</sup> *Sweeney v. Schenectady Union Publishing Co.*, 122 F.2d 288, 291 (2d Cir. 1941), *aff'd by an equally divided court*, 316 U.S. 642 (1942). The *Sweeney* case was one of approximately 70 suits brought in different districts around the country by Congressman Martin Sweeney against columnists Drew Pearson and Roger Allen and the news service and newspapers that published their column. By the time that the Supreme Court heard arguments in the case, first amendment claims had been made which were generally similar in nature to those later made and adopted in *Sullivan*. See Rosenberg, *Taking a Look at "The Distorted Shape of An Ugly Tree": Efforts at Policy Surgery on the Law of Libel During the Decade of the 1940's*, 15 N. KY. L. REV. 11, 19-30 (1988). Although the case, as Professor Rosenberg has observed, "quickly faded into historical oblivion," the 4-4 division of the Supreme Court "refutes any notion that the Warren Court Justices [in *Sullivan*] were suddenly inventing new constitutional questions and upsetting well-grounded defamation doctrine." *Id.* at 30.

<sup>28</sup> See *Sullivan*, 376 U.S. at 279.

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of

been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination."<sup>29</sup> Judge Clark's dissenting opinion urged the majority to afford protection to statements amounting to "comment and inference" and to avoid putting the burden of proof in such cases on the libel defendant.<sup>30</sup> The Supreme Court's later ruling in *Sullivan* was in accord with—and went far beyond—such views. The majority was unpersuaded.

Nor was the Second Circuit persuaded that first amendment principles protected Communist Party leaders convicted under the Smith Act.<sup>31</sup> The case, involving charges of "conspiracy to advocate" the overthrow of the United States government, raised a flurry of constitutionally thorny issues. Read forty years later, however, what is most jarring is the most famous contribution of Learned Hand, while on the circuit court, to the development of first amendment law: his recharacterization of the Holmes-Brandeis "clear and present danger" test as one in which "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>32</sup> The Supreme Court, in Chief Justice Vinson's *Dennis* opinion, later adopted the Hand reformulation<sup>33</sup> and has, on occasion, repeated it.<sup>34</sup> But it is no more persuasive—and surely no more protective of first amendment rights—for its repetition.

Whatever the clarity (or "gravity") of the danger posed within the United States by the American Communist Party in 1948 (when the *Dennis* indictment was rendered), there was hardly any "present" danger at all posed by the Party; "miserable merchants of unwanted ideas" they were (as Justice Douglas observed), whose

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official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the first and fourteenth amendments.

*Id.* (citations omitted).

<sup>29</sup> *Sweeney*, 122 F.2d at 291.

<sup>30</sup> *Id.* at 292 (Clark, J., dissenting).

<sup>31</sup> *United States v. Dennis*, 183 F.2d 201, 234 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

<sup>32</sup> *Id.* at 212.

<sup>33</sup> *See Dennis*, 341 U.S. at 510.

<sup>34</sup> *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

"wares remain[ed] unsold."<sup>35</sup> Only by abandoning the requirement that the danger posed by their speech be not only plain but *imminent* could the convictions be sustained. But by doing so, Judge Hand (and Chief Justice Vinson as well) strayed far from Justice Brandeis's classic exhortation that:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.<sup>36</sup>

Judge Hand's reframing of the clear and present danger test was inconsistent not only with that of its eminent drafters but with the far more libertarian (and speech-protective) views Hand had articulated as a district judge over the previous three decades.<sup>37</sup> In an opinion honored by legal scholars throughout the years,<sup>38</sup> Hand had written an opinion dealing with the recurrent and delicate problem of the relationship of freedom of expression to the Espionage Act of 1917. Rendered during World War I, Hand's opinion was both "elegant"<sup>39</sup> and persuasive and provided far more protection than Holmes's later crafted "clear and present danger" test. The elder Hand's opinion in *Dennis* was far less speech-protective.

Nor, to cite a final example, was the brief *per curiam* reversal by a 5-3 vote of the court of appeals in *New York Times Co. v. United States*<sup>40</sup>—the *Pentagon Papers Case*. Faced with a ruling by District Judge Murray Gurfein that the United States had failed to demonstrate that the Times's publication during the Vietnamese conflict of a highly classified historical study commis-

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<sup>35</sup> *Dennis*, 341 U.S. at 589 (Douglas, J., dissenting).

<sup>36</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>37</sup> See, e.g., *Masses Publishing Co. v. Patten*, 244 F. 535, 538-39 (D.C.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917) (magazine's pictorial and textual critique of war fell within the right to criticize normally privileged in country protecting free expression of opinion).

<sup>38</sup> See H. KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 125-30 (1988); Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 *passim* (1975).

<sup>39</sup> H. KALVEN, *supra* note 38, at 126.

<sup>40</sup> 444 F.2d 544 (2d Cir.), *rev'd per curiam*, 403 U.S. 713 (1971).

sioned by the government,<sup>41</sup> sufficiently harmed the nation, the court's slim majority voted to reverse and remand to the district court for further consideration. To be sure, the court's majority did no more than require further hearings by the district court and even went so far as to require them on an expedited basis. But in the context of an ongoing prior restraint on the press, the delay ordered by the court was a serious blow to the principle that prior restraints on speech are not only disfavored but that they require the most powerful showing before they will be seriously entertained.<sup>42</sup> The Second Circuit majority was slow to recognize this, slower certainly than the Supreme Court which speedily granted a writ of *certiorari* and reversed the Second Circuit, reinstating Judge Gurfein's ruling.<sup>43</sup>

Although I can scarcely conceal my dubiety about the court's rulings in each of these cases, I do not cite them for the proposition that they were wrongly decided. Rightly or wrongly decided, they do fairly reflect the general attitude of the Second Circuit in its first amendment rulings during the earlier part of its first century—careful, able, and serious rulings, all, but none exhibiting particular sympathy for the constitutional claims presented to it.<sup>44</sup>

It is no surprise that the Second Circuit's attitude has changed with the times. Not only has Supreme Court case law changed generally through the years, but in the first amendment area in particular it has changed to an extraordinary degree. Law school courses on first amendment topics are often taught with almost exclusive reference to Supreme Court decisions commencing with *Sullivan* and focusing on the generally protective rulings of the 1970's and 1980's. With *Edwards*, the Second Circuit is a step ahead of the Supreme Court—not always a safe place to be but, at least in this case, the right place to be.

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<sup>41</sup> *New York Times Co. v. United States*, 328 F. Supp. 324, 330 (1971). The author was co-counsel to the *Times* in the case.

<sup>42</sup> See generally Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REF. 497, 498-505 (1982) (discussing origin of prior restraints and *Pentagon Papers* decision).

<sup>43</sup> *New York Times*, 403 U.S. at 714.

<sup>44</sup> An exception is Jerome Frank's extraordinarily eloquent, witty and speech-protective concurring opinion in *United States v. Roth*, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

