Fordham Law Review

Volume 85 | Issue 1 Article 3

2016

Free Speech and Civil Liberties in the Second Circuit

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INTRODUCTION

Much of the development of First Amendment law in the United States has occurred as a result of American courts rejecting well-established principles of English law. The U.S. Supreme Court has frequently rejected English law, permitting far more public criticism of the judiciary than would be countenanced in England, rejecting English libel law as being insufficiently protective of freedom of expression[1] and holding that even hateful speech directed at minorities receives the highest level of constitutional protection.[2] The Second Circuit has played a major role in the movement away from the strictures of the law as it existed in the mother country. In some areas, dealing with the clash between claims of national security and freedom of expression, the Second Circuit predated the Supreme Court's protective First Amendment rulings. In others, dealing with claims of obscenity contained in literature, the Second Circuit moved down a path of free speech protection long before English courts did so. In still others, including libel, the Second Circuit followed Supreme Court rulings that had long since departed from English law in a variety of circumstances.

I. FREE SPEECH CASES

Few First Amendment cases are as difficult as those that arise when national security is cited as a basis for restricting speech. Frequently, efforts to limit or punish speech arise at times of genuine national emergency—during wartime or times when the safety of the nation is at risk. Often, the dangers of the speech at issue are greatly exaggerated or overstated by the governmental entity seeking to limit or punish that speech. The Second Circuit has had a number of such cases in which it was obliged to articulate legal standards by which it adjudged when, if at all, speech could be abridged. This Article deals briefly with two such cases: one that arose during World War I and another that arose toward the

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1. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
2. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

beginning of the Cold War between the United States and the Soviet Union.[3] Judge Learned Hand played a significant role in both cases. This Article then turns to the role of the Second Circuit in the Pentagon Papers Case.

In the summer of 1917, U.S. Postmaster General Albert Burleson barred the mailing of *The Masses*, a monthly antiestablishment publication that dealt with the arts and politics and which was strongly against American participation in World War I.[4] The decision was rooted in the proposition that the publication's cartoons and text violated the Espionage Act by causing or seeking to cause "insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces."[5] The case was assigned to then-District Court Judge Learned Hand, who wrote what Professor Geoffrey R. Stone has characterized as "[b]y far the most important decision in which a federal district judge held fast against a broad construction of the Espionage Act."[6] In *Masses Publishing Co. v. Patten*,[7] Judge Hand acknowledged that during wartime, Congress might be empowered to "forbid the mails to [circulate] any matter which tends to discourage the successful prosecution of the war."[8] Judge Hand then urged that it was necessary, even in wartime, to limit the scope of a broadly phrased Espionage Act so that it could not be read to justify "the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies."[9] He sought to accomplish that goal by narrowly construing the concept of incitement. In language much quoted through the years, he offered the following test:

> If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.[10]

The Second Circuit, in an opinion of Judge Henry Wade Rogers, reversed, holding that the determination of the Postmaster General violated neither the First nor Fifth Amendments since the magazine's contents could be interpreted to encourage efforts to frustrate military recruitment during time of war.[11] "The article, taken as a whole," Judge Rogers wrote, "may well be regarded as intended to encourage objectors to be as steadfast protestors against 'government tyranny' as their English comrades. In other

3. *See generally* United States v. Dennis, 183 F.2d 201 (2d Cir. 1950); Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).
4. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 151 (1994).
5. *Masses*, 246 F. at 26.
6. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 164 (2004).
7. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).
8. *Id.* at 538.
9. *Id.* at 539.
10. *Id.* at 540.
11. *Masses*, 246 F. at 38.

words, it is an encouragement to disobey the law."[12] As for Judge Hand's conclusion that the advocacy of the magazine was insufficiently direct to constitute a violation of law, the opinion was dismissive, "[t]hat one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy."[13] "[I]t is not necessary," Judge Rogers concluded, "that an incitement to crime must be direct."[14]

Thirty-three years later, the Second Circuit again was confronted with a case that required it to deal with conflicting claims of danger to national security and the need to preserve individual liberty in *United States v. Dennis*.[15] In 1948, twelve leaders of the Communist Party were indicted and convicted of conspiring to advocate the overthrow of the U.S. government. Judge Learned Hand wrote the opinion for the Second Circuit affirming the convictions, including one that led him to receive a good deal of rare criticism from many who viewed him as among the greatest jurists in American history. Some of the criticism focused on Judge Hand's recharacterization of the clear and present danger test as, "[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."[16] The Supreme Court adopted this reformulation in its affirmance of the ruling and has occasionally repeated it. But, the characterization remains controversial and is viewed by critics as a major step away from vigorous First Amendment protection. Judge Richard Posner has characterized the test as akin to "better safe than sorry," observing that such an approach is "not a plausible theory of the First Amendment" and that "we might expect of a judge of Hand's ability something more than the conventional wisdom of his time and place."[17]

Judge Hand's treatment in *Dennis* of the issues he had considered so many years before in the *Masses* case has also been a topic of continuing controversy. He concluded in *Dennis* that even if he had applied his own test in *Masses*, the *Dennis* convictions would still be upheld.[18] Noting that the defendants' efforts to "persuade others of the aims of Communism would have been protected," he concluded that First Amendment protection would ultimately be overcome since the defendants' speech was "coupled with . . . the advocacy of illegal means."[19] Since the defendants had called for force and violence to overthrow the government "when a propitious

12. *Id.* at 36.
13. *Id.* at 38.
14. *Id.*
15. 183 F.2d 201 (2d Cir. 1950).
16. *Id.* at 212.
17. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 517–18 (1994).
18. *Dennis*, 183 F.2d 201.
19. *Id.* at 207.

occasion will arise," such speech was not protected by the First Amendment.[20]

The Supreme Court affirmed the ruling by a 6–2 vote, with Chief Justice Fred Vinson's majority opinion adopting much of Judge Hand's analysis.[21] Dissenting opinions of Justices Hugo Black and William O. Douglas were particularly impassioned. The former vociferously objected to the transformation of the clear and present danger test to the Chief Justice's Hand-rooted opinion,[22] and Justice Douglas argued that there was hardly any "present" danger from the "miserable merchants of unwanted ideas" of the defendants.[23]

The role of the Second Circuit in *United States v. New York Times Co.*,[24] ("the *Pentagon Papers* case") has been little remembered in light of the ultimate decision of the Supreme Court in the case, but it is worth recalling. The case was commenced by the United States seeking an order from the district court to enjoin the *New York Times* from publishing portions of a top secret study conducted by the Department of Defense during the ongoing conflict in Vietnam.[25] The study, over 7,000 pages in length, was historical in nature, tracing the development of American involvement in Vietnam from the presidency of Harry S. Truman through 1968, three years before the litigation.[26] It had been provided to the *Times* by a confidential source (later identified as Daniel Ellsburg) who was one of the study's authors. The case proceeded at what may be viewed as juridical warp speed. The district judge, Murray I. Gurfein, initially granted a temporary restraining order. A few days later, he conducted a hearing with witnesses who addressed the issue of the supposed harm to national security if publication were not enjoined and then rendered a decision in favor of the *Times* on June 19, 1971, rejecting the government's demand for a continuing prior restraint on the newspaper. Three days later, oral argument was held in the Second Circuit Court of Appeals, sitting—unprecedentedly, it appears—en banc, without the case having been heard previously by a three-judge panel.[27]

While a number of jurists asked questions of counsel, the most memorable exchange occurred at the very beginning of the oral argument of Yale Professor Alexander Bickel, who represented the *Times*.[28] Judge Henry Friendly's questions to Bickel were brutal.[29] Bickel had commenced his argument by asserting that there was "no evidence anywhere in the record, certainly not, that the Times stole [these] documents or that anyone

20. *Id.* at 206.
21. Dennis v. United States, 341 U.S. 494 (1951).
22. *Id.* at 580 (Black, J., dissenting).
23. *Id.* at 589 (Douglas, J., dissenting).
24. 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971) (per curiam).
25. FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT 6–31 (2005).
26. *Id.*
27. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 153 (2012).
28. *Id.* at 154.
29. *Id.*

stole them."[30] That was true enough but hardly what the case or its appeal was about. This is what happened next:

> *Judge Friendly*: You know that someone gave them to the Times when he had no authority to do it, though?
> *Mr. Bickel*: That is the allegation, your Honor. But how he got them—
> *Judge Friendly*: Is there the slightest doubt about that?
> *Judge Kaufman*: You have not denied that, have you?
> *Mr. Bickel*: We have not denied that the Times did not get the documents from a government source authorized—
> *Judge Friendly*: Why not say the answer is the Times got them without authorization? . . . Why don't you face the facts?
> *Mr. Bickel*: I am simply resisting the word 'stolen,' which it does seem to me is a highly colored word.
> *Judge Friendly*: Let's say they received the goods in the process of embezzlement, then, if you prefer.
> *Mr. Bickel*: Without dwelling further on the point, may I say I resist that as well?
> *Judge Friendly*: You may resist it.[31]

The argument that followed got no worse for the *Times* but little better. Two days later, on June 23, 1971, the Second Circuit, by a 5–3 vote, issued a one sentence per curiam opinion remanding the case to the district court for further factual hearings, a distinct victory for the government.[32] The *Times*'s petition for a writ of certiorari was granted and oral argument quickly followed.[33] On June 30, fifteen days after the case began, the Court, by a 6–3 vote, concluded that the government had failed to meet its heavy burden to sustain a prior restraint and ruled in favor of the *Times*, as well as the *Washington Post*, which had been engaged in its own battle with the government over its right to publish portions of the Pentagon Papers.[34] The Second Circuit's order was reversed.[35]

II. OBSCENITY AND FREE SPEECH

In 1868, the English case of *Regina v. Hicklin*,[36] set forth the law that governed that nation well into the twentieth century. Obscene speech was defined as that which had a tendency to morally corrupt the young or those who were otherwise "susceptible" to being corrupted. That test was applied in the United States as well, at least until the memorable case of *United States v. One Book Entitled Ulysses*,[37] which remains probably the most publicized obscenity case in American history. The book *Ulysses* by James Joyce had been seized by customs authorities, who were empowered by the Tariff Act of 1930 to seize "any obscene book, pamphlet, paper, writing,"

30. *Id.*
31. *Id.* at 154–55.
32. *Id.* at 157.
33. *Id.* at 160.
34. *Id.*
35. *Id.* The author of this Article was cocounsel to the *New York Times* in this case. *See* ABRAMS, *supra* note 25, at 1–31.
36. [1868] 3 QB 360 (Eng.).
37. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

or the like, sought to be imported into the United States.[38] The book had already been held to be obscene in earlier proceedings in state court, but when the case came before Judge James Woolsey, sitting in the Southern District of New York, he concluded that the correct legal test for obscenity was whether a book tended "to stir the sex impulses or to lead to sexually impure and lustful thoughts."[39] Judge Woolsey concluded "[this type of language] did not tend to excite sexual impulses or lustful thoughts . . . [because] its net effect . . . was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women."[40] Judge Woolsey's opinion, later published as a sort of forward to the book itself, stated that the book lacked the "leer of the sensualist" and that, although some of the language of the characters was voiced in "old Saxon words . . . [i]n respect of the recurrent emergence of the theme of sex in the mind of [Joyce's] characters, it must always be remembered that [Joyce's] locale was Celtic and his season spring."[41]

On appeal, the Second Circuit affirmed the decision in a 1934 opinion by Judge Augustus Hand, joined by his cousin, Judge Learned Hand, with a dissent by Judge Martin Manton.[42] The opinion, though far less well known historically than Judge Woolsey's much quoted tribute to Joyce, is well worth recalling.

Judge Augustus Hand's opinion about the book was a bit more sardonic than Judge Woolsey's. Although Judge Hand noted that "[w]e may discount the laudation of Ulysses by some of its admirers and reject the view that it will permanently stand among the great works of literature,"[43] he was still highly appreciative of the book's "originality and sincerity of treatment"[44] and its "beauty and undoubted distinction."[45] These views plainly affected Judge Hand's ultimate conclusion that, while passages of the book were "obscene under any fair definition," they were "relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake."[46] The court concluded that, taken as a whole, the book was "not pornographic, and while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion tend to promote lust."[47] In deciding that issue, Judge Hand held that courts must view books as a whole rather than simply focusing on challenged portions (as dissenting Judge Manton had at some length).[48] The court held that the analysis must consider the effect on

38. 19 U.S.C. § 1305 (2012).
39. *Ulysses*, 5 F. Supp. at 184.
40. *Id.* at 185.
41. *Id.* at 183–84.
42. *Ulysses*, 72 F.2d 705.
43. *Id.* at 706.
44. *Id.* at 708.
45. *Id.* at 706.
46. *Id.* at 706–07.
47. *Id.*
48. *See id.* at 706.

average persons, rather than focusing only on the most sensitive people.[49] Furthermore, the impact on society of overzealous censorship must be borne in mind:

> Art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique. The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's "Queen Mab" was an indictable offense are a warning to us all who have to determine the limits of the field within which authors may exercise themselves. We think that Ulysses is a book of originality and sincerity of treatment and that it has not the effect of promoting lust. Accordingly, it does not fall within the statute, even though it may justly offend many.[50]

Judge Manton's dissent offered an entirely different view, maintaining that even if sexually graphic material was objectionable to only a narrow slice of the public, it could still be banned in light of the potential effect of the book upon the "average less sophisticated member[s] of society, not to mention the adolescent[s]."[51]

A few aspects of the Second Circuit's *Ulysses* ruling are worthy of special note. The opinion was not couched as a First Amendment opinion, but rather as one interpreting the congressional statute at issue. Not until later in the twentieth century were charges of obscenity assessed under First Amendment standards. This opinion, however, has been credited with being the first to deviate from the far-less speech-protective principles of English law. On a more amusing level, it is difficult not to notice that the Hand opinion paid as little attention to Judge Woolsey's celebrated opinion as possible, quoting two brief and truncated passages from it in the first paragraph and making not the slightest reference to it thereafter. Professor Gerald Gunther, in his biography of Learned Hand, noted that the Hands made a point of drafting their opinion so that it contained "not a single quotable line" that might fuel what they viewed as the media circus surrounding the case, further stoked, in their view, by Judge Woolsey's all-too-quotable opinion.[52]

Not long after the court's ruling in *Ulysses*, the same panel considered another obscenity case. In *United States v. Levine*,[53] the Second Circuit considered an appeal from a conviction of an individual charged with distributing obscene circulars for obscene books that no one would compare with Joyce's work.[54] Referring back to the court's ruling in *Ulysses* two years before, Judge Learned Hand observed that in such a case

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49. *See id.* at 711.
50. *Id.* at 708–09.
51. *Id.* at 711 (Manton, J., dissenting).
52. GUNTHER, *supra* note 4, at 338–39.
53. 83 F.2d 156 (2d Cir. 1936).
54. *See id.*

> the work must be taken as a whole, its merits weighed against its defects . . . ; if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise but really a small bit of legislation ad hoc, like the standard of care.[55]

Notably, Judge Augustus Hand, the author of the *Ulysees* ruling, dissented from the majority opinion.

More recent obscenity cases that are rooted in the First Amendment provide far more protection; few provide the pleasure one receives in reading so thoughtful an opinion.

III. LIBEL LAW

With the issuance of the landmark decision in *New York Times Co. v. Sullivan*,[56] the Supreme Court effectively rejected English libel law that had been applied as American law in every state in the nation.[57] It did so by essentially constitutionalizing libel law, providing novel protections for speech about public officials (which was later expanded to public figures).[58] In such cases, the burden of proving falsity shifts to the plaintiff and even false statements are protected if made without actual knowledge of falsity or serious doubts about truth or falsity.[59] The latter test, mischaracterized by the Court as "actual malice," notwithstanding that it has nothing to do with malice at all, must be proven by clear and convincing evidence.[60] But what happens when a publication publishes an article that contains a newsworthy, but false and defamatory charge, by one public figure about another? For all the protections afforded to the *New York Times*, which are designed to protect "uninhibited, robust, and wide-open" debate, one type of speech not protected is a false statement of fact voiced with knowledge of its falsity or serious doubts of its truth.[61] In fact, the moment a journalist testifies that she wrote something knowing or suspecting that it was untrue, the *New York Times*'s protection evaporates. But does the newsworthiness of the false charge provide any protection for the journalist? That was the issue in *Edwards v. National Audubon Society, Inc.*[62]

The *Edwards* litigation originated out of the heated debate over the use of the insecticide DDT.[63] Officials of the National Audubon Society were

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55. *Id.* at 157.
56. 376 U.S. 254 (1964).
57. *Id.*
58. *Id.* at 279.
59. *Id.*
60. *See id.* at 279–83.
61. *Id.* at 270.
62. 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). The author of this Article was counsel for defendant-appellee New York Times Co. in this case.
63. *See id.* at 115.

concerned that pro-DDT scientists, who had financial relationships with the chemical industry, were minimizing the possible impact of DDT by distorting figures about the number of birds that were harmed by the pesticide.[64] An editorial in an Audubon publication asserted that any scientist who did so was "being paid to lie, or is parroting something he knows little about."[65] A *New York Times* reporter called the Audubon Society and asked for the names of the "paid liars."[66] An Audubon employee called that reporter back and furnished five names. The reporter reached three of the five scientists, all of whom denied the charge.[67] The *New York Times* published an article summarizing the charges and stating that the accused scientists had "ridiculed the accusations" as "hysterical," "unfounded," and "almost libelous."[68] The scientists commenced a libel action.

The district court held that the scientists were public figures, and, basing his ruling on *New York Times*, Judge Charles Metzner refused to set aside a judgment reached by a jury against the defendants.[69] The judgment, the court held, could stand so long as 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 [Audubon's] allegations faithfully."[70]

The Second Circuit reversed.[71] In an opinion of then-Chief Judge Irving Kaufman, the Court concluded that

> 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.[72]

The court went on to note that "[l]iteral accuracy is not a prerequisite," but that the "journalist believe[d], reasonably and in good faith, that his report accurately convey[ed] the charges made."[73]

Edwards's articulation of a neutral reportage privilege was controversial when adopted and remains so today. It has thus far been adopted in a minority of circuits and state courts. New York, for example, has not

64. *See id.* at 115–16.
65. *See id.* at 117.
66. *Id.*
67. *See id.* at 117–18.
68. *Id.* at 118.
69. Edwards v. Nat'l Audubon Soc'y, Inc., 423 F. Supp. 516 (S.D.N.Y. 1976), *rev'd*, 556 F.2d 113.
70. *Edwards*, 556 F.2d at 119.
71. *See id.* at 122–23.
72. *Id.* at 120 (citations omitted).
73. *Id.*

adopted it, leading to substantively different bodies of libel law being applied in state and federal courts in the same state.[74]

The Supreme Court has yet to opine on the privilege, although in *Harte-Hanks Communications, Inc. v. Connaughton*,[75] the issue was addressed in a concurring opinion of Justice Harry Blackmun.[76] In that case, the district court had rejected a neutral reportage privilege on the ground that the original defamer was an individual rather than a "responsible, prominent" organization.[77] Unfortunately, the newspaper did not raise the issue on appeal to the Sixth Circuit or to the Supreme Court. Justice Blackmun's concurring opinion 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 might fit within it."[78]

In *Herbert v. Lando*,[79] the Second Circuit made sweeping statements about the First Amendment protections afforded to journalists facing a defamation action brought by a public figure.[80] Although ultimately reversed by the Supreme Court, then-Chief Judge Kaufman's statements about the editorial privilege are nevertheless noteworthy due to their broad scope. The plaintiff in that action, retired Army officer Anthony Herbert, had alleged that CBS program producer Barry Lando and program anchor Mike Wallace defamed him when *60 Minutes* aired allegations that Herbert had fictitiously reported war crimes during the Vietnam War.[81] During discovery, Herbert attempted to compel disclosure of materials pertaining to Lando's state of mind as he prepared the alleged defamatory program—specifically while researching Herbert's claims of war crimes, having certain conversations with Wallace, and deciding whether or not to include certain materials in the program.[82] Purporting to apply *Sullivan* and its progeny, Judge Charles Haight, in the Southern District of New York, granted Herbert's motion to compel and rejected Lando's contention that the First Amendment barred inquiry into his editorial state of mind.[83] Judge Haight characterized Lando's state of mind as "of central importance to a proper resolution of the merits," and likely to lead—either directly or indirectly—to admissible evidence.[84]

The Second Circuit, in an opinion by then-Chief Judge Kaufman, reversed the Southern District and denied Herbert's motion to compel.[85] The court recognized that the First Amendment affords "privilege to

74. *Compare id.*, *with* Hogan v. Herald Co., 446 N.Y.S.2d 836 (App. Div.), *aff'd*, 444 N.E.2d 1002 (N.Y. 1982).

75. 491 U.S. 657 (1989).

76. *See id.*

77. *Id.* at 660 n.1.

78. *Id.* at 694–95 (Blackmun, J., concurring).

79. 568 F.2d 974 (1977), *rev'd*, 441 U.S. 153 (1979).

80. *Id*. The author of this Article represented defendants-appellants Barry Lando, Mike Wallace, and CBS Inc. in this action.

81. *See id.* at 980.

82. *See id.* at 980–82.

83. *See generally* Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y. 1977).

84. *Id.* at 395.

85. *See Herbert*, 568 F.2d 974.

disclosure of a journalist's exercise of editorial control and judgment," and found that freedom from such probing was necessary to maintain "a free and untrammeled press."[86] Indeed, the views, conclusions, and iterative process that Herbert sought to scrutinize involved "human judgment," which the court described as "the lifeblood of the editorial process."[87] Judge Thomas Meskill dissented and would have held that the actual malice standard imposed by the Court in *Sullivan* required, as a "major purpose" of Herbert's lawsuit, "to expose the defendants' subjective state of mind."[88]

Recognizing the importance of the issue, the Supreme Court granted certiorari and ultimately reversed the Second Circuit, by a vote of 6–3.[89] According to Justice Byron White's majority opinion, the journalist editorial privilege was the sort of qualified privilege that was trumped when, as in the case before the Court, the required showing (actual malice) hinged on a showing that the defendant journalist acted with an improper motive.[90] The Court held that the Second Circuit's view of the privilege "would substantially enhance the burden of proving actual malice"—to the point that it would make it virtually impossible for public figure plaintiffs to pursue libel actions—and would therefore be in violation of *Sullivan* and other cases that came before it.[91] The Court remanded the case for further proceedings.[92]

Discovery recommenced following the Supreme Court's decision, with Wallace, Lando, and CBS compelled to produce the editorial process material. Following closure of discovery in September of 1982, the defendants all moved for summary judgment. Judge Haight granted summary judgment for defendants Lando, Wallace, and CBS on nine of the eleven alleged defamatory statements because they were not made with "actual malice" under the *Sullivan* standard.[93] The defendants subsequently moved to dismiss the two statements that Judge Haight deemed actionable but were denied.[94] They appealed the denial of the motion to dismiss and the motion for summary judgment for the two remaining statements.[95]

The Second Circuit, in a unanimous opinion by Judge Kaufman, agreed with the defendants' position that the two remaining statements were not actionable and ordered dismissal of both.[96] According to the court, the remaining nine actionable statements, combined with other materials accessible to the defendants during production of their show, had given them sufficient grounds to support the two conclusory statements that

86. *Id.* at 975.
87. *Id.* at 983–84.
88. *Id.* at 995 (Meskill, J., dissenting).
89. *See* Herbert v. Lando, 441 U.S. 153, 158 (1979).
90. *Id.* at 163–65.
91. *Id.* at 169.
92. *See id.*
93. *See generally* Herbert v. Lando, 596 F. Supp. 1178 (S.D.N.Y. 1984), *aff'd in part, rev'd in part*, 781 F.2d 298 (2d Cir. 1986).
94. *See Herbert*, 781 F.2d at 304.
95. *Id.*
96. *See id.* at 298.

remained at issue.[97] The opinion further held that because the defendants' published view that Herbert had lied about reporting war crimes was not actionable, other statements that merely (1) implied that same view, (2) were outgrowths of the view, or (3) were subsidiary to that view, were also not deemed actionable.[98] As Judge Kaufman colorfully explained, "[f]or Herbert to base his defamation action on subsidiary statements whose ultimate defamatory implications are themselves not actionable . . . would be a classic case of the tail wagging the dog."[99] Herbert's petition for writ of certiorari was denied.[100]

In the decades that followed, the Second Circuit has continued to issue impactful opinions in the area of libel law. Two recent libel opinions—both authored by Judge Richard Wesley—warrant mention here for their protection of the press's First Amendment rights. The first of these two cases, *Chau v. Lewis*,[101] involved libel claims based on Michael Lewis's 2010 bestselling book, "The Big Short," and attracted significant media attention due to its prominent subject matter.[102] The book, which examined the causes of the global financial crisis that occurred just a few years earlier, contained statements about a money manager named Wing Chau and his business, Harding Advisory.[103] Chau sued Lewis, his source, Steve Eisman, and the book's publisher, W.W. Norton, for libel, alleging twenty-six defamatory statements.[104] Judge Wesley's November 2014 opinion, which was joined by Senior Judge Amalya Kearse, affirmed the decision of the Southern District of New York and granted the defendants' motion for summary judgment on all twenty-six counts.[105] The thrust of Chau's complaint was that the book portrayed him as a villain by recounting a 2007 conversation between Chau and Eisman and alleging that he created unwarranted demand for risky subprime bonds that ultimately failed.[106]

Judge Wesley, agreeing largely with the original ruling of District Judge George Daniels, found that not a single one of the challenged statements could reasonably be perceived as defamatory.[107] According to Judge Wesley:

> The market events of 2008 and 2009 may undoubtedly influence one's perception as to whether going long on CDO's meant Chau was a fool, or Chau was a rube, or his motivations were avarice; but hindsight cannot give such opinions a defamatory meaning. Lewis's various implications that Chau was wrong about the mortgage market are not actionable.

97. *See id.* at 311.
98. *See id.* at 312.
99. *Id.*
100. Herbert v. Lando, 476 U.S. 1182 (1986).
101. 771 F.3d 118 (2d Cir. 2014).
102. *See id.*
103. *See id.* at 121–26.
104. *See id.* at 122.
105. *See id.* at 132.
106. *See id.* at 122.
107. *See id.*

> The law of defamation in New York is predicated on the free exchange of ideas and viewpoints. The marketplace can wound one's pride—for words can offend or insult—but simple slights are not the stuff of defamation.[108]

Since the challenged statements were not, in the court's view, "reasonably susceptible of a defamatory connotation," no reasonable jury could find for Chau and the case had to be dismissed.[109] Senior Judge Ralph Winter dissented on the grounds that a jury could have relied on the challenged statements to find Chau liable for civil or criminal securities fraud.[110]

A few months later in *Martin v. Hearst Corp.*,[111] a three-judge panel for the Second Circuit unanimously refused to construe Connecticut's criminal erasure statute to require removal or modification of news articles concerning the arrest of an individual whose arrest was subsequently erased from government records pursuant to that law.[112] Lorraine Martin, a Connecticut nurse whose arrest for drug-related offenses had been expunged, had sought removal of news stories about the arrest after the stories made it difficult for her to find employment.[113] The court affirmed a decision of the District of Connecticut, granted the Hearst Corporation's motion for summary judgment, and dismissed the plaintiff's action for libel.[114] In another opinion penned by Judge Wesley, the court found that the historical fact of the individual's arrest remained true even though, under the statute, the plaintiff whose charges were annulled "shall be deemed to have never been arrested."[115] Judge Wesley explained:

> The statute creates legal fictions, but it does not and cannot undo historical facts or convert once-true facts into falsehoods. . . . [T]he statute does not render historically accurate news accounts of an arrest tortious merely because the defendant is later deemed as a matter of legal fiction never to have been arrested.[116]

Senior Judge John Walker and Judge Dennis Jacobs both joined Judge Wesley's opinion.[117]

Although the court's opinion made no specific mention of the First Amendment, it necessarily implies that any legislative attempt to so extend the Connecticut's criminal erasure statute would be at odds with free speech principles by imposing liability for nonfalse protected speech. The *Hearst* opinion also warrants attention for its contribution to the debate on whether the United States should follow the example of the European Union and recognize a "right to be forgotten." The ruling makes plain that there is no such right in the United States, even where the individual's record is

108. *Id.* at 131.
109. *Id.* at 132 (quoting Davis v. Ross, 754 F.2d 80, 82 (2d Cir. 1985)).
110. *See id.* (Winter, J., dissenting).
111. 777 F.3d 546 (2d Cir. 2015).
112. *See id.*
113. *See id.* at 549.
114. *See id.* at 548.
115. *Id.* (quoting Conn. Gen. Stat. § 542-142a(e)(3)).
116. *Id.* at 551.
117. *See id.* at 548.

expunged.[118] Debate over whether, in the Age of the Internet, the United States should or constitutionally could recognize such a right will undoubtedly continue.

IV. PANHANDLING AS SPEECH

Some of the most interesting appellate rulings are ones in which a court all but reverses itself without quite saying it is doing so. For example, within a three-year period, commencing in 1990, the Second Circuit did so when addressing what sort of First Amendment protection beggars receive.

In *Young v. New York City Transit Authority*,[119] the Second Circuit addressed the question of whether the prohibition of begging and panhandling within the New York City subway system violated the First Amendment.[120] The Metropolitan Transit Authority (MTA) submitted evidence designed to show that begging on subway trains "contributes to a public perception that the subway is fraught with hazard and danger" and that "two-thirds of the subway ridership have been intimidated into giving money to beggars."[121] Holding that begging was not protected in the subways, the court determined that the regulation was not directed at speech itself, that it was justified by content-neutral governmental interests unrelated to the suppression of free expression, and that the New York City law banning such activity was constitutional.[122] Judge Frank Altimari observed that "[c]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'"[123] He summarized the nature of begging as follows:

> The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.[124]

Three years later, the Second Circuit took another look at the issue in a somewhat different context. In *Loper v. New York City Police Department*,[125] the Second Circuit considered the constitutionality of a New York City Penal Law that barred "loitering," defined in the law as the conduct of one who "[l]oiters, remains or wanders about in a public place for the purpose of begging."[126] City sidewalks, the court concluded, "fall

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118. *See, e.g.*, Alison Frankel, *No 'Right to Be Forgotten' Even If Record Is Expunged: 2nd Circuit*, REUTERS (Jan. 28, 2015), http://blogs.reuters.com/alison-frankel/2015/01/28/no-right-to-be-forgotten-even-if-record-is-expunged-2nd-circuit/ [https://perma.cc/X82V-KUUK].

119. 903 F.2d 146 (2d Cir. 1990).

120. *Id.* The author of this Article represented several of the defendants-appellants in this action.

121. *Id.* at 149.

122. *See id.* at 164.

123. *Id.* at 153.

124. *Id.* at 154.

125. 999 F.2d 699 (2d Cir. 1993).

126. *Id.* (quoting N.Y. PENAL LAW § 240.35(1) (McKinney 1980)).

into the category of public property traditionally held open to the public for expressive activity."[127] Judge Roger Miner characterized begging as "usually involv[ing] some communication" of a "social or political" nature.[128] "Begging," he wrote,

> frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech . . . the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.[129]

In *Young*, the court had applied the then-lenient test from *United States v. O'Brien*,[130] which looked to whether the government regulation furthered an important governmental interest and did so in a manner "no greater than is essential to the furtherance of that interest."[131] The court found that the defendant had easily met the test.[132] In *Loper*, the Court concluded that, because begging involved far greater communicative elements than that recognized in *Young*, a far more demanding First Amendment test was required.[133] Whichever test was applied, Judge Miner concluded, the citywide ban on begging at issue in *Young* violated the First Amendment.[134]

In recent cases, other circuits have sided with *Loper* in light of ever more First Amendment protective Supreme Court case law. In the wake of the Court's 2015 decision in *Reed v. Town of Gilbert*,[135] which concluded that strict scrutiny should be applied when statutes are, on their face, content based, the Seventh Circuit concluded in *Norton v. Springfield*[136] that a municipal ordinance barring oral panhandling in a downtown historic district was content based in light of *Reed* because it "regulates 'because of the topic discussed.'"[137] A similar ruling was reached in *Browne v. City of Grand Junction*,[138] in which a city ordinance banning panhandling in certain locations and during certain times was deemed content based and struck down on summary judgment because the ordinance represented "a sledgehammer to a problem that can and should be solved with a scalpel."[139]

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127. *Id.* at 704 (citing United States v. Grace, 461 U.S. 171, 178–80 (1983)). The Court offered a far less judgmental overview of begging than it had previously and distinguished this case from *Young*, because the statute at issue in that case applied only within the subway system and not throughout New York City as a whole. *See id.*
128. *Id.*
129. *Id.*
130. 391 U.S. 367 (1968).
131. *Young*, 903 F.2d at 157 (quoting *O'Brien*, 391 U.S. at 377).
132. *Id.*
133. *See Loper*, 999 F.2d at 706.
134. *See id.*
135. 135 S. Ct. 2218 (2015).
136. 806 F.3d 411 (7th Cir. 2015) (granting petition for rehearing).
137. *Id.* at 412.
138. 136 F. Supp. 3d 1276 (D. Colo. 2015).
139. *Id.* at 1294.

V. COMMERCIAL SPEECH/COMPELLED SPEECH

Since commercial speech was first held to be protected by the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[140] cases involving such speech—or what was argued to be such speech—have frequently come before the Second Circuit. Issues have been heard involving compelled speech in such cases and in others in which the context was far less commercial in nature. This part first addresses two decisions by Judge Rosemary Pooler, *New York State Restaurant Ass'n v. New York City Board of Health*[141] (*NYSRA*) and *Evergreen Ass'n v. City of New York*,[142] involving compelled speech. In the former, arising in a traditional commercial speech context, the court upheld a local ordinance requiring certain restaurants to post calorie counts on its menus.[143] In the latter, arising in a very different context, the court struck down local regulations requiring certain disclosures by abortion providers about the services they provided and the recommendation that patients consult with "licensed" providers.[144] This part then summarizes a decision of Judge Denny Chin in *United States v. Caronia*,[145] relating to FDA-imposed limits on speech of pharmaceutical companies about off-label uses of their products.[146]

A. New York State Restaurant Association

In 2006, the New York City Board of Health, under the leadership of Mayor Michael Bloomberg, adopted New York City Health Code section 81.50 ("2006 Regulation 81.50"), which required restaurants that had previously released calorie counts to display calorie counts on posted menu boards and on the menu itself.[147] News of the regulation—the first of its kind—received widespread coverage and ignited debates about the role of the government in combating the obesity epidemic.[148] The 2006 Regulation 81.50 was struck down by Judge Richard J. Holwell of the Southern District of New York following a challenge by the New York State Restaurant Association (NYSRA) on both preemption and First Amendment grounds.[149] Judge Holwell struck down 2006 Regulation 81.50 on the ground that the Federal Nutrition Labeling Education Act—

140. 425 U.S. 748 (1976).
141. 556 F.3d 114 (2d Cir. 2009).
142. 740 F.3d 233 (2d Cir.), *cert. denied*, 135 S. Ct. 435 (2014).
143. *See generally NYSRA*, 556 F.3d 114.
144. *See generally Evergreen Ass'n*, 740 F.3d. 233.
145. 703 F.3d 149 (2d Cir. 2012).
146. *See id.*
147. N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50 (2006), *repealed by* N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50 (2015).
148. *See, e.g.*, Carl Campanile, *Fat's All, Folks—City's Eatery Ban*, N.Y. POST (Sept. 27, 2006), http://nypost.com/2006/09/27/fats-all-folks-citys-eatery-ban/ [https://perma.cc/8C67-72JJ]; Melissa Klein, *Fat Food A-Weights You*, N.Y. POST (Jan. 27, 2008), http://nypost.com/2008/01/27/fat-food-a-weights-you/ [https://perma.cc/U5L6-U2YB].
149. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351 (S.D.N.Y. 2007).

which applied to nutritional content claims—preempted it.[150] Because he found it preempted, Judge Holwell did not address NYSRA's argument that the law abridged its members' First Amendment free speech rights.[151] Notably, the City did not appeal, but rather set out to revise the law—resulting in the 2008 version of Regulation 81.50.

In January of 2008, the New York City Board of Health issued a new version of Regulation 81.50, aiming to cure the previous preemption issues.[152] The new version of Regulation 81.50 was different in scope from 2006 Regulation 81.50: it required restaurant chains with fifteen or more locations to post the calories for each menu item, both on posted menu boards and on the menu itself.[153] NYSRA again petitioned the Southern District to preliminarily enjoin Regulation 81.50's enforcement and ultimately strike it down.[154] Once again, NYSRA made two arguments for striking down the law:[155] First, that the federal statutory scheme that regulated the labeling and branding of food—the Nutrition Labeling and Education Act of 1990 (NLEA) preempted the ordinance.[156] Second, that the ordinance violated restaurants' First Amendment commercial speech rights.[157]

In April 2008, Judge Holwell rejected both of NYSRA's arguments and denied its motion to preliminary enjoin the ordinance's enforcement.[158] According to Judge Holwell, the NLEA did not preempt the reformulated version of Regulation 81.50 because the voluntary nutritional statements trigger was removed.[159] Applying rational basis review, Judge Holwell found that Regulation 81.50's calorie-count disclosures—even though an underinclusive and piecemeal approach—were "reasonably related" to New York City's interest in reducing obesity.[160]

A three-judge panel for the Second Circuit affirmed Judge Holwell's decision in an opinion written by Judge Pooler.[161] Regulation 81.50 survived both preemption and First Amendment challenges. Regarding preemption, the opinion distinguished "nutrition information labeling on restaurant food" from "nutrition content claims on restaurant foods"—the NLEA preempted the latter, but not the former.[162] Because calorie counts

150. *See id.* at 357–58.
151. *See id.* at 363.
152. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000 (RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).
153. *See id.*
154. *See id.* at *13.
155. *See id.* at *4, *6.
156. *See id.* at *4.
157. *See id.* at *6.
158. *Id.* at *13.
159. *Id.* at *4–5.
160. *Id.* at *11.
161. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health (*NYSRA*), 556 F.3d 114 (2d Cir. 2009).
162. *Id.* at 120.

are the type of information that appears on a standard nutrition label, calorie counts fall into the former category and are not preempted by the NLEA.[163]

Regarding the First Amendment issue, Judge Pooler first found that calorie count disclosures were commercial speech because they were made in connection with a proposed commercial transaction: the potential purchase of a restaurant meal.[164] Citing cases from the Supreme Court and the Second Circuit, Judge Pooler rejected NYSRA's argument that heightened scrutiny was warranted and concluded that rational basis review was appropriate. First, she cited the Supreme Court's ruling in *Zauderer v. Office of Disciplinary Counsel*[165] that "regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech."[166] Second, she cited a previous Second Circuit decision authored by Chief Judge Walker—and joined by her and then-Judge Sonia Sotomayor— that applied rational basis review to "rules 'mandating that commercial actors disclose commercial information.'"[167] Applying rational basis review standards, Judge Pooler concluded that "although the restaurants are protected by the Constitution when they engage in commercial speech, the First Amendment is not violated, where as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goals of combating obesity."[168]

Throughout its journey through the judicial system—and following the Second Circuit's decision—Regulation 81.50 received significant attention. The FDA filed an amicus brief urging the Second Circuit to affirm Judge Holwell and uphold the law on both the preemption and First Amendment questions, calling it rationally related to "a state policy interest in attacking obesity among its citizens by making accurate calorie information available to consumers."[169] The Southern District and Second Circuit decisions also appear to have inspired other states contemplating similar legislation: in the two weeks following the Second Circuit's February 17, 2009 decision upholding the New York City regulation, eight states introduced their own calorie-count laws.[170] And, in September of 2008, while the case was

163. *Id.* at 125–26.

164. *Id.* at 131.

165. 471 U.S. 626 (1985).

166. *NYSRA*, 556 F.3d at 132 (quoting *Zauderer*, 471 U.S. at 626).

167. *Id.* (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114–15 (2d Cir. 2001)).

168. *Id.* at 118.

169. *See* Brief of the United States Food and Drug Administration as Amicus Curiae in Support of Affirmance at 25, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08-1892-cv, 2008 WL 6513101 (2d Cir. May 29, 2008).

170. *See* NUTRITION LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL LAWS/BILLS/REGULATIONS: 2009–2010, CTR. SCI. PUB. INT. (Feb. 16, 2010), https://cspinet.org/new/pdf/ml_bill_summaries_09.pdf [https://perma.cc/A2SQ-ASTM]. Oregon legislation was introduced on February 17, 2009—the same day as the Second Circuit decision—and enacted on June 17, 2009. *Id.* at 7. Missouri legislation was introduced that day as well. *Id.* at 14. Texas introduced legislation on February 19, 2009. *Id.* at 18. West Virginia introduced legislation on February 23, 2009. *Id.* at 19. Rhode Island introduced legislation on February 24, 2009, and Tennessee on February 26, 2009. *Id.* at 16–17. Connecticut

pending before the Second Circuit, California became the first state to enact a calorie-count law.[171]

Congress also took note. Whereas prior legislative attempts at chain restaurant labeling had failed, within a month of the Second Circuit's decision, newly proposed legislation on the subject—titled the LEAN Act—was before both the House and the Senate.[172] Had it been enacted, the LEAN Act would have effectively imposed the New York City regulation nationwide.[173] Despite the LEAN Act's ultimate failure to be adopted—as well as the failure of a rival bill titled the MEAL Act—menu-labeling legislation was proposed again later that same Congressional year (on September 17, 2009) in connection with the controversial Patient Protection and Affordable Care Act[174] (PPACA). The PPACA, along with its menu-labeling provisions, ultimately passed both the House and the Senate and was signed into law by President Barack Obama on March 23, 2010—just over a year after the Second Circuit decision.[175] Although the PPACA went through over 500 amendments between its introduction and ultimate enactment, the chain restaurant labeling requirement emerged unchanged through the process[176] and effectively extended the New York City regulation nationwide.[177]

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introduced legislation on February 27, 2009. *Id.* at 10–11 (the bill was passed by the legislature in June but was then vetoed by Governor Rell in July). Florida introduced legislation on March 2, 2009. *Id.* at 12.

171. *See* NUTRITION LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL BILLS/REGULATIONS—2007–2008, CTR. SCI. PUB. INT. 2–3 (Feb. 4 2009), https://webcache.googleusercontent.com/search?q=cache:2fp0wOpXCNcJ:https://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf+&cd=7&hl=en&ct=clnk&gl=us (summarizing the enactment of SB 1420) [https://perma.cc/5XV6-RGRN].

172. Labeling Education and Nutrition Act of 2009, S. 558, 111th Cong. (introduced by Sen. Thomas Carper (D-Del.)); Labeling Education and Nutrition Act of 2009, H.R. 1398, 111th Cong. (introduced by Rep. Jim Matheson (D-Utah)).

173. According to the official summary for both bills, the LEAN Act, if enacted, would have required

> the labeling of a standard food item served or offered for sale in a food service establishment that is part of a chain that operates 20 or more establishments under the same trade name to disclose, in a clear and conspicuous manner, prior to the point of purchase: (1) the number of calories on a menu board, on a sign meeting certain requirements, in the menu, or as part of or supplement to the menu; (2) specified nutrient information, in writing and upon request; (3) a statement directing the consumer to the availability of additional nutrient information; and (4) a statement providing suggested daily caloric intake, on a menu or menu board that does not list calories.

Cong. Research Serv., *Summary: S. 588—Labeling Education and Nutrition Act*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/senate-bill/558 (last visited Sept. 6, 2016) [https://perma.cc/8LDL-NRGE]; *see also* Cong. Research Ser., *Summary: H.R. 1398—LEAN Act of 2009*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/1398 (last visited Sept. 6, 2016) [https://perma.cc/2GML-952F].

174. H.R. 3590, 111th Cong. § 4205 (2009).

175. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (codified at 42 U.S.C. § 343(q)(5)(H)(i)–(ii) (2012)).

176. *See Amendments: H.R. 3590—Patient Protection and Affordable Care Act*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/3590/amendments (last visited Sept. 6, 2016) [https://perma.cc/N2KH-NJJF].

177. *See* 42 U.S.C. § 343(q)(5)(H)(i)–(ii).

B. Evergreen Association

In early 2011, New York City Mayor Michael Bloomberg signed into law Local Law 17, which aimed to regulate pregnancy services centers across New York City by compelling them to provide certain information to women seeking their services.[178] Such centers were often operated by groups that opposed abortions, and Local Law 17 followed a finding that some of the centers had engaged in deceptive practices. A group of pregnancy services centers sought to enjoin Local Law 17's enforcement, arguing that it infringed on their First Amendment free speech rights.[179] Specifically, the pregnancy services centers challenged Local Law 17's requirement that such centers disclose

> (1) whether or not they have a licensed medical provider on staff . . . (the "Status Disclosure"); (2) that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider" (the "Government Message"); and (3) whether or not they provide or "provide referrals for abortion," "emergency contraception," or "prenatal care" (the "Services Disclosure").[180]

In July 2011, Judge William Pauley of the Southern District of New York granted the pregnancy services centers' motion for a preliminary injunction in its entirety against Local Law 17, finding that all three disclosure requirements violated the First Amendment.[181] Finding that the plaintiffs' "speech on reproductive rights concerns an issue prevalent in the public discourse" and was therefore *not* commercial in nature, Judge Pauley applied strict scrutiny.[182] He struck down Local Law 17 as overinclusive on the ground that the required disclosures were not the least restrictive means available because they applied to both deceptive and nondeceptive speech.[183] And he declined to enforce Local Law 17's nondisclosure provisions because the statute's triggering definition of "pregnancy services center" was so vague that it was prone to arbitrary enforcement.[184]

The Second Circuit, in a January 17, 2014 opinion, also authored by Judge Pooler, affirmed in part and reversed in part.[185] Judge Pooler, joined in her opinion by Judge Raymond Lohier, rejected the Southern District's finding that "pregnancy services center" was so vaguely defined that the statute in its entirety was void and proceeded to consider each disclosure separately.[186] Applying strict scrutiny and affirming the Southern District, the Second Circuit struck down the Government Message and Services

178. N.Y.C., N.Y., ADMIN. CODE § 20-816 (2011).
179. Evergreen Ass'n v. City of New York, 740 F.3d 233 (2d Cir. 2014).
180. *Id.* at 238 (quoting N.Y.C., N.Y., ADMIN. CODE § 20-816(a)–(e)), *cert. denied*, 135 S. Ct. 435 (2014).
181. Evergreen Ass'n v. City of New York, 801 F. Supp. 2d 197 (S.D.N.Y. 2011).
182. *Id.* at 203.
183. *Id.* at 208.
184. *Id.* at 216.
185. *Evergreen Ass'n*, 740 F.3d 233.
186. *Id.* at 243–44.

Disclosure requirements.[187] In a reversal of the Southern District, it upheld Local Law 17's Status Disclosure.[188] According to Judge Pooler, the Status Disclosure was different because (1) it was "the least restrictive means to ensure that a woman is aware of whether or not a particular pregnancy services center has a licensed medical provider at the time that she first interacts with it" and (2) a pregnant woman required "prompt access to the type of care [sought]."[189]

The third judge in the panel, Judge Wesley concurred in part and dissented in part. He would have affirmed the Southern District in full and struck down the Status Disclosure as well.[190] In a sharply worded partial dissent, he labeled Local Law 17 a "bureaucrat's dream" with "a deliberately ambiguous set of standards guiding its application" because it was "irredeemably vague with respect to the definition of a pregnancy services center," and he cautioned that it would give city officials "a blank check . . . to harass or threaten legitimate activity."[191]

Even though two of the three disclosure provisions were struck down, pro-life organizations across the nation reacted strongly to the Second Circuit's decision, attributing the refusal to strike down the Status Disclosure as motivated by political concerns.[192] With the help of prominent pro-life organizations such as the American Center for Law & Justice and the Alliance Defense Fund, the pregnancy services centers filed a petition for writ of certiorari with the Supreme Court. When the Supreme Court denied that petition in November 2014, the Second Circuit decision again found itself in the spotlight.[193] During the case's journey through the federal judicial system, it played a starring role in the often-contentious debate over the role of abortion in America.

C. United States v. Caronia

The FDA plays a central role in reviewing the safety and efficacy of drugs before they may be sold to the public. After a drug is FDA approved for any use, doctors may prescribe it for whatever uses they conclude, in their medical judgment, are appropriate for their patients.[194] It is legal, commonplace, and often essential that drugs are prescribed on an off-label basis. But for years it has been unclear what limitations the FDA may place

187. *Id.*
188. *Id.* at 245.
189. *Id.* at 247.
190. *Id.* at 251 (Wesley, J., dissenting).
191. *Id.*
192. *See, e.g.*, Alliance Defending Freedom, *Court Strikes Down New York City Law Targeting Pro-Life Pregnancy Centers*, LIFENEWS.COM (Jan. 17, 2014), http://www.lifenews.com/2014/01/17/court-strikes-down-new-york-city-law-targeting-pro-life-pregnancy-centers/ [https://perma.cc/47N8-KSYU].
193. *See, e.g.*, Lawrence Hurley, *U.S. Top Court Leaves Intact New York City Pregnancy Center Rule*, REUTERS (Nov. 3, 2014), http://www.reuters.com/article/us-usa-court-abortion-idUSKBN0IN1A720141103 [https://perma.cc/K4YJ-3ZFS]s.
194. *Understanding Unapproved Use of Approved Drugs "Off Label,"* FDA, http://www.fda.gov/ForPatients/Other/OffLabel/default.htm (last visited Sept. 6, 2016) [https://perma.cc/MEY8-VFHT].

on the speech of pharmaceutical companies about the off-label uses of their drugs. In *United States v. Caronia*,[195] the Second Circuit made clear that, so long as what is said about off-label use of a drug is truthful and nonmisleading, the First Amendment protects it.[196]

Alfred Caronia was a Special Sales Consultant of Orphan Medical, Inc., a pharmaceutical company that manufactured the drug Xyrem.[197] The FDA had approved the drug for two uses for narcolepsy patients.[198] Caronia, as part of his role in marketing Xyrem, urged doctors to prescribe it for other uses.[199] He was charged and convicted of the crime of conspiring "to introduce a misbranded drug into interstate commerce" based on his efforts to persuade doctors to prescribe Xyrem for off-label uses.[200] The government made repeated references to Caronia's speech throughout the case, ultimately leading the court to reverse his conviction on the ground that he had been convicted, in violation of the First Amendment, for his off-label promotion. In reaching that conclusion, the court, in an opinion by Judge Chin, made a number of significant rulings.[201]

The court relied heavily on the then-recent Supreme Court ruling in *Sorrell v. IMS Health, Inc.*,[202] a case that, among other things, concluded that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the . . . First Amendment."[203] Applying, as the Court in *Sorrell* had, the test for commercial speech set forth in *Central Hudson Gas & Electric v. Public Service Commission*,[204] the court held that "the government's construction" of the Federal Food, Drug and Cosmetic Act (FDCA) "as prohibiting off-label promotion" could not withstand constitutional scrutiny since it did not directly advance any government interest to a material degree.[205] Off-label use itself, the court observed, was not illegal, and "even if pharmaceutical manufacturers are barred from off-label promotion, physicians can prescribe, and patients can use, drugs for off-label purposes."[206] Put another way, "[t]he government's construction of the FDCA essentially legalizes the outcome—off-label use—but prohibits the free flow of information that would inform that outcome."[207]

Nor, the court concluded, were the government's regulations narrowly drawn, as also required by *Central Hudson*.[208] There were numerous

195. 703 F.3d 149 (2d Cir. 2012).
196. *See id.*
197. *Id.* at 155.
198. *Id.*
199. *Id.* at 156–57.
200. *Id.*
201. Judge Debra Ann Livingston dissented, arguing that heightened scrutiny was unwarranted because the speech at issue was "evidence of intent." *See id.* at 182 (Livingston, J., dissenting).
202. 564 U.S. 552 (2011).
203. *Caronia*, 703 F.3d at 162 (quoting *Sorrell*, 564 U.S. at 557).
204. 447 U.S. 557 (1980).
205. *Caronia*, 703 F.3d at 166.
206. *Id.*
207. *Id.* at 167.
208. *Id.*

alternatives available to the government other than ones that threatened First Amendment rights.[209] Those included guiding physicians and patients to distinguish between misleading and accurate information, developing warning or disclaimer systems or "safety tiers within the off-label market" or the like.[210] "The government's interests," the court stated, "could be served equally well by more limited and targeted restrictions on speech."[211]

The court summed up its ruling this way: "We conclude simply that the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful, off-label use of an FDA-approved drug."[212]

The Second Circuit's ruling "sent shockwaves through the pharmaceutical industry,"[213] and left many in the industry optimistic that the ruling would give them greater freedom under the First Amendment to promote off-label uses for drugs, so long as they did so truthfully and in a nonmisleading manner.[214] The optimism increased when, in August 2015, Judge Paul Engelmayer for the Southern District of New York granted Amarin Pharma, Inc.'s motion to preliminarily enjoin the FDA from prosecuting it for misbranding based on entirely accurate and nonmisleading speech about off-label use of its drug, a ruling later embodied in a final order agreed to by the parties and signed by Judge Engelmayer.[215] *Caronia* no doubt represents a major step in providing pharmaceutical companies with broad First Amendment protection for their truthful and nonmisleading speech.

VI. SPEECH OF GOVERNMENT EMPLOYEES

In *Garcetti v. Ceballos*,[216] the Supreme Court ruled, by a 5–4 vote, that the First Amendment offers no protection to a government employee for making statements "pursuant to their official duties" that lead to their dismissal, even if the statements relate to matters of public concern.[217] Later cases thus have focused on whether statements made by public employees were made by them in that capacity or as citizens. In *Matthews*

209. *Id.* at 168.
210. *Id.*
211. *Id.*
212. *Id.* at 169.
213. Jonathan Sack, *Does Misdemeanor Misbranding Survive Caronia?*, FORBES (Dec. 11, 2012), http://www.forbes.com/sites/insider/2012/12/11/does-misdemeanor-misbranding-survive-caronia/ [https://perma.cc/N2BR-82VJ].
214. *See, e.g.*, *The Impact of* Caronia *Case: What Happens Next?*, POL'Y & MED. (Jan. 17, 2013), http://www.policymed.com/2013/01/the-impact-of-caronia-case-what-happens-next.html [https://perma.cc/74LD-YGQQ]; *see also* Katie Thomas, *Ruling Is Victory for Drug Companies in Promoting Medicine for Other Uses*, N.Y. TIMES (Dec. 3, 2012), http://www.nytimes.com/2012/12/04/business/ruling-backs-drug-industry-on-off-label-marketing.html?_r=0 [https://perma.cc/WR7V-9FGF].
215. Amarin Pharma, Inc. v. FDA, 119 F. Supp. 3d 196 (S.D.N.Y. 2015). The author of this Article represented plaintiff Amarin Pharma, Inc. in its action against the FDA.
216. 547 U.S. 410 (2006).
217. *Id.* at 421.

v. City of New York,[218] the Second Circuit addressed the question of how speech of a police officer to his commanding officers should be characterized where the officer took issue with an arrest quota policy. Reversing a district court decision to the contrary, the court concluded that the officer spoke as a citizen and that the First Amendment therefore protected his speech.[219]

Officer Matthews maintained that supervisors in his precinct had implemented a quota system "mandating the number of arrests, summons, and stop-and-frisks that police officers must conduct."[220] He repeatedly reported the policy to several of his superiors and repeatedly took issue with it, arguing that the policy was, among other things, "having an adverse effect on the precinct's relationship with the community."[221] As a result, Matthews claimed, he had been punished by being given punitive assignments, denied overtime, and given negative performance reviews; retaliation that he claimed violated the First Amendment.[222]

The legal issue in the case was clear. There was no doubt that the speech at issue related to matters of public concern. But that had been true in *Garcetti* as well, a case in which a deputy district attorney, Richard Ceballos, had become persuaded that an affidavit submitted by his office in a criminal proceeding had contained significant inaccuracies, who repeatedly told his superiors that and recommended dismissal of the case, and who finally had been called to testify for the defense in the case.[223] After doing so, Ceballos claimed that he had been retaliated against by being relegated to a diminished position, given no promotions, and otherwise punished for his speech.[224] In that context, the First Amendment had been held to afford him no protection because he had, the majority concluded, done so in his role as a government employee.[225]

In *Matthews*, the court held that *Garcetti* was not controlling.[226] Judge Walker's opinion held that Matthews's speech was not what he was "employed to do," that the speech addressed a "precinct-wide policy" which was "neither part of his job description nor part of the practical reality of his everyday work."[227] When a public employee's duties "do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern," the court concluded, "he or she speaks as a citizen, not as a public employee."[228]

Garcetti itself was a controversial ruling, one that led the President of the American Federation of State, County and Municipal Employees to

218. 779 F.3d 167 (2d Cir. 2015).
219. *See id.*
220. *Id.* at 169.
221. *Id.* at 169–70.
222. *Id.* at 170.
223. Garcetti v. Ceballos, 547 U.S. 410, 41314 (2006).
224. *Id.* at 415.
225. *Id.* at 425–26.
226. *Matthews*, 779 F.3d at 174.
227. *Id.*
228. *Id.*

characterize it as having said to public employees, "[y]our conscience or your job. You can't have both."[229] Enforcement of it has been difficult because its results have often seemed morally dubious and at odds with the spirit, if not what the Supreme Court has held to be the required reading, of the First Amendment. The reversal in *Matthews*, of a district court seeking to abide by *Garcetti*, followed earlier proceedings in the case. Earlier, a different district court judge seeking to apply *Garcetti* had also dismissed Matthews's claim and was subsequently reversed on the ground that discovery was necessary as to "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two."[230] We can expect more cases and more conflict in this area.

VII. JOURNALIST PRIVILEGE

The Second Circuit also has made noteworthy contributions to the case law regarding the First Amendment rights of journalists. *Gonzales v. National Broadcasting Co.*[231] is such a case, and, while its substance is itself noteworthy, the process by which it was reached also warrants attention.[232]

In the case motorists brought a suit against a deputy sheriff for racially motivated stops and detentions. The motorists sought to introduce video evidence of a similarly challenged stop of an NBC reporter that was also conducted by Deputy Pierce.[233] The video had been recorded from a hidden camera on the reporter's car, and several still images taken from it subsequently aired on a Dateline program regarding law enforcement misconduct.[234] The motorists filed a nonparty subpoena to compel NBC to produce the entire hidden-camera footage and, in September of 1997, NBC was ordered by the Southern District of New York to produce the tape despite its claim of journalist privilege.[235] After being held in contempt, NBC appealed.

In September of 1998, the Second Circuit affirmed the Southern District of New York and ordered NBC to turn over the previously unreleased footage.[236] The court, in a unanimous opinion written by Judge Barrington Parker, announced that "[o]ur holding today is that there is no journalists' privilege for nonconfidential information."[237] Members of the press and

229. Press Release, AFSCME, Supreme Court to Public Employees: 'Your Conscience or Your Job' (May 30, 2006), http://www.afscme.org/news/press-room/press-releases/2006/supreme-court-to-public-employeesyour-conscience-or-your-job [https://perma.cc/N9LB-ZAFS].

230. *Matthews*, 779 F.3d at 170 (quoting Matthews v. City of New York, 488 F. App'x 532, 533 (2d Cir. 2012)).

231. 155 F.3d 618 (2d Cir. 1998), *amended by* Gonzales v. Nat'l Broad. Co., 194 F.3d 29 (2d Cir. 1999).

232. *Id.*

233. *See id.* at 619–20.

234. *See id.* at 620.

235. *Id.* at 619–21.

236. *Id.* at 628.

237. *Id.* at 626.

their attorneys expressed dismay at the holding and at the courts's observation that the issue regarding nonconfidential information was one of first impression. They maintained that it was long established that nonconfidential information was protected by the First Amendment and they had long resisted subpoenas on that ground.[238]

The newly adopted stance was at odds with previous Second Circuit dicta in *Von Bulow v. Von Bulow*,[239] a 1987 opinion penned by Senior Judge William Timbers in which the Second Circuit indicated that it, like other circuits that confronted the issue, would hold that nonconfidential information was protected by a qualified journalist-source privilege.[240] But, as the court in *Gonzalez* pointed out, the language from *Von Bulow* was nonbinding, with the actual holding of *Von Bulow* being that the reporter's privilege did not apply where the journalist gathered the information for private use with no intent to ever publish it.[241] The court was thus free to depart from *Von Bulow*'s recognition of a journalist privilege if it saw fit to do so.[242]

On reconsideration, a unanimous three-judge panel withdrew the earlier opinion and announced a very different stance with respect to nonconfidential information: it recognized the existence of the journalists' privilege in the Second Circuit.[243] Judge Pierre Leval, in an opinion joined by Judges Joseph McLaughlin and Arthur Spatt (both of whom had joined Judge William Timbers's decision a year earlier), announced that "the qualified privilege protecting press materials from disclosures applies to nonconfidential as well as to confidential materials."[244] But he stressed that "the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought."[245] Ultimately the Second Circuit upheld the initial result, requiring the journalist to turn over the tape, finding that the privilege was overcome because the plaintiffs showed that the outtakes were "likely relevant to a significant issue in the case, and [were] not reasonably obtainable from other available sources."[246] The decision on reconsideration provided considerable protection for the press in an area of considerable controversy and in which the law had long been less than clear.

CONCLUSION

The Second Circuit has played a major role in the development of First Amendment law. From the days in which Learned Hand reigned

238. *See* Mark R. Kravitz, *Developments in the Second Circuit: 1997–1998*, 18 QUINNIPIAC L. REV. 809, 822 (1999).
239. 811 F.2d 136 (2d Cir. 1987).
240. *Id.* at 145.
241. *Gonzales*, 155 F.3d at 623.
242. *Id.* (reasoning that the *Von Bulow* statements were nonbinding because they were mere dicta and lacked any further analysis on the issue).
243. Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 32 (2d Cir. 1999).
244. *Id.* at 32.
245. *Id.* at 36.
246. *Id.*

intellectually on the Second Circuit through current rulings, the court has assured that broad protections for freedom of expression were afforded. First Amendment arguments did not always prevail, and there is no reason to think they always should have. But the court has always been receptive to them, and its decisions have reflected a high level of dedication to assuring that the communications capital of the nation remains at the forefront of defending the freedoms set forth in the First Amendment.