DDT, the New York Times, and Judge Irving Kaufman

by Thomas H. Jukes

The following is reprinted from the Spring 1992 issue of 21st Century Science & Technology *magazine. The article was occasioned by the death on Feb. 1, 1992, of Judge Irving Kaufman, who had gained national attention for two famous cases: the first, sentencing Julius and Ethel Rosenberg to the electric chair, and the second, overturning a jury decision in a libel suit against the* New York Times *and the Audubon Society, brought by the author and other scientists. (See box on Dr. Jukes, p. 14.)*

In the summer of 1962, Rachel Carson published her book *Silent Spring*. One remarkable feature of this book was that it did not mention in any way the fact that DDT had saved more lives and prevented more illness than any chemical in history. This was because of the effect of DDT on many tropical diseases, but most of all, malaria. Rachel Carson's readers in the United States knew little or nothing of malaria, the "monarch of diseases," and its deadly effect on the inhabitants of tropical countries, particularly on children.

Another remarkable feature about Carson's book was that she said that the American robin was on the verge of extinction. This statement appeared one year before the dean of American ornithologists, Roger Tory Peterson, said that the robin was probably the most common bird on the North American continent.

In September 1963, I published the article "People and Pesticides" in the *American Scientist*. While preparing that article, I had received a manuscript by Philip Marvin, who had summarized the bird counts listed in the Audubon Society publications. I gave one example from Marvin's summary. This was the robin count, which was 19,616 in 1941, and 928,639 in 1960, before and after DDT. The number of observers was 2,331 in 1941 and 8,928 in 1960; therefore there were more observers, but the number of robins per observer was 8.4 counted in 1941, and 104 in 1960. I commented, "the increase is presumably significant, and the robin does not appear to be on the verge of extinction."

Some years later, in 1972, I received a telephone call from John Devlin, a reporter at the *New York Times*. He said that an editor, who was an official of the Audubon Society, had stated that I was a "paid liar," together with Gordon Edwards, Bob White-Stevens, Donald Spencer, and Norman Borlaug. This accusation was made because I had allegedly "twisted" the bird data, and had not taken into account the fact that the number of bird counters in 1960 had increased over the number in 1941. Therefore, said the Audubon man, the reason that the counts had increased in 1960 was that there were "more birders, not more birds."

This statement was false. However, Devlin refused to print my rebuttal of it. All my calculations had been based on birds counted per observer. Many other species in addition to robins had been counted, and in most cases, the number of birds per observer had increased during the period when DDT came into widespread use. I had not "twisted" any data, I had merely quoted the Audubon results.

I appealed to one of the editors of the *New York Times,* the editor of the editorial page, John Oakes, whom I had met, to publish my correction of the Audubon statement that Devlin quoted. Oakes refused to do so, and did not respond to my letter.

Libel

We did not like being called "paid liars," especially when we thought that it was the Audubon people who were the misrepresenters of the facts. So we filed suit for libel against the *New York Times,* and against the National Audubon Society; its president, Dr. Elvis Starr; its employee, Robert Arbib, who had supplied the *New York Times* with the information about us; and Audubon Secretary Roland Clement, from whom Arbib had obtained the information and our names.

There was a long time of depositions and other legal proceedings before we finally got into court. During this period, attorney Victor Yannacone (famous for fighting against DDT), deposed and under oath, said that he had attended a meeting in which Roland Clement of Audubon, together with officials of the Enviromental Defense Fund, had decided that I should be muzzled. This was to be done by attacking my credibility.

The jury trial itself took place in 1976, in U.S. District Court in New York. Our attorneys, Tom Rothwell and Arthur Berndston, challenged a number of the prospective jurors and refused to accept some of them who were evidently prejudiced in favor of the *New York Times* and the Audubon Society.

There was one juror, however, who said that he was a member of Audubon Society but that he was not prejudiced

against us. This one was allowed to sit on the jury, and I have always wondered whether he was responsible for the elimination of the Audubon Society and of Robert Arbib from the charges.

A fascinating trial

The trial itself was fascinating because the two defendants, through their attorneys, attacked each other. The courtroom attorney for the *New York Times* was a well-known and able lawyer, Floyd Abrams. He castigated Arbib on the witness stand. He asked Arbib where he got his information about the plaintiffs being paid liars, and Arbib said that he got part of it in the lunch room and part of it from Roland Clement. Abrams then asked Arbib what he had done to verify his sources. When Arbib said he had done nothing, Abrams asked him, "What kind of an editor do you think you are?"

In turn, the Audubon lawyer raked John Devlin, the *New York Times* reporter who had published the libelous article, over the coals in cross-examination, and to good effect. The best one could say for John Devlin was that he appeared somewhat inept.

We began to feel quite optimistic as our opponents destroyed each other in the courtroom. The sequence of events had been that Arbib had published a piece in Audubon's *American Birds,* saying that some spokesmen for the pesticide industry were "paid liars." Devlin kept telephoning Arbib to get some names. Arbib at first refused, then asked Clement for some names, and Clement named White-Stevens, Edwards, Spencer, Borlaug, and myself. These names were then transmitted to Devlin by Arbib. Devlin telephoned some of us, but did not publish our rebuttals, except to say that we generally denied the charges.

When Devlin's article appeared, Aug. 14, 1972, Clement decided to write a letter commending it over Arbib's signature. Clement wrote and mailed the letter, then telephoned Arbib in North Dakota and read the letter to Arbib on the telephone, asking Arbib to approve it; Arbib very strongly refused, but the letter had been sent!

On the witness stand, we emphasized the need for DDT in the developing countries to protect against illness and death from malaria. The opposition did not attempt to impeach our characters or credibility.

Philip Marvin and Victor Yannacone were both witnesses for us. Marvin described how he had looked out of his window and seen many birds, so he decided to compile and compare the Audubon Christmas bird counts. This showed that most birds had increased in numbers per observer during the years of DDT. However, the opposing lawyer accused Marvin of making bird counts by looking out of his window—a ridiculous charge, since Marvin had explained that this was simply what had gotten him started on examining the actual data compiled by Audubon.

Yannacone described the meeting that Clement and he had attended with the Environmental Defense Fund, in which it was decided to attack my credibility.

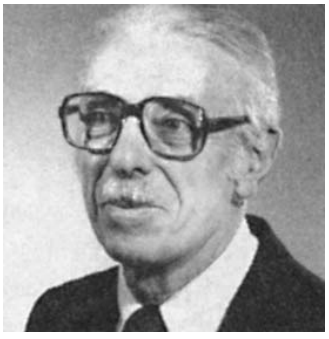
The jury decided in our favor, and the *New York Times* and Clement were blamed for the libel by the jury, but the Audubon Society and Arbib were not convicted.

Enter Judge Kaufman

This was the first libel case the *New York Times* had lost in many years, and the newspaper appealed the case. Quite conveniently, the appeal was heard in the U.S. Second Circuit by Judge Irving Kaufman, a close friend of *New York Times* publisher Arthur Ochs Sulzberger.

The case, publicized as one of Kaufman's most important decisions involving the First Amendment, was known as *Edwards v. the National Audubon Society* (1977). In it, Kaufman wrote that a newspaper does not commit libel by fairly and accurately reporting accusatory statements by a responsible public organization, even if the statements are clearly defamatory and false. Just how a public organization can be "respon-

In Memoriam: Thomas H. Jukes



Thomas H. Jukes (1906-99), an emeritus research chemist at the University of California at Berkeley, died on Nov. 1, 1999, at age 93, after a short illness. Jukes had a wide-ranging scientific career, including pioneering work in chemotherapy at Lederle Pharmaceutical Laboratories, classical research on nucleotides and the amino acid code, and many years as associate director of the space sciences laboratory at the University of California.

He was the author of hundreds of scientific articles and several books, and he was working at the university until his most recent illness.

Jukes became a leader of a group of scientists who fought for the truth about DDT, and opposed the environmental extremists who wanted to ban DDT and other pesticides. He was relentless in writing letters to editors of newspapers and producers of television shows, correcting their propaganda on DDT, and stressing that DDT had saved more millions of human lives than any other man-made chemical.—Marjorie Mazel Hecht

sible" if it makes defamatory and false statements is not explained.

The *Village Voice* (New York), in an article by Sol Stern titled "Irving Kaufman's Haunted Career" (March 6, 1984), described how Kaufman had been friendly for many years with Sulzberger and his family. Given such closeness of association, should not Kaufman have removed himself from any participation in the *New York Times'*s appeal?

The *Village Voice* article pointed out that "on March 16, 1977, disqualification notices were sent to all the judges. . . . Disqualifying bias or prejudice . . . arises most often from prior personal relationships." Supreme Court Justice Felix Frankfurter wrote that judges should recuse (disqualify) themselves when and because "the administration of justice should reasonably appear to be disinterested as well as be so in fact."

Nevertheless, Judge Kaufman "chose to be zealous in holding on to the case for himself," and he assigned the case to a panel on which he would be sitting with two outside judges—retired Supreme Court Justice Tom Clark and a visiting judge from Montana. The *Voice* comments that the record shows that "visiting judges never wrote a single dissenting opinion" from that of the chief judge in this court.

The decision, written by Judge Kaufman, overturned the ruling of the lower court. It included the following statements:

"Unfortunately, the Audubon Society's principal charges, as reported in Devlin's article for the *Times,* went far beyond a mere accusation of scientific bad faith. The appellees were charged with being 'paid to lie.' It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than 'paid liar.'

"To call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.

". . .[I]t is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessing of a democratic way of life."

Judge Kaufman therefore clearly recognized that we had been defamed and damaged. Surely, if he believed this, he should have allowed the decision against Clement to stand! The Audubon Society is not a newspaper, and does not need to be guaranteed "freedom of the press."

With consummate ingenuity, Judge Kaufman proceeded to rule that it was Arbib rather than Clement, who was to blame for naming us as paid liars. Therefore, the lower court's decision in this respect was erroneous and was overturned. Of course, it would not be possible at this point to convict Arbib—the principle of double jeopardy prevented this. Clement, and not the Audubon Society, had been convicted by the U.S. District Court.

So, Kaufman emerges not only as a friend of the *New York Times,* but as a friend of a friend of the *New York Times*. His action on behalf of Audubon showed clearly that he had no sympathy for the plaintiffs, despite his ringing assertion that we had been defamed without "any serious basis"!

Postlude

We carried our case to the Supreme Court, with the help of our friends in Accuracy in Media, the National Legal Foundation, and the Media Institute. In the meantime, retired Justice Tom Clark died. The Supreme Court refused to review our case, and we suspected that one of the reasons might be because Justice Clark had participated in the decision against us in the appeals court. The Supreme Court is reluctant to disturb the decisions of its deceased former members, we were told.

My reaction was philosophical: "You win some and you lose some." In any event, I thought the best thing was not to carry a grudge, and I wrote to Floyd Abrams, saying that I was crossing the field to shake his hand in defeat. He replied with a nice letter.

There the matter rested, until Judge Kaufman decided to open up old wounds by writing an Op-Ed piece in the *New York Times* in the fall of 1982, congratulating himself on his wonderful decision in the *Edwards v. Audubon* case, as it is now known in legal circles. This article, "The Media and Juries," also includes a self-serving explanation of how juries are not qualified to decide the "constitutional imperative of an unrestrained press." The *Village Voice* commented that "Since the Audubon decision, Kaufman has become a regular at the *New York Times*. . . . He is, to put it mildly, treated as a member of the family."

Reed Irvine of Accuracy in Media challenged Kaufman's 1982 article, writing in a letter to the editor that the Kaufman decision was "Kafkaesque"; he also mentioned Kaufman's connection with the *New York Times*. Irvine was attacked by Floyd Abrams in the letters column of the *New York Times,* which refused to print Irvine's rebuttal to Abrams's letter. Among other things, Abrams objected to the term "Kafkaesque." In retrospect, "Kaufmanesque" might have been equally forceful.

Floyd Abrams, the lawyer for the *New York Times* in this case, has benefited from it greatly and is now regarded as a leading First Amendment lawyer. In a Feb. 3, 1992 obituary for Kaufman, Abrams said that Judge Kaufman's rulings "reflected an abiding belief in the significance of free expression for everybody."

Everybody, that is, except those who object to being called "paid liars" by the *New York Times,* which has consistently refused to publish any letters from me on the subject of their article and our suit.