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OF "SLOPPY JOURNALISM," "CORPORATE TYRANNY," AND MEA CULPAS: THE CURIOUS CASE OF MOLDEA V. NEW YORK TIMES

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I. INTRODUCTION

It's a compelling (if technologically dated) image: "the lonely pamphleteer who uses carbon paper or a mimeograph," asserting First Amendment freedoms in the face of powerful interests. And, indeed, for many years, free speech law arose out of the courage of political activists of various stripes, Jehovah's Witnesses, and muckrakers, people on the fringes of society with

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iconoclastic beliefs that irritated, and sometimes threatened, the status quo.

This image, still as powerful as it was decades ago, is fast becoming a romantic picture of a society past. These days, free speech law is as likely to be made at the behest of corporations whose position in society is secure.

This Article tells the story of how for a brief time—eleven weeks—the mighty New York Times was brought to its knees by a lone journalist, Dan Moldea. It tells of an influential appellate court that first sided with a little guy and then, in the face of a barrage of scathing criticism from the media and a display of the prodigious legal talent at the Times's disposal, just weeks later reversed itself. The incident at once sheds light on an important and volatile area of First Amendment law, the judicial process, and the nature of the mass media in the 1990s.

II. THE GENERAL CONTEXT: FROM GERTZ TO MILKOVICH

It all began with a dictum. In Gertz v. Robert Welch, Inc., the United States Supreme Court faced the question of whether the strong protections provided to the media in New York Times v. Sullivan in suits brought by "public" plaintiffs would also be

5. See STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990) (arguing that the First Amendment is intended "to protect the romantics . . . the dissenters, the unorthodox, the outcasts"; its purpose is to "sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all").

6. See, e.g., Virginia Pharmacy Bd. v. Virginia Consumers Council, 425 U.S. 748 (1976) (holding that offers to sell products are protected by the First Amendment); Buckley v. Valeo, 424 U.S. 1 (1976) (finding campaign contributions to be a form of political speech protected by the First Amendment); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding that the First Amendment allows a newspaper to refuse to print a reply from a political candidate that it had attacked).


10. 376 U.S. 254, 280 (1964) (holding that a public official must prove that the defendant published with "actual malice"—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not). This constitutional privilege was extended to claims brought by public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In the years since New York Times v.
available in libel actions brought by “private” plaintiffs. Justice Powell observed:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Alas, despite this glowing rhetoric, Elmer Gertz’s libel claim had nothing to do with “ideas” or “opinions”; he sued because of allegations in a right-wing publication that he had a long police record, was a “Leninist” and “Communist,” and an architect of a plot to cripple the Chicago police force. Nevertheless, by 1990 every federal circuit and the courts of at least thirty-six states and the District of Columbia recognized that a statement of opinion was absolutely protected because, according to Gertz, “[u]nder the First Amendment there is no such thing as false idea.” Similarly, the drafters of the Restatement (Second) of Torts concluded that Gertz was so far-reaching as to render redundant the related common-law doctrine of “fair comment.”

_Sullivan_, the Court has provided a number of other constitutional protections to media defendants, both substantive and procedural. See David A. Logan, _Tort Law and the Central Meaning of the First Amendment_, 51 U. Pitt. L. Rev. 493, 505-15 (1990).

11. _Gertz_, 418 U.S. at 325.
12. _Id._ at 339-40 (footnote omitted).
13. _See id._ at 326.
14. ROBERT D. SACK & SANDRA S. BARON, _LIBEL, SLANDER, AND RELATED PROBLEMS_ § 4.2.3.1, at 208-10 (2d ed. 1994); _see also_ Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) (stating that the Gertz dictum “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question”).
15. _RESTATEMENT (SECOND) OF TORTS_ § 566 cmt. c (1977). Fair comment was one of an array of extra-constitutional privileges provided by common law to blunt the threat to free expression represented by the strict liability nature of defamation. _See_ BRUCE W. SANFORD, _LIBEL AND PRIVACY_ § 5.2 (2d ed. 1993); _see also_ Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (Holmes, J.) (quoting Lord Mansfield in _Rex v. Woodfell_, Lefft, 776, 781, 98 Eng. Rep. 914, 916 (1774)) (“Whatever a man publishes, he publishes at his peril.”). In general, fair comment “afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.” 1 FOWLER V. HARPER & FLEMING JAMES, JR., _LAW OF TORTS_ § 5.28, at 456 (1956) (footnote omitted). Most jurisdictions...
Lacking guidance from the Supreme Court as to how to apply the fact/opinion distinction, the lower courts adopted one of several related approaches. The majority rule, at least for federal courts, came from the United States Court of Appeals for the District of Columbia Circuit. In *Olman v. Evans*, Judge Kenneth Starr, writing for a highly fragmented en banc court, announced a four-part test to determine whether a particular statement was an opinion and thus absolutely protected by the First Amendment. First, did the common usage of the words have a sufficiently precise meaning to convey a definite message? Second, was the statement verifiable—susceptible to empirical proof or disproof? Third, did the specific context in which the offending statement occurred signal to readers that the statement should not be taken in a literal sense? Finally, did the broader “social context” in which the statement occurred (such as an editorial or comedy) alert readers to expect some-
thing other than statements of fact? Judge Starr concluded:

[Most fundamentally, we are reminded that in the accommodation of the conflicting concerns reflected in the First Amendment and the law of defamation, the deep-seated constitutional values embodied in the Bill of Rights require that we not engage, without bearing clearly in mind the context before us, in a Talmudic parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis. Ours is a practical task, with elemental constitutional values of freedom looming large as we go about our work. And in that undertaking, we are reminded by Gertz itself of our duty "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise."]

The United States Supreme Court did not squarely face whether the Constitution provided special protection to statements of opinion until 1990. In \textit{Milkovich v. Lorain Journal Co.} a high school wrestling coach claimed that he had been libeled by an allegation in a sports column that he lied when testifying about his role in an altercation between his team and an opposing squad. Chief Justice Rehnquist, writing for the

\begin{footnotes}
\item[22] \textit{Id.} at 983-84.
\item[23] \textit{Id.} at 991 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)). Courts adopted two other fact/opinion tests, one from Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980), the "totality of the circumstances" approach, and the other from the \textit{RESTATEMENT (SECOND) OF TORTS §§ 606-610 (1977)}, the "verifiability" approach.
\item[24] The Court had addressed the fact/opinion distinction obliquely in three earlier decisions. In \textit{Greenbelt Coop. Publishing Ass'n v. Bresler}, 398 U.S. 6 (1970), the Court held that an accusation at a city council meeting that the plaintiff's negotiating strategy with the city was "blackmail" was not actionable because the statement was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." \textit{Id.} at 14. In \textit{Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin}, 418 U.S. 264 (1974), a local union published a newsletter maligning non-union members of a bargaining unit as "scabs" and "traitors." \textit{Id.} at 268. The Court held that these words were used in a "loose, figurative sense," and thus were not actionable. \textit{Id.} at 284. Finally, in \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46 (1988), the Court held that the First Amendment precluded recovery under state law for an "ad parody" that could not reasonably be interpreted as stating actual facts about the plaintiff, Reverend Jerry Falwell. \textit{Id.} at 57.
\item[26] \textit{Id.} at 4-7.
\end{footnotes}
Court, rejected the proposition that the Gertz dictum "was intended to create a wholesale defamation exemption for [any statement] that might be labeled 'opinion.'"27 Rather, he argued that "such an interpretation ... would ... ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."28 The Chief Justice asserted that for constitutional purposes the relevant distinction was between a protected "subjective assertion" and an actionable "articulation of an objectively verifiable event."29 Thus, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."30 In a swipe at Ollman, the Chief Justice criticized reliance upon "a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum)."31 On the facts presented, the Chief Justice concluded that an allegation that plaintiff Milkovich lied under oath was sufficiently factual to be provable as true or false, and that the actual words in the column were "not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tone of the article negate this impression."32

27. Id. at 18 (citations omitted).
28. Id.
29. Id. at 22 (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).
30. Id. at 20 (footnote omitted).
31. Id. at 19. The Chief Justice emphasized that absolute protection remained for statements that cannot "reasonably be interpreted as stating actual facts" and that "[t]his provides assurance that public debate will not suffer for lack of 'imaginative expression' or 'rhetorical hyperbole.'" Id. at 20 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 53-55 (1988)). The Chief Justice also cataloged the existing constitutional protections afforded libel defendants and concluded that they provided sufficient protection "without the creation of an artificial dichotomy between 'opinion' and fact." Id. at 19; see also Logan, supra note 10, at 505-15 (discussing the various constitutional protections afforded defendants in defamation actions).
32. Milkovich, 497 U.S. at 21. One should note that Chief Justice Burger and then-Associate Justice Rehnquist dissented from the denial of certiorari in Ollman v. Evans, 471 U.S. 1127 (1985), on the ground that the opinion doctrine should be limited to statements on political ideas. Id. at 1129 (Rehnquist, J., with whom Burger, C.J., joined, dissenting); see also Ollman v. Evans, 750 F.2d 970, 1002 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (stating that courts should be especially protective when the allegedly defamatory statements occur in the "political arena"), cert.
Despite the common sense notion that the context in which a statement occurs is relevant, if not essential, to understanding the meaning of that statement, the Chief Justice's opinion focused only upon verifiability.\textsuperscript{33} So understood, \textit{Milkovich} made the "already complex body of law surrounding the fact/opinion distinction... significantly more enigmatic."\textsuperscript{34} It also exposed "to new libel risk editorials, reviews, commentaries, and columns—areas widely thought to enjoy near-absolute protection under the First Amendment."\textsuperscript{35}


Justice Brennan, in a separate opinion joined by Justice Marshall, wrote that the \textit{Milkovich} majority had answered the question of whether there is a separate constitutional privilege for statements of opinion "cogently and almost entirely correctly." \textit{Milkovich}, 497 U.S. at 23 (Brennan, J., dissenting). Unlike the majority, however, he cited \textit{Ollman} and urged that context continue to be a key factor in determining whether the offending statement purports to state or imply "actual facts about an individual." \textit{Id.} at 24. How Justice Brennan could claim to agree with the majority's analysis, while emphasizing the need for consideration of context, was puzzling:

Justice Brennan's opinion was something of a feat of legerdemain. The three cases he cited, [\textit{Ollman} plus two others,] were widely acknowledged for the principle that "opinion" was ipso facto constitutionally protected—precisely the point that the Court in \textit{Milkovich} denied—and for proffering tests to distinguish between unprotected allegations of fact and protected statements of opinion. Justice Brennan's opinion transmuted these cases from authority on the no-longer-viable issue of how to tell the difference between unprotected fact and protected opinion, to authority for how to tell the difference, under \textit{Milkovich}, between unprotected statements provably false and protected statements not provably false.

SACK & BARON, supra note 14, § 4.2.4.1, at 213 n.52 (citation omitted).

\textsuperscript{33} Cf. Immuno A.G. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991) (criticizing the majority opinion in \textit{Milkovich} for focusing only on the "type" of speech and whether the words were verifiable, while ignoring the other two \textit{Ollman} factors—the presence of any qualifying language and the context in which the statement occurred); Martin F. Hansen, \textit{Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech}, 62 GEO. WASH. L. REV. 43, 56-57 (1993) (same).

\textsuperscript{34} RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.01[2], at 6-4.1 (1994). Leading media lawyer and treatise writer Bruce Sanford, see supra note 15, agreed; he said that \textit{Milkovich} was "a crude opinion that destabilized an area of law that was perfectly stable and quite understandable." Cynthia Fox, \textit{How Scary Is Milkovich? A Matter of Opinion}, COLUM. JOURNALISM REV., May/June 1992, at 19, 20 (quoting Bruce Sanford).

\textsuperscript{35} Fox, supra note 34, at 19. \textit{Milkovich} even had an impact on federal circuit judge (and part-time wag) Alex Kozinski. He related that he was preparing a column for the \textit{Wall Street Journal} and planned to write some unpleasant things about Nintendo:
III. THE SPECIFIC CONTEXT

A. The Battle Lines Are Drawn: Dan Moldea and the New York Times

Dan Moldea, a burly ex-teamster from Akron, Ohio, was an investigative journalist “who specialize[d] in organized-crime investigations.” He was a successful lecturer and the author of three books and numerous magazine and newspaper articles. In July 1987, “Moldea secured an assignment from Regardie’s magazine . . . to write an article about [the relationship between organized crime and] the National Football League (‘the NFL’).” This article led to a book, *Interference: How Organized Crime Influences Professional Football (Interference).* Moldea’s thesis was that gambling and organized crime interests had changed the outcome of as many as seventy NFL games.

Both Moldea and his publisher had high hopes for *Interference,* and Moldea embarked upon a thirteen-city promotional tour, involving seventy interviews with the media. Sales of the first printing were strong and promised to get even better with the interest likely to be generated by the opening of the

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I wanted to tweak their nose. I was about to send it out and a word flashed through my mind: Milkovich. So I called all my law clerks together and said, “Milkovich this for me!” And sure enough, they went through it and what had been a hard-hitting, somewhat bombastic column—they’re a big company, I felt they could take it—now had the punch squeezed out of it.

*Id.*


38. *Id.*

39. DAN E. MOLDEA, *INTERFERENCE: HOW ORGANIZED CRIME INFLUENCES PROFESSIONAL FOOTBALL* (1989); see Moldea Brief, supra note 37, at 5.

40. *See* MOLDEA, supra note 39.

41. Moldea Brief, supra note 37, at 7.
NFL regular season.\textsuperscript{42}

Consistent with the usual practice, Moldea authorized his publisher to send a pre-publication copy of Interference to the New York Times, in hope of having it reviewed.\textsuperscript{43} The Times decided to review the book and assigned it to Gerald Eskenazi, an experienced reporter who had covered the NFL for the Times for two decades.\textsuperscript{44}

The resulting review in the September 3, 1989, New York Times Sunday Book Review was extremely negative; the prestigious Columbia Journalism Review characterized Eskenazi’s effort as “relentlessly disparaging.”\textsuperscript{45} Eskenazi asserted that Interference contained “too much sloppy journalism”; that there were “question[s] [about Moldea’s] diligence at simple fact-checking”; that Moldea’s “naiveté [was apparent, as [wa]s his ignorance of basic sports knowledge”; and that he “blunted his own sword of truth.”\textsuperscript{46}

Eskenazi gave several examples in support of his conclusions. First, Eskenazi said that, in Interference, Moldea characterized a meeting between opposing players Joe Namath and Lou Michaels on the eve of Super Bowl III as “sinister,” when in fact the encounter was benign.\textsuperscript{47} Second, he claimed that Interference “revive[d] the discredited notion” that the owner of the Los Angeles Rams, Carroll Rosenbloom, met “foul play” when he drowned in Florida.\textsuperscript{48} Third, he attacked Moldea for claiming that point spread considerations caused the Baltimore Colts to go for a touchdown and not a field goal in a key playoff game.\textsuperscript{49} Finally, Eskenazi maintained that Interference contained “warmed over” information.\textsuperscript{50}

\begin{footnotes}
\item[42.] Id.
\item[43.] Id. at 8.
\item[44.] Id.
\item[45.] Christopher Hanson, Playing “Chicken” with the First Amendment, 33 Colum. Journalism Rev., May/June 1994, at 21.
\item[47.] Id. at 1152.
\item[48.] Id.
\item[49.] Id.
\item[50.] Id. at 1151. Moldea’s complaint alleged that the review contained several other false and defamatory statements, but they were not considered significant by the
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It is important to recognize that the New York Times is not just another newspaper,\(^5\) and especially that the Sunday Book Review section is not just another Sunday supplement. It is available with the Sunday edition of the Times, and also by separate subscription, with a total circulation of 1.8 million.\(^2\) It is immensely influential.\(^5\) As one observer pointedly commented, "[t]he plain fact is that for an American writer, there is no worse place to take a hit than the Sunday pages of the New York Times. The second-worst place is the New York Times of any day that isn’t Sunday, and the third-worst place doesn’t really matter much in terms of how a book does on the market."\(^5\) This is because booksellers use the Review as a guide to choosing which books to buy and promote.\(^5\)

Moldea alleged that the impact on Interference and his career was "swift and devastating."\(^5\)\(^6\) In a matter of weeks, his publisher withdrew its support, twelve thousand copies were returned to the publisher, reviews and articles about the book virtually ceased, and invitations for Moldea to appear on radio and television evaporated.\(^7\) The prospects for a second and third edition and a paperback deal died.\(^5\)\(^8\) In short, Eskenazi's

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52. Moldea Brief, supra note 37, at 7.
56. Moldea Brief, supra note 37, at 12 (detailing the adverse impact upon sales of Interference and Moldea's career more generally).
57. Id.
58. Id.
review "utterly destroyed Moldea's reputation as an investigative journalist . . . with the resultant effect that Moldea could no longer earn a living as a writer." 59

Molded believed that Eskenazi misrepresented *Interference* by asserting that it contained false allegations and omitted essential information. Immediately after the review was published, Molded wrote to Eskenazi and the Times to complain. 60 Molded also charged that Eskenazi had a conflict of interest that should have precluded his being assigned to review *Interference*. In Molded's view, Eskenazi had a long and mutually supportive relationship with the NFL that disposed him to defend the NFL by attacking a highly critical book. 61 Eskenazi had long been dependent on NFL sources for their goodwill in providing information on the league's activities. 62 Eskenazi also may have had a preexisting relationship with the NFL Director of Communications. 63 Molded was especially troubled because the Review did not reveal Eskenazi's relationship with the NFL. 64 Instead, the Times provided a misleading credit line that cited only Eskenazi's ongoing work on a biography of baseball star Carl Yastrzemski. 65 According to Molded, Eskenazi's assignment violated the Times's well-established policy against knowingly assigning reviewers who have close ties with anyone who is prominently mentioned in the book under review. 66


60. Molded contacted the Times because under libel law it was a "primary publisher," legally responsible for any libels that appear in its pages. SMOLLA, *supra* note 34, § 4.13[3].


62. *Id*.

63. *Id*.

64. *Id*. at 8.

65. *Id*. at 8-9.

66. *Id*. at 8; accord Diamond, *supra* note 55, at 28. Eskenazi purported to address the conflict of interest issue in the first paragraph of his review:

First, I've got to admit a tangled financial connection to the National Football League. My wife's first cousin married a psychiatrist whose father sold his plumbing business to a company that eventually became Warner Communications. And the owners of several football teams have
On September 7, 1989, four days after the publication of the review, Moldea wrote to Eskenazi, sending a copy to the editor of the Book Review, asking for a retraction or correction.\textsuperscript{67} An attorney for the Times responded by letter, stating that Eskenazi had no conflict of interest and that the review was "clearly protected as opinion, and there is no basis for a retraction or correction."\textsuperscript{68} Subsequently, Moldea wrote to the Times, requesting that it print a letter to the editor that refuted Eskenazi's allegations; he did not receive a reply.\textsuperscript{69} Because he had failed at every turn to get his side of the story out,\textsuperscript{70} Moldea filed suit against the Times on August 23, 1990,\textsuperscript{71} arguing that under Milkovich, reviewers should be held to the same standards of accuracy as news reporters. He further alleged that Eskenazi's critical statements were actionable because they could be proven false, were highly defamatory, and were made with reckless disregard for the truth.\textsuperscript{72}

Taking up the cudgels against a deep pocket media giant is neither cheap nor easy;\textsuperscript{73} Moldea lacked the funds necessary to

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\textsuperscript{67} Moldea Brief, supra note 37, at 11. \\
\textsuperscript{68} Id. \\
\textsuperscript{69} Id. Moldea argued that the Times usually printed letters from authors whose books received unfavorable reviews as a matter of "customary courtesy." Id.; accord John Leonard, Revenge of the Fettucini, NATION, July 11, 1994, at 59 (relating that the Times published a full-page letter from Henry Kissinger defending his book Diplomacy, but refused to do so for Moldea, who was in comparison a mere "street vendor"). George Freeman, an attorney for the Times, later denied that Moldea's letter was ever received, adding that "[e]ven if there was such a letter, even in his scenario, it was three months late, addressed niggling issues in the review and essentially had the same problems as his whole case did." Debra G. Hernandez, New York Times Prevails in Libel Case, EDITOR & PUBLISHER, Oct. 15, 1994, at 20. \\
\textsuperscript{70} See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974) ("[T]he law of defamation is rooted in our experience that the truth rarely catches up with a lie."). \\
\textsuperscript{71} Moldea Brief, supra note 37, at 3. Moldea also considered suing the Washington Post for its unfavorable review of Interference, but decided against it after the paper printed his letter to the editor. David Streitfeld, Author Sues Over Negative Review, WASH. POST, Aug. 24, 1990, at C1. \\
\textsuperscript{72} See Moldea Brief, supra note 37, at 15. \\
\textsuperscript{73} One astute observer has written: \\
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retain counsel at an hourly rate or even a flat fee. Indeed, until the Court handed down *Milkovich* in late June 1990, all the lawyers that Moldea contacted refused to take his case because *Gertz* and its progeny provided absolute protection for commentary in reviews. Armed with *Milkovich* and five thousand dollars up front, however, Moldea retained on a contingency basis Roger C. Simmons, one of two partners in a six-person general practice firm in Frederick, Maryland.

The *Times* was represented by its in-house counsel, George Freeman, and three attorneys from the Washington, D.C., office of Baker & Hostetler. Lead counsel was Bruce W. Sanford, the author of a leading libel law treatise. The *Times* success-

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[A] plaintiff's ability to pursue [a libel] claim depends on a lawyer's willingness to take the case on a contingent fee. Most lawyers see media defendants as tenacious, well-represented litigants whose insurers generally will honor the defendant's reluctance to settle. The prospective recovery must be large enough to justify the lawyer's investment of time in a protracted and expensive lawsuit that may produce no recovery at all.


fully moved to stay discovery and to deny Moldea’s motion to amend the complaint. On January 31, 1992, District Judge John Garrett Penn granted the *Times’s* summary judgment motion on the grounds that Eskenazi’s review “exemplifies a description of a literary work, from one’s personal perspective.”

**B. Moldea I: A Bridge Too Far?**

The parties argued *Moldea v. New York Times Co.* in the District of Columbia Circuit on September 14, 1993. The situation must have looked good to the *Times*; the panel consisted of Chief Judge Abner Mikva and Judges Patricia Wald and Harry T. Edwards, the remaining Democratic appointees on a court that had otherwise been recast into a conservative bench by Ronald Reagan and George Bush.

The *Times* was wrong to be optimistic—dead wrong. In a two-to-one decision, the court reversed and remanded for trial on the merits. Judge Edwards, for himself and Judge Wald, began by reviewing *Milkovich* and then turned to the question of whether Eskenazi’s review reasonably could be understood to imply provable facts. Eskenazi’s allegation that *Interference* contained “too much sloppy journalism” was capable of a defamatory meaning, the judge reasoned, because “it reasonably can be understood to rest on provable, albeit unstated, defamatory facts,” and because it was “inescapable that Eskenazi implies certain

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82. Michael Hedges, *A Long-Shot Liberal Sweep: 3 Key Cases, Same 3 Judges*, WASH. TIMES, Dec. 3, 1993, at A1. According to D.C. Circuit officials, panels are chosen at random by computer. As it turned out, the liberal troika was assigned *Moldea* and the two other most critical constitutional law cases to come before the D.C. Circuit that year. The odds of this occurring were said to be more than 4,492,125 to 1, greater than the chance of getting hit by lightning or winning a lottery. *Id.* at A19. Upon closer inspection, the attitude of the liberals on libel issues was uncertain; Judges Wald and Edwards both dissented in part in *Ollman v. Evans*. See *supra* notes 16-23 and accompanying text.
83. *Moldea I*, 15 F.3d at 1151.
84. *Id.* at 1143-50.
facts—that Moldea plays fast and loose with his sources, that his allegations are not to be believed.\textsuperscript{85} Acknowledging that "too much sloppy journalism" was difficult to quantify "in a vacuum," Judge Edwards nevertheless concluded that the phrase had "obvious, measurable aspects when applied to the field of investigative journalism."\textsuperscript{86} In Judge Edwards's view, Eskenazi attacked the "discrete and fact-bound efforts of an investigative journalist," not some "amorphous, value-laden respect such as writing style."\textsuperscript{87}

The court agreed with Moldea's argument that the analysis should "not [be] altered by the fact that the challenged statements appeared in a 'book review' rather than in a hard news story."\textsuperscript{88} The court was unwilling to "craft a rule that permitted otherwise libelous statements to go unchecked as long as they appeared in sacrosanct genres."\textsuperscript{89} This conclusion was supported by Milkovich, in which the Supreme Court found statements actionable even though they appeared in an opinion column in a newspaper sports section, "a forum well known for spirited expressions of personal opinion."\textsuperscript{90}

For the Times to be entitled to summary judgment, it had to prove that the review contained facts supporting Eskenazi's judgment that Moldea was guilty of "sloppy journalism." According to the court, the Times failed to support two of the statements in the review. First, Eskenazi's review charged that Interference characterized a meeting on the eve of Super Bowl III as "sinister."\textsuperscript{91} Moldea argued that the book maintained the opposite, that the meeting was innocent.\textsuperscript{92} To Judge Edwards, this was "an essentially factual claim—either Interference so describes the meeting or it does not."\textsuperscript{93} The court was unwilling to

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85. Id. at 1145.
86. Id. Judge Edwards drew an analogy: "Similarly, an accusation of 'clumsy hands' may be amorphous in and of itself, but reasonable listeners would agree as to its implications when applied to a brain surgeon." Id.
87. Id. at 1145 n.6.
88. Id. at 1145-46.
89. Id. at 1146.
90. Id. (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 9 (1990)).
91. Id. at 1152.
92. Id. at 1147.
93. Id. at 1146-47. Judge Edwards considered the Times's efforts, both in brief
conclude as a matter of law that a reasonable juror would necessarily find Eskenazi’s statement to be true, so summary judgment for the Times on the “sinister” issue was inappropriate.94

The court reached the same conclusion on Eskenazi’s allegation that Moldea “revive[d] the discredited notion” that Carroll Rosenbloom died because of foul play.95 At one point in Interference, Moldea did mention that Rosenbloom’s friends speculated that the Mob had killed Rosenbloom.96 Some forty pages later, however, Moldea discussed his own research, setting out his conclusion that “the evidence appears to be clear that Rosenbloom died in a tragic accident and was not murdered.”97

The Times asserted that because Moldea had mentioned the rumor, he, albeit briefly, had “revived” it.98 The court disagreed and concluded that a reasonable jury could find for Moldea, taking into consideration the “generally negative tone of the review as a whole,” because Eskenazi’s statement implied that Moldea “intentionally purvey[ed] ‘discredited notions’ in an effort to suggest scandal where there [was] none.”99

In dissent, Chief Judge Mikva agreed with the Times’s arguments: “too much sloppy journalism” was not a verifiable statement;100 Eskenazi’s allegation that the pre-Super Bowl meeting was “sinister” was not verifiable because Eskenazi merely ex-
pressed his opinion that Moldea gave readers a false impression of the meeting;" and the Rosenbloom allegation was "either supported by reference to the book" or was a "non-verifiable opinion." Overarching these specific conclusions, Chief Judge Mikva insisted on drawing a "sharp distinction between communications intended to inform and those seeking to appeal to the artistic senses." Failing to maintain this distinction would make such a defamation suit "the arbiter of... literary and artistic tastes." Rather, determination of "the 'sloppiness' of the reviewer's work should be left to the readers to determine, rather than for judges or juries to ordain.

C. Counterattack

The D.C. Circuit's decision to remand the case for trial hit like a bombshell. The Times and its media allies quickly mounted a four-pronged counterattack. First, the Times and its allies in the media took what had been a relatively little-noticed appellate decision and turned it into a cause célèbre. Moldea I was termed "chilling," "alarming," and a "bummer." The Times's counsel, Bruce

102. Id. at 1157. According to Chief Judge Mikva, if "revive" is defined as "discuss anew," then Eskenazi was truthful: Moldea did "discuss anew" the rumors about Rosenbloom's death. Id. If "revived" implied that Moldea actually subscribed to the rumors, the conclusion was, like the "sinister" characterization, "based not on provable facts but on a non-verifiable interpretation of one reviewer." Id.
103. Id. at 1152.
104. Id. at 1153. Judge Mikva admitted that book reviewing was not as "clearly subjective" as other forms of artistic criticism, but insisted that the standard of "sloppiness" in the book review context was not verifiable. Id.
105. Id. at 1158 (emphasis added).
106. Before Moldea I, the case was mentioned only six times in the Curnws file of the NEXIS database, and only three of these references entailed more than one sentence. Search of LEXIS, News library, Curnws file (May 4, 1995). After Moldea I, the case was mentioned 53 times before the court handed down Moldea II. Id.
107. A Million for Your Thoughts, BOSTON GLOBE, Apr. 18, 1994, at 12; see also Joann Byrd, A Little Chilly in Here, WASH. POST, Feb. 27, 1994, at C6 (decrying the "chilling effect of laws declaring that opinion pieces are not immune to libel suits").
Sanford, said that the decision was “aberrational,” ignoring “centuries of jurisprudence.” Sarah Lyall wrote in a Times article that Moldea I “shocked and frightened newspaper and magazine lawyers around the country,” and that there was great fear that it could be “extrapolated to apply to reviews not only of books but also of films, art and restaurants.” The Washington Post warned of an inevitable slide down the slippery slope: “What the courts decide in author Dan E. Moldea’s lawsuit and in similar cases could also apply to movie reviews and arts reviews and letters to the editor. And those affect . . . the whole public discussion.”

George Freeman, in-house counsel for the Times, warned that “a reviewer who suggests the Mona Lisa is frowning and not smiling [may now] be the victim of a libel suit’ if someone disagrees.” The editor of the Washington Post book review section wrote that Moldea I could lead reviewers to “fold [their] tents.” Henry R. Kaufman, chief counsel of the Libel Defense Resource Center, termed Judge Edwards’s opinion “a surprising if not startling result, and perhaps unprecedented.”

The Columbia Journalism Review claimed Moldea I sent an “arctic tingle down the spines of many opinion writers.” Libel law expert Rodney Smolla claimed that Moldea I declared “open season on reviewers who make candid, acerbic comments.” Judges Edwards and Wald came under intense criticism: Moldea I was “bizarre” and “could destroy an
American art form—the review."\textsuperscript{120} One commentator even suggested that the decision foreshadowed a regime of state licensing of critics.\textsuperscript{121} Columnist James J. Kilpatrick argued that because of Moldea I, "every columnist and editorial writer in the country . . . will now want to think twice about expressing opinions"; indeed, Kilpatrick asserted, it was "something for every critic to think about. I'm thinking hard about what I myself write about fatheaded federal judges."\textsuperscript{122}

The award for the most purple prose, however, goes to Edwin Diamond, who wrote:

Every author, artist, or chef out to avenge an ego wounded by a less-than-glowing review is now a potential plaintiff with a viable lawsuit. . . . The spectacle of, say, a sous-chef's subpoenaing a restaurant critic's notes or a music reviewer facing a voir dire in a case brought by a string quartet is daunting. . . . Litigious chaos would rule in place of robust free expression.\textsuperscript{123}

The second aspect of the Times counterattack was to line up powerful allies to file amicus briefs. Siding with the Times were the Associated Press, Scripps-Howard, Dow Jones & Co., The Christian Science Monitor, U.S. News & World Report, Time, Inc., The New Yorker Magazine, the Copley Press, Inc., the Newsletter Publishers Association, the Newspaper Association of

\textsuperscript{120} Lucy Dalglish, Who Are They To Criticize? They're Critics, That's Who, QUILL, May, 1994, at 14. Dalglish is a bit historically challenged if she believes that reviewing is a particularly "American art form." See generally 2 J.W.H. ATKINS, LITERARY CRITICISM IN ANTIQUITY: A SKETCH OF ITS DEVELOPMENT (1934) (tracing development of Graeco-Roman criticism in the first century B.C.).

\textsuperscript{121} Leonard, supra note 69, at 59 (discussing the 1988 bill introduced in the Connecticut legislature that required restaurant critics to have spent at least six years in the "food service industry" or to have graduated from a "recognized culinary arts program").

\textsuperscript{122} Kilpatrick, supra note 108, at 3.

\textsuperscript{123} Diamond, supra note 36, at 32 (citation omitted). Indeed, the press coverage of Moldea I raised the specter that "no reviewer in the land would be safe from a lawsuit and Western Civilization itself might be in danger." Streitfeld, supra note 74, at E2.
America, the Magazine Publishers of America, the Society of Professional Journalists, the Association of American Publishers, and the PEN American Center. Upon reviewing the forces arrayed on his side, Times counsel George Freeman exulted: "[i]t's very significant that even the book publishers and authors who are the subject of scathing reviews have realized that though in the short run they may be happy that the Times got into trouble over a book review, in the long run their interests are on the side of free speech and allowance of opinionated reviews." No one filed an amicus in support of Moldea.

It is also possible to explain Moldea's lonely position in a more sinister manner: the Times used its considerable muscle. For one thing, the Times successfully lobbied the National Book Critics Circle to stay on the sidelines, even though some of its members agreed with Moldea that reviewers should be accountable for what they write. The Authors Guild followed suit. The Christian Science Monitor reported that people in the publishing industry were afraid to associate publicly with a position that drew the wrath of the mainline media. "I wouldn't touch this case with a 10-foot pole," said the publicity director of a major publishing company. The book editor of a major newspaper said, "I have no comment because I walk a tightrope be-

124. See Motion of the Newspaper Association of America, et al., for Leave To File Amicus Curiae at i [hereinafter Association Motion] (copy on file with author).
125. The PEN American Center is an international "organization . . . of novelists, poets, essayists, translators, playwrights and editors." See Motion For Leave To File Brief as Amici Curiae and Brief of Association of American Publishers, Inc., and PEN American Center as Amici Curiae at ii [hereinafter PEN Motion and Brief] (copy on file with author).
126. Lyall, supra note 111, at C19.
127. The National Book Critics Circle is a trade group of book editors and freelance critics.
128. Jack Miles, Sticks and Stones, L.A. TIMES, Apr. 3, 1994, (Book Review), at 11. The president of the Critics Circle later explained this decision: "As reviewers, [NBCC members] don't like to think that they might be subject to a lawsuit. . . . As writers, they are aware that there is essentially no recourse and standards are so loose that a blatant misrepresentation of facts has a good chance of getting into print." Jamie Prime, Two Negatives = Court Date(s), QUILL, Oct. 1994, at 31, 32 (quoting Jack Miles).
129. Lyall, supra note 111, at 19.
between the needs of book publishers, advertising, and reviewers.\textsuperscript{131} Both insisted on anonymity. The Boston Globe editorialized that Moldea was so isolated because of "how spineless the rest of the media are in the shadow of the Times [sic]."\textsuperscript{132}

The Times's third tactic was to bolster the already strong legal team assembled for Moldea I by putting together, with media amici, the most powerful lineup of heavy hitters east of People v. O.J. Simpson. One of the amici\textsuperscript{133} retained R. Bruce Rich of Weil, Gotshal & Manges.\textsuperscript{134} Rich was a communications law expert, having participated in seven cases in the United States Supreme Court.\textsuperscript{135} Professor Leon Friedman of Hofstra University Law School, an expert in constitutional law who had submitted twenty-four briefs to the Supreme Court, also joined the team.\textsuperscript{136}

\textsuperscript{131} Id.
\textsuperscript{132} A Million for Your Thoughts, supra note 107, at 12; see also Miles, supra note 128, at 12 (stating that publishers were afraid to be on the "wrong side of a newspaper that could do so much harm or good to their future products").

Moldea was no innocent in the world of public relations; he issued a press release the day he filed suit. Streitfeld, supra note 71, at C1. Also, after Moldea I, Moldea and his attorney, Simmons, were able to tell their side of the story in the handful of publications that provided a semblance of balanced coverage of the case. See, e.g., Roger C. Simmons, Beyond a 'Bad Review,' WASH. POST, Mar. 23, 1994, at A21; Simmons, supra note 55, at 60; see also Diamond, supra note 36, at 32 ("Almost all the news stories and editorial commentaries about the case have framed it as the story of one crank writer whining about one bad review."); Debra G. Hernandez, N.Y. Times Seeks Review of Libel Suit Reinstatement, EDITOR & PUBLISHER, Apr. 23, 1994, at 112; Miles, supra note 128, at 11. Moldea's only other unabashed legal champion in the media was reflexively conservative commentator Bruce Fein. See, e.g., Bruce Fein, Defamation and 'Sloppy Journalism,' LEGAL TIMES, Mar. 14, 1994, at 19, 20 (stating that Moldea I "chills what ought to be chilled"); see also David Kronke, In a Perfect World, Audiences Could Sue, L.A. TIMES, Feb. 28, 1994, at F1 (explaining that Moldea I made "one person's job . . . suddenly and exponentially . . . more hectic. Michael Bolton's attorney.").

\textsuperscript{133} The Association of American Publishers. See PEN Motion and Brief, supra note 125.

\textsuperscript{134} Weil, Gotshal & Manges is a New York firm of over six hundred lawyers. See The NLJ 250, supra note 77, at C6.

\textsuperscript{135} Id. R. Bruce Rich is the author of Book Publishing and the First Amendment and co-author of Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action, 52 BROOK. L. REV 1 (1986), with Livia D. Brilliant. Mr. Rich was assisted by Bernadette M. McCann Ezring.

\textsuperscript{136} Search of LEXIS, Genfed library, US file (Sept. 25, 1995).
Not to be outdone, the remaining amici retained attorneys from the Washington, D.C., office of Kirkland & Ellis (K&E), including lead counsel Kenneth W. Starr. Starr had “the resume of a legal wunderkind.” He had clerked for Chief Justice Warren Burger and at age thirty-seven was appointed to the D.C. Circuit. In 1989, at the request of President Bush, he resigned his life-tenured judgeship to serve as Solicitor General. Press reports had Starr on the President’s short list of possible nominees for the Supreme Court vacancies created by the retirements of Justices William Brennan and Thurgood Marshall. With the change in administrations, he joined K&E.

Starr was a brilliant choice for the Times and its supporters. First, he had the impeccable credentials necessary to suggest to the court that the Times’s position was mainstream; with his reputation as a moderate conservative, the Times’s insistence that its book reviews should not be the target of libel litigation would be considerably burnished. Perhaps even more important, Starr was the author of the lead opinion in the D.C. Circuit’s en banc decision in *Olman v. Evans*, the leading libel decision before *Milkovich*. Who better to speak to his former colleagues about the difficult questions raised by libel in the context of a book review?

137. *See supra* note 124 and accompanying text.
138. The Washington office of K&E has 81 attorneys out of the firm’s total of approximately 450. *See The NLJ 250, supra* note 77, at C8. Starr was assisted by two associates, Steven Gill Bradbury, who, before joining K&E, had clerked for Judge James L. Buckley of the D.C. Circuit and later Justice Clarence Thomas, *see 4 MARTINDALE-HUBBELL LAW DIRECTORY, supra* note 76, at DC545B, and Jonathan F. Putnam, who had clerked for Judge A. Raymond Randolph of the D.C. Circuit, *id.* at NYC653B.
140. *Id.*; *see 4 MARTINDALE-HUBBELL LAW DIRECTORY, supra* note 76, at DC546B.
141. *See McGonigle, supra* note 139, at 7A.
143. *Id.*
144. 750 F.2d 970 (1984).
145. 497 U.S. 1 (1990); *see supra* notes 16-23 and accompanying text.
146. The only possible blemishes on Starr’s record occurred after *Moldaw II*. In August 1994, he was appointed independent counsel to investigate the financial
The final aspect of the Times counterattack was the honing of several legal arguments made in Moldea I and the raising of an important new one. In its initial brief on appeal, filed June 17, 1993, the Times maintained that even after Milkovich, a court must consider the context in which the challenged statement appeared. In particular, whether Interference contained "too much sloppy journalism" could not be proven true or false be-

dealings of President Clinton, his wife, Hillary Clinton, and their friends arising out of the Whitewater investment scheme. The appointment was criticized because of Starr's long-time involvement in Republican politics. See Masters, supra note 142, at E6. He had also argued publicly that Paula Jones should be able to pursue her sexual harassment lawsuit against the President. Outcry Grows for Starr's Removal as Whitewater Prosecutor, ROCKY MTN. NEWS, Aug. 19, 1994, at 46A. Additionally, although independent counsels (unlike federal prosecutors) are permitted to do private legal work, Starr was criticized for continuing to receive his seven-figure K&E salary while serving as independent counsel. Dennis Cauchon & Judy Keen, Pressure Mounts for Whitewater's Starr To Quit, USA TODAY, Aug. 19, 1994, at 6A. This criticism flared up again when Starr filed his most recent financial disclosure form (four months late); it revealed that he had earned $1.14 million from his private practice while serving as independent counsel. (He graciously accepted only 75% of his government salary, but kept all of the $25,000 offered for teaching a course at NYU School of Law). Frank J. Murray, Starr Busy in Private Practice; Made 1.1 Million Outside Official Role, WASH. TIMES, Sept. 13, 1995, at A4. United Airlines, Hughes Aircraft, Amoco Oil, Phillip Morris, and Brown & Williamson Tobacco are just a few of his nonpareil stable of clients. Id.

Another complication arose because immediately before Starr's appointment, the chief judge of the panel responsible for appointing independent counsels, David Sentelle, dined with Republican U.S. Senators Lauch Faircloth and Jesse Helms. Mr. Starr's Duty To Resign, N.Y. TIMES, Aug. 18, 1994, at A22. Sentelle, formerly a Republican party activist in North Carolina, insisted that the luncheon was simply a meeting between "old friends" in which they discussed "cowboy boots, country music, and prostate problems." Toni Locy, Citizen Complaint Filed Over Whitewater Appointment: Judge's Role Questioned in Whitewater Case, WASH. POST, Sept. 31, 1994, at A4. Others believed that the meeting suggested that Starr's appointment was the result of partisan political pressure. Id. The New York Times editorialized that the meeting "fatally tainted" Starr, id., while five former presidents of the American Bar Association filed ethics complaints against Judge Sentelle, arguing that the meeting with the senators "resulted in an appearance of impropriety." In the Matter of a Charge of Judicial Misconduct or Disability, 39 F.3d 374, 375 (D.C. Cir. 1994). In one of the many ironies surrounding Moldea v. New York Times, the ethics complaints were considered and rejected in an opinion written by the author of the Moldea opinions, Chief Judge Harry Edwards. Id. As an additional side note, in January 1995, Senator Faircloth hired Judge Sentelle's wife as a receptionist. Senator Hired Wife of Judge On Panel that Named Whitewater Counsel, BALTIMORE SUN, Aug. 1, 1995, at 8A.

cause it represented an "unverifiable personal assessment" that appeared in an opinion column rather than in a hard news column. The Times also argued that the trial judge had determined correctly that the other statements challenged by Moldea were either factually supported by the book or intrinsically nonverifiable. In support of these arguments, the Times provided a close linguistic analysis of the words Eskenazi used by discoursing upon how "sloppy" is "too sloppy," whether an encounter was "sinister," and that there are "no fewer than 25 separate definitions for the word 'revive.'"

In its March 21, 1994, petition for rehearing, the Times renewed its arguments that Milkovich allowed consideration of context and that the challenged statements were not actionable because they appeared in a book review. The Times asserted that this fundamental error led the court in Moldea I to misapprehend the applicable law, with dangerous consequences.

First, in ruling for Moldea, the court improperly rewrote Eskenazi's review. By equating "sloppy journalism," Eskenazi's actual words, with an allegation of professional incompetence, the majority "utterly transform[ed]" a subjective evaluation of a

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148. Id. at 18.
149. Id. at 21. In support of its position, the Times quoted a number of classic critiques, including Dorothy Parker's evaluation of Katherine Hepburn's acting ability, "[s]he runs the gamut of emotions from A to B," id. at 21, and Mae West's riff on how much is too much, "too much of a good thing can be wonderful," id. at 22 n.9, to show "too much" was "an inherently subjective assessment," id.
150. Id. at 23-25.
151. Id. at 22.
152. Id. at 31.
153. Id. at 32 n.14 (citing OXFORD ENGLISH DICTIONARY 835-36 (2d ed. 1989)). Judge Edwards used this last argument to support the conclusion in Moldea I that Eskenazi's statements were sufficiently verifiable to justify jury consideration. Moldea v. New York Times Co., 15 F.3d 1137, 1146 (D.C. Cir.), rev'd, 22 F.3d 310 (D.C. Cir.), cert. denied, 115 S. Ct. 202 (1994).
154. Petition for Rehearing with Suggestion for Rehearing En Banc of Appellee The New York Times Co. at 5-7 [hereinafter New York Times Petition for Rehearing] (copy on file with author). This point was also made, in much greater detail, in the amicus petition of PEN, which discussed data from social science that "prove[d] that readers rely upon context—'page environment'—to distinguish between 'opinion' and 'fact.'" PEN Motion and Brief, supra note 125, at 10.
book into an accusation of journalistic malpractice. Unlike the allegation in Milkovich, that the plaintiff was a liar, an evaluation of the qualities of a book was not verifiable by reference to any "specific events."

Second, the Times argued that in artistic criticism there is no "true" conclusion, and that book reviews necessarily involve "literary interpretation," an "intensely subjective" enterprise. The "fundamental error" of Moldea I was thus "not in concluding that Eskenazi's characterization [of Interference] was arguably wrong; it was in presuming that there was any right interpretation."

Third, counsel for the Times vividly described the untoward consequences that would result if Moldea I was allowed to stand. There would be a "proliferation of lawsuits and protracted discovery by disappointed authors, artists, and performers." Moldea I would allow any libel plaintiff to withstand summary judgment if "any verifiable factual assertion can be extracted from inherently subjective interpretations of vague terms, literary passages, or historical perspectives." This result, in turn, would inflict catastrophic injury upon the First Amendment and the commitment to "robust debate" that it embodies because

156. Id. at 9-10.
157. Id. at 10; see Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) ("A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, inter alia, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court."). In its initial brief, the Times did refer obliquely to the "rewriting" argument, but not with regard to the essence of Moldea's claim that the review portrayed him as "incompetent or dishonest." See New York Times Initial Brief, supra note 78, at 29-30 (arguing that Eskenazi had not suggested that the pre-Super Bowl meeting between Namath and Michaels was "premeditated," as Moldea charged in his complaint).
158. New York Times Petition for Rehearing, supra note 154, at 12, (quoting Dworkin v. L.F.P., Inc., 839 P.2d 903, 918 (Wyo. 1992)) ("[When dealing with interpretation of a literary work, courts] must be especially careful to guard the critic's right to express his opinion about the meaning of the work.").
159. Id. at 12. This theme was elaborated by amici. See PEN Motion and Brief, supra note 125, at 14 ("[T]here cannot be one 'true' meaning within the genre of literary criticism.").
161. Id. at 13.
162. See id. at 1. This argument was developed more extensively in the PEN Brief and the Association Motion. The PEN brief contended that Moldea I " invite[d] each of the hundreds, if not thousands, of persons criticized in the thousands of book reviews ... to bring libel actions against their critics," PEN Motion and Brief, supra
Moldea I would shift the "critical evaluation of books out of the intellectual marketplace and into the courtroom." 163

Most significantly, the Times de-emphasized the search for the true meaning of the cryptic Milkovich opinion, and instead offered a workable and relatively simple test to determine whether libel claims arising out of book reviews should withstand summary judgment. The Times argued that liability should arise from a review "only when interpretations are unsupportable by reference to the reviewed work." 164 According to the Times, such a standard would protect "rational interpretation," which in turn "serves First Amendment principles by allowing an author . . . interpretive license . . . ." 165 If the critic could point to any passage in the book under review that supported her conclusion, the book's author could thus steadfastly disagree with the review but not recover for libel. Because Eskenazi could find some support for his criticisms in the text of Interference, the Times believed the district court should have dismissed Moldea's complaint.

D. Moldea II: Strategic Retreat

The counterattack worked. On May 3, 1994, without benefit of oral argument, and much to the shock of all concerned, Judge Edwards, joined by Judge Wald, "confess[ed] error" and "amend[ed their] earlier decision." 166 Judge Edwards wrote of

the distress felt by a judge who, in grappling with a very

note 125, at 2, and would "impede artistic progress," id. at 4. The other amici added that Moldea I would "render actionable many of the most outstanding book reviews of recent years—those which have earned the Pulitzer Prize for distinguished criticism." Association Motion, supra note 124, at 5.

163. New York Times Petition for Rehearing, supra note 154, at 4; see id. at 13; PEN Motion and Brief, supra note 125, at iv ("It is totally inappropriate to introduce the clumsy, literal tools of libel law to such an undertaking."); id. at 12 ("Unlike the typical book critics, knowledgeable as to the subjects reviewed, judges, in all but the most fortuitous circumstances, will lack more than rudimentary knowledge of the subject at hand.").


165. Id. at 4 (quoting Masson, 501 U.S. at 519).

difficult legal issue, concludes that he has made a mistake of judgment. Once discovered, confessing error is relatively easy. What is difficult is accepting the realization that, despite your best efforts, you may still fall prey to an error of judgment.

I will take refuge in an aphorism of Justice Frankfurter: Wisdom too often never comes, and so one ought not to reject it merely because it comes late.\footnote{Id. at 311 (citation omitted).}

The now-unanimous court completely adopted the arguments advanced by the \textit{Times} and the amici. In Judge Edwards's view, \textit{Moldea I} short-sightedly

fail[ed] to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations.\footnote{Id.}

Judge Edwards emphasized that critics need "a degree of 'interpretive license,' . . . some leeway to offer 'rational interpretation' of ambiguous sources."\footnote{Id. at 313 (quoting \textit{Masson}, 501 U.S. at 518-19).} The court now held that "when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation."\footnote{Id. at 315.} In the case of a book review that consists "solely of the reviewer's comments on a literary work," the "readers' expectations and understanding" involve "assessments of a book [and not] direct assaults on [the author's] character, reputation, or competence."\footnote{Id.} Judge Edwards continued, "[w]e believe that the \textit{Times} has suggested the appropriate standard for evaluating critical reviews: '[t]he proper analysis would make commentary actionable only when the interpretations are unsupportable by reference to the written work."\footnote{Id. (quoting New York Times Petition for Rehearing, \textit{supra} note 154, at 8).}
Taking its cue from the *Times's* petition for rehearing,\textsuperscript{173} the court relied on the Supreme Court's 1991 decision in *Masson v. New Yorker Magazine, Inc.*,\textsuperscript{174} for the proposition that "protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources."\textsuperscript{175} While "a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre."\textsuperscript{176} The court explained:

"[T]he supportable interpretation" standard provides that a critic's interpretation must be \textit{rationally} supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations analogous to that presented in *Milkovich*, in which a writer launched a personal attack, rather than interpreting a book. . . . For instance, if the *Times* review stated that *Interference* was a terrible book because it asserted that African-Americans make poor football coaches, that reading would be "unsupportable by reference to the written work," because nothing in Moldea's book \textit{even hints} at this notion. In such a case, the usual inquiries as to libel would apply: a jury could determine that the review falsely characterized *Interference*, thereby libeling its author by portraying him as a racist (assuming the other elements of the case could be proved).\textsuperscript{177}

The "correct measure of the challenged statements' verifiability as a matter of law is whether no reasonable person could find that the review's characterizations were supportable interpretations of *Interference*."\textsuperscript{178} Because the statements that Eskenazi offered in support of his "too much sloppy journalism" conclusion (the "sinister" meeting and the foul play allegations) were "supported by revealed premises that [the court could not] hold to be false in the context of a book review,"\textsuperscript{179} summary judgment

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\item \textsuperscript{173} New York Times Petition for Rehearing, \textit{supra} note 154, at 4, 8, 14.
\item \textsuperscript{174} 501 U.S. 496 (1991).
\item \textsuperscript{175} *Moldea II*, 22 F.3d at 316 (quoting *Masson*, 501 U.S. at 519).
\item \textsuperscript{176} \textit{Id.} at 315 (quoting \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 272 (1964)).
\item \textsuperscript{177} \textit{Id.} (emphases added).
\item \textsuperscript{178} \textit{Id.} at 317.
\item \textsuperscript{179} \textit{Id.}
\end{itemize}
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was properly granted.

E. The Morning After

Understandably, the Times and their allies from the mainstream press were exuberant. The St. Louis Post-Dispatch opined that “[a]rtistic criticism could not survive if everyone whose work is panned could scream ‘libel.’” The Houston Chronicle editorialized that while Moldea I “would have had a serious chilling effect on opinion and commentary in America,” Moldea II “should help safeguard the right of free expression.” More broadly, “[a]nyone who believes in a vigorous free press should be glad” for Moldea II because “[f]or the United States to remain free requires an unfettered press. That includes the ability to express strong, clear opinions without fear of retribution.” The New York Times itself intoned, “broad protection for strong literary and other criticism is part of the lifeblood of a literate democracy as well as our own enterprise.” The court’s adoption of the “supportable interpretation” test for determining whether a review may be libelous was necessary; “[a]ny lesser safeguard would stifle public discourse.” The Times further expounded that the “whole society, freer to speak and argue about matters of public concern, [wa]s the winner.”

Legal observers, some more impartial than others, also saluted Moldea II. Media lawyer Karl Olson characterized Moldea II as “a touchdown.” Different contexts require different legal standards and the “extremely deferential” “supportable interpretation” standard was “clearly right.” Libel expert Robert

181. Right of Opinion, HOUSTON CHRON., May 13, 1994, at 14; see also The Right to an Opinion, ROCKY MTN. NEWS, Oct. 5, 1994, at 41A (stating that if Moldea I had been affirmed, “[c]riticism would have been tamed to the point of paralysis”).
182. 'Breathing Space' for Opinions, ST. PETERSBURG TIMES, May 6, 1994, at A16.
184. Id.
185. Id.
187. Id.
Sack thought *Moldea II* was “right on” because it articulated “a workable protection for literary, artistic, and other criticism.”

Of course, the *Times* legal team was delighted. Bruce Sanford said that the “supportable interpretation” test provided the “wide breathing space necessary for book reviews.” Ken Starr commented, “on behalf of the amici, we are enormously proud of the court.”

Many also marveled that the judges in the *Moldea I* majority, Judges Edwards and Wald, so candidly and totally admitted the error of their ways. Appellate lawyer Bruce Ennis characterized the judges’ reversal as “extraordinarily rare.” Robert Sack said, “I don’t recall ever having seen a panel so thoroughly overrule itself in any field of law.” Rod Smolla thought the turn-around was “inexplicable” because the first time around Chief Judge Mikva strongly dissented, “which means ‘they argued this out, thought this out, thrashed it out.’” Bruce Sanford observed that he had “never seen anything like this in the First Amendment area.” Sanford proclaimed the reversal was “a testament to the quality of the man and the judge,” while his co-counsel, Henry Hoberman, chimed in that the change in decision was “so unusual in American jurisprudence that it [was] especially important to give credit to the intellectual honesty of a judge who could admit his mistake, rather than stand by a decision that may have done great harm.” Ken Starr, too, doffed his cap: “as a former member of the court, I am enormously proud of the court for doing the right thing, and doing so elegantly, by engaging in additional reflection and review. This is

189. *Id.*
190. *Id.*
193. Streitfeld, supra note 191, at C11.
194. *Id.*
195. *Id.* (emphases added). Could it have been a sexist oversight that the suits who represented the *Times* failed to acknowledge the courage of Judge Patricia Wald, who joined both of Judge Edwards’s opinions?
the court system operating at its very best.”

The reversal also prompted discussion of the colorful history of judicial recantation. Perhaps the best-known example involved Baron Bramwell’s succinct admission in an 1872 British case: “The matter does not appear to me now as it appears to have appeared to me then.” Also prominently mentioned was the Abe Lincoln story:

“One morning Lincoln argued an issue for a client. That afternoon, he argued the other side of the issue for a different client. So the judge said, ‘Counselor, didn’t you argue the opposite of that viewpoint this morning?’

“And Lincoln said, ‘Yes, your honor. This morning I thought I was right. This afternoon, I know I’m right.’”

Moldea presented his quite different reaction in a column in the Los Angeles Times:

Since the suit was filed, editorials and Op-Ed columns have relentlessly portrayed me as a thin-skinned author with a “wounded ego” who simply received a bad review... [The media response to Moldea I] was an avalanche of editorials and Op-Ed columns fiercely condemning and misrepresenting the ruling... Then on May 3, the appellate court inexplicably reversed itself. Without the benefit of any new evidence, legal precedent or oral argument... [the court did] nothing less than declare an open season for unchecked criticism of authors and their published works.

Moldea’s attorney, Roger Simmons, complained that Judge Edwards’s second opinion was “very uncertain as to what the

199. Dan E. Moldea, Can a Bad Book Review Ruin a Writing Career?, L.A. TIMES, May 29, 1994, at M2, M6; see also Tamar Lewin, In Reversal, Appeals Court Dismisses Libel Suit Against Times, N.Y. TIMES, May 4, 1994, at A21 (quoting Moldea as stating that between Moldea I and Moldea II “the only new contribution has been the avalanche of misleading articles and editorials overreacting to this decision. I think it’s legitimate to question what impact all of that had on this very bizarre reversal.”).
law is and ought to be in this area" and "in very sharp contrast to his opinion of 10 weeks ago, which was very clear, specific, and self-confident. The second decision cannot be reconciled with Milkovich or Masson." He believed that his client had a "good shot at Supreme Court review, especially given the emphasis placed on this case in the mass media." He filed the certiorari petition, seeking Supreme Court review of whether the "broader context" in which a statement appears nullifies an otherwise valid libel claim, and whether the First Amendment requires a "supportable interpretation" standard for a defamatory statement that appears in a review.

Unfortunately for Moldea and his attorneys, the Supreme Court denied certiorari on October 3, 1994. The denial triggered yet another round of media kudos for the wise judges of Moldea II. The Times issued the mild statement that it was "gratified that the U.S. Supreme Court saw no need to review a case that continues time-honored common-law and constitutional protection for literary criticism." The Times's attorneys were considerably less gracious winners. George Freeman stated: "we were very pleased with the Supreme Court's actions and are glad the case is over. We never thought the litigation had any merit." Henry S. Hoberman, Bruce Sanford's colleague, expressed relief that "finally, after nearly a four-year odyssey through the courts, this case has come to its rightful end. The time-honored arena of opinion and commentary is safe from the red-ink of would-be censors and opinion police like Mr. Moldea." Sanford modestly offered that the "supportable interpretation" test is a "very important

201. Id. at 3.
204. See, e.g., Libel in Reviews: The Book Is Still Open, L.A. TIMES, Oct. 10, 1994, at B6 ("We hope all forms of opinion will be more secure because of this decision."); Libel Suit, supra note 53, at A14 ("The court's decision was . . . a victory for the readers of this newspaper and any other publication that contains criticism.").
207. Id.
standard" and Moldea II is the "most important libel decision since New York Times."  

F. Hard Cases, Bad Law?

As the court acknowledged in Moldea II, "[t]his [w]as a difficult case." Despite the substantial equities on Moldea's behalf in his struggle with the Times, Moldea I, like Milkovich, took the counterintuitive position that context was irrelevant. Moldea I would have exacerbated the language interpretation difficulties intrinsic to all libel actions by requiring that judges and juries interpret literary texts, a task for which they are ill-equipped. This is certainly true in the context of commentary upon the arts. Whether great latitude is as justified for commentary on poetry as for Moldea's nonfiction is less clear, but a test that varied depending upon whether the subject of the review was a work of "art" would present excruciating line-drawing difficulties.  

208. Id.  
210. See Olson, supra note 186, at 8. ("[I]n real estate, the three most important factors are 'location, location and location;' in defamation law the three most important factors in determining whether you have a defamatory factual statement . . . are 'context, context and context'.")  
211. See Hanson, supra note 45, at 43 (arguing that modern theories of language and meaning should undergird First Amendment jurisprudence).  

Eskenazi's assessment of Moldea [sic] goes to the discrete and factbound efforts of an investigative journalist, and the assessment clearly concludes that Moldea's work as a journalist is less than competent. There is a distinction, after all, between accusing a physician of practicing "bad science," as opposed to "clumsy brain surgery." In the instant case, Eskenazi accused Moldea not of failing in some amorphous, value-laden respect such as writing style; but rather suggested that he failed, as a journalist, to present information that was accurate and that had not been aired before. What is at issue in this case is not, as the dissent says, "a general assessment of . . . the quality of an author's book." We do not hold that it is possible to verify whether Moldea's work is in fact "sloppy," but rather that this characterization rests on verifiable underlying facts.  

Id.
Moldea II provides substantial protection to writers and publishers of commentary, and presumably not just artistic critiques. Key aspects of newspapers and magazines—arts reviews, op-ed and editorial pieces, and perhaps even letters to the editor—will be shielded from libel liability.

How sweeping a protection the ruling provides, however, is not entirely clear. In Moldea II, the court pointed out that the "critic’s latitude is not unlimited." If the courts insist that a reviewer prove the reasonableness of her interpretation, then the threat of liability may result in some measure of control over the vitriol of a displeased critic. From the example provided by the court, however, only in an exceedingly rare case could a reviewer fail to point to anything, anywhere, in the work under review that supported her negative conclusions. Such a test would represent a First Amendment analog to the toothless "rational basis" test familiar to Fourteenth Amendment doctrine, a hands-off approach recently explained by Justice Clarence Thomas:

This standard of review is a paradigm of judicial restraint. . . . Those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." . . . A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

If this standard turns out to be the approach, then Dan Moldea was clearly right; it will be "open season" on authors.

The Times's George Freeman thinks that Moldea II provided broad protection—that it will have "no effect" on his pre-publication review of the Times's non-news items. Other media observers believe that because Moldea II even countenanced the idea of liability arising out of commentary, it will now be nec-

213. Moldea II, 22 F.3d at 315.
214. See supra note 177 and accompanying text.
215. FCC v. Beach Comm. Inc., 113 S. Ct. 2096, 2101-02 (1993) (citation omitted). In constitutional law circles this test has been variously termed the "babbling idiot," the "straight jacket," or the "giggle" test.
216. See supra note 199 and accompanying text.
ecessary to provide pre-publication "lawyering" of commentary.\textsuperscript{218}

Moldea \textit{I} and Moldea \textit{II} also taught that dire predictions of the imminent collapse of democracy can prod the judiciary to protect the media's power to destroy reputations with virtual impunity,\textsuperscript{219} while the flood of lawsuits that was predicted would overwhelm newspapers after Moldea \textit{I}\textsuperscript{220} never transpired.\textsuperscript{221}

\textit{Moldea v. New York Times} also reminds us that, despite all the fancy rhetoric about "the marketplace of ideas," access to the market is quite different if you are a Dan Moldea rather than a New York Times.\textsuperscript{222} This inherent unfairness doubles when the media can take advantage of the best legal representation that money can buy. As Moldea's story proves, the media is able to close ranks and throw its weight around just as effectively as the health insurance industry, pharmaceutical manufacturers, or any other collection of corporate behemoths.\textsuperscript{223}

Whether viewed broadly or narrowly, Moldea \textit{II}, with its special rules for libel arising out of commentary, adds yet another intricacy to First Amendment doctrine, an area already both

\textsuperscript{219} See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) (holding that a reporter's deliberate misquoting was protected by the First Amendment as long as it does not materially misrepresent the speaker's statement); Florida Star v. B.J.F., 491 U.S. 524 (1989) (finding that the First Amendment precludes tort recovery by rape victim identified by newspaper); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that the First Amendment requires that public officials and public figures bringing libel claims prove that the publisher intentionally lied or published with reckless disregard for the truth); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (finding that the First Amendment allows newspaper to refuse to print response of political candidate criticized by the newspaper).
\textsuperscript{220} See supra notes 106-23 and accompanying text.
\textsuperscript{221} See Hernandez, supra note 69, at 20 (quoting \textit{Times} counsel George Freeman as saying that Moldea \textit{II} "should be the death knell for any onslaught of claims by plaintiffs suing about reviews. Not that we've seen any groundswell.").
\textsuperscript{222} See Jerome A. Barron, \textit{Access to the Press—A New First Amendment Right}, 80 HARV. L. REV. 1641, 1641-42 (1967) (arguing that the marketplace theory is based on a "romantic" conception that is divorced from reality); Owen M. Fiss, \textit{Free Speech and Social Structure}, 71 IOWA L. REV. 1405 (1986) (stating that the "marketplace of ideas," once freely accessible to the public, has been foreclosed to all but the wealthy).
\textsuperscript{223} Justice Byron White made this point in his lengthy and thoughtful dissent in \textit{Gertz}, 418 U.S. at 369 (White, J., dissenting).
byzantine and balkanized. This result is a problem not only for judges, but also for lawyers, because excessively complex law may lead to poor advice.

In the end, perhaps the best argument for Moldea II is the most familiar one in libel law—the need to provide the media the "breathing space" it needs "to survive." Allowing jury evaluation of the wisdom of a reviewer's conclusions "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Without substantial protection from civil liability, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."

G. Epilogue

Who won and who lost?

The judges, lavishly praised by most observers, came up winners. Moldea II produced few critics. One critic, noted plaintiff's attorney Martin London, noted that because "the press went berserk" after Moldea I, Judge Edwards "kneeled at the

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225. On the other hand, complex law gives law professors something to write about.


228. Sullivan, 376 U.S. at 278.

229. See supra notes 186-90 and accompanying text. This outcome is not so clear as to Judge Mikva, who decided to resign from the D.C. Court of Appeals shortly after Moldea II to become White House Counsel for a politically weak and legally endangered president. This could be viewed as the professional equivalent of hari kari.
altar of the establishment press." Carlin Romano, current head of the National Book Critics Circle, suggested that the career ambitions of Judges Edwards and Wald prompted them to reverse field, and that *Moldea II*, at least in part, was their attempt to recapture the favor of a pro-civil liberties White House. These barbs drew sharp retorts from noted appellate attorneys Bruce Ennis ("I think it is unimaginable those two judges bowed to pressure") and Bruce Sanford ("I think that it is insulting to say that they bowed to the press").

The lawyers for the Times came up winners too, especially because *Moldea II* relied so heavily on the policy arguments and analytical framework offered in the Times's petition for rehearing. At a more personal level, Ken Starr reentered high visibility public service as the Whitewater independent counsel, and Bruce Sanford is using *Moldea II* as a marketing tool in support of the new edition of his libel treatise. Roger Simmons's profile as a litigator undoubtedly rose as a result of his representation of Moldea; he got more attention in the press in 1994 than any lawyer from Frederick, Maryland, could fairly expect in a lifetime.

As for Gerald Eskenazi, whose book review triggered *Moldea* ---

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231. Romano, *supra* note 55, at 779-80. Romano also points out "an unusual comment" by Judge Mikva the day after *Moldea II* came down: "[Judges Edwards and Wald] are very strong minded judges. . . . They don't cave to pressure. Even good pressure. . . . I didn't send them copies of the editorials or anything. They could read these on their own." *Id.* at 779.

Judge Wald, when later asked about the reversal in opinion, replied that it "was quite a close case," and:

> The important thing is to get it right—even if that means admitting you made a mistake. That's what we did in this case. I knew we were going to get pilloried, but we lasted it out, and we moved on. That's what life tenure is all about.


234. *See* *supra* note 146.

v. New York Times, he continues to report on sports for the Times, has completed his Yastrzemski biography, but has written no more Times book reviews.

And, finally, what about Dan Moldea? Although steadfastly insisting that he had been a victim of “corporate tyranny,” Moldea admitted after the Supreme Court denied certiorari, that he had to “get a life.” His next project is a book on the police investigation into the assassination of Robert Kennedy. When asked how he thought the Times would review it, he said, “I’m sure they’ll be very fair.”

238. David Streitfeld, The Booksellers’ Circus; Their Conventions Are Contentious Affairs, But 1994’s May Take the Cake, WASH. POST, June 1, 1994, at B1, B12.
240. Id. And you know, Moldea was right. See Christopher Lehmann-Haupt, Open Door to Conspiracy Theories, N.Y. TIMES, May 25, 1995, at C20 (stating that Moldea’s new book is “carefully reasoned and ultimately persuasive,” in part because he “meticulously dissect[s]” the evidence).