
David A. Logan
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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4. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (reversing one million dollar libel judgment against an out-of-state newspaper that ran an advertisement critical of the handling of civil rights demonstrations by the Montgomery, Alabama, police); Near v. Minnesota, 283 U.S. 697, 702 (1931) (overturning injunction imposed upon a newspaper "in the business of regularly ... publishing ... malicious, scandalous and defamatory" articles that alleged collusion between organized crime and elected officials) (quoting Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3).
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.\textsuperscript{11} 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.\textsuperscript{12}

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.\textsuperscript{13} 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."\textsuperscript{14} 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."\textsuperscript{15}

\textit{Sullivan}, the Court has provided a number of other constitutional protections to media defendants, both substantive and procedural. See David A. Logan, \textit{Tort Law and the Central Meaning of the First Amendment}, 51 U. Pitt. L. Rev. 493, 505-15 (1990).

\begin{itemize}
\item \textsuperscript{11} \textit{Gertz}, 418 U.S. at 325.
\item \textsuperscript{12} \textit{Id.} at 339-40 (footnote omitted).
\item \textsuperscript{13} See \textit{id.} at 326.
\item \textsuperscript{14} ROBERT D. SACK & SANDRA S. BARON, \textit{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").
\item \textsuperscript{15} \textit{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, \textit{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, Lofft, 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., \textit{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 *Ollman 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-

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17. Judge Bork filed a concurring opinion, joined by Judges Wilkey, Ginsburg, and MacKinnon. *Id.* at 993 (Bork, J., concurring). Judge MacKinnon filed a concurring opinion. *Id.* at 1010 (MacKinnon, J., concurring). Chief Judge Robinson filed an opinion dissenting in part, joined by Judge J. Skelly Wright. *Id.* at 1016 (Robinson, C.J., dissenting in part). Judge Wald filed an opinion dissenting in part, joined by Judges Harry T. Edwards and Antonin Scalia. *Id.* at 1032 (Wald, J., dissenting in part). Judge Edwards filed a statement concurring in part and dissenting in part. *Id.* at 1035 (Edwards, J., concurring in part and dissenting in part). Judge Scalia also filed an opinion dissenting in part, joined by Judges Wald and Edwards. *Id.* at 1036 (Scalia, J., dissenting in part). Some of the court’s frustration with the knotty issues raised by the fact/opinion issue was revealed in questioning from the bench during oral argument. Judge Edwards observed, “[w]hen you read the cases, they are a mess.” *Sanford*, supra note 15, § 5.1, at 133.
18. *Ollman*, 750 F.2d at 979-84.
19. *Id.* at 979-81.
20. *Id.* at 981-82.
21. *Id.* at 982-83.
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 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

22. Id. at 983-84.
23. 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 RESTATEMENT (SECOND) OF TORTS §§ 606-610 (1977), the "verifiability" approach.
24. The Court had addressed the fact/opinion distinction obliquely in three earlier decisions. In 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." Id. at 14. In 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." Id. at 268. The Court held that these words were used in a "loose, figurative sense," and thus were not actionable. Id. at 284. Finally, in 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. Id. at 57.
26. Id. at 4-7.
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."\(^32\)

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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. So understood, Milkovich made the "already complex body of law surrounding the fact/opinion distinction... significantly more enigmatic." It also exposed "to new libel risk editorials, reviews, commentaries, and columns—areas widely thought to enjoy near-absolute protection under the First Amendment."

Justice Brennan, in a separate opinion joined by Justice Marshall, wrote that the Milkovich majority had answered the question of whether there is a separate constitutional privilege for statements of opinion "cogently and almost entirely correctly." Milkovich, 497 U.S. at 23 (Brennan, J., dissenting). Unlike the majority, however, he cited 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." 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, Ollman plus two others, were widely acknowledged for the principle that "opinion" was ipso facto constitutionally protected—precisely the point that the Court in 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 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).

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

34. RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.0112, at 6-4.1 (1994). Leading media lawyer and treatise writer Bruce Sanford, see supra note 15, agreed; he said that Milkovich was "a crude opinion that destabilized an area of law that was perfectly stable and quite understandable." Cynthia Fox, How Scary Is Milkovich? A Matter of Opinion, COLUM. JOURNALISM REV., May/June 1992, at 19, 20 (quoting Bruce Sanford).

35. Fox, supra note 34, at 19. 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 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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Id.

36. Edwin Diamond, Can You Prove the Hollandaise Was Curdled? The Legal Uproar Over a Times Critic, N.Y. MAG., Apr. 18, 1994, at 32, 34. Moldea was also a long-time activist for authors' rights and founder of what became the National Writers' Union. Doug Ireland, Personal Foul, Roughing the Writer, VILLAGE VOICE, Sept. 11, 1990, at 8.


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 \textit{Interference} to the \textit{New York Times}, in hope of having it reviewed.\textsuperscript{43} The \textit{Times} decided to review the book and assigned it to Gerald Eskenazi, an experienced reporter who had covered the NFL for the \textit{Times} for two decades.\textsuperscript{44}

The resulting review in the September 3, 1989, \textit{New York Times Sunday Book Review} was extremely negative; the prestigious \textit{Columbia Journalism Review} characterized Eskenazi's effort as "relentlessly disparaging."\textsuperscript{45} Eskenazi asserted that \textit{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 \textit{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 \textit{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 \textit{Interference} contained "warmed over" information.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 8.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Christopher Hanson, \textit{Playing "Chicken" with the First Amendment}, 33 \textit{COLUM. JOURNALISM Rev.}, May/June 1994, at 21.
\item \textsuperscript{47} Id. at 1152.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{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
It is important to recognize that the New York Times is not just another newspaper, 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. It is immensely influential. 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." This is because booksellers use the Review as a guide to choosing which books to buy and promote.

Moldea alleged that the impact on Interference and his career was "swift and devastating." 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. The prospects for a second and third edition and a paperback deal died. In short, Eskenazi's

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 investiga-
tive journalist . . . with the resultant effect that Moldea c[ould] no longer earn a living as a writer."  

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


60. Moldea 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. 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.” 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. Because he had failed at every turn to get his side of the story out, Moldea filed suit against the Times on August 23, 1990, 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.

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

67. Moldea Brief, supra note 37, at 11.
68. Id.
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.
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.”).
72. See Moldea Brief, supra note 37, at 15.
73. One astute observer has written:
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.


74. See Michael Richman, *The Man Who Would Smite the New York Times*, WASH. TIMES, May 9, 1994, at C10, C11 (stating that Mr. Simmons, Moldea's attorney, accepted the case on a contingency basis with a $5,000 retainer); David Streitfeld, *Moldea Appeal Rejected*, WASH. POST, Oct. 4, 1994, at E2 (stating that Moldea's "income from publishing under his own name and lecturing plunged from $59,000 in 1988 to $2,800 in 1991").


76. See Richman, supra note 74, at C11. At trial and on appeal, Simmons was assisted by an associate at his firm and Stephen M. Trattner of Lewis & Trattner, *id.*, a four-person firm in Washington, D.C. See 4 MARTINDALE-HUBBELL LAW DIRECTORY DC591B (1995). Trattner had an intellectual property practice. *Id*.

77. Baker & Hostetler is the 25th largest firm in the country with 75 of its almost 400 attorneys in the D.C. office. The *NLJ* 250, Nat'l. LJ., Oct. 3, 1994, at C1, C8.

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

79. Moldea Brief, supra note 37, at 3-4.
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 Olman 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 \textit{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 \textit{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 \textit{Times} failed to support two of the statements in the review. First, Eskenazi's review charged that \textit{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 \textit{Interference} so describes the meeting or it does not."\textsuperscript{93} The court was unwilling to

\textsuperscript{85} \textit{Id.} at 1145.  
\textsuperscript{86} \textit{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." \textit{Id.}  
\textsuperscript{87} \textit{Id.} at 1145 n.6.  
\textsuperscript{88} \textit{Id.} at 1145-46.  
\textsuperscript{89} \textit{Id.} at 1146.  
\textsuperscript{90} \textit{Id.} (citing \textit{Milkovich v. Lorain Journal Co.}, 497 U.S. 1, 9 (1990)).  
\textsuperscript{91} \textit{Id.} at 1152.  
\textsuperscript{92} \textit{Id.} at 1147.  
\textsuperscript{93} \textit{Id.} at 1146-47. Judge Edwards considered the \textit{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 “reviv[ed] 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-

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94. *Id.* at 1147.
95. *Id.* at 1147-48.
96. *Id.* at 1147.
97. *Id.* at 1147-48.
98. *Id.* at 1152.
99. *Id.* at 1148.
100. *Id.* at 1153 (Mikva, C.J., dissenting). According to Chief Judge Mikva, the statement “too sloppy,” in the context of a book review, was the equivalent of saying that the author wrote a “bad” book. The statement was not actionable because it represented an unverifiable evaluation of the author’s “writing style or research methods.” *Id.* at 1154-55. One should note that Eskenazi’s review was directed at Moldea’s research in support of a nonfiction book, not at his style; the notion of “style” is much more subjective and therefore essentially unverifiable. Compare THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1785 (3d ed. 1992) (defining “style” as “the combination of distinctive features of literary or artistic expression”) with *id.* at 1534 (defining “research” as “scholarly or scientific investigation or inquiry”).
pressed his opinion that Moldea gave readers a false impression of the meeting,101 and the Rosenbloom allegation was "either supported by reference to the book" or was a "non-verifiable opinion."102 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."103 Failing to maintain this distinction would make such a defamation suit "the arbiter of... literary and artistic tastes."104 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."105

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.106 Moldea I was termed "chilling,"107 "alarming,"108 and a "bummer."109 The Times's counsel, Bruce

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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.” One commentator even suggested that the decision foreshadowed a regime of state licensing of critics. 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.”

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.

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 America, and the National Press Club. The Legal Times, Mar. 14, 1994, at 19, 22.

In a less apocalyptic mode, Garbus criticized the majority for thinking that its analysis provided “subtle distinctions [that] have some clarity,” when it did not. Martin Garbus, My Mother, Book Reviews, and the First Amendment, LEGAL TIMES, Mar. 14, 1994, at 19, 22.


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”).

Kilpatrick, supra note 108, at 3.

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, \textsuperscript{124} the Association of American Publishers, and the PEN American Center. \textsuperscript{125} 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." \textsuperscript{126} 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\textsuperscript{127} to stay on the sidelines, even though some of its members agreed with Moldea that reviewers should be accountable for what they write. \textsuperscript{128} The Authors Guild followed suit.\textsuperscript{129} 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. \textsuperscript{130} The book editor of a major newspaper said, "I have no comment because I walk a tightrope be-

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\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{126} Lyall, \textit{supra} note 111, at C19.
\item \textsuperscript{127} The National Book Critics Circle is a trade group of book editors and freelance critics.
\item \textsuperscript{128} Jack Miles, \textit{Sticks and Stones}, L.A. \textit{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, \textit{Two Negatives = Court Date(s)}, \textit{QUILL}, Oct. 1994, at 31, 32 (quoting Jack Miles).
\item \textsuperscript{129} Lyall, \textit{supra} note 111, at 19.
\item \textsuperscript{130} David Holmstrom, \textit{Libel Case Over Book Reviews Troubles Publishers}, \textit{CHRISTIAN SCI. MONITOR}, Mar. 1, 1994, at 3.
\end{itemize}
tween the needs of book publishers, advertising, and reviewers.\textsuperscript{131} Both insisted on anonymity. The \textit{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 \textit{Times}' third tactic was to bolster the already strong legal team assembled for \textit{Moldea I} by putting together, with media amici, the most powerful lineup of heavy hitters east of \textit{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}
Not to be outdone, the remaining amici\(^{137}\) retained attorneys from the Washington, D.C., office of Kirkland & Ellis (K&E), including lead counsel Kenneth W. Starr.\(^{138}\) Starr had "the resume of a legal wunderkind."\(^{139}\) He had clerked for Chief Justice Warren Burger and at age thirty-seven was appointed to the D.C. Circuit.\(^{140}\) In 1989, at the request of President Bush, he resigned his life-tenured judgeship to serve as Solicitor General.\(^{141}\) 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.\(^{142}\) With the change in administrations, he joined K&E.\(^{143}\)

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 *Ollman v. Evans*,\(^{144}\) the leading libel decision before *Milkovich*.\(^{145}\) Who better to speak to his former colleagues about the difficult questions raised by libel in the context of a book review?\(^{146}\)

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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 480. 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, 11 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

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, "[t]oo 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)).
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.\textsuperscript{156} Unlike the allegation in \textit{Milkovich}, that the plaintiff was a liar, an evaluation of the qualities of a book was not verifiable by reference to any “specific events.”\textsuperscript{157}

Second, the \textit{Times} argued that in artistic criticism there is no “true” conclusion, and that book reviews necessarily involve "literary interpretation," an "intensely subjective" enterprise.\textsuperscript{158} The "fundamental error" of \textit{Moldea I} was thus "not in concluding that Eskenazi's characterization [of \textit{Interference}] was arguably wrong; it [was] in presuming that there [was] any right interpretation."\textsuperscript{159}

Third, counsel for the \textit{Times} vividly described the untoward consequences that would result if \textit{Moldea I} was allowed to stand. There would be a "proliferation of lawsuits and protracted discovery by disappointed authors, artists, and performers."\textsuperscript{160} \textit{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."\textsuperscript{161} This result, in turn, would inflict catastrophic injury upon the First Amendment and the commitment to "robust debate" that it embodies\textsuperscript{162} because

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\item[156.] \textit{Id.} at 9-10.
\item[157.] \textit{Id.} at 10; see \textit{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, \textit{inter alia}, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court."). In its initial brief, the \textit{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 \textit{New York Times Initial Brief}, \textit{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).
\item[158.] \textit{New York Times Petition for Rehearing}, \textit{supra} note 154, at 12, (quoting Dworkin v. L.F.P., Inc., 839 P.2d 903, 918 (Wyo. 1992)) ("[W]hen 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.").
\item[159.] \textit{Id.} at 12. This theme was elaborated by amici. See \textit{PEN Motion and Brief}, \textit{supra} note 125, at 14 ("[T]here cannot be one 'true' meaning within the genre of literary criticism.").
\item[160.] \textit{New York Times Petition for Rehearing}, \textit{supra} note 154, at 1.
\item[161.] \textit{Id.} at 13.
\item[162.] \textit{See id.} at 1. This argument was developed more extensively in the PEN Brief and the Association Motion. The PEN brief contended that \textit{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," \textit{PEN Motion and Brief}, \textit{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

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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.\textsuperscript{167}

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-sighted\textit{}ly 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.\textsuperscript{163}

Judge Edwards emphasized that critics need "a degree of 'interpretive license,' . . . some leeway to offer 'rational interpretation' of ambiguous sources."\textsuperscript{169} 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."\textsuperscript{170} 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."\textsuperscript{171} 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 unsupported by reference to the written work."\textsuperscript{172}

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\item[167.] \textit{Id.} at 311 (citation omitted).
\item[168.] \textit{Id.}
\item[169.] \textit{Id.} at 313 (quoting \textit{Masson}, 501 U.S. at 518-19).
\item[170.] \textit{Id.}
\item[171.] \textit{Id.} at 315.
\item[172.] \textit{Id.} (quoting New York Times Petition for Rehearing, supra note 154, at 3).
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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 *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 *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*, *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} *Id.* at 315 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)).
\item\textsuperscript{177} *Id.* (emphases added).
\item\textsuperscript{178} *Id.* at 317.
\item\textsuperscript{179} *Id.*
\end{itemize}
\end{footnotesize}
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.”’\(^{180}\) 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.”\(^{181}\) 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.”\(^{182}\) 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.”\(^{183}\) 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.”\(^{184}\) The *Times* further expounded that the “whole society, freer to speak and argue about matters of public concern, [w]as the winner.”\(^{185}\)

Legal observers, some more impartial than others, also saluted *Moldea II*. Media lawyer Karl Olson characterized *Moldea II* as “a touchdown.”\(^{186}\) Different contexts require different legal standards and the “extremely deferential” “supportable interpretation” standard was “clearly right.”\(^{187}\) Libel expert Robert

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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”).
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."\(^{188}\)

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."\(^{189}\) Ken Starr commented, "on behalf of the amici, we are enormously proud of the court."\(^{190}\)

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."\(^{191}\) Robert Sack said, "I don't recall ever having seen a panel so thoroughly overrule itself in any field of law."\(^{192}\) 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.'"\(^{193}\) Bruce Sanford observed that he had "never seen anything like this in the First Amendment area."\(^{194}\) 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."\(^{195}\) 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

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189. *Id.*
190. *Id.*
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."\footnote{D.C. Circuit Amends, supra note 188, at 4.}

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."\footnote{Eugene R. Fidell, Admitting Error: A Proud Judicial Heritage, RECORDER, May 25, 1994, at 9.} 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.'"\footnote{Streitfeld, supra note 191, at C11 (quoting Roger C. Simmons).}

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.\footnote{Moldea's attorney, Roger Simmons, complained that Judge Edwards's second opinion was "very uncertain as to what the}
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.*"*200* 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."*201* 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.*202*

Unfortunately for Moldea and his attorneys, the Supreme Court denied certiorari on October 3, 1994.*203* The denial triggered yet another round of media kudos for the wise judges of *Moldea II.**204* 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.'"*205*

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."*206* 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."*207* Sanford modestly offered that the "supportable interpretation" test is a "very important

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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.").
205. *Hernandez,* supra note 69, at 20 (quoting the *New York Times*).
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 [wa]s 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.\footnote{218}{Henry L. Kaufman & Michael Cantwell, \textit{Moldea II: Are Reviews Protected?}, \textit{Publishers Wkly.}, Oct. 24, 1994, at 39.}

\textit{Moldea I} and \textit{Moldea 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,\footnote{219}{See, e.g., \textit{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); \textit{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); \textit{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); \textit{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).} while the flood of lawsuits that was predicted would overwhelm newspapers after \textit{Moldea I}\footnote{220}{See supra notes 106-23 and accompanying text.} never transpired.\footnote{221}{See supra note 69, at 20 (quoting \textit{Times} counsel George Freeman as saying that \textit{Moldea II} "should be the death knell for any onslaught of claims by plaintiffs suing about reviews. Not that we've seen any groundswell.").}

\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 \textit{New York Times}.\footnote{222}{See Jerome A. Barron, \textit{Access to the Press—A New First Amendment Right}, 80 \textit{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 \textit{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).} 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.\footnote{223}{Justice Byron White made this point in his lengthy and thoughtful dissent in \textit{Gertz}, 418 U.S. at 369 (White, J., dissenting).}

Whether viewed broadly or narrowly, \textit{Moldea II}, with its special rules for libel arising out of commentary, adds yet another intricacy to First Amendment doctrine, an area already both
byzantine and balkanized.\textsuperscript{224} This result is a problem not only for judges, but also for lawyers, because excessively complex law may lead to poor advice.\textsuperscript{225}

In the end, perhaps the best argument for \textit{Moldea II} is the most familiar one in libel law—the need to provide the media the "breathing space" it needs "to survive."\textsuperscript{226} 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."\textsuperscript{227} 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."\textsuperscript{228}

G. Epilogue

Who won and who lost?

The judges, lavishly praised by most observers, came up winners.\textsuperscript{229} \textit{Moldea II} produced few critics. One critic, noted plaintiff's attorney Martin London, noted that because "the press went berserk" after \textit{Moldea I}, Judge Edwards "kneeled at the


\textsuperscript{225} On the other hand, complex law gives law professors something to write about.


\textsuperscript{227} Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (holding that the First Amendment precludes liability for the intentional infliction of emotional distress arising out of "caricature").

\textsuperscript{228} \textit{Sullivan}, 376 U.S. at 278.

\textsuperscript{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 \textit{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.

Legends in the Law; A Conversation with Patricia Wald, BAR REP. (Wash. D.C.), Apr./May 1995, at 10, 11.
232. Streitfeld, supra note 191, at C11.
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."

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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 dissects" the evidence).