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IN MY OPINION, THOSE ARE NOT FACTS

The Honorable Abner J. Mikva†

The topic I have chosen for this conference on Media and the Law is the most important First Amendment case decided by the District of Columbia (D.C.) Circuit last term: *Moldea v. New York Times.*[1] You may have heard about it. This is the case that was so important the D.C. Circuit decided it twice.

Moldea was a book author's defamation action against the *New York Times* for its publication of a highly critical book review. The issue dealt with whether a distinction can be drawn—or should be drawn—between defamatory "opinions" as compared to defamatory "facts." The case was randomly assigned to a circuit panel consisting of Judges Harry Edwards, Patricia Wald, and me, a threesome which some plaintiffs' lawyers who practice before the circuit would call the "Dream Panel." Others, of course, would call it the panel from hell. In *Moldea I,*[2] Judges Edwards and Wald decided to overturn a lower court's grant of summary judgment to the *New York Times,* with me in dissent. Then, just ten weeks later, after the *New York Times* had petitioned the panel for a rehearing, Judges Edwards and Wald reversed themselves and upheld the dismissal of the case, with me now in the majority.[3] On October 3, 1994, the Supreme Court denied certiorari in the case, allowing the second panel decision to stand.[4] *Moldea v. New York Times* is a case that is interesting not just for its First Amendment law, but for its behind-the-scenes story about judges trying to get First Amendment law right.

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† Counsel to the President; former Chief Judge, United States Court of Appeals for the District of Columbia Circuit. This is the text of a speech given by the Honorable Abner J. Mikva at the Georgia State Bar Conference, October 15, 1994, on Media and the Law. Footnotes cite only authority and contain nothing of substance. *See* Abner J. Mikva, *Goodbye to Footnotes,* 56 U. COLO. L. REV. 647 (1985).

1. 15 F.3d 1137 (D.C. Cir.), *modified,* 22 F.3d 310 (D.C. Cir.), *cert. denied,* 115 S. Ct. 202 (1994) [hereinafter *Moldea I*].

2. *Id.*

3. Moldea v. New York Times, 22 F.3d 310 (D.C. Cir. 1994), *cert. denied.*, 115 S. Ct. 202 (1994). [hereinafter *Moldea II*].

4. Moldea v. New York Times, 115 S. Ct. 202 (1994).

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First, let me describe the problem in defamation law known as the "opinion-fact distinction." Americans instinctively believe that opinions should be protected by the First Amendment from libel lawsuits. I might say that preserving the freedom to express one's opinion stands foremost among our cherished constitutional beliefs. State libel laws, which are targeted against false defamatory statements, should not be allowed to threaten that freedom. Nor should they be allowed to chill the media from publishing wide-ranging opinion, be it critical of politics, literature, or the arts, or what is almost the same, be it critical of politicians, authors, or artists.

On the other hand, factual defamatory statements—if they are statements which are provably false—may provide the basis for a defamation action. Although Supreme Court rulings under the First Amendment appropriately have limited their reach, state libel laws should provide some protection to individuals whose personal reputations have been severely damaged by false and injurious defamation. Even an audience filled with representatives of the media would agree, I think, that our defamation laws should provide private figures, and even public figures, with some opportunity for redress in meritorious cases. For instance, when a journalist publishes a defamatory factual statement which is provably false and when the plaintiff establishes both the statement's falsity and that it was published with "actual malice" (that is, with knowledge that it was false or with reckless disregard of whether it was false), the applicable standard is that announced in the landmark Supreme Court case, *New York Times v. Sullivan.*[5] In short, there is and ought to be a meaningful difference in the judicial review and treatment provided to a newspaper editorial which calls a member of Congress a knave and a news story which incorrectly identifies a private citizen as a convicted felon.

Thus, the question before the D.C. Circuit and before this luncheon arises: Where does the line fall between opinion and fact? Can judges, or anyone, draw that line? If so, should the line be one of constitutional dimensions, protecting every statement or claim on the opinion side of the line, yet leaving libel laws with some bite on its other side?

5. 376 U.S. 254 (1964).

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To illustrate this conundrum, I offer you the Supreme Court's own example from an important case on this question: *Milkovich v. Lorain Journal Co.*[6] Consider the following claim: "John Jones is a liar." Certainly, that is a statement which, given the circumstances, John Jones might be able to prove is both defamatory and false. But what if the speaker had simply couched his statement in the following form: "In my opinion, John Jones is a liar"? Is the claim now any less defamatory? Should the First Amendment now protect it from an action by John Jones for defamation because it represents the speaker's opinion?

This is the nub of the problem. Not all opinions consist purely of opinion. In truth, expressions of opinion often include or imply an assertion of objective fact. If an opinion implies an assertion of objective fact, then its connotations may be provably false. In such a case, the question becomes whether a defamation action against the publication of such an opinion should proceed to a jury, foreclosing summary judgment for the defendant as a matter of law. As Judge Friendly aptly stated: "It would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' "[7]

I. *MOLDEA V. NEW YORK TIMES*

And therein lie the ingredients of *Moldea v. New York Times.* Dan Moldea is an investigative journalist who authored the book *Interference: How Organized Crime Influences Professional Football.*[8] Moldea's book claims to establish a link between professional football and the illegal gambling activities of the Mafia. In July 1989, William Morrow and Company released *Interference* to mixed reviews. Among the negative reviews was one written by Gerald Eskenazi, a *New York Times* sportswriter, which appeared in the *New York Times Review of Books* on September 3, 1989, one week before the opening of the professional football season.[9] The gist of Mr. Eskenazi's review

6. 497 U.S. 1 (1990).
7. Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).
8. DAN E. MOLDEA, INTERFERENCE: HOW ORGANIZED CRIME INFLUENCES PROFESSIONAL FOOTBALL (1989).
9. Gerald Eskenazi, *Unsportsmanlike Conduct?,* N.Y. TIMES, Sept. 3, 1989, § 7, at 8.

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was that Mr. Moldea's book contained "too much sloppy journalism" for the bulk of his allegations to be trusted by readers. Moldea, who was upset about the review, requested that the *New York Times* retract what he saw as its inaccuracies and also sought to respond to the review in a letter to the editor. The *New York Times* denied both requests.

Nearly one year later, Moldea brought suit against the *New York Times,* seeking damages for libel and invasion of privacy as a result of seven separate statements in Mr. Eskenazi's review. Foremost among the seven was the statement: " 'But there is too much sloppy journalism to trust the bulk of this book's 512 pages. . . .' "[10] In federal district court, the *New York Times* moved for summary judgment, claiming that each of the seven statements, including the line about "sloppy journalism," was either a nonverifiable statement of opinion or a supported statement of fact. Chief Judge Penn agreed and granted summary judgment. Moldea appealed.

The appeal primarily asked the question: Can the statement "too much sloppy journalism" be proved false by a plaintiff book author because it implies an assertion of objective facts? My basic response to the case was: How sloppy is too sloppy? But Judges Edwards and Wald felt differently. They wanted to come down against the *New York Times.* When they did so in *Moldea (I),* Judge Edwards reasoned as follows:

> A bare assertion that Moldea is a practitioner of "sloppy journalism" would be precisely analogous to the Supreme Court's example in *Milkovich*: "In my opinion John Jones is a liar." Although "sloppy" in a vacuum may be difficult to quantify, the term has obvious, measurable aspects when applied to the field of investigative journalism.[11]

Judge Edwards went on to write:

> 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.[12]

10. *Moldea I,* 15 F.3d 1137, 1141 (1994).
11. *Id.* at 1145 (citation omitted).
12. *Id.* at 1145 n.6.

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Judges Edwards and Wald overturned the lower court's grant of summary judgment to the *New York Times*. Their decision would have allowed Moldea's suit to proceed to a jury, allowing Moldea the chance to convince the jury that Eskenazi's statements about the book are false and defamatory.

Almost needless to say, there was a minimal amount of enthusiasm for Judge Edwards' decision. The public reaction to the majority opinion, with the definite exception of Mr. Moldea and the possible exception of recent book authors, was uniformly negative. A wide range of commentators expressed the concern that the decision would chill media criticism of literature and the arts.

This reaction was not without good reason. I wrote in my dissent: "I do not know how courts could ever check the slide down the slope that the majority opinion creates today."[13] I stated further:

> If the statement that Mr. Moldea wrote a sloppy book is defamatory, so would be a statement that Bette Midler wore a sloppy dress, or that Oliver Stone made a sloppy film, or that Itzak Perlman had a sloppy technique, or that Lincoln Steffens played fast and loose with his analyses of reform politicians. I have no doubt that many people reading such derogatory criticism of their favorite artists might have strong feelings about the criticism. I have grave doubt that defamation suits should be used as the arbiter of such literary and artistic tastes.[14]

My dissent continued:

> "Too sloppy" might be taken by some to mean that the book is full of specific factual inaccuracies, a charge the plaintiff could disprove by providing clear support for the statements found in the book. Others, however, might interpret the statement simply to imply that the author wrote a "bad" book, a clearly subjective and non-provable assessment. In my view, "too much sloppy journalism" contained in a book review lies somewhere between those two poles, but far too close to the nonverifiable end of the spectrum to warrant defamation liability.[15]

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13. *Id.* at 1153.
14. *Id.*
15. *Id.* at 1154.

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What explains this ruling? Why would Judges Edwards and Wald, widely known for their commitment to First Amendment principles, issue a ruling which I and many others believed had provided a troubling standard and had inexplicably failed to take account of the protection from defamation actions which the common law and the First Amendment historically have provided for works of artistic and literary criticism?

II. BEHIND THE SCENES

I think I can say that a feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamation actions resulting from instances of irresponsible journalism. That sounds like a scary message for me to deliver to this audience. I have been a judge for fifteen years, and now that I have taken off my robes, one of the first things I must say is: "Watch out! There's a backlash coming in First Amendment doctrine." But I did not come here to instill a false sense of paranoia in the media. I do not think such a feeling drove such judges as Judges Edwards and Wald to undermine First Amendment interests.

But *Moldea I* does reflect an inclination among judges in favor of helping plaintiffs, on the margin, in defamation actions. The Supreme Court's ruling in *Milkovich,* which did not satisfactorily resolve the opinion-fact conundrum, also reflects this judicial inclination and explains *Moldea I.*

As an aside, after the panel issued *Moldea I,* and the reaction to the majority view was negative, I never said a word to Judges Edwards or Wald about it. Judges are not like members of Congress. I never teased them one bit about the favorable reaction my dissent had met in comparison with their opinion. When they decided to grant the petition for rehearing and reverse themselves, as the senior judge, I could have taken the case and written the new majority. But I did not.

III. FIRST AMENDMENT DOCTRINE

Why do some judges think we have gone too far in protecting freedom of the press? Well, I am not going to make any comments about the state of journalism. You can gauge for yourselves, far better than I, whether the standards for accuracy in reporting have increased or declined in the thirty years since

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the Supreme Court decided *New York Times v. Sullivan.* I will only discuss judicial doctrine and how that doctrine's development over thirty years in favor of protecting the media has affected judicial attitudes. You decide if the facts have moved the law.

Until recently, under the doctrine of *New York Times v. Sullivan,*[16] Supreme Court case law in the defamation area has been directed largely toward providing the media with the necessary breathing space which freedom of expression requires. But even *New York Times v. Sullivan* itself, as revered as we hold it to be, has to be recognized thirty years hence for its result-driven quality of protecting the financial viability of the *New York Times* at all costs. Recall that the case involved a political advertisement that criticized the civil rights record of certain Alabama officials.[17] An Alabama jury had awarded the plaintiff upwards of $500,000.[18] But even though some facts stated in the advertisement were concededly inaccurate,[19] the Court barred the state from imposing liability on the defendant. Had the Court announced any lesser standard than its landmark actual malice requirement, or not gone ahead, in a highly unusual step, and applied that standard to the facts of the case,[20] the Alabama jury to which the Court might have remanded the case would likely have found liability and awarded damages seriously endangering the finances of the *New York Times.* The Court simply could not allow that to happen.

No one should take lightly the importance of this breathing space that the Supreme Court's First Amendment doctrine provides the media. But if we were to assume that constitutional protection from defamation actions has been broadened by subsequent rulings beyond the scope which is necessary to protect freedom of expression, beyond the scope which is necessary to protect responsible journalism, and beyond the scope which is necessary to protect an acceptable degree of irresponsible journalism, then by logic, at some point that doctrine might be protecting too much inaccurate and harmful reporting.

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16. 376 U.S. 254 (1964).
17. *Id.* at 256.
18. *Id.*
19. *Id.* at 258.
20. *Id.* at 285-86.

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Consider this from another perspective. Since and including *New York Times v. Sullivan,* First Amendment doctrine has developed by design to leave increasing numbers of defamed plaintiffs unable to gain redress. Case statistics show that only about ten percent of defamation actions are successful.[21] For instance, under the Court's ruling in *Philadelphia Newspapers, Inc. v. Hepps,*[22] the plaintiff bears the burden of proof. To prevail, a plaintiff must show that the statements at issue are false; the defendant need not prove that they are true. I would have it no other way. But as the Supreme Court has written:

> Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious.[23]

This harsh fact of life—that courts adhering to doctrine which provides the media with ample breathing space unavoidably must shut the courtroom doors to numbers of defamed plaintiffs—over time may have built a certain sympathy among some judges. Perhaps it is time, some of them may be thinking, to recalibrate the scales of justice in the law of defamation.

IV. OPINION-FACT DOCTRINE

The *Moldea* rulings reflect how these contrasting forces sometimes play themselves out. Prior to the Supreme Court's 1990 decision in *Milkovich v. Lorain Journal Co.,*[24] most courts did recognize a strict dichotomy in defamation actions between assertions of opinion and assertions of fact. Under this practice, only false statements of fact could be defamatory; statements of opinion could not be defamatory because all such expression was thought to be protected by the First Amendment.

Yet in applying this fact-opinion distinction, lower courts had struggled. In *Ollman v. Evans,*[25] the D.C. Circuit had attempted to provide some degree of guidance. The court set out a flexible

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21. Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity,* 25 WM. & MARY L. REV. 825, 827 (1984).
22. 475 U.S. 767 (1986).
23. *Id.* at 776.
24. 497 U.S. 1 (1990).
25. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1127 (1985).

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test for distinguishing fact from opinion that took into account several factors, including the common meaning of the language used, the degree to which the statement is verifiable, the context in which the statement occurred, and the broader social context in which the statement fits.

The facts in *Ollman* involved an Evans and Novak newspaper column criticizing the appointment of a "Marxist" political science professor to head the Department of Government and Politics at the University of Maryland. After applying the four factors, the court gave considerable weight to the context in which the critical statements had appeared, and it held for Evans and Novak. Judge Starr wrote for the D.C. Circuit: "Readers [of the Op-Ed page] expect that columnists will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere in the newspaper."[26] Thus, *Ollman* was a case that placed a heavy emphasis on context in its resolution of the opinion-fact conundrum.

The Supreme Court in *Milkovich,* however, implicitly rejected *Ollman*'s "totality of the circumstances" test in favor of a single inquiry into whether the alleged defamatory statement is verifiable. After *Milkovich,* the factors set forth in *Ollman*—common meaning and, again, the context in which the statement appeared—remain relevant, but only to the extent they bear on the verifiability of the statement. Thus, *Milkovich* rejected the notion of a fact-opinion dichotomy in favor of an analysis that recognizes that statements of opinion can be actionable if they imply a provably false fact. The *Milkovich* court stated:

> [T]he " 'breathing space' " [that] " '[f]reedoms of expression require in order to survive' " is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact . . . . [This is so because] statement[s] of opinion relating to matters of public concern which [do] not contain a provably false factual connotation will receive full constitutional protection [under existing precedent].[27]

26. *Ollman,* 750 F.2d at 986.
27. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990) (citations omitted).

The Court in *Milkovich* placed the emphasis on verifiability, to the seeming detriment of the D.C. Circuit's previous emphasis in *Ollman* on context as well as verifiability.

The *Milkovich* ruling set the stage for *Moldea.* Unless judges place a sufficient emphasis on context, then book reviews, literary criticism, and political column-writing obviously will become more susceptible to charges of defamation than was previously the case. That is precisely what happened in *Moldea I*: Judge Edwards rejected the *New York Times*' argument about the importance of a book review's context. He wrote, "it would make little sense to craft a rule that permitted otherwise libelous statements to go unchecked so long as they appeared in certain sacrosanct genres."[28]

V. MOLDEA II

In *Moldea II,* however, Judges Edwards and Wald turned on a dime with respect to the importance of context. Judge Edwards pleaded *mea culpa.* He wrote:

> Moldea I is short-sighted . . . in failing to take account of the fact that the challenged statements were evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations.
>
> . . . .
>
> Moldea I erred in assuming that Milkovich abandoned the principle of looking to the context in which speech appears.[29]

In short, *Milkovich,* because it failed to stress the importance of context, needed reinterpreting. *Moldea II* and a recent decision by the First Circuit[30] have begun the work of stretching *Milkovich.* Even though I believe my theory about judicial attitudes favoring defamation plaintiffs is correct, the breathing space required by commentary and literary review will require that courts head back to a point suspiciously near the previous *Ollman* decision, that is, context matters.

The *Moldea II* standard, if it does not make sacrosanct the book review genre, certainly provides reviewers with a considerable interpretive license. *Moldea II* sees its way to the

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28. *Moldea I,* 15 F.3d 1137, 1146 (1994).
29. *Moldea II,* 22 F.3d 310, 313-14 (1994).
30. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.), *cert. denied,* 112 S. Ct. 2942 (1992).

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right result: It breaks off commentary and literary review from the Supreme Court's context-deficient treatment of ordinary libel under *Milkovich.*

CONCLUSION

In closing, I want to praise my colleagues Judge Edwards and Judge Wald. I spent many extraordinary years serving with them; they are truly two of the finest judges in the country. They were and are two judges who make the federal judiciary the envy of the world. The Supreme Court's inadvertent shift in *Milkovich* away from the importance of context largely explains the existence of *Moldea I. Milkovich* created a tension that has made it difficult for intermediate court judges to "know when to hold 'em and know when to fold 'em" in libel cases in which context is important. The Supreme Court's denial of certiorari in *Moldea II* provides judges with at least a pretty good clue that context can make a difference. Of course, the words used will continue to make a bigger difference. The substance of the criticism and its verifiability will still be the primary engine of libel decisions and that is how it should be. But it is that focus, along with a respect for context, which creates the proper breathing space for the critics of our society. As far as judges are concerned, they must continue to struggle with the difficulties that free speech creates, because in a free society, the alternative would be totally unacceptable.

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