BOOKS & THE ARTS.

Paper Chase—I

CARLIN ROMANO

Which side should book critics and First Amendment stalwarts be on when free expression clashes with the right of the world's most powerful newspaper to publish what it wants, and to keep subjects of its book reviews from defending themselves in its pages?

In 1989, *The New York Times*, champion of the First Amendment, declared in a review that Washington investigative reporter Dan Moldea exhibited "too much sloppy journalism" in *Interference: How Organized Crime Influences Professional Football* (Morrow). Moldea wanted to respond in a letter, but the *Times* refused to let him. Moldea sued for libel.

Is the resulting legal battle a Hobson's choice for all genuine advocates of free expression? Does it scramble even a first-rate legal mind when the *Times*, of all publications, fights to silence an author determined to rebut a stinging book review? Anyone sizing up this year's self-contradictory decisions by D.C. Circuit Court Judge Harry Edwards on Moldea's action might think so.

In his first opinion, handed down February 18 on Moldea's appeal of a district court's decision to grant the *Times* summary judgment—a ruling that, if upheld, effectively kills Moldea's case by denying him the chance to prove it before a jury—Edwards, with Judge Patricia Wald joining him and Chief Judge Abner Mikva in dissent, reversed the lower court. He found that "the trial court erred in ruling that the *Times* review could not be defamatory as a matter of law."

Noting that the review attacked "Moldea's competence as a practitioner of his chosen profession, a matter archetypically addressed by the law of defamation," Edwards found that "too much sloppy journalism" was a statement of opinion that implied defamatory facts. Further, he declared, "We hold that some of the challenged characterizations of *Interference* are sufficiently factual that a jury could meaningfully determine their truth or falsity."

That, however, was February. In a highly unusual "second opinion" handed down May 3 in response to the *Times*'s petition for a rehearing—a judicial rewrite that First Amendment expert Rodney Smolla called "inexplicable" and "impossible to understand" in *The Washington Post*—Edwards reversed what he lamely called Moldea I, upholding the lower court's grant of summary judgment. Speaking now for a unanimous panel of three, Edwards confessed his "distress" at his earlier opinion, labeling it "a mistake of judgment." He invoked Justice Frankfurter's observation that "wisdom too often never comes, and so one ought not to reject it merely because it comes late."

The new decision may represent the weirdest serial behavior by a top jurist since Sol Wachtler's phone calls.

Wisdom is one thing. *Stare indecisis* is another. Contrary to some reports, which suggested that Edwards had tossed out Moldea I, Moldea II announced that the "fundamental framework" for defamation actions established in Moldea I is "sound, and we do not modify it in this decision." The problem was that Moldea I "failed 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 are capable of a number of rational interpretations." On reconsideration, Edwards declared, he and his two colleagues now held that "as a matter of law" the *Times* review—written by veteran *Times* sportswriter Gerald Eskenazi—was "substantially true."

The chief problem with the flip-flop is that the "generally correct" statement of the law of defamation in Moldea I *specifically recognized* that the Supreme Court in *Milkovich v. Lorain Journal* (1990)—a case in which a high school coach charged that a sports column libeled him by implying he'd perjured himself—ruled that the *genre* in which a defamatory statement appears is irrelevant to its actionability. Moldea II's adoption of the analysis suggested in the *Times*'s brief on the petition to rehear—that libel suits against criticism should go forward "only when the interpretations are unsupportable by reference to the written work"—differed so much in tone and approach from the aggressive, pro-little-guy sound of Moldea I that it seemed to come from either a completely different judge (with the same name), or at least a completely different law clerk (perhaps *The American Lawyer* can ferret out the small fry behind this fiasco and impede their predestined rise to law school appointments).

One hopes that Moldea II is not simply Chapter II in the weirdest serial behavior by a top jurist since Sol Wachtler's phone calls. After Moldea I, the *Times*, in a routine move that rarely succeeds, petitioned for a rehearing by the panel of three or by the D.C. court sitting en banc. Edwards, Wald and Mikva could have denied the rehearing, thereby leaving it to the full appeals court to decide whether to bring a fresh perspective to the case en banc, or let it go on, if accepted, to the Supreme Court. Instead, Edwards took the almost unheard of route of reanalyzing the case and coming out on the other side. Having made a thorough mess of things so far, Edwards and Wald should resist taking a third crack at the case in response to Moldea's own likely petition for rehearing. But as it stands—or wobbles—Moldea II smells as bad as any D.C. Appeals Court case in memory.

Before the rehearing, the *Times* aggressively undertook its familiar strategy of prompting other media organizations to take its side through the filing of, or signing on to, amici curiae briefs. By May 3, when Edwards handed down Moldea II, the troops facing down Moldea on the *Times*'s side included the Associated Press, Scripps-Howard, Dow Jones & Co., *U.S. News & World Report*, *The New Yorker*, the Newspaper Association of America, Magazine Publishers of America, the Association of American Publishers and PEN American Center. As former *New York Magazine* media critic Edwin Diamond observed, "In the annals of publishing, it would be difficult to find a more David and Goliath-like mismatch."

Contributing to the pile-on tactics, both big corporate media and putative defenders of free expression strafed Moldea I from the start, with little attempt to understand Moldea's side of the case. *The*

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Washington Post editorialized that Moldea I "greatly impairs the ability of opinion writers to speak their minds," without addressing whether rapid-fire dismissal of libel suits greatly impairs the ability of media victims to speak theirs. Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press, called Moldea's filing of a libel suit "unconscionable," even though a libel motion is partly an act of free expression—a call upon the state to grant a forum, to listen to both sides of an argument and adjudicate.

As if all that didn't already place enough of a figurative ex parte hand on the scales of D.C. justice, the lawyer hired to write the brief for "the world," as some referred to the media organizations' amicus, was Kenneth Starr, himself a former member of the D.C. Circuit Court of Appeals. While former federal judges are free to file briefs to their former courts (why they're not subject to "turnstile" regulations might make a nice question on a Legal Ethics exam), Moldea could be forgiven for thinking the circumstance didn't help him. Did their former colleague's opinion affect Edwards and Wald?

They certainly don't want anyone to think so. On May 2, the day before handing down Moldea II, the Court of Appeals issued an order denying permission for the two pro-*Times* amicus briefs to be filed. If not for that move, Moldea would have had a legal right to reply to them. Plainly, the court wasn't interested in giving him the opportunity. The court was so abrupt in rushing to issue Moldea II that the order denying the pro-*Times* amicus briefs reached Moldea's attorney on the day after Moldea II was announced. Did Edwards, Wald or any of their clerks read the pro-*Times* amicus briefs?

Perhaps not. But the possibility that Edwards and Wald succumbed to media pressure, expressed both in print and on the inside-the-Beltway dinner circuit, can't be ignored. In an unusual comment about the case to the *Post* the next day, Mikva, while opining that Edwards and Wald "don't cave to pressure," also remarked, "I didn't send them copies of the editorials or anything. They could read these on their own." (Outside evidence is not supposed to affect appellate decisions.)

Starr himself acknowledged that the reversal was "the talk" of Washington law firms. Did Edwards, an ambitious, 53-year-old former University of Michigan law professor, decide that the intense media criticism of Moldea I might doom his

hopes for a Supreme Court nod? It's been rumored that President Clinton eventually might like to add a liberal African-American to counter Clarence Thomas. According to some Washington observers, Edwards, an unrepentant liberal appointed by Jimmy Carter in 1980, fits the bill in more ways than one. Did Wald, a 65-year-old former assistant attorney general frequently mentioned as a candidate for high posts in the Clinton Administration, really have nothing to say in Moldea II to explain her own about-face? Was she simply trying to escape responsibility for the Moldea I firestorm?

Only the judges know. But while you couldn't tell it from reading the *Times*, whose customary rapt attention to First Amendment cases waxed and waned on this action depending on whether the paper was winning or losing (it ran a brief wire service notice of Moldea I; a prominent, staff-written National section story on Moldea II), *Moldea v. New York Times* is the most provocative First Amendment case in years. It offers subtle facts and complicated philosophical questions about the respective verifiability of facts and evaluations. It pits deeply entrenched legal ideals against each other: the "breathing space" that criticism needs to be effective, and the right of an individual to defend his reputation. Perhaps most singularly, it exhibits the *Times*, normally on the noble side of free-expression controversies, confronting its raw power in the marketplace of ideas, particularly in regard to books.

As with most complex litigation, it would take a lifetime to disentangle every contested element of *Moldea v. New York Times*. But despite the reflex posturing of big media organizations praising Moldea II as a victory for freedom of speech, it's actually the opposite. It's a victory not for working journalists, authors and critics who thrive on debating issues and interpretations but for corporate media managers who want to squelch criticism of what they publish, escape tightening their standards to eliminate shoddy reviewing, evade questioning of the judgment of their critics, avoid paying for their mistakes as other corporate managers must and, above all, prevent ordinary Americans—the members of a jury—from getting a look at their practices.

Both sides recognized that they faced a public relations battle as well as a legal one.

Learning to love *Moldea v. Times* as a watershed libel ruling requires bringing together the facts of the case, the legal analysis they generate and the realities of power politics in book reviewing. It isn't a pretty picture.

The battle began on Sunday, September 3, 1989, when the *Times* published a review of Moldea's book, *Interference: How Organized Crime Influences Professional Football*. The reviewer, veteran *Times* sportswriter Gerald Eskenazi, had covered professional football for the paper for many years. In 1977, he'd written his own puffy book about pro football, *There Were Giants in Those Days*, in which he acknowledged his indebtedness to various New York Giants officials and to Joe Browne, the N.F.L.'s chief spokesman.

In his review of *Interference*, Eskenazi accused Moldea of using "crazy-quilt tie-ins" and "unfounded insinuations" to "explain how organized crime and the N.F.L. are cozy." He stated that Moldea's performance in the book amounted to "too much sloppy journalism to trust the bulk of this book's 512 pages—including its whopping 64 pages of notes." He then cited several alleged errors, including three misspelled names, to support that conclusion.

Moldea felt that the review misrepresented his book. He thought it asserted that he alleged facts in the book that he hadn't alleged, and claimed that he didn't provide facts that, he believed, he'd provided. On the advice of his attorney, Moldea sent a letter to Eskenazi on September 7, with a copy to *Times Book Review* editor Rebecca Sinkler, demanding a retraction or correction. Getting no immediate response, Moldea directed his attorney to call the *Times*'s general counsel on September 13, with a demand that the *Times* either retract or correct the review. On September 22, *Times* attorney David Thurm responded by letter that Eskenazi's review was "clearly protected as opinion, and there is no basis for a correction or retraction."

Following further efforts to get a retraction or correction of the review, Moldea wrote to Sinkler on November 15. His 653-word letter, submitted for publication, sought to rebut Eskenazi's criticisms point by point. According to Moldea, he never received a reply and the letter was never published. On August 24, 1990, as the statute of limitations on his libel claim was running out, he sued the *Times* in U.S. District Court in Washington for $10 million, alleging that six specific statements in the *Times* review—"too much sloppy journalism" and five other statements meant to support that judgment—falsely characterized his book and libeled him.

One Eskenazi statement claimed that Moldea portrayed a meeting between Joe Namath and Lou Michaels as "sinister" when Moldea never used that word. Another said that Moldea "revives the discredited notion" that Los Angeles Rams owner Carroll Rosenbloom drowned as a result of foul play—a notion Moldea rejected late in the book. A third stated that *Interference* contained only "warmed over" stuff, despite Moldea's many fresh interviews. A fourth claimed that Moldea failed to reveal "in his text" that the Baltimore Colts in a famous 1958 playoff game had a lousy field goal kicker (he mentioned it in a footnote). A final statement claimed that Moldea mischaracterized a certain Joe Hirsch as the writer of "an inside information sheet" for horseracers.

In support of his libel claim, Moldea asserted that the *Times* review destroyed the commercial prospects of his book and caused his agent and publisher to abandon him. (However, after several discouraging years of having his proposals rejected, he recently signed a $75,000 advance for a book on the Robert Kennedy assassination.)

The *Times* filed a motion to have the suit dismissed. Both sides recognized that they faced a public relations battle as well as a legal one. The *Times* sought amicus briefs from other media organizations in its behalf—a move that, litigators recognize, while technically a contribution to

the legal process, also gets reported in the media and tends to help organizations determine whose side they should take. Moldea similarly appealed to groups to support him. In September 1991 he asked the National Book Critics Circle, the countrywide organization of literary editors, critics and reviewers (of which this writer is now president), to consider his case and issue a statement about it. (The N.B.C.C. declined to do so after a subcommittee of three board members—this writer, *San Francisco Chronicle* book editor Pat Holt and former *Los Angeles Times* book editor Jack Miles—could not agree on their recommendation to the organization.)

Some commentators backed *The New York Times*. Some, such as Doug Ireland in *The Village Voice*, backed Moldea. The case was heard in February 1991. Judge Penn ruled in favor of the *Times* on January 31, 1992, determining that Moldea's claim was not actionable as a matter of law. Moldea appealed. And that's where things stood legally until Judge Edwards issued Moldea I this past February 18.

But the nonlegal record is just as important to understanding the lessons of *Moldea v. New York Times*. To start, it's easy to see how Moldea's behavior immediately estranged the *Times* and hurt his cause. Instead of first writing a letter only to Sinkler protesting the review, and then giving her reasonable time to consider it, he immediately made the dispute a legal matter by bringing in his attorney. Given the time of year—the post–Labor Day return to work in early September—the *Times*'s failure to respond to Moldea's September 7 letter by September 13 was hardly lax. By having his attorney call the *Times*'s general counsel on September 13, further turning the editorial matter into a legal one and raising the possibility of a suit, he made it difficult for Sinkler to resolve the matter independently.

So Moldea's bulldog tactics plainly hurt his case for editorial satisfaction of his complaint, and he bears some blame for the result. At the same time, the *Times* did not perform admirably either. Its traditional hauteur, and the unfortunate tendency of its journalists to permit *Times* lawyers to muzzle them whenever a dispute triggers legal machinery, both served it poorly.

To be sure, Eskenazi's review and its presentation exuded disingenuousness on *someone*'s part at the *Times*. Eskenazi was then a veteran writer assigned to cover the Jets. In his book, Moldea specifically warned that the N.F.L.'s "loyal sportswriters," dependent on the league for information and access, would attempt to discredit his account. That alone might not have justified keeping the book from Eskenazi for review, but it increased the *Times*'s obligation to make Eskenazi's link to the book's subject clear and upfront. Instead, the *Times*'s identification line read, "Gerald Eskenazi, a sportswriter for *The New York Times*, is currently working with Carl Yastrzemski on his autobiography."

As Doug Ireland noted in his September 11, 1990, *Village Voice* critique of the *Times*, "the unsuspecting reader would naturally think that Eskenazi was a baseball writer." To make matters worse, Eskenazi did not acknowledge in the body of the review that he'd covered the Jets for years, and had received past assistance from the N.F.L.'s director of communications, Joe Browne. Instead, worsening an already deceptive presen-

tation, Eskenazi began his review with a mock admission that he might have a "tangled financial connection" to the N.F.L. because "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 a piece of Warner. Is that clear?"

While trying to make it seem as if only a conspiracy nut could connect him to the N.F.L., Eskenazi essentially covered up his arguable conflict of interest. Whoever signed off on his ID line slipped up. Since most book reviewers are invited to suggest their own ID lines, the original blame probably rests with Eskenazi. At a busy book review, the failure to demand a more forthright ID was a miscue, but an understandable and venial one.

So just as one can see how Moldea's legalistic approach and doggedness irritated the *Times*, one can see how Eskenazi's combination of condescension and deception, coupled with his alleged inaccuracies, infuriated Moldea. To an outside eye, the whole review looks not so much illegal as inept—a bad assignment that produced an untrustworthy review. To Moldea, it constituted an act of libel that declared him incompetent at investigative reporting—a direct attack on his livelihood.

Yet the troubling aspect of the *Times*'s behavior throughout—and one that should spur observers to weigh the merits of Moldea's case—is how consistently it has frustrated open discussion of the matter. For nearly eleven months between the appearance of the review and Moldea's suit, the *Book Review* refused to print his letter, even though Moldea made clear to the *Times* that if it published his letter, he would not sue. The *Times*'s legal team has since repeatedly advised its journalists not to discuss the case, even though there's no reason not to except fear that the journalists may say something that screws up their lawyers' courtroom strategy (a risk that Moldea and his lawyers have been willing to take).

Even recently, when media critic Edwin Diamond questioned George Freeman about Moldea's offer to go away if the *Times* printed his letter, Freeman, now assistant general counsel of the *Times*, "would neither confirm nor deny that the paper had received such a letter." Becky Sinkler, Diamond reported, "would not comment on the matter because of the ongoing litigation."

But in 1991 and 1992, both Sinkler and Freeman spoke more directly to the N.B.C.C. and its president, Jack Miles. Moldea had asked the N.B.C.C. to consider the merits of his case. He hoped that it would issue a statement supporting his view that the *Times* had libeled him or at least find that the paper had shown extreme lack of generosity in refusing to publish his letter. *Times* counsel Freeman, however, opposed the idea of the N.B.C.C. commenting on the matter, writing in a letter to Miles on January 16, 1992, that "it is entirely inappropriate for the National Book Critics Circle to take any substantive position with respect to the facts of this litigation. It hardly behooves your fine organization to be exploited by a party in litigation in such a way." He later acknowledged to Miles that the *Times* had received Moldea's letter. "Freeman says," Miles wrote in a letter to me, "they were aware at the time that publishing the letter would avert a suit, but they declined to do so on principle, finding the charges factually baseless."

Miles reported in another letter to this writer that in a phone call to him on January 14, 1991, Sinkler said that Moldea's charges had been checked and found false, and that the *Times* protects its reviewers from false charges. Miles also said she told him that the matter was handled while she was on vacation, and that the editor who handled it was no longer with the *Times*. A victory for Moldea, she told Miles, would be a defeat for the First Amendment rights of reviewers.

Yet it is here, where the editorial theories behind the *Times*'s legal position get dragged out into the sun, that we see their fundamentally anti-free-expression foundations. Whether we go back to John Stuart Mill, Oliver Wendell Holmes or the free-expression philosopher of one's choice, the democratic policy value of free expression has never rested in the idea that one side of an argument, the *true* side, should be protected and the other side silenced. The whole point of the marketplace of ideas is to permit different versions of the truth to compete. Sinkler's notion that Eskenazi should be protected from false charges is exactly the opposite of the classic Millean thinking that undergirds the First Amendment: that truth should be exposed to error, because confronting error only makes truth stronger. "However pernicious an opinion may seem," Justice Lewis Powell wrote in *Gertz v. Robert Welch*, a case on which the *Times* depends heavily in the Moldea litigation, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Sinkler also wrote to Miles in February 1992, sending him Judge Penn's decision and inviting him to call her to discuss the *Times*'s handling of the review. According to a February 21 letter from Miles, he spoke to her that day and Sinkler said she considered the charges in Moldea's letter groundless and decided not to publish it. "She stresses," Miles wrote, "that they strive to protect reviewers from reckless or unjustified charges by aggrieved authors even as they strive to protect authors from reviewers who may have misled the *Book Review* about, e.g., a prior relationship."

The desire to protect innocent and accurate reviewers is an altruistic one, but it has little place in a regime of free expression. It's an especially unwise policy for the *Times Book Review* to adopt because it feeds a more cynical supposition about the publication's stinginess with outside critics: that it stems from the *Times*'s desire to be seen as a unique, objective judge of books.

Just as the chief corporate asset of the *Times*, as a reporter of news, is its claim to objectivity, thoroughness and accuracy—a claim it seeks to uphold through first-rate reporting and a vigorous correction policy on its news pages—so its chief corporate asset as an appraiser of culture, at least since the demise of the *New York Herald Tribune*, has been its putative authority as America's elite newspaper of culture. Appreciating why *Moldea v. Times* turned into such a mess requires reflection on a too-little-pondered subject: how the *Times*, as a matter of practice rather than policy, often discourages free expression. □

This is the first of two parts.

Of Melville, Poe and Doctorow

TED SOLOTAROFF

THE WATERWORKS. *By E.L. Doctorow. Random House. 253 pp. $23.*

In what used to be the canon of American fiction, there is a sharp break between Hawthorne, Poe and Melville and the post–Civil War figures such as James, Twain, Howells and Crane. The dark meditative tales and romances (what Hawthorne called "blasted allegories") suddenly give way to realistic stories and novels, and an intensely literary language drops a level to embrace the fresh current of the spoken idiom. One of the several fascinating features of E.L. Doctorow's new novel, which takes place in 1871, is that it settles in the mind like a kind of missing link in our literary evolution. Hints and glints of Poe are embedded in its twinned interests in mystery and science, its detective-story format, its necrological overlay, its protagonist—a brilliant, noir, disinherited literary journalist—its man-about-New York ambiance, even a mansion named Ravenwood.

The other figure who haunts the book's pages is Melville. Not the Melville who wrote the novels so much as the one who had ceased to do so, who would have been walking these harsh teeming streets on his way to his job at the Custom House, his moral imagination gripped between the evils of rampant industrialism and even more rampant corruption. Melville's provenance in *The Waterworks* is less a matter of literary traces than of a great shadow cast on Doctorow's moral imagination, urging him to see darkly and negatively all the way to the end of sanity and morality, and to make a distinctively American allegory of it, updated from the era of the New England oversoul and whaling industry.

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At the same time, *The Waterworks* is controlled by a direct, reportorial realism that looks forward to the urban, industrial-age fiction of Crane, Upton Sinclair and Dreiser. The New York that it holds in its bifocal lens is both a factual and prophetic place, the young power-struck metropolis of the gilded age and at the same time a "panoramic negative print, inverted in its lights and shadows" of the postwar city for sale that had a centennial of sorts in the Ed Koch era. Doctorow's New York, with its horse-drawn traffic jams, its humming industrialized waterfronts, its real estate boom north of 42nd Street, is also a city of homeless veterans, ruined children, a cynical younger generation, a massively extortionate politics, a screaming press, a humming stock exchange, a plague of fires.

> It was a pungent air we breathed—we rose in the morning and threw open the shutters, inhaled our draft of the sulfurous stuff, and our blood was roused to churning ambition. Almost a million people called New York home, everyone securing his needs in a state of cheerful degeneracy. Nowhere else in the world was there such an acceleration of energies. A mansion would appear in a field. The next day it stood on a city street with a horse and carriage riding by.

Doctorow is a remarkable writer. He casts his imagination into a patch of American history and makes it his own turf, an accurately rendered, resonating "repository of myth," as he says in one of his essays. Viewed together, his novels form a highly composed vision of American history, its phenomena turned into firm images pointed in our direction. Mostly set in and around New York, each book is a kind of relay network between its time and ours, keeping our awareness in touch with American experience. For example, his narrator reports that as the sluice gates of the city reservoir, then at 42nd Street, are opened, "the water thunders in . . . as if it were not a reservoir at