BOOKS & THE ARTS.

Paper Chase—II

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Did Dan Moldea have to sue *The New York Times*? How does a self-described free speecher help the cause by bringing libel charges against the one American newspaper that considers the First Amendment a personal bequest from the Framers?

Respect for the facts of Moldea's case confronts any free-expression realist with uncomfortable answers. As suggested in the first part of this commentary, formulating a position on *Moldea v. New York Times* that actually *encourages* robust debate rather than one that merely aligns itself with traditional free-expression reflexes requires abandoning knee-jerk loyalty to the *Times* for its First Amendment deeds over the years [see Romano, "Paper Chase—I," June 6]. It requires taking account of the more unfortunate side of the *Times*'s power—in this case, the dominance of its *Book Review* over ideas about books and their marketplace value, the *Times*'s behavior as a corporation when it faces a legal threat and the place of the "right to reply"—as a moral notion—in our larger theory of free expression.

Once that's done, the *Times*'s victory in Moldea II seems less triumphant. The unholy mess of *Moldea v. Times*, in which Moldea fights for the right to answer an attack on his book and the *Times* hides behind the First Amendment while suppressing his voice, developed because of a fundamental division at the heart of *The New York Times*. Its corporate aim is to project itself as uniquely authoritative and objective. Its professed editorial aim is to encourage precise reporting, free expression and robust debate. In the Moldea case, unfortunately, the paper's editors continue to exhibit the worst instincts of *Times*folk rather than the best. Having refused for years to publish a letter from Moldea defending his book, they recently refused to publish an Op-Ed piece by him, responding to the paper's May 7 editorial crowing about Moldea II. Nearly five years after the dispute began, the *Times* has still neither allowed Moldea to give his side of the argument in its pages nor quoted a single expert who supports him.

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Why did Dan Moldea have to sue the *Times*? Because newspapers are companies. And when they're legally challenged, they tend to respond like companies, not newspapers. Labor lawyer Harriet Rabb made the point to the women employees who sued the *Times* for sex discrimination in 1974: "Don't think of this company as the liberal *New York Times*, think of it as the Georgia Power Company."

The illusion of enduring objectivity and authority is belied by the individuality and biases of Times *staffers, known to book professionals.*

Our free-expression thinking should be forced to accommodate that fact. First Amendment literature teems with eloquent statements about the need for the press to curb the bad institutional impulses of government: its tendency to keep secrets about its internal operations, to reject outside criticism, to muffle internal dissent, to promote the public impression that it has always acted properly.

The Moldea case, by contrast, forces us to weigh whether free-expression theory, and First Amendment jurisprudence, must also take better account of the institutional impulses of the elite daily newspaper: its tendency to keep secrets about its internal operations, to reject outside criticism, to muffle internal dissent, to promote the public impression that it has always acted properly.

When those impulses combine, as they do at the *Times*, with a marketing approach that touts the paper as the one necessary and sufficient news product for all readers, a threat to free expression looms. When that alliance further combines with raw private power as chief evaluator of the country's books (a power *The Boston Globe*'s editorial on the Moldea case rightly attributed to "how spineless the rest of the media are in the shadow of the *Times*"), lovers of robust debate must re-examine their premises.

A look at the *Book Review* in particular indicates a few reasons why that's so. Many of its characteristics reflect the paper's desire to project an air of impersonal, infallible authority, which creates the kind of atmosphere that allowed *Moldea v. Times* to happen.

Unlike *The Washington Post Book World*, for instance, the *Times Book Review* doesn't list the names of its editors on a masthead. "To list any names of the editors would be to imply that a personal point of view might be involved," says a *Book Review* editor quoted in media critic Edwin Diamond's book *Behind the Times*. Unlike other newspapers, the *Times* frowns upon its book review editors' writing criticism for other publications, fearing that would dilute the aura of objectivity sought for the criticism they supervise at the *Times*. Unlike the *Times Literary Supplement*, the *Times Book Review*—despite the considerable space it devotes to reviews—provides scant space for letter writers to disagree. And unlike most quality publications, the *Times* tends to cite only reviews by its own critics when sampling past opinion.

Yet the illusion of enduring objectivity and authority is belied by the individuality and biases of *Times* staffers, well-known to book professionals. Every savvy publishing veteran, for instance, knows that Rebecca Sinkler's book section, with its advocacy of women's fiction and preference for mainstream books, differs from Harvey Shapiro's self-consciously literary and intellectual review (he took pride in putting an anthology of Chinese poetry on the cover) or John Leonard's aggressive and politically engaged review. Every savvy publishing person notices that books by present or former *New York Times* staffers—from Anna Quindlen to Alex Jones to Thomas Friedman to Samuel Freedman—are, particularly in recent years, virtually guaranteed front-page or prominent treatment in the *Book Review*. Just this past February, for instance, the *Book Review* ran two straight covers on books by authors with strong *Times* affiliations: *Parallel Time* by *Times* editorial writer Brent Staples, and *On the Real Side* by former

Times Book Review editor Mel Watkins. Some New York editors privately calculate the syndrome into the advances and deals they offer to *Times* writers.

Similarly, every savvy publishing person knows that authors with clout vis-à-vis the *Times* get opportunities to respond to criticism of their work that are denied to others. The most notorious example is Henry Kissinger, master of multipage letters to the *Book Review* whenever a reviewer gives his book less than an A-plus. Norman Mailer similarly enjoyed a lengthy rejoinder to John Simon's allegedly biased review of his novel *Harlot's Ghost*. Diamond, commenting on Moldea, remarks that "the editors' decision to ignore Moldea meant that the antennas of the *Book Review* were attuned mostly to Big Noise like Mailer, and not to scuffling free-lancers or to small publishing houses on the fringes of media-world."

While this media sociology might seem tangential to *Moldea v. Times*, it is, in fact, crucial, because it is the *Times*'s journalistic arrogance in the case, far more than Moldea's intense determination to protect his reputation, that drove the dispute into court and is now producing opinions that may threaten other journalists.

How can Moldea II be so bad for free expression when it has been "greatly welcomed" by *The Washington Post*'s editorial page and prompted the *Times*'s editorial writers to applaud the judges for their "courage" and "sensitivity"?

There are two problems. First, as suggested by such editorials, Moldea II will encourage newspapers, including the *Times*, to feel more justified than ever in denying those they bash the right to talk back. *Miami Herald v. Tornillo* held that papers don't have to print what they don't want to. Yet that decision should be a shield against harassment, not a license to suppress. Second, Moldea II creates a confused jurisprudence on the relationship between libel law and criticism that will leave editors puzzled once they read past the headlines.

In *Moldea v. Times*, for openers, we see the U.S. Court of Appeals for the D.C. Circuit invoke philosophical notions—such as the idea that a "factual" statement is verifiable in ways that an "evaluative" statement is not—that few sophisticated contemporary philosophers would endorse. Verifying either sort of statement, almost all would agree, requires committing to certain axiomatic theses, recognizing their contingency and proceeding from there. Moreover, logical positivism, the philosophical school that argued the link between determinable meaning and verification that Judge Harry Edwards relies on, largely collapsed after someone noticed that the verification principle fails its own test.

Moldea II is dangerous partly because the opinion still countenances parts of Moldea I. In the latter, as noted earlier, Edwards rejected the lower court's conclusion that the *Times* review was "not actionable" because it consisted only of "unverifiable statements . . . statements that no reasonable juror could find to be false." In his opening statement—which he repudiated in Moldea II—Edwards elaborated on the procedural import of overturning the summary judgment, holding that some of reviewer Gerald Eskenazi's characterizations of Moldea's book *Interference* were sufficiently factual that a jury could determine their truth or falsity. Edwards expressed no opinion on "the ultimate merits of Moldea's libel claim."

In his discussion, Edwards set out the narrow questions of law. For the case to go forward, the statements at issue had

to be capable of carrying a defamatory meaning and had to be understood that way. They had to injure Moldea in his trade or status. They had to be verifiable—that is, capable of being shown false, in the judgment of a reasonable juror, by a preponderance of the evidence.

Looking at precedent, Edwards then noted that—contrary to some media reports—the Supreme Court had thrown out libel law's previous "strict dichotomy" between assertions of opinion and assertions of fact in *Milkovich v. Lorain Journal*, the case of the high school coach supposedly libeled by the implication that he had perjured himself. In *Milkovich*, Moldea I said, the Court asserted that "statements of opinion can be actionable if they imply a provably false fact." *Milkovich* ruled that "the breathing space which freedoms 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." Only statements of opinion that contained a "provably false factual connotation" lacked constitutional protection.

A subsequent D.C. Circuit Court case, *White v. Fraternal Order of Police* (1990), in which a statement of opinion implied that White had tested positive for illegal drugs and engaged in bribery, made it clear, Edwards said, that "even a *per se* opinion" can be actionable if it can "reasonably be understood as implying provable facts." His job, then, was to examine whether Eskenazi's statements constituted expressions of opinion that implied an objective fact.

Applying that sense of the law to the facts of Moldea's case, Edwards found that the statement "too much sloppy journalism"—apart from any of the examples used to support it—was "actionable because it is capable of defamatory meaning, and it reasonably can be understood to rest on provable, albeit unstated, defamatory facts." According to Moldea I, "Although 'sloppy' in a vacuum may be difficult to quantify, the term has obvious, measurable aspects when applied to the field of investigative journalism. (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.)"

Edwards emphasized that his analysis *could not be affected* (italics mine) by the genre in which allegedly libelous statements appeared: "To permit a defendant to escape liability for libel merely because defamatory remarks are published in a book review would be as simplistic as permitting an author to insulate himself or herself by merely prefacing assertions with the words, 'I think . . . ' and calling everything that followed nonactionable opinion."

So Moldea I rejected the idea of "sacrosanct genres," arguing that "the injury to Moldea's professional reputation is if anything greater because Eskenazi's review appeared in a forum to which readers turn for evaluations of books. For an author, a harsh review in *The New York Times Book Review* is at least as damaging as accusations of incompetence made against an attorney or a surgeon in a legal or medical journal." Edwards declared that "assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review." And he further found that four of the five statements that Moldea alleged were false claims in support of the "too much sloppy journalism" phrase were such that "a jury could meaningfully determine" whether they "are true or false."

Perhaps the sharpest insight of Moldea I vis-à-vis a challenged Eskenazi statement—an insight that Edwards totally abandoned in Moldea II—was that "the arguments presented by both parties as to this statement's truth or falsity make it clear that one can adduce evidence on the issue and that a jury could meaningfully decide it." In Moldea I, Edwards rigorously distinguished, as he should have, between whether the court *happens to think* one of the Eskenazi statements is true or false and whether a juror could reasonably find it one way or another. If a juror could, Edwards recognized, the court should not as a matter of law keep the case from going to the jury.

Thus, Edwards concluded, "in a case of this sort, in which the truth or falsity of multiple statements are presented as questions of fact for the jury, it is the jury's province to determine whether the

publication was sufficiently false so as to have defamed the plaintiff."

Moldea II throws that respect for the jury out the window. In Moldea I, the court found that two of Eskenazi's five allegedly libelous statements—those referring to a "sinister" meeting on the part of Joe Namath, and the revived "discredited" notion that Carroll Rosenbloom was murdered—were (in the words of Moldea II) "verifiable, and that a reasonable juror could conclude that they were false."

Yet Moldea II argues that they're no longer verifiable because they were "evaluations of a literary work which appeared in a forum in which readers expect to find such evaluations." Moldea I, Edwards now declared, "erred in assuming that *Milkovich* abandoned the principle of looking to the context in which speech appears." *Milkovich* "did not disavow the importance of context," but simply " 'discounted it in the circumstances of that case.' " As a result, "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."

In other words, providing evidence in support of a claim, so that the reader will think it is true, turns a claim that might not have been true into one that *cannot* be true. And Eskenazi's questionable paraphrases of a nonfiction book about the mob's influence on professional football become "evaluations of a literary work."

In Moldea II, Edwards seems too moved by Chief Justice Abner Mikva's argument in dissent in Moldea I that analogizing Eskenazi's claim about Moldea's sloppiness in a book review to a charge that a brain surgeon has clumsy hands "is to equate a piano recital with medical practice." In fact, a bland book review by a sportswriter about a nonfiction book by a reporter is not like a piano recital—it's more like a hospital report on an operation. Mikva writes, "Applied to another profession or contained in another context, a charge of sloppiness might indeed be actionable," and he accepts that it could be verified by reference to standards in, say, medicine or manufacturing. Yet journalism has standards too, and *Milkovich* specifically tries to stop courts from identifying contexts with genres—the exact mistake committed by Moldea II.

Whereas Moldea I common-sensically recognized that Eskenazi's comments were direct assaults on Moldea's "competence" as a journalist, Moldea II states that they are "assessments of a book, rather than direct assaults on Moldea's character, reputation, or competence as a journalist." Then, adding insult to lack of injury, Edwards in Moldea II states that the *Times*'s brief "has suggested the appropriate standard for evaluating critical reviews": Commentary should be "actionable only when the interpretations are *unsupportable by reference to the written work*." Of course, since "supportable" means only that evidence can be adduced for a claim—not that the evidence is persuasive—the *Times*'s standard immunizes criticism from libel so long as some material from the work under review is put forth. Moldea II confirms this by affirming that the new standard for determining the verifiability of Eskenazi's statements—as a matter of law—is "whether no reasonable person could find that the review's characterizations were supportable interpretations of *Interference*." This, of course, lifts the bar for a plaintiff over the moon.

In truth, Edwards's reasoning in Moldea II is a mishmash. He states that "reasonable minds can and do differ as to how to interpret a literary work," then argues that because Eskenazi's statements appeared in a book review, they are "solely evaluations of a literary work."

While rejecting the outcome of Moldea I, he holds on to that opinion's notion of "implied facts," which would make journalists vulnerable to libel suits for claims they've never made. In light of Moldea II's inferiority as a piece of reasoning, its abrupt delivery, its failure to counter the reasoning of Moldea I, the criticism leveled at Moldea I and the traditionally ambitious character of judges on the D.C. Circuit Court of Appeals, the common-sense conclusion is that Edwards and Patricia Wald held their fingers up to the wind and tailored their new opinion accordingly.

Is there a way out of this mess? The legal solution, if Moldea petitions for a rehearing, is for the D.C. Court of Appeals, en banc, to reinstate Moldea's suit. It can do that by recognizing, in weighing summary judgment, that it should err on the side of little-guy plaintiffs versus powerful media defendants when the defendant's allegedly libelous statements are arguably factual and false, the plaintiff is a subject of the media defendant's

criticism and the plaintiff has been offered no opportunity to reply. That is, the court should err on the side of permitting plaintiffs such as Moldea to clear the first hurdle toward trial, giving them added leverage against deep-pocket media defendants.

Letting Moldea go to a jury doesn't mean *he* should or would ultimately prevail. Nor does it mean that courts must similarly allow big corporations and aggrieved millionaires to intimidate conscientious publications by waving them on to the jury. Rather, it would mean that media defendants who deny criticized or arguably misrepresented individuals a right to some reply may face tougher dismissal standards. That would pressure powerful publications to allow more replies, thus heightening robust debate. And the solution in Moldea itself would pressure the *Times* to offer a journalistic handshake to Moldea. Even now—perhaps especially now, when the *Times* has the upper hand—the ideal resolution of *Moldea v. Times* would be a settlement that included an Editor's Note from the *Times* apologizing for being less than its best self in denying Moldea his right to reply, publication of a letter from Moldea and payment of court costs.

Corporation or not, a great newspaper such as *The New York Times* should not act like just any company. It should apologize when it's wrong and offer space to critics as reflexively as it takes returns from its vendors. Moreover, it should have the vision to see that the relation of an individual author to the paper is not unlike its own relation to more powerful institutions. Perhaps the best model for the *Times* to adopt vis-à-vis unhappy subjects of its coverage who request access is to think, in every such case, about how it feels when its speech, or ability to report, is frustrated by the military, or the courts. Contra the *Times*, libel actions launched in the face of a newspaper's refusal to permit victims to speak do not chill the freedom of first-rate critics. Rather, the right to sue for libel remains one of the few weapons a stigmatized author retains in a corporate media environment. It should not be necessary for an author who has a grievance against the *Times Book Review* to sue. □

Jews, Germans and 'Revenge'

JON WIENER

"Some Holocaust survivors . . . became like Nazis," John Sack argues in *An Eye for an Eye: The Untold Story of Jewish Revenge Against Germans in 1945*, published by Basic Books last November. The book provides firsthand accounts of concentration camps in postwar Poland, where, Sack says, Jews tortured, starved and killed innocent German women, old men and children. Sack claims the death toll was 60,000-80,000. These claims might be dismissed as distorted or exaggerated, except that the book carries a strong endorsement from a prominent professor of Judaic Studies at Brandeis University: Antony Polonsky, who has written or edited nine books about twentieth-century Poland, including *The Beginnings of Communist Rule in Poland*. In the publicity and advertisements for Sack's book, and on the back cover, Polonsky is quoted praising it as "gripping . . . compelling . . . a major contribution to our understanding."

Polonsky, however, says he did not write those words about *An Eye for an Eye*. "I was sent a manuscript entitled 'Lola,' " he told me. "It took the form of an extended interview with a Jewish woman who survived Auschwitz and who was recruited by the Communist security organs in postwar Poland to run one of the camps in which Germans were held in western Poland." He says he had "some reservations" about recommending publication of the "Lola" manuscript because the author, John Sack, "failed to place it in a broader historical context"—in particular "the nature of Stalin's aims in Poland," as well as "the way Communist rule was established in Poland." While the "Lola" book lacked this historical context, "I felt it did add something to the small amount of information available on a very nasty episode, in which the concept of collective guilt, which we all reject, was used against the Germans of the area."

But the book that Basic eventually published "took a quite different form from the manuscript," Polonsky told me. "It bore a new and tendentious title and stressed in the blurb and the publicity material the 'Jewish' character of what were in fact Communist functionaries." Polonsky concludes, "I have a strong feeling that I have been manipulated and used."

An Eye for an Eye is indeed a bad book. Sack's writing comes from the school of sadistic sensationalism, combining a little Mickey Spillane with a lot of anti-Semitism: "A Jew was whipping a German. . . . In his rage, the Jew's lower jaw jutted out like the claw of a giant ditch-digging machine, and on his teeth the spit almost shone. . . . 'You fucking sonofawhore!' the Jew screamed, as his six-foot whip went crack! on the German's bare back."

According to Sack, no one else would publish the book: It was rejected by something like a dozen publishers, until Steve Fraser of Basic Books signed it up. A much-admired and sought-after editor, and an accomplished historian in his own right (the author of *Labor Will Rule: Sidney Hillman and the Rise of American Labor*), Fraser contradicted Polonsky's statement: "He received and read exactly the book we published, except for the most trivial differences," Fraser said. "He did receive a manuscript whose title page was 'Lola' because this whole story began with Sack meeting Lola. Later we changed the title. I can only speculate that Polonsky has been intimidated."

Fraser defended his decision to publish the book. "We checked it out as best we could under the time pressures we faced, and were assured its evidentiary basis was a solid one," he told me. "We concluded it ought not to be suppressed—which is what was happening. I take my vocation as a publisher seriously enough to feel that it's my responsibility to publish something that's important, even if the rest of the industry is afraid to do that." But to say that the topic is important and the evidence is solid is not to say that the Sack manuscript was worth publishing.

The "time pressure" Fraser mentioned came from the fact that *60 Minutes* was doing a story about one of the central figures in the book, a Jewish camp commander; the program also featured an on-camera interview with Sack. Since *60 Minutes* is one of the ten most popular shows in the United States, publishers are desperately eager to get their authors on it. Sack himself told me, "I was in Poland taping with *60 Minutes* when Basic called to say they accepted the book. I'm not sure anyone would have bought the book except for [my appearance on] *60 Minutes*, but I think Basic would have done it in any case." Fraser said they rushed the book so that publication would coincide with the *60 Minutes* broadcast. "I've

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