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 aura 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
The Nation

June 20, 1994

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 mediaworld."

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 "Nordakota," where her father farmed before opening a butcher shop in the town of Wing, and her mother yearned for the Old Country while struggling to maintain a kosher home and build up a sense of community among a small scattering of Jewish homesteaders.

In his discussion, Edwards set out the narrow questions of law. For the case to go forward, the statements at issue had
Corporation or not, a great newspaper like
The New York Times should not act like just any company.

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 transformed 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 portable 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 opinion accordingly. In 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

MANAGING PRIVACY
Information Technology and Corporate America
H. Jeff Smith

“...This is without doubt a landmark book, the best informed and most insightful examination of the growing challenge to individual privacy in many years.”—David Burnham, Syracuse University
314 pp., $45 cloth, $17.95 paper

PROTECTORS OF THE LAND AND WATER
Environmentalism in Wisconsin, 1961-1968
Thomas R. Huffman

“A pioneering study of the crucial decade when modern environmentalism emerged as an identifiable political movement.”—William J. Cronon, University of Wisconsin-Madison
300 pp., $30.95 cloth, $14.95 paper

AT BOOKSTORES OR BY TOLL-FREE ORDER
The University of North Carolina Press
Chapel Hill
PHONE [800]848.6224
OR FAX [800]272.6817
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 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 blur 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 son-of-a-whore!' 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 solid."

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