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You Have the Right to Criticize This Casenote: Protecting Negative Reviews within the Law of Defamation and the First Amendment

David C. Vogel

You Have the Right To Criticize This Casenote: Protecting Negative Reviews Within the Law of Defamation and the First Amendment

Moldea v. New York Times Co.[1]

I. INTRODUCTION

In *Moldea v. New York Times Co.*, the District of Columbia Court of Appeals attempted to determine under what circumstances a statement labeled as opinion may be the basis for a defamation suit.

The court approached the topic with some difficulty, as the United States Supreme Court's 1990 decision in *Milkovich v. Lorain Journal Co.*[2] had created confusion in lower courts over not only the validity of several traditional tests used to distinguish between fact and opinion, but also as to whether placing statements in an opinion context provides them with blanket protection from liability, regardless of their content. The three-judge panel deciding the case demonstrated the evolving nature of this facet of defamation law when it reversed itself less than three months after an earlier decision in the same matter.[3]

II. FACTS AND HOLDING

Dan E. Moldea, author of the non-fiction book *Interference: How Organized Crime Influences Professional Football* ("*Interference*"), sued The New York Times Company ("the Times") for libel and invasion of privacy, alleging a negative review of his book in the Times' book review section was defamatory. Specifically, Moldea charged that several statements by the reviewer, including one that the book contained "too much sloppy journalism" to be trusted, were "sufficiently factual to be reasonably capable of being proved false, or that they impl[ied] undisclosed assertions of fact that are capable of being proved false or misleading."[4] Moldea sought damages for

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

2. 497 U.S. 1 (1990).

3. *Moldea II*, 22 F.3d at 320.

4. Moldea v. New York Times Co., 793 F. Supp. 335, 336 (D.D.C. 1992), *rev'd*, 15 F.3d 1137 (D.C. Cir.), *rev'd*, 22 F.3d 310 (D.C. Cir.), *cert. denied*, 115 S. Ct. 202 (1994). Moldea was suing under the District of Columbia's definition of defamation,

the review's detrimental effect on his career as an author, lecturer and investigative journalist.[5]

The United States District Court for the District of Columbia granted the Times' motion for summary judgment.[6] The court accepted the newspaper's defense that the statements in question were unverifiable opinions, which were not actionable under the First Amendment.[7]

The court of appeals, in a 2-1 decision, reversed the lower court, remanding on the basis that passages of the review implied verifiable facts that a reasonable juror could find false.[8] Furthermore, the court held the statements were not protected merely by their inclusion in a book review, one of many fora "well known for spirited expressions of personal opinion."[9]

The Times filed a petition for rehearing, but rather than allowing the argument to be heard before the court *en banc*, the original panel reversed itself,[10] a move commentators termed both "unusual"[11] and "extraordinary."[12] Writing that he had "fall[en] prey to an error of judgment,"[13] Judge Harry T. Edwards, along with Judge Patricia M. Wald, concurred with Chief Judge Abner J. Mikva, who had dissented in the earlier case. The opinion noted that while reviews are not per se exempt from defamation suits, the court was incorrect not to consider the context in which the statements appeared.[14] "Thus, 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."[15]

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which comes from case law and describes it as any statement that "tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Moldea I*, 15 F.3d at 1142.

5. *Moldea I*, 15 F.3d at 1140.

6. *Moldea*, 793 F. Supp. at 337.

7. *Id.*

8. *Moldea I*, 15 F.3d at 1145-49.

9. *Id.* at 1146 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

10. *Moldea II*, 22 F.3d at 310.

11. *CA DC Changes Mind On Libel Standard For Critical Comments In Book Reviews*, 62 U.S.L.W. 2684 (May 10, 1994).

12. News notes, *DC Circuit Amends Decision In "Shoddy Journalism" Action*, 22 Media L. Rep. (BNA) No. 19 (May 10, 1994).

13. *Moldea II*, 22 F.3d at 311.

14. *Id.* at 313.

15. *Id.*

III. LEGAL BACKGROUND

A. Distinction Between Fact and Opinion Pre-Milkovich[16]

At common law, the impossibility of proving the truthfulness of certain statements of opinion did not preclude making them the basis of a defamation suit.[17] Instead, defendants could respond that their statements were "fair comment—the privilege of stating opinions that they actually held and did not express solely for the purpose of hurting the object of the attack."[18]

Yet the fair comment doctrine was only "a qualified privilege," restrictive in its coverage.[19] A defendant invoking the privilege had to prove not only his belief and lack of intention to harm the subject, but also that the criticism "was . . . of legitimate public interest" based on facts given to or known by the receiver.[20]

The doctrine was, however, successfully used to fend off libel cases based on a defendant's criticism of another's literary work. For example, in *Berg v. Printers' Ink Publishing Co.*,[21] a psychiatrist alleged an article criticizing two of his own published pieces was libelous due to numerous statements that were false and damaging to his "ability and integrity in his profession."[22]

The court dismissed the complaint, holding that allowing "fair and honest criticism" was especially appropriate in the discussion of "any work to which the attention of the public has been invited."[23] Not only was such criticism to be expected, but it was protected under the fair comment doctrine.[24] The court explained that such "honest comment or criticism" was not actionable as

16. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). The decision in Milkovich was a turning point in the Supreme Court's efforts to clarify the fact/opinion distinction. *See* discussion *infra* notes 89-106 and accompanying text.

17. T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA 83 (4th ed. 1988).

18. *Id.*

19. *Id.*

20. RESTATEMENT (SECOND) OF TORTS § 606 (1938), *cited in* Ollman v. Evans, 750 F.2d 970, 974 n.5 (D.C. Cir. 1984).

21. 54 F. Supp. 795 (S.D.N.Y. 1943).

22. *Id.* at 799.

23. *Id.* at 797.

24. *Id.* at 796-97. In addition to the requirements that the comment be based on disclosed facts, not intended to harm the subject, the honest opinion of the speaker, and of legitimate public interest, the court added that the criticism must be "free from imputations of corrupt or dishonest motives on the part of the person whose work is criticized." *Id.* at 797.

libel, so long as the facts supporting the opinion were "correctly stated," even if "the comment or criticism . . . is not reasonably warranted by the facts."[25]

The District of Columbia Court of Appeals had reached a similar conclusion when faced with a plaintiff's allegation that a criticism imputed that his magazine "was and is of Nazi character."[26] The court dismissed this plaintiff's claim, noting the metaphorical nature of the statement in context "is not a proposition of fact."[27] Further, any comment or criticism of published work made without "bad faith or bad motive" was protected regardless of whether such commentary was "neither false nor demonstrably true."[28]

The United States Supreme Court recognized the constitutional significance of the fair comment doctrine in *New York Times Co. v. Sullivan*,[29] its seminal decision dictating the rights of public officials as plaintiffs in defamation actions.[30] In a footnote, the Court stated that "a defense of fair comment must be afforded for honest expression of opinion based upon . . . true . . . statements of fact."[31]

Although the *Sullivan* decision did not require the Court to deal with protection of opinions labeled as such, it has been argued that its main holding—requiring public officials to prove actual malice before recovering for false statements of fact[32]—paved the way for the clarification of an opinion privilege "by revolutionizing the treatment of libel law under the [F]irst [A]mendment."[33]

Sullivan was decided with a focus on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks"[34] on its targets, which were at the time limited to "government and public officials."[35] Against this "background,"[36] the Court elected to give limited protection to "erroneous statements honestly

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25. *Id.*

26. Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942).

27. *Id.* at 735.

28. *Id.*

29. 376 U.S. 254 (1964).

30. *See* Rodney W. Ott, Note, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 764 (1990).

31. *Sullivan*, 376 U.S. at 292 n.30.

32. *Id.* at 278-80.

33. Jeffrey E. Thomas, Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CAL. L. REV. 1001, 1004 (1986).

34. *Sullivan*, 376 U.S at 270.

35. *Id.* The Court later expanded the protection to cover "public figures." *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

36. *Sullivan*, 376 U.S. at 270.

made,"[37] absent proof that they were made with knowing falsity or a reckless disregard for their truth.[38] The Court's intention was to avoid a conundrum in which citizens refrain from speaking on matters of public concern "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so,"[39] resulting only in the repression of "public debate."[40]

The *Sullivan* Court had clearly expanded the protection of the Constitution to cover some defamatory statements. But it went further, essentially adopting what had been a minority view of the fair comment doctrine whereby the disclosure of true facts was immaterial to the privilege of the opinion expressed.[41]

A decade later, the Court, perhaps unintentionally,[42] greatly expanded the protection for opinions that it had only alluded to in *Sullivan*. In *Gertz v. Robert Welch*,[43] while defining the rights of private individuals suing for libel, Justice Powell included two sentences in his majority opinion concerning the protection of opinion: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[44] This brief excerpt, well acknowledged as dicta,[45] became the rationale for some lower courts, both state and federal,[46] to "establish an absolute constitutional privilege for statements of opinion."[47]

B. Distinguishing Fact From Opinion: The Post-Gertz Tests

The protective net ostensibly tossed over this class of language, however, did not stop most courts from engaging in a case-by-case analysis to determine whether the speech at issue was opinion or fact.[48]

Some courts suggested that tests to distinguish whether an opinion is actionable hinge upon whether the false facts implied are accusations of

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37. *Id.* at 278.
38. *Id.* at 279-80.
39. *Id.* at 279.
40. *Id.*
41. *See* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 820 (4th ed. 1971), *cited in* Thomas, *supra* note 33, at 1003.
42. *See infra* notes 148-150 and accompanying text.
43. 418 U.S. 323 (1974).
44. *Id.* at 339-40.
45. *Ollman*, 750 F.2d at 974.
46. *See* Ott, *infra* note 30, at 765 n.21 (collecting cases).
47. Ott, *supra* note 30, at 765.
48. *Ollman*, 750 F.2d at 977.

criminal or quasi-criminal conduct.[49] Others, however, emphasized that true opinions are impossible to prove.[50] This strict "verifiability" test[51] requires a court to first determine "whether the language used is so imprecise or vague that it has no generally accepted core of meaning."[52] If so, it is protected."[53] If not, the court then decides if the statement may be "proven objectively."[54] If it cannot, it "is protected opinion."[55]

Such a test was utilized by the Second Circuit in *Hotchner v. Castillo-Puche*.[56] In *Hotchner*, the court of appeals held an author's negative characterization of the plaintiff's friendship with Ernest Hemingway could not be proven false and was therefore protected as opinion.[57]

The *Hotchner* court also found basis for its conclusion in that the defendant author had not implied in his comments he was "privy to facts about the [plaintiff] that are unknown to the reader."[58] This is the foundation of the Second Restatement's test, used by most lower courts in the wake of *Gertz*.[59] According to the Restatement, an expression of opinion is "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[60] This approach was endorsed by not only numerous state and federal courts but arguably the Supreme Court as well.[61]

Perhaps the most practical tests were those that considered various factors beyond the verifiability of the opinion or the disclosure of facts on which it

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49. *See* Lewis v. Time Inc., 710 F.2d 549, 554 (9th Cir. 1983).

50. CARTER ET AL., *supra* note 17, at 85.

51. Thomas, *supra* note 33, at 1017.

52. Thomas, *supra* note 33, at 1017.

53. Thomas, *supra* note 33, at 1017.

54. Thomas, *supra* note 33, at 1017.

55. Thomas, *supra* note 33, at 1017.

56. 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

57. *Id.* at 913. In a book about Hemingway, the author described the plaintiff, among other labels, as a "manipulator," a "toady," a "two-faced . . . hypocrite," and an "exploiter." *Id.* at 912.

58. *Id.* at 913.

59. Thomas, *supra* note 33, at 1011 n.70 (collecting cases).

60. RESTATEMENT (SECOND) OF TORTS § 566 (1977). The classic example the Restatement uses involves A writing to B about his neighbor C: "I think [C] must be an alcoholic." The commentary accompanying the illustration suggests that this expression of opinion "implied that A knew undisclosed facts" about C and therefore may be actionable. *Id.* illus. 3.

61. Thomas, *supra* note 33, at 1014-15 (citing Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)). Thomas states the decisions in the above cases "may have turned on the full disclosure of the facts in the" statements at issue. *Id.*

is based. These tests, known as "multi-factor"[62] or "totality of the circumstances"[63] tests, took several facets of the purported opinion and balanced them in an effort to determine whether it was actionable.

For example, in *Information Control Corp. v. Genesis One Computer Corp.*[64], the court looked at three factors of the challenged statement:[65] "the facts surrounding the publication,"[66] the audience's possible perception of it as an attempt at persuasion through "epithets, . . . rhetoric or hyperbole,"[67] and whether the statement was "'cautiously phrased in terms of apparency' or is of a kind typically generated in a spirited legal dispute . . . [so that] the statement is less likely to be understood as a statement of fact rather than as a statement of opinion."[68]

The District of Columbia Court of Appeals, in an effort to provide a clearer means of distinguishing between the two types of speech,[69] created another multi-factor test, incorporating four factors to assess "'whether the average reader would view the statement', as fact or . . . opinion."[70]

First, the court analyzed "the common usage or meaning of the specific language of the challenged statement" in an effort to determine whether it had "a precise core of meaning" or was "indefinite and ambiguous."[71] Second, the court "consider[ed] the statement's verifiability" to determine whether it was "capable of being objectively characterized as true or false."[72] Third, the court examined "the full context" in which the statement appeared, including the immediate surrounding words.[73] Finally, the court looked at "the broader

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62. Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980).

63. *Ollman*, 750 F.2d at 979.

64. 611 F.2d 781 (9th Cir. 1980).

65. The defendant, a marketer of electronics products, had issued an attorney's statement and a press release accusing the plaintiff, a manufacturer, of filing a breach of contract suit as a "device" to avoid payment of monies due the defendant. *Id.* at 783.

66. *Id.* at 783-84.

67. *Id.* at 784.

68. *Id.* (quoting Gregory v. McDonnell Douglas, 552 P.2d 425, 429 (Cal. 1976)).

69. *Ollman*, 750 F.2d at 977-78. In *Ollman*, a political science professor sued two popular newspaper columnists for reporting an anonymous source's statement that the professor "has no status within the profession" and "is a pure and simple activist." *Id.* at 973.

70. *Id.* at 979.

71. *Id.*

72. *Id.*

73. *Id.*

context or setting," such as the type of writing, "in which the statement appears."[74]

These tests were applied repeatedly between 1974 and 1990, in some cases upon facts similar to those in *Moldea*.[75] For example, in *Cole v. Westinghouse Broadcasting Co.*,[76] a reporter sued his former employer for statements that he was fired because of "sloppy and irresponsible reporting" and "a history of bad reporting techniques."[77] In its analysis of whether the statement was fact or opinion, the court used the *Information Control* test[78] and "examine[d] the statement in its totality in the context in which it was uttered."[79] After doing so, the court held the statements "could not reasonably be viewed as statements of fact."[80]

In what would appear to be extremely persuasive authority for the *Moldea* decisions, the court wrote that "[w]hether a reporter is sloppy and irresponsible with bad techniques is a matter of opinion. The meaning of these statements is imprecise and open to speculation."[81]

Courts also used the multi-factor tests to protect reviewers critical of another's product. In *Mr. Chow of New York v. Ste. Jour Azur S. A.*,[82] the Second Circuit switched from analyzing the strict verifiability of the statements at issue[83] and employed a multi-factor test to determine whether statements in a restaurant review were libelous.[84] The court looked at the immediate and broad context of the statements, their objective verifiability, and the possible existence of undisclosed defamatory facts.[85] In holding that

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74. *Id.* Judges Wald and Edwards, who constituted the majority in both *Moldea I* and *II*, both dissented on essentially the same grounds, agreeing with the multi-factor analysis employed by the court but disagreeing as to whether all of the statements at issue were not actionable. *Id.* at 1032, 1035.

75. *See, e.g.*, Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Cole v. Westinghouse Broadcasting Co., 435 N.E.2d 1021 (Mass.), *cert. denied*, 459 U.S. 1037 (1982).

76. 435 N.E.2d 1021 (Mass. 1982).

77. *Id.* at 1023.

78. *See supra* notes 64-68 and accompanying text.

79. *Cole*, 435 N.E.2d at 1025 (quoting *Information Control*, 611 F.2d at 784).

80. *Id.*

81. *Id.* at 1027.

82. 759 F.2d 219 (2d Cir. 1985).

83. A French restaurant guide had lambasted a Chinese restaurant in New York, describing the various dishes as "heavy and greasy," "disturbingly gamy," "badly cooked," "rubbery," and "totally insipid." *Id.* at 221. "We do not know where Mr. Chow recruits his cooks," the reviewer wrote, "but he would do well to send them for instruction somewhere in Chinatown." *Id.* at 222.

84. *Id.* at 226.

85. *Id.* at 225.

none of the statements were actionable, the court gave a great deal of weight to the fact that the statements appeared in the context of a review, "the well recognized home of opinion and comment."[86] The court wrote "reviews, although they may be unkind, are not normally a breeding ground for successful libel actions"[87] even in cases where the reviewer's opinion is "unreasonable."[88]

C. Milkovich and Its Progeny

In 1990, the Supreme Court issued its landmark decision in *Milkovich v. Lorain Journal Co.*[89] The Court held the First Amendment does not provide an exemption from defamation suits for statements merely labeled as opinions[90] particularly in situations where the opinions "imply an assertion of objective fact."[91]

The Court found that a newspaper columnist implied a high school wrestling coach committed perjury.[92] The Court stated that no separate protection was necessary in light of precedent which gave "full constitutional protection" to opinions "relating to matters of public concern which [do] not contain a provably false factual connotation."[93] In addition, the protection afforded to statements such as "hyperbole" or "imaginative expression" that could not "reasonably [be] interpreted as stating actual facts" about an individual remained intact under *Milkovich*.[94]

The Court noted that its rationale was consistent with *Sullivan* and its progeny, holding that freedom of expression requires adequate "breathing space" to avoid the perils of self-censorship.[95] Such freedom, however, "is

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86. *Id.* at 227.

87. *Id.* at 228. *See also id.* at 228 n.7 (collecting cases).

88. *Id.* at 229.

89. 497 U.S. 1 (1990); *see* text accompanying *supra* note 2.

90. *Milkovich*, 497 U.S. at 18.

91. *Id.*

92. *Id.* at 20.

93. *Id.*

94. *Id.* at 20 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)). *See also Old Dominion Branch No. 496*, 418 U.S. at 284-86 (calling non-union "scab" a "traitor" was not actionable in sense used); *Greenbelt Coop. Publishing Ass'n*, 398 U.S. at 13-14 (use of "blackmail" to describe developer's proposal was "rhetorical hyperbole" and nonactionable).

95. *Milkovich*, 497 U.S. at 18 (quoting Philadelphia Publishers v. Hepps, 475 U.S. 767, 772 (1986)).

adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[96]

Nevertheless, the decision spurred immediate criticism, with one article charging the decision created an ambiguity that could lead to a chilling effect on the media,[97] even though the Court's standard was "essentially the same as that the lower courts have used for years to distinguish between fact and opinion."[98]

Following *Milkovich*, lower courts appeared to struggle in determining whether previous tests to differentiate between opinion and fact retained any validity.[99] Perhaps not surprisingly, most courts recognized the absence of a per se exemption for opinion but still felt free to use totality of the circumstances and objective verifiability tests to determine whether a challenged statement was fact or opinion.[100]

Some decisions, however, concluded that multi-factor tests in which the strength of one factor—such as context—could protect an otherwise actionable statement could no longer be used in light of *Milkovich*.[101] For example, when television commentator Andy Rooney stated that a product "didn't work," his statement was not protected solely because of the humorous nature of the report in which he made it.[102] Rather, Rooney escaped liability only because the plaintiff was unable to prove the falsity of the comment.[103]

Other courts disagreed and stated that the *Milkovich* decision did not forbid the evaluation of context in determining whether a statement is fact or opinion, but rather "indicated that the context in which language appears *must* be evaluated to see whether 'the general tenor'" of a piece can overcome the defamatory impression conveyed by the words at issue.[104]

Furthermore, and of eventual importance to the *Moldea II* decision, courts appeared to agree that when a statement was merely an interpretation of a set

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96. *Id.*

97. *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 219, 224 (1990).

98. *Id.* at 223.

99. *See* Robert C. Vordaret et al., *Media Law and Defamation Torts: Recent Developments, A Supreme Court Decision Applied: The Effect of Milkovich on Opinion Cases in the Lower and Federal Courts*, 27 TORT & INS. L.J. 333, 339 (1992).

100. *See, e.g.*, Kumaran v. Brotman, 617 N.E.2d 191, 200 (Ill. App. Ct. 1993).

101. *See* Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

102. *Id.* at 1054.

103. *Id.* at 1057.

104. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir. 1992) (emphasis added) (quoting *Milkovich*, 497 U.S. at 21).

of objective facts, it could not be sued upon as defamatory.[105] Such an analysis was considered "consistent with" *Milkovich*.[106]

IV. INSTANT DECISION

A. Moldea I

In *Moldea I*, the two-judge[107] majority held the Times' review could injure Moldea in his profession as an investigative journalist,[108] thereby bringing it under the District of Columbia's case-law definition of defamation.[109] However, the court still had to address the issue of whether the statements were objectively verifiable or implied provable facts, and "whether a reasonable juror could find them to be false."[110]

The court looked to *Milkovich* in establishing a rule that "an unsupported statement of opinion that implies defamatory facts" is capable of a defamatory meaning[111] and that even where a speaker discloses the facts on which his opinion is based, it may still be actionable if the facts disclosed "are either incorrect or incomplete."[112]

In addressing the portion of the complaint which dealt with the charge of "sloppy journalism," the court acknowledged that "sloppy" is generally a nebulous term but it "has obvious, measurable aspects when applied to the field of investigative journalism."[113] Judge Edwards then analogized that "sloppy" is to a journalist as an accusation of having "clumsy hands" is to a surgeon,[114] and the use of such "arguably imprecise terms" alone cannot justify the attack on another's work "without substantiating [the] charges with facts."[115]

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105. *Id.* at 730. *See also* Fortier v. International Bhd. of Elec. Workers, Local 2327, 605 A.2d 79, 80 (Me. 1992); Immuno AG v. J. Moor-Jankowski, 567 N.E.2d 1270, 1273-74 (N.Y.), *cert. denied*, 111 S. Ct. 2261 (1991).

106. *Fortier*, 605 A.2d at 80.

107. Circuit Judges Harry T. Edwards and Patricia M. Wald.

108. *Moldea I*, 15 F.3d at 1143.

109. *Id.* at 1142 (defining a statement as defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community").

110. *Id.* at 1143.

111. *Id.* at 1144.

112. *Id.* (quoting *Milkovich*, 497 U.S. at 18-19).

113. *Id.* at 1145.

114. *Id.*

115. *Id.*

The court went on to say that the location of the statements in a book review did not alter its analysis.[116] "[I]t 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."[117] This statement was clarified by dismissing any suggestion "that all bad reviews are actionable."[118] The court held only "that assertions [which] would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review."[119] To avoid liability, the Times was required to show the opinion expressed about Moldea's work was supported by "true facts."[120]

The court then explored the five examples the Times gave in its review as examples of Moldea's alleged sloppy work.[121] It held that two were assertions of fact that a reasonable juror could find to be false.[122] The case was remanded to the district court for resolution of these issues.[123]

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116. *Id.* at 1145-46.

117. *Id.* at 1146.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1145-50. The five statements in the review which Moldea argued supported his libel charge were:

1. Moldea's book falsely described Joe Hirsch as the author of "an inside information sheet." Moldea contended that the passage was in fact true, making the Times' statement otherwise "verifiably false." *Id.* at 1141.

2. Moldea's book falsely described a "sinister" meeting between New York Jets' quarterback Joe Namath and Baltimore Colts' placekicker Lou Michaels shortly before the Jets victory in Super Bowl III. Moldea argued that his book described the meeting as innocent. *Id.*

3. Moldea's book revived a "discredited notion" that the owner of the Los Angeles Rams' drowning death was due to foul play. Moldea claimed the book stated the exact opposite. *Id.*

4. Moldea's book implied that the Colts' failure to attempt a field goal late in a 1958 playoff game was an attempt to beat the point spread, ignoring the fact that the Colts' kicker was one of the league's worst. In fact, Moldea included in his book a footnote that Baltimore had the NFL's second-worst field goal percentage that year. *Id.* at 1141-42.

5. Moldea's book included "some really hot stuff . . . albeit warmed over." Moldea's claim was that this statement was provably false given that "his book contains significant new revelations." *Id.* at 1142.

122. *Id.*

123. *Id.* The court also reinstated Moldea's claim for false light invasion of privacy, concluding the district court had applied an improper standard in dismissing it. *Id.* at 1150-51.

In a dissenting opinion, Chief Judge Abner J. Mikva traced the development of the opinion privilege through *Milkovich*, noting the factors previously considered by the court in *Ollman*—including context—were still "relevant, but only to the extent they bear on the verifiability of the statement."[124]

The dissent discussed the inherent subjectivity of terms like sloppy, and concluded such words defy objective verifiability.[125] "[B]ecause the burden of proving that an allegedly defamatory statement is false lies with the plaintiff, defendants should prevail in cases like this where the verifiability of the statements at issue is doubtful."[126] Mikva also explored the context of the statements, and while he agreed "a wholesale defamation privilege for statements appearing in literary or artistic criticism" went too far,[127] he felt that subjective comments in a review did not raise the same concerns as opinions implying facts in other forums.[128] Such statements often have an imprecise meaning[129] or are clearly non-verifiable "general assessments" of the reviewer, "the subjective interpretation of one person."[130]

In the dissent's view, the majority was ignoring "a long history of defamation jurisprudence which recognizes that reviews are generally offered, and reasonably received, as statements of subjective, non-verifiable opinion rather than fact."[131] With regard to the specific statements offered as support for the Times' opinion, the dissent agreed that the reviewer's characterization was "open to debate" but that this did not alter the impossibility of verifying it.[132]

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124. *Id.* at 1154 (Mikva, C.J., dissenting).

125. *Id.* The dissent took exception to the majority's view that calling a journalist sloppy was akin to charging a brain surgeon with having clumsy hands. Such an analogy "is to equate a piano recital with medical malpractice." *Id.* at 1152.

126. *Id.* at 1555.

127. *Id.* at 1156.

128. *Id.* at 1155.

129. *Id.* at 1155-56 (citing *Cole*, 435 N.E.2d at 1027).

130. *Id.* at 1156 (citing Stuart v. Gambling Times, Inc., 534 F. Supp. 170, 172 (D.N.J. 1982) and Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 226-29 (2d Cir. 1985)).

131. *Id.*

132. *Id.* at 1157.

B. Moldea II

The Times responded to *Moldea I* with a petition for an *en banc* rehearing of the case.[133] Yet before the court ruled on the petition, the majority reversed its order remanding the case, reinstating the district court's grant of summary judgment to the Times.[134] The court wrote it had carefully considered its original opinion and concluded it

> 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 they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations.[135]

The court reaffirmed its earlier contention that statements in book reviews could be actionable.[136] The recognized error, however, was its failure to consider the forum in which the statements were printed is one "in which readers expect to find such evaluations."[137] Therefore, the court ruled, "when a reviewer offers commentary that is [1] tied to the work being reviewed, and [2] . . . 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."[138]

In its analysis, the court recognized its previous error and sided with other circuits in holding the *Milkovich* decision had not dismissed the relevance of context in determining whether a challenged statement was fact or opinion.[139] In fact, the court wrote, the setting of certain speech "helps determine the way in which the intended audience will receive" it.[140] Thus, a "supportable interpretation standard" is the proper means by which commentary such as literary criticism should be analyzed in ruling whether a cause of action for defamation exists.[141] Such a standard does not give a literary critic free reign to make derogatory statements about a subject, but

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133. News Notes, *supra* note 12.
134. *Moldea II*, 22 F.3d at 320.
135. *Id.* at 311.
136. *Id.* at 313.
137. *Id.*
138. *Id.* (emphasis added).
139. *Id.* at 314 (citing Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.9 (1st Cir. 1992)). *See also supra* notes 100, 104 and accompanying text.
140. *Id.*
141. *Id.* at 315.

does allow the "breathing space" required by the constitution for opinionated works in certain fora.[142]

To meet the "supportable interpretation" requirement, a defendant's work must be supportable by references to the text he is criticizing.[143] Within this interpretation, a choice of language that reasonable people may believe is a misconception of the work described does not provide a cause of action.[144]

The review at issue satisfied this new standard.[145] The court did not expressly rebut its contention in *Moldea I* that the reviewer's statement regarding Moldea's alleged "sloppy journalism" may be verifiable.[146] The critic had, however, revealed the premises for his belief—to wit, Moldea's book itself.[147] Given that a reader understood the subjective conclusions expressed were those of the critic and realized she could draw her own conclusions based upon the same premises, the statements were protected.[148] The court concluded the correct test of whether a statement was actionable was not whether any reasonable juror could find the facts supporting the verifiable opinion to be false, but rather whether any reasonable juror could find the statements were not supportable interpretations of the written work.[149] Although at least one of the passages relied upon by the reviewer was interpreted in a troubling manner,[150] the true statements, and supported opinions and supportable interpretations justified the overall assessment that Moldea's book included "sloppy journalism."[151]

V. COMMENT

Since the 1960s, the Supreme Court has molded defamation law against the background of the First Amendment, with concomitant goals of protecting both the marketplace of ideas and the vigorous debate that shall inevitably accompany it.[152] Inherent in this process is the theory that no one should

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142. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).

143. *Id.*

144. *Id.* at 315-16 (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 519 (1991)).

145. *Id.* at 317.

146. *Id.*

147. *Id.*

148. *Id.* (citing *Moldea I*, 15 F.3d at 144-45).

149. *Id.*

150. *Id.* at 318. The court was referring to the reviewer's characterization of Moldea's alleged description of the Namath meeting as "sinister." *Id.*

151. *Id.* at 319. In addition, the court dismissed its earlier reinstatement of Moldea's false light invasion of privacy claim.

152. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

be punished with civil or criminal liability merely for expressing distaste with a matter of public concern. This protection has been held to extend even to statements that include some false content.[153] The *Moldea* cases represent an appellate court's efforts to reconcile these goals with another goal of equal importance: that a person's reputation should not be fair game for defamation by the reckless or knowing dissemination of lies.

Moldea II continues a trend that began with the fair comment doctrine:[154] providing broad protection for statements of opinion. In light of *Moldea II*, this protection, at least in the case of artistic criticism, will extend even where the opinions are arguably misguided or based on a misreading of their source.[155]

Perhaps more importantly, the appellate court's final decision offered a solution to the mystery resonating after *Milkovich* as to whether the context in which a challenged statement appears is still relevant. The D.C. Circuit found part of the answer in the text of *Milkovich* itself. In that case, the majority opinion stated the "general tenor of the article" sued upon did not negate an impression that the author was seriously maintaining his subject perjured himself in a judicial proceeding.[156] Justice Brennan, in a dissenting opinion, also stated the majority opinion recognized "the context in which [language] is used may signal readers that an author is not purporting to state or imply actual, known facts."[157] These passages clearly demonstrate, as the First Circuit recognized in *Phantom Touring*,[158] that the Supreme Court never dismissed the potential importance of context in certain cases.

Yet both the District of Columbia Circuit and the Supreme Court were justified in asserting that absolute freedom from liability should never attach to the mere labeling of a statement as an opinion or its inclusion in one of the genres well known for robust debate.[159] Such a rule would lead to absurd extensions of the First Amendment by giving those with the title of "critic" carte blanche approval to impugn the character of any public figure on virtually any matter without regard to the truth of the facts used to support such an attack.

The apparent source of the confusion over the lengths to which courts must go to protect "opinion" is Justice Powell's opinion in *Gertz*,[160] in which

153. *See id.* at 271.

154. *See* discussion *supra* notes 17-31 and accompanying text.

155. *See Moldea II*, 22 F.3d at 319.

156. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

157. *Id.* at 25 (Brennan, J., dissenting).

158. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.9 (1st Cir. 1992).

159. *See Milkovich*, 497 U.S. at 20; *Moldea II*, 22 F.3d at 311.

160. *See supra* note 43.

he cited the First Amendment for the proposition that "there is no such thing as a false idea."[161] Yet Powell arguably meant only that an individual's expression of purely subjective thoughts, those that may not be proven false, should not be punished by the government's judicial arm.[162] It is only when such expressions imply false facts that they become subject to the established Constitutional tests for defamation liability.

The idea that *Milkovich* overruled the *Gertz* dicta regarding protected opinions therefore may be based on a faulty interpretation of the latter.[163] An examination of the legal history[164] reveals that opinions merely labeled as such have never fully been afforded absolute protection, rebutting the contention that Powell's language had been taken to its literal extreme. Under the tests promulgated by various jurisdictions, ranging from the strict verifiability approach[165] to the multi-factored analyses,[166] it is highly unlikely that the simple words "in my opinion" or "I think" would ever provide protection for an otherwise actionable statement.[167] The argument that *Milkovich* simply reiterated the same fact versus opinion tests that had been used by lower courts "for years"[168] thus appears to have some merit. In a multi-factor test such as that used by the D.C. Circuit in *Ollman*,[169] context may still provide the basis for a conclusion that a statement is indeed protected opinion so long as it goes to the central question of whether the statement implies a "provably false factual assertion."[170]

The greater impact of the *Moldea II* opinion may be its prevention of the chilling effect which the majority feared in *Sullivan*.[171] A contrary decision may have hindered the efforts of various media to provide spirited criticism in clearly labeled reviews. Even the harshest commentator would be unlikely to call a film director "amateurish," a rock singer "tone deaf" or an author "careless" if the subjectivity of such terms could no longer be assumed. This

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161. Gertz v. Robert Welch, 418 U.S. 323, 339-40 (1974).

162. *See generally* Gordon Schneider, *A Model for Relating Defamatory "Opinions" to First Amendment Protected "Ideas"*, 43 ARIZ. L. REV. 57 (1990).

163. *Id.*

164. *See supra* notes 16-106 and accompanying text.

165. *See supra* note 50 and accompanying text.

166. *See supra* notes 62-63 and accompanying text.

167. *See supra* note 100 and accompanying text.

168. *See supra* notes 97-98 and accompanying text.

169. Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984).

170. Moyer v. Amador Valley Joint Union High Sch. Dist., 225 Cal. App. 3d 720, 724 (Cal. Ct. App. 1990).

171. *See supra* notes 29-41 and accompanying text.

fear may have encouraged several media outlets to join in the filing of an amicus brief in support of the Times.[172]

Judicially-created defamation laws such as the District of Columbia's could sound a death knell for critical reviews absent some type of privilege. Such laws provide that defamatory statements include those that "[tend] to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community."[173] Yet the purpose of negative reviews, essentially, is to do just that which the law forbids. The Times book reviewer, although presumably not acting with evil intent toward Moldea, was telling thousands of newspaper readers Moldea had written a bad book. Regardless of his intentions, the reviewer must have been aware that his piece could have had a devastating effect on the sales of the book and Moldea's future as 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."[174]

By protecting such negative statements so long as they are based on a "supportable interpretation" of the work being discussed, *Moldea II* provided a holding more in line with the values of the First Amendment than that of *Moldea I.* The supportable interpretation standard prevents the dreaded chilling effect upon harsh criticism, but protects the subject of such commentary by providing that a supportable interpretation arguably has not been made if the facts it contains are knowingly or recklessly false.[175] An author offering published work in the public sector is voluntarily inviting criticism from those who have made a profession of reviewing such work. It seems only fair that this type of limited public figure[176] should have to establish not only that the criticisms include assertions of provable false facts, but that they were published with the actual malice required under *Sullivan*[177] and the cases which followed it.[178] Given the tenuous nature of defining apparently subjective terms and the rare cases in which the critic actually will know or harbor great doubt about the conclusions put forth in his commentary, the barrier to these sorts of defamation actions constructed by the *Moldea* court will rarely be hurdled. Consequentially, those who practice in

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172. Paul M. Barrett, *In Rare Reversal, Court Blocks Libel Suit Over Book Review*, WALL ST. J., May 4, 1994, at B1.

173. *Moldea I*, 15 F.3d at 1142.

174. *Id.* at 1146.

175. *Moldea II*, 22 F.3d at 315.

176. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 11.01[2] (1994) (citing *Gertz*, 418 U.S. at 349).

177. *Sullivan*, 376 U.S. at 278-80.

178. *See supra* notes 42-106 and accompanying text.

the field of artistic criticism should not be deterred from their mission so long as they do not engage in the dissemination of purely false or reckless statements, a result directly in line with the policies behind the First Amendment.

Nevertheless, it is doubtful *Moldea II* precluded any future lawsuits arising from a negative review, given that the "supportable interpretation" theory is generally untested and appears to have been inspired at least in part by the Times' own argument in its petition for rehearing.[179] Such issues as whether all of the facts supporting the interpretation need to be disclosed or whether the various lower court tests distinguishing fact from opinion still carry weight may arise in future litigation.

The inherent difficulty of ruling on such issues was exemplified in the *Moldea* cases, as the majority of the appeals panel discarded what Moldea's lawyer called a "very clear, specific, and self-confident" opinion just 10 weeks after its entry. It is unlikely that the decisions of future courts will be much easier when faced with similar issues.

VI. CONCLUSION

The decision in *Moldea II* confronted the difficult question as to when negative criticism may provide grounds for a defamation suit. The court provided an answer that should satisfy both supporters and critics of legal doctrines of free speech. While merely labeling a criticism as opinion does not create a per se exemption from civil liability, a plaintiff, in order to state a claim, must show that the critic's interpretation cannot be supported by the work being reviewed. Such a standard provides some protection to the artist, while avoiding suppression of the free-flowing debate over the various works placed before the public eye that is essential to the First Amendment.

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179. *See Moldea II*, 22 F.3d at 315. The D.C. Circuit also acknowledged that such a test was supported by previous Supreme Court decisions, including Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) and Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).