IF YOU CAN'T SAY SOMETHING NICE, CAN YOU SAY ANYTHING AT ALL? *MOLDEA V. NEW YORK TIMES CO.* AND THE IMPORTANCE OF CONTEXT IN FIRST AMENDMENT LAW

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A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.[1]

I. INTRODUCTION

A. Conflicting Values in Libel Law

Historically, the greatest threats to freedom of expression have come from governments. "Governments in all places at all times have succumbed to the impulse to exert control over speech and conscience," notes Professor Rodney Smolla.[2] "Censorship is a social instinct."[3] While state suppression of speech remains the primary threat to free expression in many countries, in the United States most of the government's more intrusive attempts at direct censorship have been rebuffed by court decisions enforcing First Amendment guarantees.[4] Today, the main threat to freedom of expression comes from private sources. Libel suits, or even the threat of expensive litigation, can have a significant "chilling effect" on free expression.[5]

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1. Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).
2. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 4 (1992).
3. *Id.*
4. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (recognizing almost absolute immunity from prior restraint on expression); Cohen v. California, 403 U.S. 15 (1971) (holding that offensive or unpleasant speech may not be suppressed); Brandenburg v. Ohio, 395 U.S. 444 (1969) (overruling earlier cases that upheld suppression of "dangerous" speech).
5. *See generally* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds., 1989); Seth Goodchild, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 315-16 (1986) ("Because defamation cases have become so expensive to defend, the possibility of high defense costs imposed by frequent suits exerts significant pressure on news

Libel law requires courts to balance two competing values that are both important to our society: freedom of expression and protection of personal reputation.[6] Increasingly, however, libel lawsuits are used not only to protect genuine interests in personal reputations, but also to silence opponents, squelch competing viewpoints, and impede the free flow of information. For example, some public officials and corporations have filed "SLAPPs" —Strategic Lawsuits Against Public Participation—in an attempt to intimidate critics, particularly environmental activists.[7] Libel actions are increasingly used this way in other parts of the world as well, illustrating the potential danger of tilting the balance toward libel plaintiffs.[8]

In reconciling these competing values, First Amendment law generally favors free expression. It is true that free speech can pose dangers to national security and to personal reputation. Protection from both threats, however, is found not in the suppression of speech but in subjecting it to the "marketplace of ideas."[9] Seditious ideas are not banned but left to compete with

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organizations to engage in self-censorship rather than risk incurring staggering legal fees."). Because of the damage that protracted libel litigation can do to free expression, it is important to have legal standards that allow groundless actions to be dismissed at an early procedural stage. "In the First Amendment area, summary procedures are even more essential . . . . The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

6. The U.S. Supreme Court has enshrined both values. The exchange of views must be "uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). At the same time, "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

7. *See, e.g.*, Amy Kuebelbeck, *SLAPP Lawsuits Stifle Discourse, Activists Say: People Who Speak Out on Public Issues Are Being Accused of Defamation*, L.A. TIMES, Aug. 28, 1994, at A4; George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937 (1992).

8. In Russia, for instance, state censorship has largely disappeared with the dissolution of the USSR. But the "marketplace of ideas" has proved no easier to create than a market economy. Now, as political figures like Vladimir Zhirinovsky routinely head to the courthouse when they or their policies are criticized, "the libel suit has replaced the Kalashnikov rifle as the chief instrument of political struggle in Russia." Sonni Efron, *Russia's New Revolution: Libel Suits*, L.A. TIMES, Sept. 16, 1994, at A17. Like the United States, Russia is trying to reconcile free expression and reputation. If the balance tilts away from freedom of expression, Russia will risk silencing those who speak out against extremists like Zhirinovsky.

9. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919)

patriotic ideas: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[10] Likewise, in the area of defamation, the law should safeguard legitimate interests in personal reputation. But in close cases, the law should risk error on the side of allowing free expression: "The First Amendment requires that we protect some falsehood in order to protect speech that matters."[11]

B. The Background of Moldea v. New York Times Co.

These competing values of freedom of speech and protection of reputation collided in *Moldea v. New York Times Co.*[12] The "speech that matters" in this case is the expression of opinion, particularly critical reviews. In 1989, the *New York Times* published a review of *Interference: How Organized Crime Influences Professional Football*,[13] a book by investigative reporter Dan Moldea.[14] The review, written by sportswriter Gerald Eskenazi, contained some positive comments, but concluded that *Interference* was marred by "too much sloppy journalism to trust the bulk of this book's 512 pages."[15] Eskenazi supported his conclusion with several examples from the book, including spelling errors and mischaracterizations of events. Moldea sued the *Times*, alleging that he was defamed by both the general conclusion of the review and the specific examples.

A federal district court granted summary judgment in favor of the *Times*, holding that Eskenazi had expressed "an unverifiable opinion . . . not actionable under libel law."[16] On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed the trial court,

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(Holmes, J., dissenting).

10. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* THE PORTABLE THOMAS JEFFERSON 292 (Merril D. Peterson ed., 1983).

11. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

12. 15 F.3d 1137 (D.C. Cir.) [hereinafter *Moldea I*], *modified*, 22 F.3d 310 (D.C. Cir.) [hereinafter *Moldea II*], *cert. denied*, 115 S. Ct. 202 (1994).

13. DAN E. MOLDEA, INTERFERENCE: HOW ORGANIZED CRIME INFLUENCES PROFESSIONAL FOOTBALL (1989) [hereinafter INTERFERENCE].

14. Gerald Eskenazi, *Unsportsmanlike Conduct?*, N.Y. TIMES BOOK REV., Sept. 3, 1989, at 8 (reprinted as appendix to *Moldea I*, *supra* note 12, at 1151).

15. *Id.*

16. Moldea v. New York Times Co., 793 F. Supp. 335, 337 (D.D.C. 1992).

reviving Moldea's claim.[17] Then, just three months later, in what one commentator called an "extraordinary reversal,"[18] the same court of appeals panel changed its own decision, dismissing Moldea's libel suit as a matter of law.[19]

What explains this rare change of mind? Judge Harry Edwards, who switched his vote along with Judge Patricia Wald to join Chief Judge Abner Mikva, the lone dissenter in *Moldea I*, admitted a "mistake of judgment" and took "refuge in an aphorism of Justice Frankfurter: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'"[20] Moldea himself speculated that "the original majority gave in to outside pressure" from powerful national media organizations.[21] Rodney Smolla, an expert in libel law, found the reversal "impossible to understand."[22] The case illustrates the confusion over the distinction between fact and opinion in defamation law and the difficulty courts have had in applying the First Amendment privilege for expressions of opinion.[23] The *Moldea II* opinion goes a long way toward clearing up this important area of First Amendment law.[24]

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17. *Moldea I*, *supra* note 12.

18. David Streitfeld, *Judges Switch Sides in Libel Suit: Original Ruling in Book Review Case "Misguided," One Says*, WASH. POST, May 4, 1994, at C1 (quoting Carlin Romano, president of the National Book Critics Circle).

19. *Moldea II*, *supra* note 12.

20. *Id.* at 311 (quoting Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

21. Joan Biskupic, *In Libel Suit U-Turn, Judge Admits Starting in the Wrong Direction*, WASH. POST, May 5, 1994, at A20. Some commentators agree with Moldea's assessment. To Carlin Romano, the "common-sense conclusion is that Edwards and . . . Wald held their fingers up to the wind and tailored their new opinion accordingly." Carlin Romano, *Paper Chase—II*, 258 THE NATION 874, 878 (1994).

22. Streitfeld, *supra* note 18, at C1.

23. "[N]o area of modern libel law can be murkier than the cavernous depths of this inquiry." BRUCE W. SANFORD, LIBEL AND PRIVACY § 5.1 (2d ed. Supp. 1996-1).

24. Abner Mikva, retired from the bench and speaking at a conference on media and the law, recalled *Moldea* as "the most important First Amendment case decided by the District of Columbia (D.C.) Circuit last term," joking that it is "the case that was so important the D.C. Circuit decided it twice." Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. U. L. REV. 291, 291 (1995). In his treatise, Rodney Smolla called *Moldea* "[o]ne of the most important and controversial defamation cases of the 1990s, and perhaps the most important fact/opinion distinction case since *Milkovich*." RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[7][b][I] (Release #9, Nov. 1995). Even commentators who disagree with the final opinion concede the importance of the issues raised by the case. Carlin Romano, who thinks "*Moldea II* smells as bad as any D.C. Appeals Court case in memory," nonetheless called it "the

For background, the next part of this Casenote traces the opinion privilege from its origins to its apparent demise in *Milkovich v. Lorain Journal Co.*[25] Part III discusses the original decision in *Moldea I* and how it threatened to jeopardize freedom of expression. The final, modified opinion—*Moldea II*—is examined in Part IV. Finally, Part V offers a preliminary assessment of how the *Moldea* test will be applied in other cases. This analysis leads to the conclusion that the benefits to society from free, unabashed criticism deserve strong First Amendment protection. As Chief Judge Mikva admonished, "[c]ourts should be most hesitant to assume an arbiter's role in this most delicate area."[26] By disregarding the role of context in free speech analysis, the court in *Moldea I* nearly did just that. That decision, had it not been modified on rehearing, would have tilted the balance perilously far from guaranteeing sufficient freedom of expression. The final decision in *Moldea v. New York Times Co.* reaffirms the value of expressions of opinion, and provides a workable test for analyzing allegedly defamatory statements of opinion.

II. FACT AND OPINION IN LIBEL LAW

> *"Anyone who reads that review is going to think I'm this terrible person." — Dan Moldea*[27]

The First Amendment does not protect libelous speech.[28] But in order to be libelous, a statement must be demonstrably false.[29] Only a fact can be true or false.[30] "Under the First Amendment there is no such thing as a false idea. However pernicious an

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most provocative First Amendment case in years." Carlin Romano, *Paper Chase—I*, 258 THE NATION 778, 778, 780 (1994).

25. 497 U.S. 1 (1990).

26. *Moldea I*, *supra* note 12, at 1158 (Mikva, C.J., dissenting).

27. David Streitfeld, *Author Sues over Negative Review: Criticism Was Libelous, D.C. Writer Charges*, WASH. POST, Aug. 24, 1990, at C1.

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

29. Falsity, of course, is only one element of a libel claim: the plaintiff must also show that the statement was defamatory, and that the defendant acted with the required level of fault. *See id.* In *Moldea*, only the issue of falsity was litigated; because "the essential element of falsity is lacking," the district court granted summary judgment in favor of the *New York Times*. Moldea v. New York Times Co., 793 F. Supp. 335, 336 (D.D.C. 1992).

30. Truth is a complete defense to libel. *See, e.g.*, Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988).

opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[31] As a result, expressions of opinion have enjoyed virtually total protection under the First Amendment.[32]

A. *Before* Milkovich: *Fair Comment*

Protection for expressions of opinion originated in the common-law doctrine of "fair comment," which "afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact."[33] Since at least 1964, the fair comment privilege has enjoyed constitutional recognition. In *New York Times Co. v. Sullivan*, the Supreme Court held that "a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact."[34] The rationale for this doctrine is that if the reader is given the *facts* on which the *opinion* is based, the reader will have sufficient information with which to agree or disagree.[35] This may seem simple enough, but in practice courts have had difficulty distinguishing expressions of fact and opinion. Indeed, during oral argument in the 1984 case of *Ollman v. Evans*,[36] Judge Harry Edwards himself observed, "When you read the [fact/opinion] cases, they are a mess." Six years later, in *Milkovich v. Lorain Journal Co.*,[37] the Supreme Court apparently abandoned the strict distinction between fact and opinion as "artificial."

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

32. *See id.*

33. 1 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS § 5.28, at 456 (1956).

34. 376 U.S. 254, 292 (1964).

35. Lane v. Random House, 23 Media L. Rep. (BNA) 1385, 1390 (D.D.C. 1995) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 30 n.7 (1990) (Brennan, J., dissenting)). "The common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Id.*

36. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985), oral argument *quoted in* SANFORD, *supra* note 23, § 5.1.

37. 497 U.S. 1, 19 (1990).

B. Milkovich: *Substance over Form*

Michael Milkovich was a high school wrestling coach whose team was involved in a brawl after a tournament. A sportswriter for a Lorain Journal Company newspaper witnessed the altercation and heard the coach testify about the incident before an investigative panel. The reporter wrote in his sports column that "[a]nyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth."[38] The coach sued for libel, alleging that the column implied he had committed the criminal offense of perjury.[39] The newspaper asserted in defense a "First-Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.'"[40]

The Supreme Court agreed with Milkovich, holding that the bright-line distinction between fact and opinion was both artificial and unnecessary.[41] According to the Court, automatic immunity for statements labeled "opinion" creates an "artificial dichotomy"[42] because it allows writers to assert defamatory facts in the guise of commentary. "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."[43] Because the "opinion" contains a specific factual allegation (either Jones is a liar or he isn't), it "would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"[44]

However, the Court in *Milkovich* did not intend to discard entirely the protections given to statements of opinion. Rather, the Court found the explicit opinion privilege unnecessary because statements of opinion (as opposed to facts disguised as opinion) are adequately protected under general First Amendment principles.[45] Because the burden of proof in libel suits is on

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38. *Id.* at 5.
39. *Id.* at 6-7.
40. *Id.* at 17.
41. *Id.* at 19.
42. *Id.*
43. *Id.* at 18.
44. *Id.* at 19 (quoting Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).
45. *Id.*

the plaintiff, and falsity is an element of libel, the plaintiff must prove the allegedly defamatory statement is false.[46] A statement can be proven true or false only if it is verifiable—if it contains either facts or a "provably false factual connotation."[47]

The *Milkovich* rule, as interpreted in the cases leading up to *Moldea*, is that statements of opinion are actionable if they "can reasonably be understood as implying provable facts."[48] Thus, *Milkovich* did not repudiate First Amendment protection for statements of opinion. Rather, it only shifted the focus of the test for whether an utterance expresses fact or opinion from the formalistic label of "opinion" to a substantive test of whether a statement is verifiable.

Under *Milkovich*, a statement of opinion may be actionable for defamation if it implies a provably false fact. But *Milkovich* left some questions unanswered: Are expressions of opinion and fact subject to an identical analysis in libel cases? If so, what impact does this have on the First Amendment and the values it protects? It was this "very difficult legal issue," the source of so much "distress" to Judge Edwards,[49] that was resolved by *Moldea v. New York Times Co.*

III. *MOLDEA I*: NO "SACROSANCT GENRES"

"This case is not about the First Amendment." — Dan Moldea[50]

In deciding the *Times*'s motion for summary judgment in the *Moldea* case, the district court was called upon to apply the *Milkovich* standard. Judge John Garrett Penn ruled that "*Milkovich* did not change prior First Amendment law but simply rejected a separate constitutional privilege for statements of 'opinion.'"[51] Under the *Milkovich* test, the issue before the *Moldea* trial court was whether Eskenazi's evaluation contained

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46. *Id.* at 20.

47. *Id.*

48. White v. Fraternal Order of Police, 909 F.2d 512, 522 (D.C. Cir. 1990) (holding letters advocating criminal investigation of a police officer actionable because "assertions that someone used illegal drugs and that he engaged in illegal activity such as bribery—whether express or implied" are objectively verifiable).

49. *Moldea II*, *supra* note 12 at 311.

50. David Holmstrom, *Libel Case over Book Review Troubles Publishers*, CHRISTIAN SCI. MONITOR, Mar. 1, 1994, at 3.

51. Moldea v. New York Times Co., 793 F. Supp. 335, 337 (D.D.C. 1992).

a provably false factual connotation.[52] Most significantly, Judge Penn asserted that the context in which a statement appears can bear on whether it implies verifiable facts.[53] The case of *Ollman v. Evans* had previously established that "the reasonable reader . . . perus[ing] [a] column on the editorial . . . page is fully aware that the statements found there are not 'hard' news."[54] Judge Penn concluded that "a book review is similarly the type of article which the reasonable reader knows is comprised of the reviewer's opinion."[55] He therefore held that "in such context," Eskenazi's statement about sloppy journalism "is an unverifiable opinion, and is thus not actionable under libel law," and granted summary judgment for the *Times*.[56]

Moldea appealed, arguing that *Milkovich's* rejection of a blanket privilege for statements of opinion made context irrelevant in libel cases.[57] Simply labeling the statement an opinion by placing it in a book review, Moldea claimed, should not affect the determination of whether it is a verifiable, and therefore actionable, statement.[58]

In its first consideration of the case, the U.S. Court of Appeals for the D.C. Circuit reversed the trial court's grant of summary judgment.[59] Judge Harry Edwards's majority opinion focused on the fact that the Supreme Court's decision in *Milkovich* had "squarely refused to recognize a separate constitutional privilege for opinion."[60] Therefore, the fact that the phrase "too much sloppy journalism" was expressed as an opinion was "simply not dispositive of the question before us."[61] The context in which the statement appeared was irrelevant, by the court's reasoning, because placing the statement in an article labeled "book review" or "editorial" or "opinion" is as artificial as placing it after the phrase "I think" or "in my opinion." The court declined to "craft a rule that permitted otherwise libelous

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52. *Id.*
53. *Id.*
54. 750 F.2d 970, 986 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (Evans and Novak column calling a university professor a Marxist is protected opinion, not actionable assertion of fact).
55. 793 F. Supp. at 337.
56. *Id.*
57. Brief of Appellant, Dan E. Moldea at 40, *Moldea I*, *supra* note 12.
58. *Id.*
59. *Moldea I*, *supra* note 12.
60. *Id.* at 1143.
61. *Id.* at 1145.

statements to go unchecked so long as they appeared in certain sacrosanct genres."[62] Thus, *Moldea I* interpreted *Milkovich* as abandoning the fact/opinion distinction. Accordingly, all allegedly defamatory statements would be subjected to the same standard of verifiability, regardless of whether they appeared in the context of an opinion piece or a hard news article.

Applying this conclusion—that context has no bearing on verifiability—the majority found that Eskenazi's phrase "sloppy journalism" was not merely an opinion but necessarily implied certain facts.[63] Indeed, the court saw the review as "precisely analogous to the Supreme Court's example in *Milkovich*: 'In my opinion John Jones is a liar.'"[64] Because Eskenazi's purportedly subjective conclusion connotes verifiable facts, the majority held, it is actionable in libel.

Chief Judge Abner Mikva dissented, arguing that *Milkovich* "did not significantly alter these earlier protections" of opinion but simply "shift[ed] the inquiry away from whether a statement could be said to be 'opinion' and towards whether the statement is verifiable."[65] Under this interpretation, the fact that a statement is expressed as an opinion (its context) is not to be ignored. Rather, the statement's context is relevant to the extent it affects the verifiability of the statement.[66] An assertion is verifiable only if it contains provably false factual connotations. Judge Mikva argued that whether a statement implies facts depends on the expectations of the audience. The context of a book review is relevant, therefore, because "readers approach literary and artistic criticism with the expectation that the opinions they express are not meant as objective statements or implications of fact."[67]

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62. *Id.* at 1146.

63. *Id.* at 1145. The facts implied by the phrase "sloppy journalism," according to the court, are "that Moldea plays fast and loose with his sources [and] that his allegations are not to be believed." *Id.*

64. *Id.* (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990)).

65. *Id.* at 1153 (Mikva, C.J., dissenting).

66. "*Milkovich* implicitly rejected *Ollman's* 'totality of the circumstances' test in favor of a single inquiry into whether the alleged defamatory statement is verifiable. The factors set forth in *Ollman*—common meaning, *context*—remain relevant, but only to the extent they bear on the verifiability of the statement." *Id.* at 1154 (emphasis added) (citing Ollman v. Evans, 750 F.2d 981 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)).

67. *Id.*

False factual statements have no immunity from libel actions because incorrect information does not serve the values the First Amendment protects.[68] For this reason, free speech decisions have "always recognized a sharp distinction between communications intended to inform and those seeking to appeal to the artistic senses."[69] When readers understand from the context that a statement reflects only the writer's opinion, the law should leave judgments about the merit of the opinion to the marketplace of ideas: "The public nature of the work under review allows readers to arrive at their own opinions."[70] The majority opinion in *Moldea I* ignored the importance of the statement's context. According to Judge Mikva, the result of holding reviews "actionable . . . because they could be shown to 'rest upon provable, albeit unstated, defamatory facts,'" would be "to open up the entire arena of artistic criticism to mass defamation suits."[71]

IV. *MOLDEA II*: INFERENCES TO MATCH THE IMPLICATIONS

> *"The free expression of opinion is democracy's oxygen. Choke it off and democracy begins to die. . . . We hope all forms of opinion will be more secure because of this decision in a case of literary opinion."*[72]

Arguing that the *Moldea I* decision "places at risk virtually every unflattering review" by "leap[ing] from the indisputable proposition that book reviews have no automatic immunity from

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68. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

69. *Moldea I*, *supra* note 12, at 1152.

70. *Id.* at 1153. In arriving at their own opinions, readers can also consider the competing assessment of other reviewers.

71. *Id.* at 1152-53. As the case wound its way through the courts, many observers shared Judge Mikva's fear that this interpretation of *Milkovich* would spark a litigation explosion. "Libel lawyers are going to be busy," predicted Floyd Abrams, a prominent First Amendment litigator. Streitfeld, *supra* note 18, at C1. The prospect of costly lawsuits could increase the pressure for self-censorship of all critical reviews, a chilling effect that would harm the public's interest in open discussion of cultural life. *See supra* note 5 and accompanying text. Shortly after *Moldea I*, *supra* note 12, was decided, one editorial writer predicted that "[w]e are much less likely to get an honest appraisal, or a spirited and valuable discussion, if the writer [of a review] is looking over his shoulder for advancing attorneys." Joann Byrd, *Ombudsman—A Little Chilly in Here*, WASH. POST, Feb. 27, 1994, at C6.

72. *Libel in Reviews: The Book is Still Open*, L.A. TIMES, Oct. 10, 1994, at B6.

libel suits [under *Milkovich*] to the erroneous assertion that context is irrelevant,"[73] the New York Times asked for a rehearing en banc. Instead, the same three-judge panel reheard the case, changed its interpretation of *Milkovich*, and affirmed the district court's grant of summary judgment in favor of the New York Times.[74] Under this final decision, the proper interpretation of the Supreme Court's holding in *Milkovich* is that expressions of subjective evaluation, especially in contexts like book reviews, are just as immune from libel suits after *Milkovich* as they were before.

Context was the factor that swayed Judges Edwards and Wald.[75] Judge Edwards insisted that "[t]he original majority opinion was generally correct in its statement of the law of defamation":[76] *Milkovich* requires courts to look beyond the fact that a statement is labeled "opinion" and consider its verifiability.[77] However, the opinion in *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 they understand to be . . . capable of a number of possible rational interpretations."[78] Judge Edwards accepted the argument that context is relevant to the issue of verifiability. Thus, under *Moldea II's* interpretation of *Milkovich*, subjective evaluations are still nonactionable if they do not imply provable facts; and "[w]hile there is no per se exemption from defamation for book reviews,"[79] statements appearing in that context should be analyzed with regard to how readers are likely to perceive them.

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73. Petition for Rehearing with Suggestion for Rehearing En Banc of Appellee The New York Times Co. at 1, 4, *Moldea I*, *supra* note 12, (No. 92-7065).

74. *Moldea II*, *supra* note 12, at 314, 320.

75. "*Moldea I* erred in assuming that *Milkovich* abandoned the principle of looking to the context in which speech appears." *Id.* at 314.

76. *Id.* at 311.

77. Under *Milkovich*, "statements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false." *Id.* at 313.

78. *Id.* at 311.

79. *Id.*

A. The Standard

Interpretive statements in a review do not imply facts because readers do not expect facts in that context. They expect ideas.[80] Of course, as *Milkovich* recognized, opinions can imply facts. *Moldea II* adds a step to this analysis: whether demonstrable facts are implied by an author is determined in part by whether they are likely to be inferred by the reader in light of the context in which the statement appears.[81] In a book review, statements evaluating the book are understood to be opinions. By contrast, a statement in a book review that is not about the book, but instead makes a defamatory factual allegation about its author, might be taken to imply facts about that person.[82] Therefore, the context analysis protects only statements of the kind readers expect to find in a given context. If the statement is an evaluation of the reviewed book, and not a factual implication about the author disguised as opinion, it is not actionable for libel.[83] The new standard announced in *Moldea II* is "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."[84] To enjoy the

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80. The fact that this point was lost on the majority in *Moldea I* is shown by its statement that "[f]or 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." *Moldea I*, *supra* note 12, at 1146. This analogy "equates literary works held out for public evaluation with private services rendered pursuant to professional standards." Petition for Rehearing with Suggestion for Rehearing En Banc of Appellee The New York Times Co. at 7, *Moldea I*, *supra* note 12, (No. 92-7065). The analogy is inaccurate because the expectations of the readers in the two contexts are quite different.

A similar factual distinction separates the *Milkovich* and *Moldea* cases. Because the newspaper reporter in *Milkovich* claimed to be "the only non-involved person at both the controversial meet and the administrative hearing, . . . a reader reasonably could have understood the reporter . . . to be suggesting that he was singularly capable of evaluating the plaintiffs' conduct." Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 730-31 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992). By contrast, Eskenazi's conclusions were based on information—Moldea's book—accessible to everyone, readers and other reviewers.

81. *Moldea II*, *supra* note 12, at 311.

82. The context of the book review would be irrelevant "if, for example, the review stated or implied that *Interference* was a badly written book because its author was a drug dealer." *Id.* at 315.

83. *Id.*

84. *Id.* at 313 (emphasis added).

additional protection afforded by the proper consideration of context, "[a] critic's statement must be a rational assessment or account of something the reviewer can point to in the text."[85] This test—whether it is reasonable to say that the statement is an evaluation of the content of the book—safeguards the free exchange of ideas and protects authors from veiled defamations.[86]

This standard is not entirely new but is the logical result of Supreme Court holdings in a line of cases dealing with ambiguous language. The Court in *Masson v. New Yorker Magazine*[87] recognized that "writers must be given some leeway to offer 'rational interpretation' of ambiguous sources."[88] In *Bose Corp. v. Consumers Union of the United States, Inc.*,[89] a negative review of stereo equipment was held nonactionable because it was within the range of "possible rational interpretations."[90] So long as the reviewer's position can reasonably be said to be an interpretation of the object being reviewed, the statements are protected even if they turn out to be inaccurate because this is "the sort of inaccuracy that is commonplace in the forum of robust debate" protected by the First Amendment.[91]

On rehearing, the *Moldea* panel decided that *Milkovich* addressed the relevance of context only for factual accusations cloaked in opinion pieces and did not affect subjective evaluations. "We now recognize . . . that *Milkovich* did not disavow the importance of context, but simply 'discounted it in the circumstances of that case.'"[92]

Thus, the "supportable interpretation" test is entirely consistent with *Milkovich*. The majority in *Moldea I* thought *Milkovich* made context irrelevant. However, the *Milkovich* opinion itself hints that its holding may not apply in all situa-

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85. *Id.* at 315.

86. The test prevents writers from "commit[ting] libel at will merely by labeling [their] work a 'review.'" *Id.* at 313. It also affirms "our cultural and legal traditions of affording reviewers latitude to comment on literary and other works" by giving reviewers "the constitutional 'breathing space' appropriate to the genre." *Id.* at 315.

87. 501 U.S. 496 (1991).

88. *Moldea II*, *supra* note 12, at 313 (quoting *Masson*, 501 U.S. at 497).

89. 466 U.S. 485 (1984).

90. Id. at 512 (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)).

91. *Id.* at 513.

92. *Moldea II*, *supra* note 12, at 314 (quoting Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 n.9 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992)).

tions, noting that the "general tenor of the article" is relevant to whether the statement implies provable facts.[93]

Moreover, other federal and state cases construing *Milkovich* have found it to be consistent with a consideration of context. The court in *White v. Fraternal Order of Police*,[94] for example, believed *Milkovich* was intended to protect language "which would preclude an impression that the author was seriously maintaining a provable fact."[95] In *Phantom Touring, Inc., v. Affiliated Publications*,[96] a drama critic's comments that a show was "a rip-off, a fraud, a scandal, a snake-oil job" were held not defamatory.[97] Over the plaintiff's protests that *Milkovich* had eliminated protection for such statements "simply because they could be classified as opinion," the court dismissed the action "even in the light of *Milkovich*."[98] Context was the decisive factor in *Phantom Touring*. Ignoring the setting of the drama review, the words "rip-off" and "fraud" could be interpreted as an accusation of illegal conduct. But consideration of the "context in which language appears" negates the implication.[99] Other courts applying *Milkovich* have continued to analyze allegedly defamatory statements in context; *Moldea I* was clearly the aberration.[100]

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93. 497 U.S. 1, 21 (1990).

94. 909 F.2d 512 (D.C. Cir. 1990).

95. *Id.* at 522. *See also* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, . . . rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.") (Posner, J.); Dworkin v. L.F.P., Inc., 839 P.2d 903, 915 (Wyo. 1992) ("Certain formats—editorials, reviews, political cartoons, monthly features—signal the average reader to expect a departure from what is actually known by the writer as fact.").

96. 953 F.2d 724.

97. *Id.* at 726.

98. *Id.*

99. *Id.* at 727. In addition to *Milkovich*, the court in *Phantom Touring* cited the earlier cases of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (calling a person a "traitor" not actionable because of "loose, figurative" context), and Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) ("blackmail" not defamatory in context).

100. *See, e.g.*, Sagan v. Apple Computer, 874 F. Supp. 1072, 1075 (C.D. Cal. 1994) (The phrase "Butt-Head Astronomer" is not defamatory in light of *Milkovich*, because "[a]ny reader exposed to such a publication would likely have knowledge of the context in which the language was used."); Carpenter v. Drechsler, No. 89-0066-H, 1991 WL 332766, at *7 (W.D. Va. May 7, 1991) (A statement implying plaintiff's real estate license would be revoked is not actionable, "especially when . . . viewed within the context of a hotly contested battle for control of the corporate board of directors."); Steinhilber v. Alphonse, 501 N.E.2d 550, 553 (N.Y. 1986) ("[T]he essential task is to decide whether the words complained of, considered in the context of the

B. *Applying the New Standard in* Moldea

The circumstances of *Milkovich* point to the key distinction recognized by the court in *Moldea II*: the difference between a "supportable interpretation" and a "garden-variety libel."[101] In *Milkovich*, the plaintiff won; the statement accusing the coach of perjury was held actionable. The majority in *Moldea I* believed that case compelled a similar result in favor of Dan Moldea. However, that decision was reversed in *Moldea II* on the strength of factual distinctions between the cases that become apparent only when the role of context is properly considered. In *Milkovich*, the reporter asserted that the plaintiff lied under oath during a legal proceeding. Because "an accusation of criminal conduct is a classic libel," the Court in *Milkovich* "did not even pause to assess the effect that the column's context may have had on those who read it."[102] The appearance of the accusation in an editorial column did not immunize the writer from liability because the statement did not give a subjective evaluation (which is what readers expect in that context) but rather alleged a fact. As Chief Judge Mikva pointed out in his *Moldea I* dissent, "[r]eviewers should escape defamation liability unless they attempt to smuggle defamatory and verifiable facts about the author under the guise of criticism."[103] The sportswriter's statement implies a fact because it is verifiable: either the coach lied or he didn't. If he did not lie, the story is false and is actionable as a garden-variety libel, regardless of its context.

Eskenazi's conclusion that Moldea's book contained "too much sloppy journalism," on the other hand, is a subjective evaluation "quintessentially of a type readers expect to find in that genre."[104] Not only does the language indicate an imprecise and personal judgment,[105] but in the context of a book review,

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entire communication, . . . may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion.").

101. *Moldea II*, *supra* note 12, at 315.

102. *Id.* at 314.

103. *Moldea I*, *supra* note 12, at 1156 (Mikva, C.J., dissenting).

104. *Moldea II*, *supra* note 12, at 315.

105. The "precise[ ] analog[y]" the *Moldea I* majority saw between "too much sloppy journalism" and "[i]n my opinion John Jones is a liar," 15 F.3d at 1145, is clearly not precise at all. *Liar* has a specific meaning: a person who says false things. Whether a person is a liar may be objectively verified, therefore, by determining if the things the person said are true or false. But the charge of sloppiness, and especially of excessive sloppiness, is necessarily subjective and ambiguous: "What constitutes

even an apparently factual evaluation of the book would be nonactionable if it is supported by references to the book itself. Opinions based on facts are protected if they are "based on true facts that are either stated in the review itself or readily available to the reader *by reference to the work.*"[106] Eskenazi supported his conclusion in the review with several examples from the text of *Interference*,[107] all of which were either acknowledged by Moldea or found by the court to be reasonable interpretations of Moldea's text.[108] By calling the book "sloppy," Eskenazi does not suggest that this is the objective truth. He implies only that this is his personal opinion, and that the examples from the book he cites to support it are actually in the book and have not been mischaracterized. Therefore, because Eskenazi's evaluations were supported by reasonable interpretations of the book, and because that is all readers expect from a review, his review passes the supportable interpretation test and the statements are not actionable.[109]

V. AFTER *MOLDEA*

"Now I have to get a life." — Dan Moldea[110]

Apart from the negative consequences that the *Moldea* court's modification avoided, the question remains whether its final opinion will help clarify the distinction between fact and opinion in libel law. The few cases that have looked to *Moldea* for guidance thus far suggest that the case made some important contours in libel law more visible. *Moldea* highlighted the

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sloppiness? How sloppy is too sloppy?" *Moldea I*, *supra* note 12, at 1155 (Mikva, C.J., dissenting). Other cases support the view that imprecise statements are inherently unverifiable. *See, e.g.*, McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision makes the assertion 'X is a scam' incapable of being proven true or false.").

106. *Moldea I*, *supra* note 12, at 1154 (Mikva, C.J., dissenting) (emphasis added). "This 'supportable interpretation' standard provides that a critic's interpretation must be rationally supportable by reference to the actual text he or she is evaluating, and thus would not immunize situations analogous to that presented in *Milkovich*, in which a writer launches a personal attack . . . ." *Moldea II*, *supra* note 12, at 315.

107. INTERFERENCE, *supra* note 13.

108. *Moldea II*, *supra* note 12, at 318.

109. *Id.*

110. David Streitfeld, *Moldea Appeal Rejected; Justices Refuse to Hear Book Review Case*, WASH. POST, Oct. 4, 1994, at E2.

difference between subjective evaluations of the reviewed work and personal attacks disguised as editorial criticism. In contrast to the accusation of specific improper conduct, which was upheld in *Milkovich*, "[i]t was Moldea's book at issue, not his character, reputation or competence as a journalist."[111]

At least three cases in the United States District Court for the District of Columbia since have turned on this distinction. *Lane v. Random House*[112] involved a newspaper advertisement for a book about the assassination of President Kennedy. The advertisement featured photographs of several authors of other books on the assassination, including Mark Lane, an investigative journalist, under the caption "Guilty of Misleading the American Public."[113] The book advertisement is a "context not far removed" from the book review at issue in *Moldea*.[114] In light of *Moldea's* contextual analysis of "evaluations quintessentially of a type readers expect to find in that genre,"[115] the advertisement does not make a verifiable accusation of dishonesty but expresses a subjective disagreement with Lane's assassination theory.[116] Recognizing the importance of freewheeling debate in both literature and criticism, the court concluded that while "Lane is certainly entitled to his beliefs . . . it is not defamatory to criticize him."[117]

In *Matusevitch v. Telnikoff*,[118] decided the next day, the district court cited *Moldea* for "the importance of context in a First Amendment analysis."[119] Accordingly, an accusation of political extremism made in a newspaper article was held nonactionable, because "if the statements were read in context to the original article or statement and in reference to the location of the statements in the newspaper, a reader would reasonably be

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111. Lane v. Random House, 23 Media L. Rep. (BNA) 1385, 1390 (D.D.C. 1995).

112. *Id.*

113. *Id.* at 1386.

114. *Id.* at 1391. Indeed, readers of a paid advertisement might be even less likely to perceive it as a factual assertion because it makes no pretense of objectivity.

115. *Id.* (quoting *Moldea II*, *supra* note 12, at 315).

116. *Id.* "That evaluation cannot be objectively verified without resolving thirty years of controversy surrounding the Kennedy assassination." *Id.*

117. *Id.* at 1390.

118. 877 F. Supp. 1 (D.D.C. 1995).

119. *Id.* at 4. The plaintiff had sought to enforce the libel judgment of a British court. Because under British law the jury was instructed to ignore context, the judgment was held "repugnant to the public policies of the State of Maryland and the United States" and thus unenforceable in this country. *Id.* at 2.

alerted to the statements' function as opinion and not as an assertion of fact."[120]

In *Washington v. Smith*,[121] a college basketball coach sued a sportswriter who wrote that the coach "usually finds a way to screw things up."[122] This remark, if read outside its context, could arguably imply verifiable facts about the coach's performance in previous seasons.[123] But the comment was part of the sportswriter's prediction in a sports preview magazine.[124] In this context, "readers . . . understand that a considerable portion of the magazine's content is subjective opinion."[125] Because the magazine contained statistics and other information on which the writer based his evaluation, the statement passes the supportable interpretation test, which, the court acknowledged, "*Moldea II* requires us to apply."[126]

State courts have also relied on *Moldea*. A television news report's characterization of a business selling "living will" kits as a "scam" is an expression of unverifiable opinion when examined in context, according to the holding of a Colorado case, *NBC Subsidiary (KCNC-TV) v. Living Will Center*.[127] The Colorado Supreme Court found support for its "contextual test" in *Gertz v. Robert Welch, Inc.*,[128] *Milkovich*,[129] and *Moldea*.[130]

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120. *Id.* at 5.

121. 893 F. Supp. 60 (D.D.C. 1995), *aff'd*, No. 95-7197, 1996 WL 168924 (D.C. Cir. Apr. 12, 1996).

122. *Id.* at 61.

123. *Id.* at 63.

124. *Id.* at 61.

125. *Id.* at 64.

126. *Id.* at 63-64.

127. 879 P.2d 6, 11 (Colo. 1994), *cert. denied*, 115 S. Ct. 1355 (1995).

128. 418 U.S. 323 (1974).

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

130. The court cited *Moldea II*, *supra* note 12, at 310, to support the view that *Milkovich* did not overturn the state-law contextual test. *Living Will Ctr.*, 879 P.2d at 10. Colorado's contextual test was adopted in Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983) ("Allegedly defamatory language must be examined in the context in which it is uttered."). *Burns* established a three-part test to distinguish statements of fact from expressions of opinion:

> First, whether the statement complained of is "cautiously phrased in terms of apparency." . . . Second, the entire published statement must be examined in context, not just the objectionable word or phrase. Third, all the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to whom it is directed, should be considered.

Id. (quoting Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980)). Of course, *Moldea* is not controlling authority in Colorado. But

VI. CONCLUSION

> *"I laid it down as a law to myself, to take no notice of the thousand calumnies issued against me, but to trust my character to my own conduct, and the good sense and candor of my fellow citizens." — Thomas Jefferson*[131]

If the opinion in *Moldea I* had not been reversed, it could have caused serious harm to the free exchange of opinions we expect from literary and other types of criticism. If context is not considered, nearly any statement of opinion could be made to seem verifiable. As a state court applying *Milkovich* observed, "[i]solating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, . . . may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."[132] This could lead courts to engage in "hypertechnical parsing of a possible 'fact' from its plain context of 'opinion,'" undermining "the objective of the entire exercise, which is to assure that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved."[133] *Moldea I* could have triggered an avalanche of litigation over bad reviews, which in turn might have produced the chilling effect of forcing reviewers to give only praise or hyperbolic criticism.[134]

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by clarifying the U.S. Supreme Court case of *Milkovich*, *Moldea* supported the Colorado Supreme Court's conclusion that "the factors identified in Burns remain applicable under Milkovich." *Living Will Ctr.*, 879 P.2d at 10 (citing *Moldea II*, *supra* note 11, at 310).

Other state courts have used *Moldea*'s contextual approach as well. *See, e.g.*, Garvelink v. Detroit News, 522 N.W.2d 883, 887 (Mich. Ct. App. 1994) (In light of *Moldea*, "the appearance of the column on the editorial page, where a reader expects to find the opinions and biases of the writer, is important and may be considered.").

131. *Quoted in* Lane v. Random House, 23 Media L. Rep. (BNA) 1385, 1390 (D.D.C. 1995).

132. Immuno A.-G. v. Moor-Jankowski, 567 N.E.2d 1270, 1281 (N.Y. 1991) (affirming, in light of *Milkovich*, decision holding letter to the editor a nonactionable statement of opinion), *cert. denied*, 500 U.S. 954 (1991).

133. *Id.* at 1282.

134. Under *Moldea I*'s interpretation of *Milkovich*, opinions that are so "loose, figurative, or hyperbolic" as to fall clearly in the category of "parody and other imaginative commentary" are protected as unverifiable. *Moldea I*, *supra* note 12, at 1143 (quoting *Milkovich*, 497 U.S. at 21). Thus, *Moldea I* would have given total protection to outrageous commentary, such as *Hustler* magazine's depiction of Jerry Falwell in an Oedipean outhouse embrace, Hustler Mag. v. Falwell, 485 U.S. 46

Libel law involves conflicting values—freedom of expression and protection of reputation—both of which deserve protection. But when the law reflects "over-concern"[135] for the reputations of people who have voluntarily jumped into the fray of public debate,[136] the price is a stifling of free expression. This is especially true when courts are called upon to judge not the truth of facts but the merit of opinions.

The free interaction of viewpoints is fundamental to the values served by the First Amendment: providing valuable information to others and the self-fulfillment of the person expressing the opinion.[137] Disregarding context in the determination of what constitutes an actionable connotation of provable fact would have tilted this balance too far away from freedom of speech by subjecting expressions of opinion to the same standards as factual assertions. Such a development would have given encouragement to those officials, corporations, and public figures who are not content to entrust their ideas to the competition of the marketplace of ideas[138] but are asking the courts to punish people who express contrary views. Instead, the final opinion in *Moldea v. New York Times Co.* will ensure that shoppers in the marketplace of ideas and the marketplace of goods and services can benefit from the fact that nothing is shielded from the healthy scrutiny of dauntless critical opinion.

(1988), but not to serious evaluations of the merit of literary work.

135. Martin Garbus, *Thumper Rabbit to Replace Siskel and Ebert*, NEWSDAY, Mar. 10, 1994, at 117.

136. "Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments." Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

137. *See generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

138. Another point of view, however, is that in the marketplace of ideas, like the economic free market, some people have more power than others. Dan Moldea argues that the final decision in his case protects not freedom of expression but the power of the big mainstream media (who may be linked, by advertising and in other ways, to other powerful institutions like the National Football League) to suppress controversial views. Carlin Romano, president of the National Book Critics Circle, argues that "it may be Moldea who's on the right side of freedom of expression here. His argument—that he and authors like him have little chance to respond to book reviews in major publications—is well taken." Streitfeld, *supra* note 18, at C1.