

Affirming the Value of Criticism

BY LAWRENCE SAVELL

IT IS SAID that "everyone's a critic." If so, then everyone should thank the D.C. Circuit Court of Appeals.

In May, the court issued a ruling in *Moldea v. New York Times Co.* (retracting its own opinion of three months before) which should be applauded as a reasoned and appropriate recognition of the value of criticism, on a variety of levels.

Moldea is a libel action by investigative journalist, Dan E. Moldea, against the publisher of a newspaper that printed a largely-unfavorable review of his book on organized crime's alleged involvement in professional football. Mr. Moldea claimed that the review's assertion that his book contained "too much sloppy journalism" (despite the inherent imprecision, vagueness and subjectivity of that phrase), and its citation of examples of the work's alleged journalistic shortcomings, were personally defamatory.

The Times Co. moved for summary judgment, which the district court granted. Mr. Moldea appealed. On Feb. 18, by a 2-1 vote, and over a strong dissent by Chief Judge Abner Mikva, the Court of Appeals reversed, ruling the district court erred in dismissing the suit at that stage of the litigation.

Without expressing any opinion on the ultimate merits of the claim, the panel concluded that the review had attacked Mr. Moldea's "competence as a practitioner of his chosen profession, a matter archetypically addressed by the law of defamation." Although conceding that some of the review's characterizations were "irrefutably true and thus not actionable," it ruled that the accuracy of other statements was sufficiently open to dispute that it could not hold as a matter of law that no reasonable juror could find them to be false. Significantly, the court said that its analysis was not altered by the fact that the challenged statements appeared in a book review rather than in a "hard" news article. Indeed, the court suggested that the injury to the plaintiff's professional reputation was, if anything, greater because the statements had appeared in a forum (the Sunday Book Review section) to which readers turned for evaluations of books.

This troubling decision, undermining constitutional protections historically afforded literary criticism, understandably elicited a strong reaction across all segments of the publishing industry. The Times Co. filed a petition for rehearing (with a suggestion for rehearing en banc). Amicus briefs in support of that petition were submitted, including, significantly, one on behalf of many in the author and book publisher communities — the very individuals and entities whose works are the subject of literary criticism.

On May 3, the same three-judge panel of the Court of Appeals, in a highly unusual step (and without hearing new oral argument), issued another opinion "amend[ing]" its prior ruling. The court, now speaking unanimously, openly characterized its earlier decision as a "mistake of judgment" which "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." It acknowledged that "[t]here is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." Balancing the equities, while recognizing that "a bad review necessarily has the effect of injuring an author's reputation to some extent — sometimes to a devastat-

ing extent," it emphasized that critics "must be given the constitutional 'breathing space' appropriate to the genre."

The court prudently stopped short of per se exemption from defamation for book reviews. Nevertheless, it acknowledged it had originally applied an inappropriate standard by which to judge whether a review was actionable. The court ruled that the proper criterion was one that "would make commentary actionable only when the interpretations are unsupportable by reference to the written work." Applying such a "supportable interpretation" standard, the court affirmed the district court's grant of summary judgment in favor of the Times Co.

ON ONE LEVEL, the panel's May 3 opinion stands as an appropriate recognition of the value of literary criticism, and of the broader latitude that must be granted statements made in that particular and narrow context because of the importance of such speech among the "marketplace of ideas." But it also serves to highlight the value of the analogous element of respectful criticism and comment inherent in the appellate process itself, and the open-mindedness of courts like the D.C. Circuit to consider reasoning advanced even after they have rendered a decision.

In essence, virtually all appeals reflect the appellant's criticism of the justification for an adverse ruling. Such commentary plays a necessary and important role in the interpretation and evolution of the law. Justice Felix Frankfurter, in his concurrence in *Dennis v. United States* (341 U.S. 494, 549 (1951)) wrote that "[c]riticism is the spur to reform . . ." In his dissent in *Re Sawyer* (360 U.S. 622, 669 (1959)), he further advised that "[c]ertainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." Oliver Wendell Holmes concurred with that opinion, writing earlier in the *Harvard Law Review*: "I trust that no one will understand me to be speaking with disrespect of the law, because I criticize it so freely. I venerate the law But one may criticize even what one reveres." Just as authors and publishers depend on literary criticism to stimulate interest and discussion among readers, our judicial system depends on the insight and perspective presented in appellate briefing and argument to elucidate issues and highlight potential ramifications.

It is heartening to parties and counsel that contemplate lengthy and costly resort to the appellate process to be reminded that well-reasoned arguments and communication of the likely implications of a rendered decision will be carefully considered. Particularly in an area as murky as libel law, the knowledge that courts are wrestling with the same knotty questions as the litigants, and that the courthouse door remains open to additional reflection and review, cannot but increase faith in our system of justice.

For both writers and lawyers, the courageous and thoughtful second opinion of the D.C. Circuit panel in *Moldea* justifiably affirms that, whether in the context of a book review or an appellate brief, respectful criticism presented in the form of reasoned and supportable argument serves a strong societal purpose.

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