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## Considering the Libel Trial of Émile Zola in Light of Contemporary Defamation Doctrine

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## CONSIDERING THE LIBEL TRIAL OF ÉMILE ZOLA IN LIGHT OF CONTEMPORARY DEFAMATION DOCTRINE

*Peter Zablotsky\**

Recently, a conference presented by Touro College Jacob D. Fuchsberg Law Center, entitled “Persecution Through Prosecution: Alfred Dreyfus, Leo Frank and The Infernal Machine,”<sup>1</sup> provided the occasion to re-examine the libel trial of Émile Zola. One of the most interesting aspects of the trial, from the perspective of modern tort law, is the extent to which the legal issues that framed the Zola trial are similar to—even identical to—the issues that frame modern defamation actions. This article highlights some of those similarities.

### I. BACKGROUND: THE LIBEL TRIALS OF ÉMILE ZOLA

Alfred Dreyfus was a late nineteenth-century French army officer who was falsely accused of treason.<sup>2</sup> Émile Zola was a noted French writer and social activist of the day.<sup>3</sup> The events that would forever link them in history began in 1894, when Dreyfus was charged with selling secrets to a German military attaché.<sup>4</sup> There was no credible evidence against Dreyfus.<sup>5</sup> The proffered evidence included the supposed similarity of his handwriting to a document found in a wastebasket and documents forged by the real traitor.<sup>6</sup>

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<sup>1</sup> Paris, France (July 5-7, 2011).

<sup>2</sup> Steven Lubet, *Why the Dreyfus Affair Does and Doesn't Matter*, 13 GREEN BAG 2d 329, 329 (2010) (reviewing LOUIS BEGLEY, *WHY THE DREYFUS AFFAIR MATTERS* (Yale Univ. Press 2009)).

<sup>3</sup> See Donald E. Wilkes, Jr., “*J'Accuse ...!*” *Émile Zola, Alfred Dreyfus, and the Greatest Newspaper Article in History*, FLAGPOLE MAG., Feb. 11, 1998, at 12, available at [http://www.law.uga.edu/dwilkes\\_more/his9\\_jaccuse.html](http://www.law.uga.edu/dwilkes_more/his9_jaccuse.html) (recounting the famous article written by Émile Zola entitled “*J'Accuse*” and its impact on society and law).

<sup>4</sup> Lubet, *supra* note 2.

<sup>5</sup> *Id.* (describing the evidence as “appallingly flimsy”).

<sup>6</sup> *Id.* at 329-30.

Nevertheless, due to anti-Semitism then present in the French army and other elements of French society, Dreyfus was twice convicted by military tribunals.<sup>7</sup>

After Alfred Dreyfus was convicted and sent to prison, his older brother, Mathieu Dreyfus, began a campaign on Alfred's behalf.<sup>8</sup> During the course of this campaign Mathieu enlisted the support of notable figures such as Émile Zola and Georges Clemenceau.<sup>9</sup>

Also during this period, Lieutenant Colonel George Picquart was put in charge of the Statistics Section (the French Military Intelligence Service).<sup>10</sup> He re-investigated the case against Dreyfus and discovered evidence that unequivocally established Dreyfus's innocence and implicated another officer—Major Ferdinand Walsin Esterhazy.<sup>11</sup> Picquart's superiors responded by transferring Picquart and replacing him with Major Joseph Henry.<sup>12</sup> Henry promptly "creat[ed] a series of forged documents . . . [that purported] to reinforce the case against Dreyfus" and implicate Picquart in a cover-up.<sup>13</sup> Eventually, copies of these forged documents came to the attention of Mathieu Dreyfus, who made them public and forced the military to investigate Esterhazy.<sup>14</sup> Esterhazy, however, was cleared by a sham court martial, and Picquart was imprisoned.<sup>15</sup>

It was in response to these events that Émile Zola published his famous essay *J'Accuse!*<sup>16</sup> It was published in the French newspaper *L'Aurore* (The Dawn) as an open letter to French President Felix Faure and has been called "the greatest newspaper article of all time."<sup>17</sup>

*J'Accuse!* demolished the case against Dreyfus, condemned the persecution of Picquart, revealed the creation of the documents forged by Henry, and named Esterhazy as the real traitor.<sup>18</sup> *J'Accuse!* sold between 200,000 and 300,000 "copies within days of publica-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 332.

<sup>9</sup> Lubet, *supra* note 2, at 332.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 333.

<sup>13</sup> *Id.*

<sup>14</sup> Lubet, *supra* note 2, at 333.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Wilkes, *supra* note 3.

<sup>18</sup> Lubet, *supra* note 2, at 333.

tion, building public support for Dreyfus among many of France's intellectual and political leaders."<sup>19</sup> However, the "Minister of War, General Jean-Baptiste Billot summarily rejected the claims of *J'Accuse* and brought criminal libel charges against Zola for defaming the military court that had cleared Esterhazy."<sup>20</sup> The case went to trial within six weeks, and Zola was convicted and sentenced to a year in prison.<sup>21</sup>

The libel trial of Émile Zola was marked by several significant irregularities, not the least of which was the effort by the tribunal to divorce the Dreyfus case from the allegedly libelous statements that had absolutely everything to do with the case.<sup>22</sup> This article now turns to highlighting some of those irregularities, using principles of modern defamation law as a frame of reference.

## II. RE-EXAMINING THE ZOLA TRIAL IN LIGHT OF CONTEMPORARY TORT PRINCIPLES GOVERNING DEFAMATION

### A. New York State Defamation Law and the Elements of the *Prima Facie* Case for Libel Against a Public Official

Under modern New York State law, for a public official to re-

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* For a sample of many fine scholarly works presenting and analyzing the facts of the Dreyfus affair and the Zola trials, see, e.g., GÉNÉRAL ANDRÉ BACH, *L'ARMÉE DE DREYFUS: UNE HISTOIRE POLITIQUE DE L'ARMÉE FRANÇAISE DE CHARLES X À "L'AFFAIRE"* (2004); LOUIS BEGLEY, *WHY THE DREYFUS AFFAIR MATTERS* (2009); MICHEL DROUIN, *L'AFFAIRE DREYFUS DE A À Z* (2006); VINCENT DUCLERT, *L'AFFAIRE DREYFUS: QUAND LA JUSTICE ÉCLAIRE LA RÉPUBLIQUE* (2010); ALBERT S. LINDEMANN, *THE JEW ACCUSED: THREE ANTI-SEMITIC AFFAIRS: DREYFUS, BEILIS, FRANK 1894-1915* (1991); Lubet, *supra* note 2; HENRI MITTERAND, *QUE SAIS-JE? ZOLA ET LE NATURALISME* (4th ed. 2012); HENRI MITTERAND, *ZOLA: L'HISTOIRE ET LA FICTION* (P.U.F., 1st ed. 1990); HENRI MITTERAND, *ÉMILE ZOLA: FICTION AND MODERNITY* (Monica Lebron et al. eds., 2000); HENRI MITTERAND, *ZOLA: LA EN MARCHÉ: J'ACCUSE...!: LETTRE AU PRÉSIDENT DE LA RÉPUBLIQUE* (1995); HENRI MITTERAND, *PASSION ÉMILE ZOLA: LES DELIRES DE LA VÉRITÉ* (2002); HENRI MITTERAND, *UNE BIOGRAPHIE DE ZOLA EN TROIS VOLUMES* (1999 – 2002); ALAIN PAGES, *EMILE ZOLA, UN INTELLECTUEL DANS L'AFFAIRE DREYFUS* (1991); ALAIN PAGES, *ÉMILE ZOLA: BILAN CRITIQUE* (1993); PHILIPPE ORIOL, *L'HISTOIRE DE L'AFFAIRE DREYFUS: L'AFFAIRE DU CAPITAINE DREYFUS—1894-1897* (2008).

<sup>22</sup> Wilkes, *supra* note 3 (explaining that the evidence presented at Zola's trial established the military was lying about Esterhazy being the true traitor).

cover damages for libel the plaintiff must demonstrate: (1) the statement was defamatory, *i.e.*, the statement had a tendency to expose the plaintiff to public hatred, contempt, ridicule, or disgrace; (2) the statement referred to the plaintiff; (3) the defendant published the statement; (4) the statement was false; (5) the defendant knew that the statement was false or acted with reckless disregard of the truth; and (6) the statement caused the plaintiff financial harm.<sup>23</sup> “The designation public official ‘applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.’”<sup>24</sup> The case law leaves no doubt that the members of the Council of War—the individuals Zola allegedly defamed—would be considered public officials under New York law.

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<sup>23</sup> See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Curtis Publ’g Co. v. Butts*, 338 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also *Mahoney v. Adirondack Publ’g Co.*, 517 N.E.2d 1365 (N.Y. 1987); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1307 (N.Y. 1977) (citing *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425 (Cal. 1976)).

<sup>24</sup> NEW YORK PATTERN JURY INSTRUCTIONS – Civil 3:23 (3d ed.) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)); see also *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Sweeney v. Prisoners’ Legal Servs.*, 647 N.E.2d 101 (N.Y. 1995) (correction officer); *Roche v. Hearst Corp.*, 421 N.E.2d 844 (N.Y. 1981) (county attorney); *Kerwick v. Orange Cnty. Publ’ns Div. of Ottaway Newspapers, Inc.*, 420 N.E.2d 970 (N.Y. 1981) (tax assessor); *Rinaldi*, 366 N.E.2d 1299 (justice of the Supreme Court of the State of New York); *Schneph v. New York Post Corp.*, 213 N.E.2d 309 (N.Y. 1965) (Chief of the Division of Penalties in the office of the Corporation Counsel of the City of New York); *Scott v. Cooper*, 640 N.Y.S.2d 248 (App. Div. 2d Dep’t 1996) (Chief of Police); *Stuart v. Porcello*, 603 N.Y.S.2d 597 (App. Div. 3d Dep’t 1993) (state trooper who was also president of Police Benevolent Association); *Stanwick v. Meloni*, 551 N.Y.S.2d 106 (App. Div. 4th Dep’t 1990) (superintendent of county jail); *Duane v. Prescott*, 521 N.Y.S.2d 459 (App. Div. 2d Dep’t 1987) (member of the state legislature); *Scacchetti v. Gannett Co.*, 507 N.Y.S.2d 337 (App. Div. 4th Dep’t 1986) (police sergeant); *Dally v. Orange Cnty. Publ’n*, 497 N.Y.S.2d 947 (App. Div. 2d Dep’t 1986) (deputy sheriff); *Dattner v. Pokoik*, 437 N.Y.S.2d 425 (App. Div. 2d Dep’t 1981) (village building inspector); *Malerba v. Newsday, Inc.*, 406 N.Y.S.2d 552 (App. Div. 2d Dep’t 1978) (policeman); *Orr v. Lynch*, 401 N.Y.S.2d 897 (App. Div. 3d Dep’t 1978), *aff’d*, 383 N.E.2d 562 (N.Y. 1978) (policeman); *Silbowitz v. Lepper*, 299 N.Y.S.2d 564 (App. Div. 1st Dep’t 1969) (supervisor and senior administrator of a post office station); *Kruteck v. Schimmel*, 278 N.Y.S.2d 25 (App. Div. 2d Dep’t 1967) (the auditor for a waterworks); *Cabin v. Cmty. Newspapers, Inc.*, 275 N.Y.S.2d 396 (App. Div. 2d Dep’t 1966) (member of a school board).

**B. New York State Defamation Law and the Issue of Evaluating Allegedly Libelous Statements in Context**

Perhaps the most significant irregularity of the trial of Zola was its focus on only a few sentences in *J'Accuse!*, to the exclusion of the rest of the document.<sup>25</sup> Indeed, at the outset of the trial, “Attorney-General Van Cassel took the floor to make what he described as ‘a statement of the case.’”<sup>26</sup> He stated in relevant part:

The minister of war has taken notice, in his complaint, of the imputation cast by M. Émile Zola upon the first council of war of having acquitted Major Esterhazy in obedience to orders. The summons could not go beyond the terms of the complaint. It is natural that every complainant should circumscribe the grievances for which he demands reparation. Otherwise it would be too easy for the accused to turn the discussion from its proper course, and create a diversion for the audience, which is the great art in the assize court. A single question is submitted to you, gentlemen of the jury: *Did the first council of war act in obedience to orders in acquitting Major Esterhazy?* The other imputation contained in M. Zola’s article the minister of war holds in contempt. Nevertheless the accused assert the right to discuss all the allegations contained in the article. Their avowed plan is to make you judges of the legality of the sentence passed upon Dreyfus. We shall not permit it. I warn them that any attempt on their part to provoke a sort of indirect revision of the Dreyfus case would be illegal and futile.<sup>27</sup>

As this statement establishes, the tribunal which Zola appeared before focused the libel case on a few sentences taken out of the total context of *J'Accuse!* Limiting the perspective to that of contemporary libel law in New York State and focusing on the allegedly libelous words raise the issue of whether, in seeking to establish the

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<sup>25</sup> Wilkes, *supra* note 3.

<sup>26</sup> Benj. R. Tucker, *The Trial of Émile Zola* at 17 (1898), available at [http://www.rosingsdigitalpublications.com/trial\\_of\\_emile\\_zola\\_the.pdf](http://www.rosingsdigitalpublications.com/trial_of_emile_zola_the.pdf).

<sup>27</sup> *Id.* at 17-18.

first element of the *prima facie* case identified in Section B above, an allegedly libelous statement can be divorced from its overall context. On this point, modern New York law is clear: the words are to be construed in the context of the article as a whole.<sup>28</sup>

As compared to and inspired by the Zola libel trial, three of these cases are particularly instructive: *Armstrong v. Simon & Schuster, Inc.*,<sup>29</sup> *Samuels v. Berger*,<sup>30</sup> and *November v. Time, Inc.*<sup>31</sup>

### 1. *Armstrong v. Simon & Schuster, Inc.*

This case was a libel action brought by a defense attorney, Michael F. Armstrong, who sought damages for an allegedly defamatory paragraph about him that appeared in the book, *Den of Thieves*.<sup>32</sup> *Den of Thieves* is a 450-page book about the Wall Street insider trading scandals of the 1980s and 1990s.<sup>33</sup> The book was written by defendant James B. Stewart, edited by defendant Laurie P. Cohen, and published in 1991 by defendant Simon & Schuster.<sup>34</sup>

The paragraph in question dealt with the following events, as described by the New York Court of Appeals:

[Armstrong] primarily represented Michael Milken's brother, Lowell, an attorney who worked for Drexel on Michael's partnership ventures and tax issues. In their corporate dealings, the Milkens were represented by a small in-house firm which included Craig M. Cogut, who mainly worked on partnership issues for Lowell. In 1986, Boesky pleaded guilty to a securities felony and agreed to cooperate with Federal prosecutors in the investigation of the Wall Street community.

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<sup>28</sup> See, e.g., *Sydney v. MacFadden Newspaper Pub. Corp.*, 151 N.E. 209 (N.Y. 1926); *accord Mahoney*, 517 N.E.2d 1365; *WDM Planning, Inc. v. United Credit Corp.*, 389 N.E.2d 1099 (N.Y. 1979); *James v. Gannett Co.*, 353 N.E.2d 834 (N.Y. 1976); *November v. Time, Inc.*, 194 N.E.2d 126 (N.Y. 1963); *Ava v. NYP Holdings, Inc.*, 885 N.Y.S.2d 247 (App. Div. 1st Dep't 2009); *Samuels v. Berger*, 595 N.Y.S.2d 231 (App. Div. 2d Dep't 1993); *Park v. Capital Cities Commc'ns, Inc.*, 585 N.Y.S.2d 902 (App. Div. 4th Dep't 1992); see also *Fraser v. Park Newspapers of St. Lawrence, Inc.*, 668 N.Y.S.2d 284 (App. Div. 3d Dep't 1998); *Landsman v. Tonawanda Publ'g Corp.*, 588 N.Y.S.2d 480 (App. Div. 4th Dep't 1992).

<sup>29</sup> 649 N.E.2d 825 (N.Y. 1995).

<sup>30</sup> 595 N.Y.S.2d 231 (App. Div. 2d Dep't 1993).

<sup>31</sup> 194 N.E.2d 126 (N.Y. 1963).

<sup>32</sup> *Armstrong*, 649 N.E.2d at 826; JAMES B. STEWART, *DEN OF THIEVES* (1991).

<sup>33</sup> *Armstrong*, 649 N.E.2d at 826.

<sup>34</sup> *Id.*

Lowell Milken and other employees were subpoenaed to appear before both a Federal Grand Jury and the Securities and Exchange Commission. Cogut then hired Armstrong to represent him pursuant to a retainer letter which stated that should a conflict of interest arise, Cogut would obtain other counsel as Armstrong would continue to represent Lowell.<sup>35</sup>

In the course of representing Cogut, “Armstrong drew up an affidavit for Cogut and submitted it to him.”<sup>36</sup> The affidavit stated that:

“Mr. Cogut recalls being present when Lowell Milken spoke to the accountants,” that “Craig Cogut believes that he was present during all of the ‘substantive discussion,’ ” that “Cogut’s careful qualifications of his two and a half year old recollections should not be used to discount his testimony,” and that the “most significant thing about Craig Cogut is the fact that he was there.”<sup>37</sup>

In *Den of Thieves*, these events were described, on pages 396-97, as follows:

After news of the Boesky agreement, Cogut had agreed to be represented by New York criminal lawyer Michael Armstrong, Lowell’s lawyer. But like Maultsch and Dahl, Cogut had become uneasy about his attorney’s possible conflict of interest [the differing needs of his attorney’s several clients]. Lowell’s interests were too close to Mike Milken’s. Cogut’s concern had increased when, earlier in 1988, Armstrong came to him with an affidavit he had prepared for Cogut to sign. Its intent had been to exonerate Lowell, based on assertions of fact by Cogut. Cogut read it over and had only one problem: the facts weren’t true. He angrily refused to sign, and began looking for new lawyers, eventually hiring Los Angeles lawyers Tom

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<sup>35</sup> *Id.* at 826-27.

<sup>36</sup> *Id.* at 827.

<sup>37</sup> *Id.* (quoting Cogut’s Affidavit, *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825 (N.Y. 1995)).



Pollack and Ted Miller. [In September 1988 Cogut submitted an affidavit.]<sup>38</sup>

This paragraph was the focus of the case.<sup>39</sup> Specifically, Armstrong alleged that the quoted section was “materially false and defamatory in that it depict[ed] him as ‘attempting unsuccessfully to procure the perjured oath of his client, Craig M. Cogut, by preparing for Cogut’s signature a false affidavit exonerating another client . . . and that Cogut ‘angrily refused to sign’ because ‘the facts weren’t true.’”<sup>40</sup> In analyzing whether the contested statements were reasonably susceptible to a defamatory meaning, the Court of Appeals held that, “[i]n making this determination, the court must give the disputed language a fair reading *in the context of the publication as a whole*.”<sup>41</sup> In applying this principle to the facts before it, the Court of Appeals acknowledged the defendants’ argument “that the verified amended complaint—which incorporate[d] . . . information contained in the 10 appended exhibits—itsself establishe[d] that the paragraph [in question was] at least substantially true.”<sup>42</sup> The defendants further argued that it was:

[U]nquestionably true from the face of the pleading . . . that Armstrong had a possible conflict of interest when, as Lowell Milken’s attorney, he undertook representation of Cogut; . . . prepared an affidavit for . . . Cogut that was intended to exculpate Lowell Milken; and that after reading the affidavit Cogut indeed retained his own counsel.<sup>43</sup>

The court then concluded:

At least one significant statement, however, does not at this juncture fit defendants’ characterization. Plaintiff insists that he never prepared a false affidavit for Cogut’s signature and that the sentence, “Cogut read [the affidavit] over and had only one problem: the facts weren’t true,” is false. Armstrong

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<sup>38</sup> *Armstrong*, 649 N.E.2d at 827-28 (alteration in original) (quoting STEWART, *supra* note 32).

<sup>39</sup> *Id.* at 828.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 829 (emphasis added) (citing *James*, 353 N.E.2d at 837-38).

<sup>42</sup> *Id.*

<sup>43</sup> *Armstrong*, 649 N.E.2d at 829.

specifically pleaded in the verified amended complaint that the final affidavit that Cogut signed “set forth the same essential facts in exoneration of Lowell Milken as were set forth in every prior draft affidavit that had been presented to Cogut by Armstrong for Cogut’s comments and revisions.” Viewing the statements at issue most favorably to plaintiff, as we must on a dismissal motion, we conclude that this sentence, in the context in which it appears, is susceptible of a defamatory meaning: that Armstrong deliberately presented a false affidavit for one client (Cogut) to sign in order to exculpate another client (Lowell), resulting in Cogut’s angry discharge of Armstrong and the retention of new counsel. Thus, the complaint must go forward.<sup>44</sup>

Thus, while the court ultimately focused not only on part of one paragraph, but only on one sentence, it did so only after placing the sentence in the context of the entire series of relevant events.

## 2. *Samuels v. Berger*

This case was a defamation action brought by a marine contracting company and its president, against the Director of the New York State Department of Environmental Conservation’s (“DEC”) Region I, which includes both Nassau and Suffolk Counties.<sup>45</sup> “The plaintiffs alleged . . . that in a 1987 conversation between the defendant and a reporter for New York Newsday newspaper, the defendant stated, ‘Samuels feels he can do whatever he pleases . . . he violates the law every day.’”<sup>46</sup> This statement was published in a news article entitled DEC Gets Chance to Reply to Critics of LI Operation.<sup>47</sup>

The court engaged in a lengthy factual analysis, focusing almost exclusively on the context in which the statement was made:

The statement in issue, i.e., “Samuels feels he can do whatever he pleases . . . he violates the law every day,” was contained in an article which generally discussed the ongoing public controversy regarding DEC

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<sup>44</sup> *Id.* (alteration in original).

<sup>45</sup> *Samuels*, 595 N.Y.S.2d at 232.

<sup>46</sup> *Id.* (second alteration in original).

<sup>47</sup> *Id.*

Region I's practices, policies, and regulations concerning tidal wetlands and the shorelines on Long Island. The article discussed the various criticisms and accusations that have been leveled against the DEC's regional office in Stony Brook, and then stated that DEC officials would have the opportunity to respond to these criticisms at an upcoming meeting. The statements complained of were immediately followed by Samuels' response, "We have been fined eight times since 1977. And those were 'stipulations' because the owners—Huntington Town, Southampton Town, Suffolk County—wanted to pay the fine and keep the project going . . . . The average fine was \$250. It's regulation by extortion."<sup>48</sup>

The court then concluded, "In the context in which the alleged defamatory statement was made, an average reader would understand it to be part of the criticisms, accusations, and counter-accusations which had become part of the public controversy surrounding Region I's enforcement of DEC regulations."<sup>49</sup>

The conclusion of the court would seem particularly applicable to *J'Accuse!* Indeed, saying of Zola's article that "[i]n the context in which the alleged[ly] defamatory statement was made, an average reader would understand it to be part of the criticisms, accusations, and counter-accusations which had become part of the public controversy" could not be more apt.<sup>50</sup>

### 3. *November v. Time, Inc.*

This case was a libel action brought by an attorney named November against Time, Inc., as the publisher of "Sports Illu-

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<sup>48</sup> *Id.* at 232-33 (alterations in original).

<sup>49</sup> *Id.* at 233. The court recited the legal standard to be used by stating:

The statement complained of will be "read against the background of its issuance" with respect to "the circumstances of its publication" and "[t]he construction which it behooves a court of justice to put on a publication which is alleged to be libelious [sic] is to be derived as well from the expressions used as from the whole scope and apparent object of the writer."

*Samuels*, 595 N.Y.S.2d at 233 (alteration in original) (citations omitted) (quoting *James*, 353 N.E.2d at 838).

<sup>50</sup> *Id.* at 233.

strated.”<sup>51</sup> The suit was based on the February 20, 1961, issue of the magazine, which “carried an article written by defendant Boyle entitled ‘Hail, Hail, the Gang’s All Here.’”<sup>52</sup> The plaintiff asserted that “a particular paragraph . . . directly and falsely impugned [his] professional ability and standing,” and accused him of “deliberately giving erroneous legal advice to a client named D’Amato ‘in order that plaintiff would be in a position to replace D’Amato as adviser and manager of Floyd Paterson, the Heavyweight Boxing Champion of the World.’”<sup>53</sup>

The paragraph at issue read, in part:

D’Amato also got into difficulty when he failed to answer a subpoena issued by State Attorney General Louis Lefkowitz. D’Amato says that November, who serves as attorney for both D’Amato and Patterson, told him to ignore it, that the hearing had been postponed. D’Amato did as he was instructed, but he was arrested, hauled into court, fined \$250 and given a suspended sentence of 30 days in the workhouse. The case is now on appeal, but D’Amato was to see Lefkowitz Tuesday and there were reports “something might happen” to him.<sup>54</sup>

The Appellate Division dismissed the complaint and held: “The alleged libelous matter, read in the context of the entire article, cannot be fairly construed as imputing incompetency or unethical conduct by plaintiff, an attorney, in representing his client.”<sup>55</sup> A divided Court of Appeals reversed, but applied exactly the same principle regarding evaluating statements in context.<sup>56</sup> Specifically, the majority stated:

If that were the whole of it there would probably be no defamation since, as we will assume, the rule still holds that language charging a professional man with ignorance or mistake on a single occasion only and not

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<sup>51</sup> *November*, 194 N.E.2d at 127.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 128 (internal quotation marks omitted).

<sup>55</sup> *Id.* at 127 (quoting *November v. Time, Inc.*, 17 A.D.2d 619 (N.Y. App. Div. 1st Dep’t 1962), *rev’d*, 13 N.Y.2d 175 (1963)).

<sup>56</sup> *November*, 194 N.E.2d at 127, 129.

accusing him of general ignorance or lack of skill cannot be considered defamatory on its face . . . . But there is a great deal more in addition to that quoted paragraph and a reading of the whole of it may well have left a sophisticated and sports-conscious reader of the magazine with the impression that plaintiff had indulged in highly unprofessional conduct.

. . . .

Defendant argues the case as if the few sentences quoted in this opinion were the whole basis of the plaintiff's complaint. We do not so understand plaintiff's theory. He points out that, taken as a whole, the picture presented by the magazine article was or the jury might say it was of a group of ambitious people each using his wits to grab for money and power and one of them, plaintiff, doing it by methods inconsistent with his professional obligations.<sup>57</sup>

**C. Other Relevant Elements of the Contemporary Prima Facie Case for Defamation as Applied to *Dreyfus: Rinaldi v. Holt, Rinehart & Winston, Inc.***<sup>58</sup>

In this case, a justice of the Supreme Court of the State of New York, Second Judicial District, alleged that "he was libeled in the book, 'Cruel and Unusual Justice,' authored by defendant Jack Newfield and published by defendant Holt, Rinehart & Winston, Inc."<sup>59</sup> Newfield was a well-known investigative journalist who wrote five articles on judicial conduct that were published in *The Village Voice*, and an article, *The Ten Worst Judges in New York*, that was published in *New York Magazine*.<sup>60</sup> These articles then formed the basis of the above-mentioned book.<sup>61</sup>

The book contained several "extremely grave accusations," which the court described as follows:

In a chapter entitled, "The Ten Worst Judges in New

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<sup>57</sup> *Id.* at 127-29 (citations omitted).

<sup>58</sup> 366 N.E.2d 1299 (N.Y. 1977).

<sup>59</sup> *Id.* at 1301.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1302.

York,” Newfield wrote that plaintiff “is very tough on long-haired attorneys and black defendants, especially on questions of bail, probation, and sentencing. But his judicial temper softens remarkably before heroin dealers and organized crime figures.” Newfield set forth three illustrative cases. . . .

In a second chapter, “Justice Gets a Fix,” Newfield again reported plaintiff’s dispositions in *People v. Burton* and *People v. Glover*. With reference to his release of Burton without bail, it was stated, “This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.” Newfield wrote that “what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit.” It was reported that, in the Burton case, plaintiff “abused” the officer who had reported the bribery attempt.

Newfield stated that he had spent several weeks carefully analyzing records of plaintiff’s previous dispositions. Newfield detected a “disturbing pattern.” “Blacks and Puerto Ricans got high bail and long sentences. Defendants connected with organized crime families were treated permissively motions granted, misdemeanor pleas accepted, suspended sentences given, fines imposed instead of jail terms. Occasionally large-scale heroin dealers would get inexplicably lenient sentences, even conditional discharges, for Class A felonies. And certain Brooklyn lawyers would almost always win their cases against Rinaldi. My instincts smelled a rat. I decided to begin a personal crusade to alert the judicial, legal, and political establishments to this incompetent and probably corrupt member of the judiciary.”<sup>62</sup>

In commenting on the nature of the book, the court observed

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<sup>62</sup> *Id.* at 1302-03.

that the book was not intended to be simply “an objective account of plaintiff’s judicial dispositions,” but rather, that “[t]he book took definite editorial positions on significant issues and advocated reforms and corrective action,” and that “[i]t was a book written from a subjective, rather obvious, point of view and did not purport to be anything else.”<sup>63</sup> As such, this case may be the most analogous to Zola’s. While *J’Accuse!* is certainly much more, it too can, on one level, be described as a piece of investigative journalism about performance by judicial officers who advocate—from a particular point of view—corrective action on a significant issue.

In dismissing the libel action brought by the plaintiff—the court, not surprisingly, again analyzed the statements in context.<sup>64</sup> Then, the court engaged in a more expansive analysis, and also focused on opinion, falsity and malice.<sup>65</sup> Regarding the relevance of opinion, the court held that “[t]he expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office,” cannot be subject to a defamation action.<sup>66</sup> The court continued, however, and stated:

Newfield’s assertions that plaintiff is “probably corrupt” and that his sentences of certain defendants were suspiciously lenient, with their strong undertones of conspiracy and illegality, rest on a different footing than his opinions as to plaintiff’s judicial performance. These words were not used merely in a “loose, figurative sense” to demonstrate Newfield’s strong disagreement with some of plaintiff’s dispositions. The ordinary and average reader would likely understand the use of these words, in the context of the entire article, as meaning that plaintiff had committed illegal and unethical actions. Accusations of criminal activity, even in the form of opinion, are not constitutionally protected.<sup>67</sup>

Regarding those aspects of the piece that allegedly contained false charges regarding performance of judicial duties, the court held that a

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<sup>63</sup> *Rinaldi*, 366 N.E.2d at 1308.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1308-09.

<sup>66</sup> *Id.* at 1306.

<sup>67</sup> *Id.* at 1307 (citation omitted).

plaintiff must establish both falsity and malice.<sup>68</sup> With respect to these elements of the prima facie case for libel, the court concluded:

Hence, there are no evidentiary facts which would support plaintiff's claim that Newfield's accusations are false. Further, there is no triable issue as to actual malice. Newfield did undertake a certain amount of investigation and there is no proof that he published his allegation of probable corruption knowing that allegation to be false or in reckless disregard of its truth.<sup>69</sup>

If the case by Justice Rinaldi could not be sustained under contemporary defamation doctrine—because there was no proof of falsity or malice—there is no doubt that the case against Zola could not be sustained.

### III. CONCLUSION

Applying contemporary tort law to *J'Accuse!* may amount to nothing more than a simple academic exercise. Yet, the exercise may be relevant when defamation is claimed by public officials during the course of highly charged debates on contemporary social and political issues.

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<sup>68</sup> *Rinaldi*, 366 N.E.2d at 1307.

<sup>69</sup> *Id.*