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# ***NEW YORK TIMES CO. V. SULLIVAN: NO JOKING MATTER—50 YEARS OF PROTECTING HUMOR, SATIRE AND JOKERS***

BY ROY S. GUTTERMAN\*

## INTRODUCTION

Humor is necessary in a democracy for reasons other than serving as a device for spreading truth and attacking fools and knaves. In a free society, every few years, the populace engages in a wrenching struggle for power. Humor lets us take the issues seriously without taking ourselves too seriously. If we are able to laugh at *ourselves* as we lunge for the jugular, the process loses some of its malice.— Gerald C. Gardner<sup>1</sup>

From colonial-era editorial cartoons to satirical online news websites to the Washington “Gridiron Club Dinner,” comedy, satire, and political humor have occupied a hallowed place in the American political system since before the country’s birth.<sup>2</sup> Even one of our most patriotic songs, “Yankee Doodle Dandy,” had its origins in mockery,<sup>3</sup> and iconic editorial cartoons were symbolic of the American Revolution’s spirit.<sup>4</sup>

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1. GERALD GARDNER, *THE MOCKING OF THE PRESIDENT 12* (Wayne State University Press 1988).

2. *See* *Hustler Magazine v. Falwell*, 485 U.S. 46, 54–55 (1988).

3. *See The Music of Early America: Yankee Doodle*, ARCHIVING EARLY AMERICA, <http://www.earlyamerica.com/music/yankee-doodle.htm> (last visited Nov. 1, 2013).

4. *See generally* PETER C. MARZIO, *THE MEN AND MACHINES OF AMERICAN JOURNALISM: A PICTORIAL ESSAY FROM THE HENRY R. LUCE HALL OF NEWS REPORTING* (Smithsonian 1973).

Today, our elite political leaders and policy makers are probably mocked more than they are revered.

Beginning with the republic's birth and the ratification of the Constitution, the First Amendment has served as a protection from government censorship.<sup>5</sup> In 1964, the landmark *New York Times Co. v. Sullivan*<sup>6</sup> opinion firmly established the role of the First Amendment as an insulator from tort liability, particularly with regard to criticizing the government.

*Sullivan* emerged from the most serious of circumstances: the civil rights movement and a libel suit that could have crippled *The New York Times*.<sup>7</sup> To balance the playing field in libel cases with public officials, Justice William Brennan imported one of the most vexing legal standards in the law: actual malice (which is publication with either known falsity or reckless disregard for the truth).<sup>8</sup>

In the decades following *Sullivan*, courts at all levels have wrestled with what actual malice means and which plaintiffs will satisfy the sometimes abstract legal standard.<sup>9</sup> The first string of post-*Sullivan* cases delved into the "who" of applying the rule; cases, such as *Curtis Publishing Co. v. Butts*<sup>10</sup> and *Gertz v. Robert Welch, Inc.*,<sup>11</sup> extended the application of the actual malice standard to public figures. In other cases, courts found the actual malice standard should be applied to such areas as opinion.<sup>12</sup> With potential plaintiffs finding it more difficult to collect judgments from newspapers or television stations under the new formulation of defamation law, they sought ways around it by invoking invasion of privacy torts and even intentional and negligent infliction of

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5. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

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

7. See *id.*

8. See Ashley Messenger, *The Problem with New York Times Co. v. Sullivan: An Argument for Moving from a "Falsity Model," of Libel Law to a "Speech Act Model,"* 11 FIRST AMEND. L. REV. 172 (2012); see THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 131–33 (Everette E. Dennis & Eli M. Noam eds., 1989).

9. See ERIK L. COLLINS, JAY B. WRIGHT & CHARLES W. PETERSON, PROBLEMS IN LIBEL LITIGATION, DEFAMATION: LIBEL AND SLANDER: READINGS FROM COMMUNICATIONS AND THE LAW 115–16 (Theodore R. Kupferman ed; 1990).

10. 388 U.S. 130 (1967) (decided with *Associated Press v. Walker*).

11. 418 U.S. 323 (1974).

12. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

emotional distress.<sup>13</sup> An intentional infliction of emotional distress judgment in favor of televangelist Jerry Falwell also prompted the Supreme Court to weigh in on the concept of parody and satire through the lens of the First Amendment.<sup>14</sup>

*Hustler Magazine v. Falwell*,<sup>15</sup> another libel case, relied heavily on *Sullivan*, and, at the same time, carved out a large area of protection for a generation of comedians, performers, humorists, and assorted wise guys.<sup>16</sup> With implications in news, opinion, and entertainment, these protections have forged an important contribution to the marketplace of ideas.

This Article examines how the *Sullivan* decision has helped protect satire and extend significant protections under the First Amendment to areas of both humorous commentary and entertainment. Part I presents a picture of the scant legal protections afforded humor and satire before *Sullivan*. Part II examines *Sullivan*, and discusses how this landmark ruling impacted *Hustler v. Falwell*. Part III analyses how *Sullivan*'s principles protect humor, satire, and comedic commentary. Part IV examines how *Sullivan* ultimately led to First Amendment protections for crude and offensive humor, as well as political humor.

### I. SATIRE PRE-*NEW YORK TIMES CO. V. SULLIVAN*

Before *Sullivan*, defamation law was simply another part of the body of state tort laws.<sup>17</sup> Publication of a false, harmful statement about a plaintiff could cause harm, and allow that plaintiff to recover damages.<sup>18</sup>

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13. See *Hustler Magazine v. Falwell*, 485 U.S. 461, 47–48 (1988).

14. *Id.* at 48.

15. 485 U.S. 46 (1988).

16. See *id.* at 51–52.

17. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 771–849 (W. Page Keeton ed., West Publishing Co. 5th ed. 1984).

18. See, e.g., *Kimmerle v. N.Y. Evening Journal, Inc.*, 186 N.E. 217, 218 (N.Y. 1933) (“Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.”).

With defenses of truth or qualified privileges, scholars consider defamation law a treacherous area.<sup>19</sup>

In the decades before *Sullivan*, humor, parody, and satire straddled a dangerous line.<sup>20</sup> Philip Wittenberg, in *Dangerous Words*, took 18th century British jurist Lord Mansfield's intonation of the hazards of publishing a step further: "If a newspaper publishes news as fiction or fiction as news, it does so at its peril for the courts have said that reputations may not be traduced with impunity, whether in the literary forms of the work of fiction or in jest."<sup>21</sup> Another pre-*Sullivan* libel guide summarized: "Words written in jest may be read as libelous. Satire, irony, figure of speech, and innuendo may be defamatory, though not so intended."<sup>22</sup> While satire, particularly cartoons or comics, could be potentially hazardous from a libel standpoint, they might also be vested in protection under fair comment or commentary privileges.<sup>23</sup>

In the 1930s, Al Jolson, one of the most famous American performers and comedians of the time, got in hot water because of an off-the-cuff comment on a radio show criticizing a hotel.<sup>24</sup> The off-script comment (broadcast live on the air in June 1935) came through a sponsored entertainment radio show with a segment in which Jolson interviewed a guest.<sup>25</sup> Calling plaintiff's hotel "rotten" was deemed

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19. Hence, the *Times v. Sullivan* constitutional privilege of actual malice. Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise*, 21 S. CAL. INTERDIS. L.J. 95 (2011).

20. See PHILIP WITTENBERG, *DANGEROUS WORDS: A GUIDE TO THE LAW OF LIBEL* 10, 22–24 (Columbia Univ. Press, N.Y. 1947).

21. *Id.* at 22.

22. PAUL P. ASHLEY, *SAY IT SAFELY* 12 (University of Washington Press 1970) (1948). As a sign of the times, Ashley (a member of the Seattle bar) had an extensive entry on how the law of libel applies to new media, including "ad lib radio and television broadcasts . . ." *Id.* at 83.

23. WITTENBERG, *supra* note 20, at 19, 37 ("Mere holding the subject up to banter or mild ridicule would not be enough. Some degree of humor is still permissible and some criticism is still allowed, particularly where the subject concerns the political life of the community. A picture or cartoon may be as much defended as being fair comment as may words.").

24. *Summit Hotel Co. v. Nat'l Broad. Co.*, 8 A.2d 302 (Pa. 1939).

25. *Id.* at 303.

defamatory even though Johnson was a comedian.<sup>26</sup> The court affirmed the defamatory meaning of the comment.<sup>27</sup>

Furthermore, there are a number of cases where the courts still held publishers liable for defaming plaintiffs in purportedly satirical settings. For example, a series of newspaper columns deriding a university professor was deemed libelous by the New York Court of Appeals because the offending material could not be construed as humorous and delved into personal ridicule while portraying him in “a ridiculous light.”<sup>28</sup> This would be a matter for a jury.<sup>29</sup> More succinctly, the court wrote: “The principle is clear that a person shall not be allowed to murder another’s reputation in jest.”<sup>30</sup> The court ruled:

It is likewise claimed by the respondent that these articles were written in jest, and hence that it is not liable to the plaintiff for the injury he has sustained. It is, perhaps, possible that the defendant published the articles in question as a jest yet they do not disclose that, but are a scathing denunciation, ridiculing the plaintiff. If, however, they can be regarded as having been published as a jest, then it should be said that however desirable it may be that the readers of and the writers for the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of reputation or business of another.<sup>31</sup>

Cartoons also proved particularly dangerous. A cartoon in a campaign circular depicting an opponent for a local election as throwing black splotches labeled “Lies” at a rival candidate and mud as “Last

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26. *Id.* at 303–04 (internal quotation marks omitted).

27. *Id.* at 312 (“Where the broadcasting station’s employe [sic] or agent makes the defamatory remark, it is liable, unless the remarks are privileged and there is no malice.”).

28. *Triggs v. Sun Printing and Publ’g Ass’n*, 71 N.E. 739, 742 (N.Y. 1904).

29. *Id.*

30. *Id.* at 748.

31. *Id.* at 742–43.

Minute Lies" was deemed libelous by a Missouri appellate court.<sup>32</sup> In this case, *Becker v. Brinkop*,<sup>33</sup> the court wrote:

It clearly conveyed in the cartoon portion thereof, when taken in combination with the statements appearing therein, and in the entire circular, the thought that plaintiff was a liar and that she was engaged in promulgating last minute lies in cooperation with others . . . . The circular plainly shows plaintiff as one engaged in besmearing and besmirching with lies one of her opponents in the political contest described therein.<sup>34</sup>

In 1933, a writer, linguist, and lecturer who held prominent positions in California's Portuguese community won a substantial libel award for a newspaper editorial cartoon depicting him as "an ass in grotesque form."<sup>35</sup> A jury awarded the plaintiff \$10,000 in compensatory damages and \$1,000 in punitive damages from the newspaper, and \$5,000 in compensatory damages and \$5,000 in punitive damages from the editor as well.<sup>36</sup> Between the cartoon and the accompanying text, the plaintiff was able to prove that the innuendo insinuated that he was corrupt and dishonest, and that this "was done maliciously and with intent to injure, defame and disgrace him, and to expose him to hatred, contempt, ridicule and obloquy, and to injure his good reputation and business of the newspaper he was publishing."<sup>37</sup> The California appellate court concluded: "Without further describing the cartoon or the reading matter accompanying the same, it will be sufficient to say that the same

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32. *Becker v. Brinkop*, 78 S.W.2d 538 (Mo. Ct. App. 1935); *Russell v. Brooklyn Daily Eagle*, 168 A.D. 121, 122 (N.Y. App. Div. 1915) ("The court properly left it to the jury to ascertain the pith and scope of the cartoon and then to determine whether defendant's proofs were adequate to meet the charges as thus ascertained.").

33. 78 S.W.2d 538 (Mo. Ct. App. 1935).

34. *Becker*, 78 S.W.2d at 541.

35. *Gloria v. A Colonia Portuguesa*, 18 P.2d 87, 88-89 (Cal. Dist. Ct. App. 1933).

36. *Id.* at 87.

37. *Id.* at 88.

constituted libel, as that term is defined by statute and interpreted by numerous decisions.”<sup>38</sup>

Though not editorial cartoons in the traditional sense, a newspaper in California used a range of common law defenses to get a jury award overturned in *Blake v. Hearst Publications*.<sup>39</sup> Here, the *Los Angeles Herald Examiner*, a large daily newspaper, published eight cartoon strips titled, “Betrayal from the East.”<sup>40</sup> The plaintiff claimed the cartoons portrayed him as “a degenerate, dissolute, disheveled, slovenly, and unkempt person addicted to the use of narcotics”<sup>41</sup> He argued that this depiction exposed him to public contempt and caused harm to his reputation.<sup>42</sup>

The jury in *Blake* awarded the plaintiff \$15,000 in damages resulting from the editorial cartoon. However, the trial judge issued a judgment notwithstanding the verdict (JNOV), dismissing the jury’s award.<sup>43</sup> Upholding the JNOV, the California appellate court held:

Obviously, the cartoons were not meant to be a true portrayal of appellant’s physical appearance, but rather were intended to represent the part he played as a counter-spy. While they may have been extremely distasteful to him, they were in no sense defamatory, even when viewed without the accompanying text.<sup>44</sup>

The newspaper’s defense, which the appellate court accepted, was based on grounds that they were truthful renditions accompanying a newspaper account of the plaintiff’s experiences as a counterspy published absent innuendo and should be interpreted under the innocent construction rule.<sup>45</sup>

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38. *Id.* 88–89.

39. *Blake v. Hearst Publ’ns*, 170 P.2d. 100 (Cal. Dist. Ct. App. 1946).

40. *Id.* at 101.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 103.

45. *Id.* at 101.



II. *NEW YORK TIMES CO. V. SULLIVAN*'S PROTECTION OF PARODYA. *New York Times Co. v. Sullivan: Constitutional Cornerstone for the Funny Bone*

The facts of *Sullivan* are certainly well-known and thoroughly understood.<sup>46</sup> To briefly summarize the case: in the height of the civil rights movement, L.B. Sullivan, an elected commissioner of Montgomery, Alabama, brought a defamation lawsuit against *The New York Times* for an advertorial published in the newspaper.<sup>47</sup> The advertorial intended to both raise money for Martin Luther King's legal defense fund and expose the abuses perpetrated by some members of the governments in the south.<sup>48</sup> Sullivan sued for libel per se, and collected a \$500,000 judgment from a Montgomery jury.<sup>49</sup> Because he sued for libel per se and there were numerous factual errors in the advertorial, damages were implied and the only matter Sullivan had to prove to the jury was whether the published statements were "of and concerning" him.<sup>50</sup>

Seizing on the effect of the case in his landmark opinion, Justice Brennan equated Sullivan's claim (and collection of damages) to a modern example of seditious libel, which was virtually antithetical to the First Amendment.<sup>51</sup> To balance the freedom of the press with the applicable body of tort law, Brennan created the constitutional privilege, actual malice, imported from a 1908 Kansas Supreme Court decision as well as a handful of other state court cases.<sup>52</sup>

Wrapped up in Justice Brennan's analysis was the concern over criticizing public officials on public issues.<sup>53</sup> As Justice Brennan noted: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

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46. For a comprehensive discussion of the case, see generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

47. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

48. *Id.* at 256-57.

49. *Id.* The advertorial, "Heed Their Rising Voices," ran in the newspaper on March 29, 1960. *Id.* at 256.

50. *Id.* at 262.

51. *Id.* at 273-75.

52. *Id.* at 279-80 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

53. *Id.* at 269.

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>54</sup> Further, Justice Brennan famously quotes James Madison on the role of caustic debate: “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.”<sup>55</sup>

More importantly, Justice Brennan imported the notion of “breathing space” with regard to accuracy and freedom of expression.<sup>56</sup> This further created a degree of wiggle room for factual errors, which he deemed both necessary and unavoidable, especially with regard to criticism of public officials—“even though the utterance contains ‘half-truths’ and ‘misinformation.’”<sup>57</sup> This space also avoided the overwhelming concern that an overly cautious newspaper may engage in self-censorship.<sup>58</sup> As Justice Brennan held, self-censorship “dampens the vigor and limits the variety of public debate.”<sup>59</sup>

Quoting John Stuart Mill, Justice Brennan noted in a footnote that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”<sup>60</sup> Perhaps there may be no more valuable false statement in the marketplace of ideas than humor, satire, parody, and mockery.<sup>61</sup> In his treatise on defamation and other media-related torts, Judge Robert Sack analyzed the intersection between humor and falsity: “The protection obtains under constitutional principles, although its application becomes confused because the author is usually well aware of any ‘falsity’

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54. *Id.* at 270.

55. *Id.* at 271 (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

56. *Id.* at 271–72.

57. *Id.* at 273.

58. *Id.* at 278 (“Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”).

59. *Id.* at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’”).

60. *Id.* at 279 n.19 (quoting J.S. MILL, ON LIBERTY 15 (1947)).

61. See ROBERT D. SACK, SACK ON DEFAMATION, 5-114–15 (4th ed. 2010).

contained in the comment and indeed intends no 'truth.' That sounds like 'actual malice.'"<sup>62</sup>

*B. Hustler Magazine v. Falwell & the First Amendment Breathing Space for Humor*

The Supreme Court addressed the parody issue head on in *Hustler Magazine v. Falwell*.<sup>63</sup> The landmark case, which relied heavily on *Sullivan*, recently celebrated its 25th anniversary.<sup>64</sup> This case pitted polar opposites of the political spectrum against each other in a First Amendment showdown: Larry Flynt, the controversial and flamboyant publisher of *Hustler Magazine*, and Reverend Jerry Falwell, minister, televangelist, and founder of the political movement the Moral Majority.<sup>65</sup> In 1983, *Hustler* published a parody of the Campari liquor ads depicting Falwell in a "drunken incestuous rendezvous with his mother in an outhouse" in Lynchburg, Virginia.<sup>66</sup> Falwell brought a civil action against *Hustler* and Flynt based on libel, invasion of privacy, and intentional infliction of emotional distress.<sup>67</sup> While the district court dismissed the libel and privacy claims at the close of evidence on a directed verdict, it let the emotional damages claim proceed to the jury.<sup>68</sup> The jury ultimately awarded Falwell \$100,000 in compensatory damages and \$50,000 in punitive damages.<sup>69</sup>

After the Court of Appeals for the Fourth Circuit affirmed the decision,<sup>70</sup> the Supreme Court granted certiorari "given the importance of

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62. *Id.*

63. 485 U.S. 46 (1988).

64. See Geoff Herbert, *Hustler Publisher Flynt to Discuss First Amendment*, THE POST STANDARD, Mar. 5, 2013, at A8.

65. See generally RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT* (1988).

66. *Falwell*, 485 U.S. at 48.

67. *Id.* at 48–49. In this case, Virginia defined the tort of intentional infliction of emotional distress as (1) an intentional or reckless act; (2) which offends generally accepted standards of decency or morality; (3) causally connected with plaintiff's emotional distress; and (4) that was severe. *Id.* at 50 n.3. See also RESTATEMENT (SECOND) OF TORTS § 46 (1965).

68. *Id.* at 48–49.

69. *Id.* at 49.

70. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986).

the constitutional issues involved.”<sup>71</sup> While every case that reaches the Supreme Court is of major importance, *Hustler v. Falwell* speaks to an important right under the First Amendment in the democracy: the right to mock our leaders.<sup>72</sup> In ruling for *Hustler*, Chief Justice William Rehnquist noted that “the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern . . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.”<sup>73</sup>

Most importantly, the *Falwell* Court relies heavily on *New York Times Co. v. Sullivan*.<sup>74</sup> The majority and concurring opinions refer to or cite *Times* and “the *Times* Rule” nine times throughout the opinion. A number of cases referred to as “*Times* progeny” were also cited and relied upon throughout the opinion.<sup>75</sup> Throughout the case, the rationale focused on the First Amendment protections aimed at ensuring “robust debate” and criticism regarding public officials, public figures, and those “intimately involved” in matters of public interest.<sup>76</sup> Quoting some of *Sullivan’s* famous language, the *Falwell* Court acknowledged that “[s]uch criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to ‘vehement, caustic, and sometimes unpleasantly sharp attacks.’”<sup>77</sup> Yet, in light of *Sullivan’s* rationale, the First Amendment need for “breathing space” necessitated protection of the parody despite the harms alleged by Jerry Falwell.<sup>78</sup>

The beauty of the *Falwell* opinion is the section where Chief Justice Rehnquist not only defines parody and satire, but also delivers a

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71. *Falwell*, 485 U.S. at 50.

72. *Id.* at 51.

73. *Id.* at 50–51.

74. *Id.* at 46.

75. See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

76. *Falwell*, 485 U.S. at 51 (quoting *Curtis Publ’g v. Butts*, 388 U.S. 130, 164 (1967) (Warren, J., concurring)).

77. *Id.* at 51 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

78. *Id.* at 52.

history lesson on the role of parody and satire in democracy.<sup>79</sup> Cartoons, caricatures, and jokes at the expense of leaders, particularly the President, are part of the American democratic tradition.<sup>80</sup> Presidents from George Washington to Abraham Lincoln to Franklin D. Roosevelt found themselves ridiculed in caricatures.<sup>81</sup> The cartoons by Thomas Nast were partially credited with exposing the corrupt political machine of “Boss” Tweed.<sup>82</sup>

Even though the *Hustler* parody was possibly a “distant cousin” to more sophisticated, higher-brow, or cleaner commentary, the Court believed it deserved sufficient protection under the First Amendment.<sup>83</sup> The fact that the content in question was offensive or even shocking did not lower its value or importance under the First Amendment.<sup>84</sup> Accordingly, the Court ruled:

There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description “outrageous” does not supply one.<sup>85</sup>

The Court added “were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.”<sup>86</sup>

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79. *Id.* at 53–55 (citing WEBSTER’S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY (Jean L. McKechnie et al. eds., 2d ed. 1979)).

80. *Id.* at 55.

81. *Id.* at 53–55.

82. *Id.*

83. *Id.* at 55.

84. *Id.*

85. *Id.*

86. *Id.* at 53.

III. HOW *SULLIVAN*'S PRINCIPLES PROTECT HUMOR

In the fifty years following *Sullivan* (and the twenty-five following *Hustler v. Falwell*) there has been a steady stream of comedians, humorists, satirists, and jokers finding themselves in courts, defending not only their attempts at humor, but their right to mock. Most cases are vested in torts of defamation (libel and slander) as well as invasion of privacy, but several jokers have even found themselves in intellectual property battles.<sup>87</sup>

While the bulk of the tort cases are defended on reasonableness grounds—that no reasonable reader, listener, or viewer could mistake the content at issue for a truthful statement—this defense could not be posited as effectively without the First Amendment protections fostered in *Sullivan* and *Falwell*. Judge Sack noted the almost paradoxical need for First Amendment protection of humor with the actual malice rule: “[h]umor is an important medium of legitimate expression and central to the well-being of individuals, society, and their government. Despite its typical literal ‘falsity,’ any effort to control it runs severe risks to free expression as dangerous as those addressed to more ‘serious’ forms of communication.”<sup>88</sup>

A. *Satire*

Satire may be more readily deserving of First Amendment protection because it can be viewed as a form of commentary. Even so, a range of comedic endeavors have been the subject of litigation. In one case, a fake memo written on a judge’s letterhead was protected parody because no reasonable reader could think it was true.<sup>89</sup> In *New Times*,

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87. While many comedic defendants in copyright and trademark disputes manage successful defenses under the fair use doctrine, their cases rarely invoke *New York Times Co. v. Sullivan*. As interesting as these cases are, they will not be further discussed in this article. See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (“Pretty Woman” and 2 Live Crew); *Annie Liebovitz v. Paramount Pictures*, 948 F. Supp. 1214 (S.D.N.Y. 1996) (Demi Moore photos in *Naked Gun 33 1/3*).

88. See SACK, *supra* note 61, at 5-113.

89. *Patrick v. Super. Ct. of Los Angeles*, 27 Cal. App. 2d 883, 888 (Cal. App. 1994) (“If anyone still wonders whether the memo is genuine after reading the first

*Inc. v. Isaacks*,<sup>90</sup> a judge and district attorney sued an “alternative weekly” newspaper after they were satirized in an article published in response to a controversial arrest of a minor on terroristic charges. The article was based on a totally fictitious and satirical premise that police arrested a 6-year-old girl for her book report on the children’s book *Where the Wild Things Are*, and it also attributed bogus quotes to the plaintiffs.<sup>91</sup> Yet, the Texas Supreme Court would hold that the satirical falsities could not be reasonably taken as truthful or published with actual malice.<sup>92</sup>

Relying on and quoting lengthy passages from both *Sullivan* and *Falwell*, the Texas Supreme Court ruled in *Isaacks* that a reasonable reader should have been incapable of confusing the fake story with real news. This requires an objective reading of the content, which the court added is not a question of “whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader could be.”<sup>93</sup> The *Isaacks* court further ruled:

This is not the same as asking whether all readers actually understood the satire, or “got the joke.” Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law does not. In the case of parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them.<sup>94</sup>

The *Isaacks* court’s discussion clarifies the (at times) difficult distinction between the actual malice standard and the technical knowledge of falsity entailed in some forms of protected humor.<sup>95</sup>

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three paragraphs, all doubt as to its satirical nature is removed by the megalomaniac final paragraph.”)

90. 146 S.W.3d 144 (Tex. 2004).

91. *Id.* at 148–49.

92. *Id.* at 161, 166–67.

93. *Id.* at 157 (footnote omitted).

94. *Id.* at 158.

95. *Id.* at 165.

Quoting *Sullivan*, the court wrote: “Equating intent to ridicule with actual malice would curtail the ‘uninhibited, robust and wide-open’ public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody.”<sup>96</sup>

Truth or verisimilitude is a part of all jokes and satires. Whether it is fake news shows like *The Daily Show with Jon Stewart*<sup>97</sup> *Saturday Night Live’s Weekend Update*, or a newspaper’s realistic-looking April Fool’s edition, some of these formats have also given rise to litigation. *Saturday Night Live*, NBC’s iconic live, sketch comedy show, has been running a fake news segment since its inception in 1975.<sup>98</sup> In its nearly forty years of performing “live from New York,” *SNL* has been the subject of only one reported judicial opinion based on defamation.<sup>99</sup>

In *Frank v. NBC*, *SNL* defended a segment from the Weekend Update featuring the comedian Tim Kazurinsky playing the role of “Fast Frank,” a sketchy accountant doing out, as the plaintiff described, “ludicrously inappropriate” tax advice on the eve of the deadline for filing tax returns.<sup>100</sup> Coincidentally, the character had the same name and bore a physical resemblance to the plaintiff, an accountant in Westchester, New York.<sup>101</sup> However serious the plaintiff may have been,

96. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

97. *See* *Busch v. Viacom Int’l, Inc.*, 477 F. Supp. 2d 764, 775 (N.D. Tex. 2007) (dismissing defamation and misappropriation claims against *The Daily Show with Jon Stewart* on jurisdictional grounds and because as “a satiric program, no reasonable viewer would have believed that the challenged clip contained assertions of fact about Plaintiff”); *Kane v. Comedy Partners*, No. 00 Civ.158 (GBD), 2003 U.S. Dist. LEXIS 18513 (S.D.N.Y. Oct. 15, 2003).

98. *See* BEN VOTH, *SATURDAY NIGHT LIVE AND PRESIDENTIAL ELECTIONS*, in *LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE* 229, 230, 235 (Jody C. Baumgartner & Jonathan S. Morris eds. 2008).

99. *Frank v. Nat’l Broad. Co.*, 506 N.Y.S.2d 869 (N.Y. App. Div. 1986). *See also* *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.2d 252 (2d Cir. 1980) (finding an *SNL* parody of the “I Love New York” advertising campaign and music with a sketch described as “I Love Sodom” would be a fair use under copyright law).

100. *Frank*, 506 N.Y.S.2d at 870. Plaintiff sought damages for defamation and invasion of privacy under N.Y. Civil Rights Law §§ 50-51. Plaintiff also demanded a public apology from *SNL*’s producer Richard Ebersol. *Id.* at 506 N.Y.S.2d at 871. The suit had also initially named Kazurinsky, the performer, as a defendant. *Id.* at 870 n.2.

101. *Id.* at 870–71.



the court questioned whether any reasonable viewer could take “Fast Frank’s” tax advice seriously: claiming a Boston fern as a dependent, acne medication as an oil depletion allowance, and loss of a spouse as a “home improvement” worthy of a tax deduction.<sup>102</sup>

Relying on *Sullivan* and the actual malice standard, the *Frank* court acknowledged that humor and comedy are entitled to protection from defamation, though it refused to institute a “blanket protection” for comedy.<sup>103</sup> It also balanced the interests of identifiable individuals with wide-open debate.<sup>104</sup> Humor will be “insulated from liability” even if it “pokes fun at an identifiable individual.”<sup>105</sup> Focusing on the heart of the matter, the court wrote:

In the instant case, it can also be asserted without hesitation that no person of any sense could take the so-called tax advice of “Fast Frank” seriously. If anything, the statements here are even more plainly the obvious figments of a comic imagination . . . It might also taste bad, and unquestionably persons who might be regarded as ruffians can and do advertise many products. Income taxes, on the other hand, and persons connected with their collection and even preparation, have been a fertile source of the comic imagination since their adoption.<sup>106</sup>

The *Frank* court further elaborated:

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102. *Id.* at 874–75 (“The contested statements here were so extremely nonsensical and silly that there is no possibility that any person hearing them could take them seriously.”).

103. *Id.* at 872–73.

104. *Id.* at 872 (quoting *Sullivan*, 376 U.S. at 270, 280) (“In reviewing defamation cases, it is the principal duty of the courts to reconcile the individual’s interest in guarding his good name with cherished First Amendment considerations.”).

105. *Id.* at 875.

106. *Id.* at 874.

We believe that the lunacy of the statements themselves, presented as they were as a small, comic part of a larger and obviously comic entertainment program, coupled with the fact that they were neither a malicious nor vicious personal attack, requires a finding that they were not defamatory as a matter of law. Rather, this case involves just that sort of humor which is “of a personal kind that begets laughter and leaves no sting”, and it thus cannot form the basis of a lawsuit.<sup>107</sup>

In *San Francisco Bay Guardian v. Superior Court of the City and County of San Francisco*, a newspaper’s April Fool’s Day parody edition, complete with a fake letter attributed to a real person, was protected under the First Amendment.<sup>108</sup> The satirical nature of the edition should have been clear to an average reader viewing the “totality of the circumstances.”<sup>109</sup> The court stated that “[r]eview of the full context in which the fake letter appeared leads us to conclude that the average reader, as a matter of law, would recognize that the letter was a part of the parody and not actually written by real party.”<sup>110</sup> The entire parody section was designed to be viewed by turning the paper upside down and contained stories and photo illustrations which could have been easily recognized as parody “at first glance.”<sup>111</sup>

Even though the letters to the editor appeared authentic and authored by real people, the court continued to find them protected.<sup>112</sup> As

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107. *Id.* at 875 (quoting *Lamberti v. Sun Print & Pub. Ass’n*, 97 N.Y.S. 694, 696 (N.Y. App. Div. 1906)).

108. *S.F. Bay Guardian v. Super. Ct. of San Francisco*, 21 Cal. Rptr. 2d 464 (Cal. App. Div. 1993).

109. *Id.* at 465.

110. *Id.* at 466.

111. *Id.* (offering, for example, a story depicting a government supervisor being restrained by armed guards because of the weather; a statement by a losing candidate for local office declaring his intent to undergo a sex change operation; and a statement that “unsigned letters (to the editor) will be sent to the Federal Bureau of Investigation for cross-checking. In case of accident, we will notify next of kin”).

112. *Id.* at 466–67 (“On the page containing the letters to the editor, some of the material is not so obvious . . . . Only a viewer that read only the fake letter,

the *San Francisco Bay Guardian* court noted, “[t]he very nature of parody and of April Fool’s jokes is to catch the reader off guard at first glance, after which the ‘victim’ recognizes that the joke is on him to the extent that it caught him unaware.”<sup>113</sup> Accordingly, the court ruled: “Because the average reader would recognize the April Fool’s issue as a parody, the letter does not defame real party by false attribution or presentation of false facts.”<sup>114</sup> Even the extent of the joke was analyzed by the court:

If parody could be actionable because, while recognizable as a joke, it conveyed an unfavorable impression, very few journalistic parodies could survive. The butt of the parody is chosen for some recognizable characteristic or viewpoint which is then exaggerated. It is not for the court to evaluate the parody as to whether it went “too far.” As long as it is recognizable to the average reader as a joke, it must be protected or the rather common parody issues of newspapers and magazines must cease to exist.<sup>115</sup>

### *B. Comedic Discussion and Commentary*

Over the years, many comedians worth their weight in “airplane peanuts”<sup>116</sup> have gotten into a range of lawsuits emanating from their routines, television appearances or off-the-cuff snarky comments. The roster, just to name a few, sounds like the guest list at a Friar’s Club roast: Johnny Carson, Jay Leno, Jerry Seinfeld, Jimmy Kimmel, and Robin Williams. The late night television talk show seems to be fertile

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accepted it at face value despite its unusual message, and looked at nothing else could miss the joke in this case, and that is not the average reader.”).

113. *Id.* at 466.

114. *Id.* at 467.

115. *Id.* at 468.

116. See generally A.D. Amorosi, *Open-mike Tuesdays at Helium Comedy Club*, THE PHILA. INQUIRER, Dec. 24, 2006, at M2 (“‘Open mike’ at a comedy club is often anything but funny: hacky amateurs and armchair humorists doing airplane-peanut jokes . . .”).

ground for litigation, testing the boundaries of free speech values and defamation law, even if no reasonable person can mistake the content for humor.

The iconic *Tonight Show*, which dominated the late night talk show genre for decades under Johnny Carson, tested the liability of a variety show comedic monologue, which was considered protected.<sup>117</sup> In *Blackwell v. Carson*, Carson constructed a joke about plaintiff's famous "Best Dressed List" by fabricating a quote attributed to plaintiff, which mocked Mother Teresa, saying "Miss Nerdy Nun is a fashion no-no."<sup>118</sup> Given the context of the comedy show's monologue, the court held that the jokes could not be reasonably understood as defamatory.<sup>119</sup> The court, in an unpublished opinion, wrote: "In his monologue he typically took current events and public figures and poked fun at them. It was clear that the monologue, though it mixed fact with fiction, was hyperbolic and humorous in intention rather than providing serious social or political commentary."<sup>120</sup> Carson's successor, Jay Leno, faced litigation related to his "headlines segment," in which he makes fun of wacky newspaper headlines, published typos, and advertisements on the *Tonight Show*.<sup>121</sup> Defamation flowing from a comedy routine should be unavailing because nobody tunes into the *Tonight Show* expecting to hear or see the truth.<sup>122</sup>

Jerry Seinfeld's off-the-cuff comments on *The Late Show with David Letterman* generated a defamation suit after he called a woman litigating an intellectual property case against his wife a "nut," a stalker,

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117. See *Blackwell v. Carson*, No. B070547, 1994 WL 395544 (Cal. App. Apr. 4, 1994) (unpublished).

118. *Id.* at \*1.

119. *Id.*

120. *Id.* at \*2.

121. See *Drake v. Leno*, 34 Media L. Rep. (BNA) 2510 (Cal. App. Dep't Super. Ct. 2006) (The court rejected plaintiff's cause of action and held in favor of defendant's Anti-SLAPP motion. Defendant's counsel was awarded \$57,000 in attorneys' fees and costs, according to the hearing transcript that was filed as the court's opinion on the matter.); *Walter v. NBC Television Network, Inc.*, 811 N.Y.S.2d 521, 523 (N.Y. App. Div. 2006) (The court held that the display of plaintiff's photograph during the Headlines segment could not be an invasion of privacy under New York Civil Rights Law §§ 50-51. "A performance involving comedy and satire may fall within the ambit of the newsworthiness exception even if the performance is not related 'to a "legitimate" news broadcast . . .").

122. See *Drake*, 34 Media L. Rep. at 2511-17.

and an assassin.<sup>123</sup> Because the context of the remarks was a television comedy and variety show, the court held no reasonable viewer could have taken Seinfeld's comments seriously.<sup>124</sup> Also on the *Late Show*, one of Letterman's pranks, blowing up a pumpkin symbolizing a person, was held not to be libelous.<sup>125</sup> Furthermore, Conan O'Brien was sued for libel by old-time comedian Red Buttons for jokes emanating from an actual Friars Club roast.<sup>126</sup>

Even more recently, late night newcomer Jimmy Kimmel successfully fended off an invasion of privacy claim against him for a parody based on a video he found on YouTube.<sup>127</sup> Ruling for Kimmel, the court held that "[e]ven if the newsworthy exception did not apply here, the use of the clip in this entertainment context raises serious First Amendment concerns that would likewise require dismissal of the . . . claims."<sup>128</sup>

Perhaps one of the clearest and most entertaining cases delving into the stand-up comedy genre involves Robin Williams.<sup>129</sup> Years before he became an international television and movie star, Williams was a stand-up comedian, known for his frenetic style, extemporaneous rants, and rainbow suspenders.<sup>130</sup> In his live comedy routine—also recorded for

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123. *Lapine v. Seinfeld*, 918 N.Y.S.2d 313, 326 (N.Y. Sup. Ct. 2011) (facing defamation, misappropriation, and breach of contract counts).

124. *Id.* at 326–27 (holding the comments were protected opinion because the language lacked precise meaning, could not be proven true or false, and were made within the context of a comedy show).

125. *See Bilyeu v. C.B.S.*, No. CV 12–8150–PCT–JAT, 2012 U.S. Dist. LEXIS 158933 (D. Ariz. Nov. 6, 2012); *Bilyeu v. David Letterman Show*, 414 Fed. App'x. 519 (4th Cir. 2011).

126. *Buttons v. Nat'l Broad. Co.*, 858 F. Supp. 1025, 1028 (C.D. Cal. 1994) ("Here, it is clear from the context that the statement was not intended as and would not reasonably be understood as an assertion of fact . . . . [T]he Show itself is a comedy show.").

127. *Sondik v. Jimmy Kimmel*, 941 N.Y.S.2d 541 (N.Y. Sup. Ct. 2011).

128. *Id.* at 541 (citing New York's Invasion of Privacy Statute, N.Y. Civ. Rights Law §§ 50–51). This is New York's invasion of privacy statute, which defines the tort in terms of commercial appropriation of a plaintiff's image or likeness for commercial purposes. New York does not recognize the tort of false light invasion of privacy or publication of private or embarrassing facts. *See id.*

129. *Polygram Records, Inc. v. Rege*, 170 Cal. App. 3d 543 (1985).

130. *See* Scott D. Pierce, *Robin Williams is back on HBO*, THE DESERET MORNING NEWS (Dec. 4, 2009, 12:00 AM), <http://www.deseretnews>

an HBO cable television special and a record album—he used the name of a winemaker as a punch line in an offensive riff.<sup>131</sup> This prompted a wide-ranging lawsuit based on defamation, trade libel, invasion of privacy, and intentional infliction of emotional distress.<sup>132</sup>

The court ruled that:

Williams, who was performing in a nightclub before an audience that knew him as a comedian, not a wine connoisseur, seems to have made it clear that the wine to which he referred did not exist, because his joke was constructed around the rhetorical question ‘why are there no black wines like . . . .’<sup>133</sup>

In short, the court held that a joke should be taken as a joke:

For this reason, and in light of the occasion at which the joke was delivered and the attending circumstances, we conclude that, as a matter of law, it was not defamatory. To hold otherwise would run afoul of the First Amendment and chill the free speech rights of all comedy performers and humorists, to the genuine detriment of our society.<sup>134</sup>

The court discussed the “serious aims” of comedy and the difficulty, if not impossibility, of having courts decide what is funny and should be protected.<sup>135</sup> The court likened the difficulty to that of

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.com/article/705348909/Robin-Williams-is-back-on-HBO.html?pg=all. See also HBO Young Comedians Show 1977, available at <http://www.youtube.com/watch?v=FH7crqRvhhc>.

131. *Polygram Records, Inc. v. Rege*, 170 Cal. App. 3d 543, 546 (1985).

132. *Id.* at 545–46.

133. *Id.* at 556.

134. *Id.* at 557.

135. *Id.* at 552–53.

obscenity, which is an equally “quixotic” venture to ascertain.<sup>136</sup> The court also noted:

Such judicial timidity should not distress advocates of the constitutional rights of comedians and humorists; for if judges assumed the responsibility to decide what is amusing and made the protections of the First Amendment turn upon their views, perhaps less putative humor would be safeguarded than our restrained approach permits.<sup>137</sup>

The nature of these disputes, though, is in the context of television shows or stand-up comedy or comedians. While their humor at times may be biting, it more often than not does not rise to the level of high-brow satire or political humor.<sup>138</sup>

#### IV. FROM HIGH-BROW TO LOW-BROW AND BACK

##### *A. Crude and Offensive Humor*

The range of lower-brow comedy runs the gamut: sports radio,<sup>139</sup> talk radio,<sup>140</sup> morning radio,<sup>141</sup> college newspaper parodies,<sup>142</sup> books,<sup>143</sup>

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136. *Id.* at 553.

137. *Id.* (relying on *Salomone*, which in turn relies on *Gertz*, which relies on *Sullivan*).

138. See *Doe v. Channel Four Television*, No. B217145, 2010 Cal. App. Unpub. LEXIS 2468 (Cal. App. Apr. 6, 2010). Sacha Baron Cohen’s comedy has been the subject of several suits. A California Appellate Court affirmed dismissal of claims against him emanating from his HBO show, “Da Ali G Show,” because no reasonable viewer could construe his jokes as defamatory. This comedy sketch involved a reference to a character with the plaintiff’s name. *Id.* at \*1. “The Ali G. character made the statements during a comedy show in the context of an interview with Vidal involving a series of other comedic and sometimes crude statements that could not be reasonably understood as asserting actual facts,” the court wrote. *Id.* at \*17.

139. *Havens v. McLain*, 22 Media L. Rep. (BNA) 1092, 1094 (Mich. Ct. App. 1993) (“While it is conceivable that lighthearted, jestful comments may rise to the level of defamation, a certain degree of latitude must be expected.”).

140. *Stepien v. Franklin*, 528 N.E.2d 1324, 1326 (Ohio Ct. App. 1988) (holding that an Ohio talk radio host who likened himself to comedian Don Rickles

songs,<sup>144</sup> and even pornography.<sup>145</sup> Aside from the *Falwell* case, other crude and offensive caricatures and content received protection, perhaps exacerbating the sting on the plaintiffs because of the genre. There is also a long line of famous comedians who have found themselves in courtrooms for their humor. The infamous travails of Lenny Bruce in the 1960s on obscenity charges<sup>146</sup> eventually gave way to the biting and offensive, but less raunchy, broadcasts of a George Carlin routine, which

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as “‘insult’ genre of entertainment” was protected from a defamation lawsuit because, under *New York Times Co. v. Sullivan* and *Hustler v. Falwell*, no reasonable reader or listener could find insults and derogatory comments were made with actual malice, and that those comments should also be viewed as protected opinion under state and federal law).

141. *Formby v. Chancellor Broad. Co., Inc.*, 26 Media L. Rep. (BNA) 2468, 2470 (Colo. Dist. Ct. Denver Cnty. 1998) (“[T]his radio program is intended to be an irreverent and outrageous attempt at humor. It is irrelevant that there is nothing funny here. Therefore, any reasonable listener would know comments on fly fishing could not in this context be interpreted as stating actual facts.”).

142. *Walko v. Kean Coll. of N.J.*, 235 N.J. Super. 139, 147–49 (N.J. Law Div. 1988) (The United States Supreme Court emphasized in the then-recent decision in *Hustler v. Falwell* “that it is not the value of the obviously vulgar ad itself, but rather the inherent danger in trying to set standards for value in a cartoon, satire, or parody, that requires protection even for the most unthinkable publications.” This involved a phony advertisement of a “Whoreline” associated with plaintiff’s name in a college newspaper’s April Fool’s edition.)

143. *Salomone v. MacMillan Publ’g Co.*, 77 A.D.2d 501 (N.Y. App. Div. 1980) (A parody of the 1950s classic children’s book series, *Eloise*, which included a potentially defamatory depiction could not be actionable as defamatory. The 1972 cartoon parody titled “Titters: The First Collection of Humor by Women,” included a picture of graffiti in the Plaza Hotel’s Men’s room saying, “Mr. Salomone was a child molester!!!” Although Salomone turned out to be a real person, much to the surprise of the publishers, he was unable to prove any cognizable damages because the material was clearly humorous. Unable to prove damages or harm, especially under the actual malice standards, the appellate court held that the case should have been dismissed.)

144. *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 228 (E.D. Va. 1990) (“The context of the publication of the song would also signal to the reader that the ditty was a comic parody. The song was allegedly published during the Station’s morning comedy and music show, the ‘Q Morning Zoo.’ As such, it is impossible to believe that a reader would have perceived the song to be anything else than irrelevant and irreverent social commentary.”).

145. *Dworkin v. Hustler Magazine*, 867 F.2d 1188 (9th Cir. 1989).

146. *See People v. Bruce*, 202 N.E.2d 497 (Ill. 1964).



got a radio station in hot water with the Federal Communications Commission.<sup>147</sup>

Though Carlin was central to the discussion in *FCC v. Pacifica*, the case was a question of the Commission's power and authority to regulate indecent content broadcast over the airwaves.<sup>148</sup> Nevertheless, the Court could not escape tangentially addressing humor as a form of expression.<sup>149</sup> The Court even acknowledged Carlin was a "satiric humorist"—an elevated appellation—in weighing the 12-minute "Filthy Words" monologue.<sup>150</sup> Many listeners may find the monologue comedic as a contemporary exploration into modern language usage, albeit told through a satirical and potentially offensive tone.<sup>151</sup> Carlin, through his comedy, could make a statement about language that even the best grammarian or etymologist could not.

In *Dworkin v. Hustler Magazine*,<sup>152</sup> the Ninth Circuit applied the actual malice rule to libel, privacy, and intentional infliction of emotional distress<sup>153</sup> claims against the magazine by a noted feminist and anti-pornography advocate. The material at issue here involved a cartoon depicting and mocking the plaintiff as well as features mentioning her name in offensive and derogatory ways.<sup>154</sup>

The plaintiff's case failed for multiple reasons, the court said, particularly because she was both a public figure involved in public debate, and there was no possible way the content in question could be construed as truthful or factual.<sup>155</sup> "Ludicrous statements are much less

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147. *FCC v. Pacifica Found.*, 438 U.S. 726, 747 n.24 (1978) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) (noting that even though the offensive "Seven Dirty Words" monologue would presumably be immune from tort or incitement liability, because of the context of the broadcast, it might not escape liability under broadcast indecency standards because it was played in the afternoon).

148. *Id.*

149. *Id.* at 750 n.28 (noting that consenting adults who may want to hear offensive or indecent language either on records, tapes, theaters, or night clubs would be perfectly entitled to that content).

150. *Id.* at 729.

151. A transcript of the monologue is also appended to the court's opinion. *Id.* at 751.

152. 867 F.2d 1188 (9th Cir. 1989).

153. *Id.*

154. *Id.* at 1190-91.

155. *Id.* at 1192.

insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are,” the court wrote.<sup>156</sup> Here, plaintiff also had a mixed, if not limited, understanding of actual malice under *Sullivan*.<sup>157</sup> The critical analysis follows:

*Falwell* makes clear that the Features do address matters of public concern. Accordingly, Dworkin’s claims in this case are squarely within the rule of *New York Times*, which requires her to establish a question of fact as to malice on the part of Hustler. As we indicated above, this she has failed to do.<sup>158</sup>

Further reiterating the *Falwell* case, the court held the content would “receive full-fledged *New York Times* protection” because of the nature of the material and the source of the content, a pornographic magazine’s Features section and cartoons.<sup>159</sup>

In *Geary v. Goldstein*,<sup>160</sup> the court protected another pornographic attempt at humor where a commercial was spliced with a pornographic video played during a well-known adult television program on New York City’s public access station. Here, the context and reasonableness of the viewer of the phony commercial played a decisive role, even though plaintiff argued the pornographic video, which was inserted in a legitimate commercial in which she performed but was done without her knowledge or consent, giving rise to defamation and invasion of privacy claims.<sup>161</sup> The parody commercial, which mocked the

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156. *Id.* at 1194.

157. *Id.* at 1194–95 (noting that the nuances between actual malice and common law malice “eludes” appellants).

158. *Id.* at 1196.

159. *Id.* at 1197. The court also summarily rejected plaintiff’s privacy claims based on both New York state law and the common law doctrine of appropriation: “Dworkin does not and cannot plausibly argue that the cartoons constitute an appropriation by Hustler of the commercial benefit of a performance in which Dworkin has a propriety interest or that the cartoons indicate her endorsement of Hustler.” *Id.* at 1198.

160. No. 91 Civ. 6222, 1996 U.S. Dist. LEXIS 11288 (S.D.N.Y. Aug. 7, 1996).

161. *Id.* at \*1–3.

underlying work's sexual innuendos, was obviously a parody, the court held.<sup>162</sup>

[I]t would be clear to any viewer who watched for more than a few minutes that both the Parody and Midnight Blue were produced by Goldstein; that they arose from his particular set of beliefs; and hence that the Parody was part of the larger work of the Midnight Blue Program.<sup>163</sup>

*B. Worlds Collide: Humor and Politics*

If comedy is serious business, then political humor is a matter of life and death. Perhaps a bit of hyperbole needs to be a part of the discussion of the legal protections for humor under the First Amendment. After all, exaggeration and hyperbole are often vital components of jokes and satire.<sup>164</sup>

In mapping comedy's legal landscape, it is important to not only address how courts have afforded a range of legal protections for comedy, satire, and jokes (especially under *New York Times Co. v. Sullivan*), but also to explore the types of comedy and the role humor and comedy plays in the marketplace of ideas. Political humor, often biting and caustic, plays a crucial role in the protections comedy has been afforded under the *Sullivan* precedent. One scholar considers humor as a spur to science, creativity, and "unconventional ideas."<sup>165</sup> Others have credited comedic sources from *The Daily Show* to *Saturday Night Live* as vital and influential sources for news and commentary during recent presidential elections.<sup>166</sup>

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162. *Id.* at \*10.

163. *Id.*

164. See, e.g., MAHADEV L. APTE, *HUMOR AND LAUGHTER: AN ANTHROPOLOGICAL APPROACH* 17, 119 (1985).

165. Alexander Kohn, *Humor as a Vehicle for Unconventional Ideas*, in *LAUGHING MATTERS: A SERIOUS LOOK AT HUMOR* 121, 122 (John Durant & Jonathan Miller eds., 1988).

166. See, e.g., Jody Baumgartner & Jonathan S. Morris, *The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth*, 34 *AM. POLITICS RESEARCH* 341, 344, 362 (2006).

Political humor's role in the marketplace of ideas has long been considered "a most essential element in democracy,"<sup>167</sup> and the political cartoon is considered to be "the most powerful weapon in the journalistic armory."<sup>168</sup> A British political cartoonist, Nicholas Garland, reveled in skewering politicians and leaders through his caricatures, which he considered "the heart of political cartooning."<sup>169</sup> The political cartoon can both unnerve and sooth the viewer.<sup>170</sup> Garland wrote:

First, caricature – the humorously or maliciously distorted representation of politicians; second, the actual political comment, criticism or stance communicated in the drawing, and third, the vehicle or image chosen to convey the political point. When brought together, at its best the effect is formidable. The *apparent joke* can contain a reverberating subversive power.<sup>171</sup>

As powerful as the editorial cartoon was, and still is, modern media (particularly television comedy) has played an increasingly important role in educating the public on political issues, players, and elections.<sup>172</sup> Though often considered "soft news," entertainment, or "infotainment,"<sup>173</sup> scholars note that more people are bypassing traditional news media and getting their information from late night

167. Josh Compton, *More Than Laughing? Survey of Political Humor Effects Research*, in LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE 39, 39 (Jody C. Baumgartner & Jonathan S. Morris eds., 2008).

168. *Id.* at 40 (quoting Steve Plumb, *Politicians as Superheroes: The Subversion of Political Authority Using a Pop Culture Icon in the Cartoons of Steve Bell*, 26 MEDIA, CULTURE & SOC'Y, 432, 432 (2004).

169. NICHOLAS GARLAND, *Political Cartooning*, in *Laughing Matters: A Serious Look at Humor* 75, 78 (John Durant & Jonathan Miller eds., 1998).

170. *Id.* (explaining the potential effects of political caricatures).

171. *Id.* at 76 (emphasis in original).

172. See generally Paul Brewer & Xiaoxia Cao, *Late Night Comedy Television Shows as News Sources, What Polls Say*, in LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE, *supra* note 167, at 263.

173. Geoffrey Bayem, *Serious Comedy: Expanding the Boundaries of Political Discourse*, in LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE, *supra* note 167, at 21, 28.

comedy shows, talk shows, or variety shows where political humor is a staple of the comedy fare.<sup>174</sup> From Johnny Carson to Jay Leno to David Letterman to Arsenio Hall, and even to a lesser extent, less popular or fleeting show hosts in the 1990s such as Dennis Miller, Bill Maher, or the first incarnation of *The Daily Show* with Craig Kilbourn, these comedy hosts carried politics into many homes.<sup>175</sup> “Substantial percentages” of the public, particularly younger viewers, receive their news about presidential campaigns and political events from comedic and entertainment sources.<sup>176</sup>

In recent presidential elections, *The Daily Show with Jon Stewart* and *Saturday Night Live* have been credited with not only mocking the campaigns but shaping the electorate’s views on the candidates and public policy issues.<sup>177</sup> Scholars have even coined this “the Daily Show effect.”<sup>178</sup> For example, Jody Baumgartner and Jonathan Morris observe that: “In addition to frequently poking fun at the candidates, *The Daily Show* makes a habit of ridiculing the electoral and political process as a whole.”<sup>179</sup>

While Comedy Central’s *The Daily Show* and *The Colbert Report* have assumed the mantle of the political comedy masters, they owe much of their success and influence to *Saturday Night Live*, which has incorporated political humor into its skits and news spoofs since its inception in 1975.<sup>180</sup> Dan Akroyd first mocked President Nixon and

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174. See Julia R. Fox, Glory Koloen & Volkan Sahin, *No Joke: A Comparison of Substance in The Daily Show with Jon Stewart and Broadcast Network Television Coverage of the 2004 Presidential Election Campaign*, 51 BROAD. & ELEC. MEDIA 213, 222 (June 2007).

175. See Brewer & Cao, *supra* note 172, at 265.

176. *Id.* at 275.

177. See Baumgartner & Morris, *supra* note 166, at 361–63.

178. See *id.* at 362 (“Stewart’s style of humor paints the complexities of politics as a function of the absurdity and incompetence of political elites, thus leading viewers to blame any lack of understanding not on themselves but on those who run the system. In presenting politics as the theater of the absurd, Stewart seemingly simplifies it.”).

179. *Id.* at 345 (citing JEFFREY P. JONES, ENTERTAINING POLITICS: NEWS POLITICAL TELEVISION AND CIVIC CULTURE (2005)).

180. See LOUIS W. LIEBOVICH, THE PRESS AND THE MODERN PRESIDENCY: MYTHS AND MINDSETS FROM KENNEDY TO ELECTION 2000, 98–99 (2nd ed. 2001); see also Tom Shales, *SNL: The Wonder Years*, WASH. POST, Feb. 20, 2005, at N1.

Chevy Chase tripped over himself lampooning President Ford.<sup>181</sup> Tellingly, more people watched *SNL* mock politicians than the *NBC Evening News*.<sup>182</sup>

In fact, the symbiosis between politics and humor in recent years has been credited with reviving *SNL*. An analysis of *Saturday Night Live's* parodies of the 2000 and 2004 presidential debates helped form the American public's opinions on the candidates.<sup>183</sup> Strong characters and sharp writing has produced "historic parodies" of politics and politicians, and coined terms that became synonymous with candidates—think candidate Al Gore's "lock box" or President George Bush's "strategy."<sup>184</sup> In the 2008 election, Tina Fey's biting portrayals of Vice Presidential candidate Sarah Palin spurred *Saturday Night Live's* ratings and generated unprecedented interest on the internet.<sup>185</sup>

Reflecting on the show's political spoofs, Lorne Michaels, *SNL's* legendary creator and producer, described his show's commentary on politics and politicians as "'more affectionate and goofy' than mean."<sup>186</sup> But he has also noted that, "Our job is, whoever is in power, we're opposed."<sup>187</sup> Meanwhile, the editor of the noted satirical newspaper, *The Onion*, which recently celebrated its 25th anniversary, recently said: "It's not always laugh-out-loud; the site's most trenchant commentary is often rather morbid and can rub some people the wrong way. But *The Onion* structurally bypasses the worst failing of many op-ed columnists: taking

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181. LIEBOVICH, *supra* note 180, at 99.

182. *Id.*

183. See VOTH, *supra* note 98, at 232–37 ("In American political discourse, *SNL* is a longtime tradition for the integration of humor and politics in American entertainment. The dramatic presidential elections of 2000 and 2004 provided significant insights into how humor and argument work together to produce rhetorical results in the campaign process.").

184. VOTH, *supra* note 98, at 237.

185. See Arhlene A. Flowers & Cory L. Young, *Parodying Palin: How Tina Fey's Visual and Verbal Impersonations Revived a Comedy Show and Impacted the 2008 Election*, 29(1) *J. VISUAL LITERACY* 47, 49 (Spring 2010).

186. Diane Holloway, *Presidents Become Boobs, Bumpers on SNL*, *WASHINGTON TIMES*, Feb. 24, 2001, at D4.

187. Dave Itzkoff, "SNL" *Writer Narrows the Gap Between Politics and Farce*, *N.Y. TIMES*, Mar. 3, 2008, at E1.

themselves too seriously. *The Onion* won't cop to even having an opinion."<sup>188</sup>

Perhaps no event or program smashes the worlds of politics and humor together more than the Washington "Gridiron Dinner," also known as the White House Correspondents' Dinner, where a comedian roasts the Washington political elite, with the President right up on the dais as the barbs come flying in.<sup>189</sup> One scholar illustrates the convergence by describing Stephen Colbert's 2006 performance at the annual event.<sup>190</sup> Colbert, he wrote, "unleashed a powerful stream of satire – sarcasm, irony, and double entendre that sounded like praise but in actuality was blistering criticism. His performance thus illustrates the degree to which both popular culture and public affairs have fused and the serious and the silly have become intertwined."<sup>191</sup>

Perhaps no single event tells the world more about our humor and its role in the democracy than having a comedian insult the President more than the Gridiron Dinner. In his introduction to one of his many books on political humor, Gerald C. Gardner not only recites a laundry list of comedians and humorists who incorporate political humor into their repertoire, but he thanks them.<sup>192</sup> His gratitude rests not only in the delivery of laughter and levity into the serious world of politics, but also the importance of the role of comedy in a democracy.<sup>193</sup> Gardner observes:

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188. Noreen Malone, *The Onion Is the Country's Best Op-Ed Page. Seriously*, NEW REPUBLIC (Aug. 30, 2013), <http://www.newrepublic.com/article/114556/onion-countrys-best-op-ed-page-seriously>.

189. See generally Roxanne Roberts & Amy Argetsinger, *Perry Steals the Show at the Gridiron Dinner*, WASHINGTON POST, Mar. 26, 2012, at C1.

190. See Geoffrey Baym, *Serious Comedy: Expanding the Boundaries of Political Discourse*, in LAUGHING MATTERS: HUMOR AND AMERICAN POLITICS IN THE MEDIA AGE, *supra* note 167, at 21, 26–28, 30–34.

191. *Id.* at 31.

192. See GERALD GARDNER, *THE MOCKING OF THE PRESIDENT: A HISTORY OF CAMPAIGN HUMOR FROM IKE TO BUSH* ix (1989) (The comedians, cartoonists and television shows are: Art Buchwald, Mark Russell, Garry Trudeau, Jules Feiffer, Mort Sahl, Paul Conrad, Pal Oliphant, Herblock, Johnny Carson, Bob Hope, Saturday Night Live, Laugh-In, and the Smothers Brothers Comedy Hour.). In a later book, *Campaign Comedy*, the author sends an identical thank you note to the next generation of comedians beginning with Jay Leno. GERALD GARDNER, *CAMPAIGN COMEDY: POLITICAL HUMOR FROM CLINTON TO KENNEDY* 11–12 (1994).

193. See GARDNER, *THE MOCKING OF THE PRESIDENT*, *supra* note 192, at ix–x.

Humor is necessary in a democracy for reasons other than serving as a device for spreading truth and attacking fools and knaves. In a free society, every few years, the populace engages in a wrenching struggle for power. Humor lets us take the issues seriously without taking *ourselves* too seriously. If we are able to laugh at ourselves as we lunge for the jugular, the process loses some of its malice.<sup>194</sup>

According to Gardner, the humor prevalent in our political discourse is valuable because it dually assists voters and candidates, and deters outright tyranny by negating “messianic delusions” of our leaders.<sup>195</sup> He chronicles humor in its relation and role in presidential politics, reciting anecdote after anecdote, joke after joke, and politician after politician, providing both the punch line and the historical context behind the barbs—none of which would be possible without the First Amendment and the accompanying protections.<sup>196</sup> Gardner’s malice may not be in the legal or actual sense, but it is certainly valued under the First Amendment and protected.

CONCLUSION: *SULLIVAN* PROVIDES THE PLATFORM FOR OUR PUNCH  
LINES

The *New York Times Co. v. Sullivan* opinion can be central to a discussion of a wide range of topics, from civil rights to public policy. The case is central to our body of First Amendment law, considered perhaps the most important First Amendment case ever, one that “revolutionized” the law.<sup>197</sup> Changing the standards for defamation to

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194. *Id.* at x.

195. *Id.* at x–xi.

196. *See id.* at x (“In a dictatorship the practice of satire is a jeopardsous pastime indeed. This is doubtless because no public figure willingly subjects himself to the barbs of the satirist if there is some way to dispose of the troublesome fellow. In a democracy we cannot so readily eliminate our critics and iconoclasts.”).

197. *See* ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 55, 58 (2007).



allow robust debate and critique of those in positions of power also dovetails with our First Amendment values of freedom of speech, freedom of the press, and the right to petition government for redress of grievances—all important tenets of freedom of expression. Perhaps there is no greater way to express yourself or to criticize power brokers than through humor.

If a society cannot laugh at itself and its leaders, it runs the risk of turning despotic. Gardner, the political comedian, notes that one common denominator of totalitarian regimes and dictatorships is a “lack of humor.”<sup>198</sup> If our satirists, humorists, and comedians are helping preserve our democracy, our laws—particularly the First Amendment—must be in place to protect them and allow them to perform their public service. Whether we cackle in laughter, cringe, or cry at humor (or attempts at humor), *New York Times Co. v. Sullivan* has formulated the backbone to our modern protections and helps preserve our democracy—and that is no joke.

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198. GARDNER, CAMPAIGN COMEDY, *supra* note 192, at x.