SCT 88-16

No. 86-1278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE ASSOCIATION OF AMERICAN EDITORIAL CARTOONISTS, THE AUTHORS LEAGUE OF AMERICA, INC. AND MARK RUSSELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE ASSOCIATION OF AMERICAN EDITORIAL CARTOONISTS, THE AUTHORS LEAGUE OF AMERICA, INC. AND MARK RUSSELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This is the first case to present this Court with "the question of constitutional limitations upon the power to award damages" for the tort of intentional infliction of emotional distress caused by a publication concerning a public official or public figure. "In deciding the question now," the Court is "compelled by neither precedent nor policy to give any more weight to the epithet ['intentional infliction of emotional distress'] than [it has] to other 'mere labels' of state law." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 268-69 (1964) (hereafter "*New York Times*"). Thus, even as it was held in *New York Times* that "libel can claim no talismanic immunity from constitutional limitations," a judgment for the state-law tort of intentional infliction of emotional distress must likewise "be measured by standards that satisfy the First Amendment." *Id.* at 269. The court below agreed in principle that defendants are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel," (Pet. A8),[1] but it failed in practice to accord such protection.

The Court of Appeals' analysis was fundamentally flawed in that it focused on the state-law elements of the intentional infliction of emotional distress tort, to the

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[1] "Pet." will refer to the Petition for a Writ of Certiorari and the Appendices thereto. "Br. Opp." will refer to Respondent's Brief in Opposition. "C.A. App." will refer to the Appendix in the Court of Appeals.

exclusion of the policies of the First Amendment, and the protections necessary to safeguard those policies. This error had two specific manifestations: The Court held that in suits based on this tort, the *New York Times* standard is not applicable, and that the distinction between "fact and opinion" is "irrelevant." (Pet. A 8-A 11.)

We show in subpart A that the Court of Appeals' refusal to distinguish fact and opinion in deciding suits under this tort resulted in the imposition of sanctions for publishing opinion, and therefore violates the First Amendment. This Court's decisions, in suits for defamation and in other legal contexts, have recognized that the First Amendment provides absolute protection to expressions of opinion: "Under the First Amendment, there is no such thing as a false idea." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). See also, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (dissenting opinion); *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940). This protection, as held in *Gertz* and *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U.S. 6 (1970), embraces "rhetorical hyperbole." When viewed in context, as it must be, the defendants' publication herein was just that; no reader could reasonably believe that *Hustler* was literally accusing respondent of having had sexual intercourse with his mother any more than readers could have believed that Charles Bresler had committed a criminal offense. See *id.* at 14. As Judge Wilkinson explained in dissent below, the parody was directed at ridiculing respondent for seeking to impose his views of morality on society. (Pet. B 10.) While the parody may be "unworthy" of this country's tradition of satiric commentary in political debate, *id.*, felicity of expression may not be constitutionally regulated. *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Cohen* v. *California*, 403 U.S. 15, 25 (1971).

In subpart B, we show that the Court of Appeals erred in holding that the first element of the emotional distress tort under Virginia law—that the "defendant's misconduct be intentional or reckless"—is the constitutional equivalent with respect to this tort of the *New*

York Times "actual malice" standard in defamation cases (Pet. A 11). On the contrary, by focusing on the defendant's intent to inflict an injury, the court's test parallels the "intent to defame" standard of the Sedition Act of 1798 and the common law "malice" test disapproved implicitly in *New York Times* and explicitly from *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) through *Letter Carriers*, 418 U.S. at 281-82. As *Garrison* teaches, the circumstance that a publication was made with ill will or the intent to injure is irrelevant to its contribution to First Amendment values. 379 U.S. at 73-74. By contrast, the *New York Times* standard separates constitutionally protected from unprotected expressions: "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech . . . the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75.

Additionally, the "actual malice" standard creates "breathing space" for constitutionally-protected speech lest critics of public officials or public figures "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true. . . ." *New York Times*, 376 U.S. at 279. It matters not that *under state law* liability for intentional infliction of emotional distress does not depend upon "falsity." *Falsity is an essential element of liability under the First Amendment.* "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74. Indeed, precisely because falsity is not an element of the tort, allowing public officers or public figures to recover for intentional infliction of emotional distress caused by publications concerning them intrudes impermissibly on First Amendment values. A true publication about a public person may cause him severe emotional distress, perhaps all the more because it is true. Of course, these First Amendment considerations create no impediment in the typical suit under this tort, which has a wide range of applica-

tions which either do not involve speech, or only involve speech which is addressed directly to the plaintiff and is not part of public debate.

In subpart C, we show that, under First Amendment principles, public persons should not be permitted to recover for publications concerning them under the state law tort of intentional infliction of emotional distress for another reason—the tort is "a common law concept of the most general and undefined nature." *Cantwell* v. *Connecticut*, 310 U.S. at 308. The standard is, therefore, "unlikely to be neutral with respect to the content of the speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times*, *supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 267-77 (1971). See also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963).

Virginia's version of the tort, "that the conduct was outrageous and intolerable in that it offends the generally accepted standards of decency and morality" (C.A. App. 1490), likewise fails to cabin the jurors' discretion and propensity to discriminate on the basis of their views as to what is decent and moral. Further, the standard's reference to "generally accepted standards" appears to suffer from the same constitutional defect as that of the instruction which was recently disapproved in *Pope* v. *Illinois*, 55 L.W. 4595 (U.S. May 4, 1987). See *id.* Slip Op. at 2-3.

II. Part II of the brief is an exegesis on Judge Wilkinson's observation below: "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress." (Pet. B 9.) We show that political satire, be it delivered through the medium of the editorial cartoon or literature, is uniquely vulnerable to this tort because satire's instrument is the direct, often crude and tasteless, *ad hominem* attack.

ARGUMENT

I. The Decision Below Unconstitutionally Imposes Sanctions For The Exercise Of First Amendment Rights

A. The court below rejected the defendants' contention that the parody at issue was "an opinion and therefore is protected by the first amendment," on the following ground:

> At common law the dichotomy between statements of fact and opinion was often dispositive in actions for defamation. An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se. We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress. The defendants' argument on this point is, therefore, irrelevant in the context of this tort. [Pet. A 11.]

This ruling, which permits a defendant to be mulcted for damages because he has injured a public person [2] by publishing an opinion concerning him, cannot be reconciled with the First Amendment. The question whether such a publication constitutes "fact" or "opinion" is relevant—and may be decisive—not for some reason peculiar to the common law of defamation, but because the expression of opinion concerning public persons is protected by the First Amendment for reasons of fundamental constitutional policy.

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem,

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[2] Since public officials and public figures are subject to the same constitutional rules insofar as is pertinent to the present case, such individuals will sometimes be collectively referred to as "public persons."

we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), reaffirmed in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984). As stated in *Bose*, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 503-04. Articulation of this principle has not at all been limited to suits for defamation. The classic expression is, of course, that of Justice Holmes, "that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), Justice Roberts wrote for a unanimous Court:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. [310 U.S. at 310.][3]

[3] In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), Justice Harlan wrote an opinion (concurring in part and dissenting in part) wherein he

The constitutional protection of opinion extends also to "rhetorical hyperbole." *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Letter Carriers* v. *Austin*, 418 U.S. 264, 286 (1974).[4] In *Letter Carriers*, which was decided together with *Gertz*, the Court struck down three state libel judgments which were based on statements printed in a union newsletter which, during the course of a labor dispute, had identified the plaintiffs as "Scabs" and set forth "a well-known piece of trade union literature, generally attributed to author Jack London, which purported to supply a definition." *Id.* at 268. Applying First Amendment analysis, the Court held:

> The definition's use of words like "traitor" cannot be construed as representations of fact. Such words

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expressed his understanding of the principles underlying *New York Times*. One of these, he wrote, was "the Court's recognition that in many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship. *Any nation which counts the* Scopes *trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.* See *Cantwell* v. *Connecticut*, 310 U.S. 296, 310." 385 U.S. at 406, emphasis added.

[4] *Letter Carriers* applied First Amendment analysis "to determine the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a basic tenet of federal labor policy." 418 U.S. at 270. The Court adhered to the framework for analysis established by *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966). *Linn* had held that the National Labor Relations Act ("NLRA") does not divest state courts of jurisdiction over suits for defamation occurring in the course of a labor dispute subject to the NLRA. But "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy . . .," *Linn* "limit[ed] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage"; the *New York Times* standards of "malice" were adopted "by analogy, rather than under constitutional compulsion." *Id.* at 64-65. The Court followed the *Linn* approach to pre-emption with respect to the intentional infliction of emotional distress tort in *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), discussed at pp. 19-20, *infra*.

were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [418 U.S. at 284, quoting *Gertz*, 418 U.S. at 339-40.][5]

Bresler and *Letter Carriers* have thereby constitutionalized the role of "context" in determining if the plaintiff seeks to punish the expression of an opinion,[6] whether through the literary vehicle of satire or through other common forms of expression such as rhetorical hyperbole or the epithet.[7] No reader could have thought that

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[5] *Letter Carriers* also reaffirmed *Bresler*, where the use of the word "blackmail" in a newspaper article referring to plaintiff, a public figure, was held to be constitutionally protected because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S. at 14. See 418 U.S. at 284-86.

[6] See Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 829-31 (1984).

[7] When the reasoning of *Bresler* and *Letter Carriers* has been applied to the works of editorial cartoonists in suits by public persons, the courts have, with one exception, concluded that a constitutionally-protected opinion was expressed. See, *e.g.*, *Keller* v. *Miami Herald Publishing Co.*, 778 F.2d 711 (11th Cir. 1985); *Miskovsky* v. *Oklahoma Publishing Co.*, 654 P.2d 587, 594-96 (Okla.), *cert. denied*, 459 U.S. 923 (1982); *Yorty* v. *Chandler*, 13 Cal.App.3d 467, 470, 91 Cal.Rptr. 709, 710 (1970). But see *Buller* v. *Pulitzer Publishing Co.*, 684 S.W.2d 473, 478-79 (Mo. Ct. App. 1984) (cartoon depicting psychic in bizarre setting imputed lack of professional skill and integrity and was therefore defamatory *per se*).

The same analysis and result have obtained in suits challenging other forms of satire. See, *e.g.*, *Pring* v. *Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *Silberman* v. *Georges*, 91 A.D.2d 520, 521, 456 N.Y.S.2d 395, 397 (1982); *Myers* v. *Boston Magazine Co.*, 380 Mass. 336,

Hustler was literally accusing respondent of having had sexual intercourse with his mother any more than readers could have believed that Charles Bresler had committed a criminal offense. See 398 U.S. at 14. The Court of Appeals' analysis was thus fundamentally flawed by failing to undertake the vital inquiry into the context of the parody which, as Judge Wilkinson explained, was a literary convention directed at ridiculing respondent for seeking to impose his views of morality on society:

> The natural urge to bring down self-appointed moralists led Molière to satirize the French lay clergy in *Tartuffe*, and motivated Mencken to chastise novelists for failing to look beneath the surface of American evangelists. Sinclair Lewis acted on Mencken's suggestion by writing *Elmer Gantry*, a scathing satiric attack on the Protestant clergy and the public's willingness to boost demagogues to positions of influence. [Pet. B10.]

It is pertinent to add that both Tartuffe and Elmer Gantry were portrayed as lechers, doubtless because Molière and Lewis believed that this was a most forceful means of demonstrating their moral hypocrisy.[8]

Although the parody may be "unworthy" of this country's tradition of satiric commentary in political debate, *id.*, the felicity of expression may not be constitutionally regulated. *Hustler*'s parody, and non-obscene speech generally, is "as much entitled to the protection of free speech as the best of literature." *Winters* v. *New York*, 333 U.S. 507, 510 (1948). It is well to remember also that Justice Holmes referred to the two leaflets which were at issue in *Abrams* as "poor and puny anonymities," and that he expressed his belief that the creed that they avow is "the creed of ignorance and immaturity."

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403 N.E.2d 376 (1980); *Polygram Records, Inc.* v. *Superior Court*, 170 Cal. App. 3d 543, 577, 216 Cal. Rptr. 252 (1985).

[8] It is also pertinent to note that attempts were made to suppress *Tartuffe* and *Elmer Gantry*. See Rosenheim, Jr., *Swift and the Satirist's Art* (Univ. of Chicago Press: 1963), at 29; Schorer, *Sinclair Lewis an American Life* (Univ. of Minn. Press: 1963), at 473.

(250 U.S. at 629.) As Justice Harlan wrote for the Court in *Cohen* v. *California*, 403 U.S. 15, 25 (1971), "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Indeed, if the courts were to draw such distinctions, they would undertake precisely the "kind of authoritative selection" which the First Amendment forbids." See *United States* v. *Associated Press*, 52 F.Supp. 362, 376 (S.D.N.Y. 1943, L. Hand, J.), quoted in *New York Times*, 376 U.S. at 270.

Respondent has asserted that the judgment below can be saved without "undermin[ing] the First Amendment" because Mr. Flynt engaged in "intentional wrongdoing" (Br. Opp. 8). This argument is fundamentally mistaken, for this Court has repeatedly rejected the proposition that a publication can lose its constitutional protection because it was published with the intent to injure. See p. 11, *infra*. Indeed, in *Letter Carriers*, *supra*, the Court held that no liability could be imposed for publishing the "rhetorical hyperbole" involved there, even though the jury had found that the defendants had done so with "actual malice" in the common-law sense. See 418 U.S. at 289, quoting the instructions in that case.

B. The Court of Appeals decided that a plaintiff, in a suit for intentional infliction of emotional distress, need not prove "actual malice" as defined in *New York Times*—"that is, with knowledge that [the publication] was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. According to that court, "the actual malice standard alters none of the elements of the tort [of defamation]; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication" (Pet. A 10). Applying that approach, the Court concluded that the *New York Times* requirement is satisfied by the first element of the emotional distress tort under Virginia law, that the "defendant's misconduct be intentional or reckless" (*id.* at A 11)—specifically, as the jury in this case was instructed, that the defendant "conducted himself in such

a manner in connection with the article as to intentionally inflict emotional distress upon plaintiff." (C.A. App. 694.)

In so reasoning, the court again misunderstood the teachings of *New York Times* and its progeny. To begin with, the court below was wrong in stating that *New York Times* did not change the elements of defamation law. Alabama had not required evidence of *any* degree of fault (other than the actual publication of the defamatory matter) to establish liability and support an award for general damages. See 376 U.S. at 262, 267 and 283. Even more tellingly, the standard which was applied in this case is *not* analogous to the *New York Times* "actual malice" standard. On the contrary, by focusing on the defendant's intent to inflict an injury, the court's test parallels the "intent to defame" standard of the Sedition Act of 1798 (see *New York Times*, 376 U.S. at 274) and the common-law malice test disapproved implicitly in *New York Times* and explicitly from *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) ("an intent merely to inflict harm, rather than an intent to inflict harm through falsehood") through *Letter Carriers*, 418 U.S. at 281-82 and cases cited *id.*[9]

These discredited formulae, like that which was approved by the court below, "focus[] on culpability" (Pet. A 11). The *New York Times* standard, on the other hand, "focuses on" First Amendment values. The difference affects the constitutional analysis in two significant respects.

First, unlike the Court of Appeals' approach, the requirement that the plaintiff establish knowing or reckless falsehood separates constitutionally protected from

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[9] So too, in the "false light" case of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the Court held that the *New York Times* standard must be satisfied and disapproved a trial court's instructions which "could have been taken by the jury to relate, not to truth or falsity, but to appellant's attitude toward appellee's privacy." *Id.* at 396 n.12.

unprotected expressions.[10] As the Court held in *Garrison*:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. [379 U.S. at 75.][11]

By contrast, the circumstance that a publication was made with ill will or the intent to injure is irrelevant to its contribution to First Amendment values. As the Court also held in *Garrison*:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule . . . permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." [379 U.S. at 73-74, citations omitted.]

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[10] The same function is performed by the rule, discussed previously, which forbids the imposition of liability for the expression of opinion.

[11] See also, *e.g.*, *Time, Inc.* v. *Hill*, 385 U.S. at 390; *Gertz*, 418 U.S. at 340.

Second, the "actual malice" standard creates "breathing space" for constitutionally-protected speech lest critics of public officials or public figures "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true . . . "; this is essential because a rule which inhibits the publication of truth "dampens the vigor and limits the variety of public debate." *New York Times*, 376 U.S. at 272, 279. This requirement cannot be excused on the Court of Appeals' theory that liability for intentional infliction of emotional distress does "not depend upon 'falsity' as an essential element" of that tort *as defined by state law* (Br. Opp. 4). *Falsity is an essential element of liability under the First Amendment.* "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74.[12] Yet, by holding that a plaintiff is not required to show "actual malice," the Court of Appeals' approach creates an impermissible hazard to constitutionally-protected true speech.

Indeed, the threat created for true speech is not merely indirect. A true publication about a public person may cause him severe emotional distress, all the more, perhaps, *because* it is true. Precisely because "falsity" is not "an essential" element of the tort of intentional infliction of emotional distress, the Court of Appeals' theory permits imposition of civil sanctions for the "discussion of public affairs." We hasten to point out that this is not an infirmity in the theory of the tort. Falsity is not an element of the intentional infliction of emotional distress tort because it is immaterial to its function—to vindicate the plaintiff's emotional well-being rather than his repu-

[12] Respondent has argued that the publication herein is not "legitimate or normal hyperbole" because the publication here "strays from the plaintiff's 'public character' and becomes an assault on his 'private life' or an 'intrusion into his private affairs.'" (Br. Opp. 8, quoting *Time, Inc.* v. *Johnston*, 448 F.2d 378, 380 (4th Cir. 1971)). This argument is wide of the mark since, as the jury found, "no reasonable man would believe that the parody was describing actual facts about Falwell" (Pet. A6).

tation.[13] In the typical suit, this creates no constitutional impediment because this tort (unlike defamation) has a wide range of applications which either do not involve speech,[14] or only involve speech which is addressed directly to the plaintiff and is not part of public debate.[15] But where suit is based on a publication which concerns a public person (or is otherwise within the ambit of the First Amendment), the Court of Appeals' approach, by focusing exclusively on the state law elements, leads to

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[13] See Restatement (Second) of Torts § 46 & comment b (1965) (tort protects "interest in freedom from emotional distress standing alone"); W.P. Keeton, *Prosser and Keeton on the Law of Torts* 54-55 (5th ed. 1984); Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24, 26 (1983); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936) (hereafter cited as "Magruder").

[14] See, *e.g.*, *Womack* v. *Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974) (plaintiff recovered for defendant's conduct in obtaining photograph of plaintiff by false pretenses and turning it over to defense counsel in molestation case); *Johnson* v. *Woman's Hospital*, 527 S.W.2d 133 (Tenn. Ct. App. 1975) (deceased newly born infant was displayed to plaintiff in a formaldehyde jar); *Blakeley* v. *Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945) (directed verdict for defendant reversed where decedent committed suicide in plaintiff's kitchen and plaintiff discovered bloody corpse); *Alderman* v. *Ford*, 146 Kan. 698, 72 P.2d 981 (1937) (plaintiff's complaint alleging mutilation of husband's body stated cause of action).

[15] The classic example is *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, where defendant, a practical joker, told a woman that her husband had been severely injured in an accident. The debt-collection cases in which defendants are held liable for intentional infliction of emotional distress illustrate speech deemed tortious even though not published to third persons. *E.g.*, *Bundren* v. *Superior Court of California*, 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983) (hospital debt collector may have acted in outrageous manner by telephoning patient in hospital the day after her surgery and questioning her abusively). See also, *e.g.*, *Hall* v. *May Dep't Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981) (store whose security officer accused plaintiff of stealing and falsely claimed to have proof of her guilt liable for tort); *Samms* v. *Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961) (defendant liable for making repeated sexual advances to plaintiff).

the constitutionally impermissible result that true statements, or opinions, will be penalized.[16]

C. Under First Amendment principles, public persons should not be permitted to recover for publications concerning them under the state law tort of intentional infliction of emotional distress for another reason—the tort is "a common law concept of the most general and undefined nature." *Cantwell* v. *Connecticut*, 310 U.S. at 308. As Professor Givelber has observed:

> The tort of intentional infliction of emotional distress by outrageous conduct differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct. . . .
>
> The term "outrageous" is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct.[17]

In his seminal article promoting judicial acceptance, Professor (later Judge) Magruder said that the "formula" which he articulated "would not decide concrete cases; but it is as practicable to apply as the standard of reasonable care in ordinary negligence cases, and it would permit the courts to exercise a judgment upon the merits of the particular case, unembarrassed by the no-

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[16] As in *Time, Inc.* v. *Hill*, 385 U.S. at 383 n.7, and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975), this case does not present "the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed." *Id.* Cf. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 275 (1971): "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."

[17] Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 51 (1982) (hereafter cited as "Givelber").

tion that the interest involved is beyond the pale of legal protection." [18] But Professor Givelber has disagreed: "The indeterminateness of outrageousness poses issues of fairness and practicability beyond those posed by the concept of negligence." [19] This objection is well taken, especially in the present context of publications concerning well-known individuals. *Monitor Patriot, supra*, provides an instructive analogy. The Court there identified "a major, and in this case decisive, difference between liability based on a standard of care, and liability based on a judgment of the 'relevance' of a past incident of criminal conduct to an official's or a candidate's fitness for office."

> A standard of care "can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Curtis Publishing Co.* v. *Butts, supra*, at 153 (opinion of Harlan, J.). A standard of "relevance," on the other hand, especially such a standard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail. [401 U.S. at 276-77.]

A standard of "outrageousness" is even more "unlikely [than relevance] to be neutral with respect to the content of speech." It is quite unrealistic to suppose that a juror would find to be "outrageous" a publication that expresses an opinion with which he agrees; conversely, under so value-laden and subjective a standard, jurors

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[18] Magruder, 49 Harv. L. Rev. at 1058-59.

[19] Givelber, 82 Colum. L. Rev. at 55.

are prone to impose liability based on publications with which they strongly disagree, or which they find offensive in tone. This Court has frequently recognized that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [20]

In *NAACP* v. *Button*, 371 U.S. 415, 432 (1963), the Court reaffirmed that "standards of permissible statutory vagueness are strict in the area of free expression." This principle, the Court made clear, applies fully in civil litigation: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433, citations omitted. See also *Grayned*, 408 U.S. at 109, and cases cited at nn. 6 and 7. As *New York Times* recognized, the fear of damage awards in a common law action "may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. at 277.

The problem of vagueness is not cured by the "intent" component of the tort. In *Smith* v. *Goguen*, 415 U.S. 566 (1974), where the state law under which the defendant was convicted had been construed by the highest state court as limited to "intentional contempt" of the United States flag, the Court said: "Aside from the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute, this holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent." *Id.* at 580, footnote omitted. So here, the intent requirement does not clar-

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[20] *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972), footnote omitted. See also cases cited *id.* at n.4.

ify what speech is "outrageous" or, under the Virginia standard, "offends decency or morality." In either case, the definition of the tort "is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* at 578, quoting *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971).

Virginia's version of the tort, according to which the jury was instructed here, "that the conduct was outrageous and intolerable in that it offends the generally accepted standards of decency and morality" (C.A. App. 1490), does not cabin the ju rs' discretion and propensity to discriminate on the basis of their views as to what is decent and moral. Indeed, in the context of this case, these instructions may invite the jury to impose liability because of the parody's crude treatment of sex, although it clearly was not subject to regulation as obscene since it was not "in some significant way, erotic." See *Cohen* v. *California*, 403 U.S. 15, 20 (1971).

Moreover, the standard's reference to "generally accepted standards" appears independently to violate the First Amendment. The defect is the same as that of the instruction which was recently disapproved in *Pope* v. *Illinois*, 55 L.W. 4595 (U.S. May 4, 1987), that the jury should determine the value of allegedly obscene materials by reference to the views of "ordinary adults in the whole State of Illinois." Slip op. at 2. This Court said: "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won." *Id.* at 3. Just so, a work need not be required to satisfy "generally accepted standards of decency and morality" in order to receive constitutional protection. Indeed, the instruction herein is the antithesis of the constitutional standard enunciated in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971): "[S]o long as the

means are peaceful, the communication need not meet standards of acceptability." [21]

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[21] In the course of rejecting the defendants' submission that the parody here is protected as opinion, the court below said: "An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se." (Pet. A 11.) *Cohen* v. *California* makes clear that where the "only 'conduct' [against which sanctions were imposed] is the fact of communication," a court "deal[s] with a [judgment] resting solely upon 'speech.' " 403 U.S. at 18. So here, liability was imposed solely for the "publication." (Pet. A 11.)

However, we do not foreclose the possibility that cases may arise where a distinction between speech and conduct may validly be drawn, because the manner of publication is such as to create serious distress *apart from the substance of the communication.* In such a case, the imposition of liability under the emotional distress tort may be constitutionally permissible. *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), is instructive in this regard. The Court there held, in accordance with precedents involving other torts, including *Linn, supra,* that Congress did not intend to oust state-court jurisdiction over actions for intentional infliction of emotional distress arising in a labor dispute. *Id.* at 305. But the Court made clear that "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle." *Id.*

The constitutional imperative of protecting defendants against damage awards for intentional infliction of emotional distress based on publications which are protected by the First Amendment weighs more heavily than the need to maintain the federal-state relationship which is implicit in the national labor laws. Thus, to paraphrase *Farmer*, if recovery is to be permitted under this tort for injury caused by "conduct" even though it is related to a publication, "it is essential that the state tort be either unrelated to [the defendant's publication] or a function of the particularly abusive manner [in which the publication is utilized to cause serious emotional distress] rather than a function of the [publication itself]."

Moreover, if such an action is to be allowed, the *Farmer* opinion's cautionary admonition concerning trial of such suits should be closely adhered to. To again paraphrase that opinion: "In view of the potential for interference with [First Amendment rights] the trial court should be sensitive to the need to minimize the jury's exposure to [the publication itself] in cases of this sort. Where [the publication itself] is necessary to establish the context in

II. The Decision Below Jeopardizes Graphic And Literary Political Satire

Judge Wilkinson wrote below, "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress." (Pet. B 9.) Political satire, be it delivered through the medium of the editorial cartoon or literature, is uniquely vulnerable to this tort because satire's instrument is the direct, often crude and tasteless, *ad hominem* attack. As we document below, this time-honored literary convention, which is calculated to arouse indignation and expose political leaders and their follies, has made an important contribution to robust political debate.

A. The Editorial Cartoon

One of the most potent weapons of American political satire is the editorial cartoon. Its English and French pedigree dates back to the eighteenth and early nineteenth centuries to James Gillray, William Hogarth, and Thomas Rowlandson in England, and to Honoré Daumier and Charles Philipon in France.[22] From 1864 to 1900, editorial cartoonists flourished, employed by such publications as *Frank Leslie's Illustrated Newspaper* and *Harper's Weekly*, and by sharply satirical weekly magazines such as *Puck* and *Judge*. Their impact was so powerful that the major newspapers hired popular cartoonists to battle one another and boost circulation.[23]

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which the state claim arose, the trial court should instruct the jury that the fact of [publication and its content] (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages." Cf. 430 U.S. at 305 n.13.

[22] See generally Hill, *Mr. Gillray, The Caricaturist* (Phaidon Press: 1965); Press, *The Political Cartoon* (Assoc. Univ. Presses: 1981) (hereafter cited as "Press"), at 39-43.

[23] Hess & Kaplan, *The Ungentlemanly Art: A History of American Political Cartoons* (Macmillan: 1975) (hereafter cited as "Hess & Kaplan"), at 100.

The cartoonist's ability to harness public opinion against a particular candidate was achieved through gross exaggeration, cruel exploitation of physical traits or politically embarrassing events, attribution of grotesque animal features and blatant emotional appeals.[24] Lincoln was said to have been "deeply hurt" by an 1860 cartoon showing him with a Janus-like face, denying his presidential ambitions in 1858,[25] juxtaposed with his 1860 presidential campaign. Thomas Nast's unwavering commitment to the Grant Administration prompted President Grant to say in 1868: "Two things elected me: the sword of Sheridan and the pencil of Thomas Nast."[26] When Cleveland industrialist Mark Hanna was cruelly depicted by Homer Davenport throughout the 1896 campaign, Hanna tearfully remarked: "That hurts . . . to be held up to the gaze of the world as a murderer of women and children. . . . I tell you it hurts."[27]

Thomas Nast's relentless assault on New York City's Democratic machine and its leader, William Marcy "Boss" Tweed, was "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art."[28] A fierce supporter of post-Civil War Republicanism, Nast's cartoons in the pages of *Harper's Weekly* depicted Tweed and his cohorts as

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[24] Geipel, *The Cartoon: A short history of graphic comedy and satire* (A.S. Barnes & Co.: 1972) (hereafter cited as "Geipel"), at 21-40; Keller, *The Art and Politics of Thomas Nast* (Oxford Univ. Press: 1968) (hereafter cited as "Keller"), at 324.

[25] Hess & Kaplan, at 87. Lincoln later described Nast as the North's "best recruiting sergeant." Press, at 45.

[26] Hess & Kaplan, at 46-47. In 1868 Nast portrayed Democratic presidential candidate Horatio Seymour as Lady Macbeth, unable to rid himself of the taint of the New York draft riots of 1863. (Page 1a, *infra*.) Both Grover Cleveland and William McKinley credited their election victories to satiric cartoons of their opponents in *Puck* and *Judge*, respectively. *Id.*

[27] Hess & Kaplan, at 127.

[28] Keller, at 177. See also Murrell, "Nast, Gladiator of the Political Pencil," *The American Scholar*, Autumn, 1936, at 472.

vultures, vicious tigers, bloated opportunists and boozy degenerates. The success of the "boiling" Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." [29]

As the invention of photoengraving in the last decade of the nineteenth century was adopted by daily newspapers, the editorial cartoon became widely available. The editorial cartoon as a molder of public opinion achieved special professional recognition in 1922, when the Pulitzer Prize added a category for cartooning.[30]

Throughout the Prohibition Era, the Great Depression and two world wars, cartoons of Boardman Robinson, C.D. Batchelor, Jay N. "Ding" Darling, Clifford Berryman, Daniel Fitzpatrick and Vaughn Shoemaker developed powerful symbols that bonded national sentiment on a variety of domestic and foreign policy issues. Walt Kelly's "Pogo" comic strip and David Levine's caricatures savaged Senator Joseph McCarthy.[31] (Page 4a, *infra.*) Courageous cartoonists like Bill Mauldin from the South and border states bared the viciousness of racism and bigotry in the 1950s and 1960s.[32] Jules Feiffer effectively mocked the hypocritical, self-satisfied Northern white liberal in the *Village Voice.*[33] In the last twenty-five years, political cartoons have helped shape public debate about major public issues. Presidents have, nat-

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[29] Press, at 251. One of Nast's most remarkable cartoons of the Tweed Ring is reproduced at page 3a, *infra.*

[30] Press, at 47, 195. See also Johnson, *The Lines Are Drawn: American Life Since The First World War As Reflected In The Pulitzer Prize Cartoons* (J. B. Lippincott: 1958).

[31] Geipel describes the caricature as "the least subtle and potentially most damaging form of cartoon; its basic techniques, its undertow of cruelty and derision, are the very taproots of all comic art." Geipel, at 21-22. Of Gerald Scarfe, described as "the most withering of contemporary caricaturists," it has been said, "If Scarfe couldn't draw, he'd be an assassin." *Id.* at 23.

[32] Hess & Kaplan, at 159-60.

[33] *Id.* at 161.

urally, occupied their share of the spotlight; but equally sharp and wounding attacks have been directed against other public officials and public figures on the national, state and local levels. Targets of especially cruel darts at the hands of modern editorial cartoonists are reflected in the cartoons reproduced at pages 4a-11a, *infra*.

Several collections of modern political cartoons give valuable insights into the essence of the cartoonist's craft. Faithful to their English and American forebears, modern cartoonists recognize that their most potent weapon is the unambiguous attack. If "loose language or undefined slogans" are accepted as "part of the conventional give-and-take in our economic and political controversies," *Letter Carriers*, 418 U.S. at 284, exaggeration, burlesque and distortion are essential ingredients of the editorial cartoon. "Cartooning is not a fair art," according to Mike Peters of the Dayton, Ohio *Daily News*. "Most cartoonists like me—who like to attack—are like loaded guns. Every morning we start looking through the newspaper for a target to blast. That's our function." [34] Bill Sanders of the *Milwaukee Journal* deliberately chooses highly-charged emotional issues for his subjects: "I have done a lot of cartoons on abortion, gay rights, women's rights—in specific areas of real, live social issues, that people get very on edge about. . . . It makes people uncomfortable." [35] Cartoonist Scott Long captures the essence of the modern cartoon thusly:

> The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters.[36]

The modern cartoon continues its journalistic tradition by being an "attention-getting art," an image which

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[34] Westin (ed.), *Getting Angry Six Times A Week: A Portfolio of Political Cartoons* (Beacon Press: 1979), at 96.

[35] *Id.* at 3.

[36] Long, "The Political Cartoon: Journalism's Strongest Weapon," *The Quill*, Nov. 1962, at 57.

"distorts in order to hammer home what the artist regards as the essential truth about an individual." [37] Indeed, to the extent that political cartoons were perceived to lapse into a relatively tepid period, practitioners of the art mourned for their profession.[38]

B. Political Satire In Literature

Northrop Frye has written: "Two things, then, are essential to satire; one is wit or humor founded on fantasy or a sense of the grotesque or absurd, the other is an object of attack." [39]

In an elegant study, Edward Rosenheim, Jr. has made the same point:

> To return to the sources of our common feeling that we are in the presence of satire, there is one general quality which, although it has been given various names, seems most readily and widely recognized. This is the quality which, although the term may seem rather loose, we shall describe as *attack*. For in one way or another, satire seems

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[37] Press, at 74, 63. In 1958, Herblock drew Richard Nixon crawling out of a sewer to meet his welcoming committee, prompting Nixon to remark several years later, "I have to erase the Herblock image." But when the head of a San Francisco art exhibition ordered a lithograph of Nixon as a black-masked hoodlum removed from the exhibition, Nixon wired: "One of the most sacred precepts of our Anglo-American legal heritage is the right of individuals to criticize public officials." Keogh, *This Is Nixon* (G.P. Putnam's Sons: 1956), at 72, 73.

[38] Smith, "The Rise and Fall of the Political Cartoon," *The Saturday Review*, May 29, 1943 at 7-9, 28-29. Columnist Art Buchwald suggested a class action suit by himself and cartoonists Herblock, Bill Mauldin, Pat Oliphant and others for being "publicly humiliated" and for suffering "grievous professional injury" when they, unlike other journalists, did not appear on President Nixon's official "enemies" list. Buchwald, *Down the Seine and Up the Potomac* (G.P. Putnam's Sons: 1977), at 442-43.

[39] Frye, *Anatomy of Criticism* (Princeton Univ. Press: 1971), at 224, emphasis in original.

always to treat an object of some kind in an unfavorable way.[40]

And, in distinguishing "between punitive satire and comedy," he adds: "All satire is not only an attack; it is an attack upon *discernible, historically authentic particulars*. . . . The reader must be capable of pointing to the world of reality, past or present, and identifying the individual or group, institution, custom, belief, or idea which is under attack by the satirist." [41]

Moreover, "all satire involves, to some extent, *a departure from literal truth* and, in place of literal truth, a reliance upon what may be called a *satiric fiction*." [42]

Passing for a moment satiric fiction, and the truth embedded therein, we examine briefly the nature of the satiric attack. The "typical emotion which the author feels and wishes to invoke in his readers . . . is a blend of amusement and contempt. . . . [W]hether it is uttered in a hearty laugh, or in that characteristic involuntary expression of scorn, the stillborn laugh, a single wordless exhalation coupled with a backward gesture of the head—it is inseparable from satire. Even if the contempt which the satirist feels may grow into furious hatred, he will still express his hatred in terms suitable, not to murderous hostility, but to scorn." [43]

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[40] Rosenheim, Jr., *Swift and the Satirist's Art* (The Univ. of Chicago Press: 1963), at 12, emphasis in original (hereafter cited as "Rosenheim").

[41] *Id.* at 25, emphasis in original. See also Highet, *The Anatomy of Satire* (Princeton Univ. Press: 1962) (hereafter cited as "Highet"), at 16: "[T]he type of subject preferred by satire is always concrete, usually topical, often personal. It deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils."

[42] Rosenheim, at 17, emphasis in original.

[43] Highet, at 21-22. The point is made in almost identical language with respect to the basic meaning "of satire" in the seventeenth and eighteenth centuries: "[T]he poet's task, like the orator's, was to arouse in his audience certain emotions about the subject of his poem. When scorn, hatred, or contempt was the

In making his attack, the satirist

> intends to shock his readers. By compelling them to look at a sight they had missed or shunned, he first makes them realize the truth, and then moves them to feelings of protest. Most satirists enhance those feelings by careful choice of language. They employ not only accurate descriptive words, but also words which are apt to startle and dismay the average reader. Brutally direct phrases, taboo expressions, nauseating imagery, callous and crude slang—these are parts of the vocabulary of almost every satirist.[44]

In short, "Satire is the literary equivalent of a bucket of tar and a sack of feathers."[45] The result is that the

> victims of true satire must "suffer," whether through their own injured awareness of assault or in the ridicule or hostility which the satirist produces in the minds of others. The ultimate wellspring of the satiric spirit is perhaps benign, and sin itself, rather than the sinner, may be the true object of the satirist's wrath. But the essence of the satiric procedure is attack, and the attack launched impartially against everyone is no attack at all.[46]

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emotion he wished to arouse, he was writing satire. The essence of the meaning of the word was simply 'a composition *against* someone or something'." Jack, *Augustan Satire: Intention and Idiom in English Poetry, 1660-1750* (Clarendon Press: 1952), at 98, emphasis in original.

[44] Highet, at 20. See also *id.* at 18. "Most satiric writing contains cruel and dirty words; all satiric writing contains trivial and comic words; nearly all satiric writing contains colloquial anti-literary words." Other comments are to the same effect: "[G]ood satire is, almost without exception, vivid, racy, and sensual. The satirist wants to project us into a situation that already exists, and, in order to do this, he must screw our senses up to a high pitch, must involve us with the milieu or the personality which he is describing. This is why satire often presents us with a series of vignettes: history seen by flashes of lightning." Lucie-Smith (ed.), *The Penguin Book of Satirical Verse* (Penguin Books: 1967), at 19 (hereafter cited as "Lucie-Smith"). See also Roth, *Reading Myself and Others* (Farrar, Straus & Giroux: 1975), at 48-49.

[45] Highet, at 155.

[46] Rosenheim, at 29.

The latter point was forcefully made by Alexander Pope himself: "General Satire in Times of General Vice has no force, & is no Punishment: . . . 'tis only by hunting One or two from the Herd that any Examples can be made. If a man writ all his Life against the Collective Body of the Banditti, . . . would it do the least Good, or lessen the Body?" [47]

Much of the satire discussed by the critics we have quoted, and much of Pope's, was "political" in that political figures were its targets. But we must not omit reference to the greatest body of purely political English satire was a series of open letters written between 1769 and 1772 to the *Public Advertiser* by the anonymous Junius. An ally of John Wilkes, Junius attacked George III and the Lord North ministry with a vengeance.[48] "It must be confessed that the famous *Letters*, great as is their talent, are unpleasant reading: venomous malignity and corrosive spite are qualities not beautiful to contemplate; and cold poison seems somehow to be more deadly than poison that is not so cold." [49]

The poems of the leading English satirists, and the *Letters* of Junius (who strongly supported the colonists in his attacks on the North administration) were well known in America and often imitated. Indeed, satire formed an important part of the vast outburst of political writing in the colonies during the revolutionary period. Professor Granger identified 530 satires during the

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[47] Letter from Pope to Arbuthnot, quoted in Mack, *Alexander Pope, A Life* (W. W. Norton: 1986), at 636 (hereafter cited as "*Pope Life*"). Pope reiterated this poetically in *One Thousand Seven Hundred and Thirty-Eight, Dialogue II*, quoted in *Pope Life*, at 710. This generalization must, however, be qualified, since Jonathan Swift, Pope's friend and ally in the fight against the corruption of his time, not only attacked particular individuals and groups, but satirized all mankind, as in Book IV of *Gulliver's Travels*.

[48] Letters of Junius (C.W. Everett, ed., London: 1927). An excerpt from his letters which may particularly interest the Court, addressed to Lord Mansfield and excoriating his conduct in libel cases, is reproduced at pages 15a-16a, *infra*.

[49] Walker, *English Satire and Satirists* (Octagon Books: 1965), at 217.

period 1763-1783, on both the Patriot and the Loyalist side: [50] "From the Juvenalian verse of Freneau and Odell through Trumbull's and Bailey's Rabelaisian caricatures to the seeming geniality of Hopkinson and the Swiftian bite of Franklin, this body of satire runs the rhetorical spectrum."[51] The tradition of American political satire thus antedates the Republic.

Since the object of satire's attack is to wound, it is not surprising that it often succeeds, although some targets are—or appear to be—unhurt. A few illustrations must suffice: "The various authors attacked in the *Dunciad* were angry at being, as they thought, treated unfairly. Their anger was not only understandable, but justified. Pope did not tell the truth about them." [52] Yet, Lord Hervey, as *Sporus* the victim of Pope's—and English literature's—most vicious satire, was, according to his biographer, unmoved.[53] While Beerbohm's parodies of their writings deeply hurt Kipling and Arnold Bennett, Henry James was highly appreciative and pleased.[54] Wolcott Gibbs' famous profile of Henry Luce in *Time*style ("Backward ran sentences until they reeled the mind") was read by him "with the anguish of a man suspicious of humor and dreadfully concerned about his own image." [55]

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[50] Granger, *Political Satire in the American Revolution, 1763-1783* (Cornell University: 1960), at viii.

[51] *Id.* at 7, 8, 26.

[52] Sutherland, Jr., *The Art of The Satirist* (Univ. of Texas Press: 1965), at 11.

[53] *Epistle to Dr. Arbuthnot*, reproduced at page 14a, *infra*. See Halsband, *Lord Hervey Eighteenth Century Courtier* (Oxford: 1973), at 177.

[54] See Highet, at 145-46; Behrman, *A Portrait of Max* (Random House: 1960) (hereafter cited as "Behrman"), at 231-32.

[55] Swanberg, *Luce and His Empire* (Scribner: 1972), at 123. Referring to Luce's possible political ambitions, the profile concluded: "Where it all will end, knows God." See *id.* at 124.

A remarkable example of the susceptibility of even sophisticated public persons to satiric wounds is provided by the report that Gilbert and Sullivan's Sir Joseph Porter, K.C.B., a satire of William Henry Smith, the bookseller, who moved into politics and became First Lord of the Admiralty in Disraeli's 1887 Cabinet, "stunned Disraeli" (himself an author of political novels), who

We do not suggest that any of these victims would have sued their satiric tormentors if the law had enabled them to do so. But human nature is such that individuals who feel seriously aggrieved tend to counterattack with any weapon that comes to hand, and the prospect of a large damage award will encourage many satiric targets to sue, if the decision below is sustained.

When one looks to the motives of satirists—as does the Court of Appeals in this case—it is clear that they are usually, if not inevitably, moved by what the common law would describe as "malice." Professor Highet has written that, whatever additional motives a satirist may have, "he is always moved by personal hatred, scorn, or condescending amusement. Frequently he disclaims this, and asserts that he has banished all personal feelings, that he is writing only for the public good. But he always has a rankling grudge, however well he tries to conceal it, or a twitch of contempt, however gracefully he turns it into a smile." [56]

Often, there will be objective evidence of the satirist's personal ill feeling toward the object of his satire, even as history records that of past satirists toward their victims.[57] In many other cases, especially with regard to effective satire, a reasonable jury could, if permitted by the Court to do so, infer malice from the writing itself.

To recapitulate, satire regularly attacks and wounds individuals, often due to the personal ill will which the satirist bears toward his target. More often than not, therefore, the elements for a claim of intentional infliction of emotional distress will be present. Only the First Amendment can protect the writing and publishing of satire against this danger.

"said that *H.M.S. Pinafore* made him feel 'quite sick'." Highet, at 125.

[56] Highet, at 238. See also Rosenheim, at 181.

[57] For example, Pope's Portrait of Lord Hervey as *Sporus* "springs from an intense personal hatred"; longstanding feuds furnished the impetus for other attacks. See *Pope Life*, at 646; Beerbohm "loathed" Kipling. See Highet, at 145; Behrman, at 61-71.

Of course, "the constitutional protection for a free press [does not apply] only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right." [58] But for purposes of this case, it is sufficient that satire, such as we have been discussing, and especially political satire, is an expression of the writer's opinion. The satiric fiction, to which we referred at the outset, is the satirist's manner of expressing his vision of the truth.

"The satirical writer believes that most people are purblind, insensitive, perhaps anaesthetized by custom and dulness and resignation. He wishes to make them see the truth—at least that part of the truth which they habitually ignore." [59] To be sure, it is not "necessary that the satiric work contain an appreciable element of 'affirmation.' An art whose distinguishing effect is that of attack is almost inevitably more destructive than otherwise." [60] Satire is a "savage but useful art whose glory is not to proclaim truth but to destroy falsehood." [61] Thus, by eradicating falsehood and exposing sham, satire makes an indispensable contribution to political dialogue. As one of Shakespeare's Fools, Jacques, said:

> Invest me in my motley. Give me leave
> To speak my mind, and I will through and through
> Cleanse the foul body of th' infected world,
> If they will patiently receive my medicine.[62]

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[58] *Winters* v. *New York*, 333 U.S. at 510, reaffirmed in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952); see also *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977).

[59] Highet, at 19. "[S]atire is militant irony: Its moral norms are relatively clear, and it assumes standards against which the grotesque and absurd are measured." Frye, at 223. See also Sutherland, at 11; Lucie-Smith, at 14.

[60] Rosenheim at 180-81.

[61] *Id.* at 238. Thus, "Sporus is simply the climactic instance of a form of prostitution bedeviling the entire society that [Pope's] poem depicts." *Pope Life* at 646.

[62] Shakespeare, *As You Like It*, Act II, Sc. 7, ll.58-61.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ROSLYN A. MAZER
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June 15, 1987

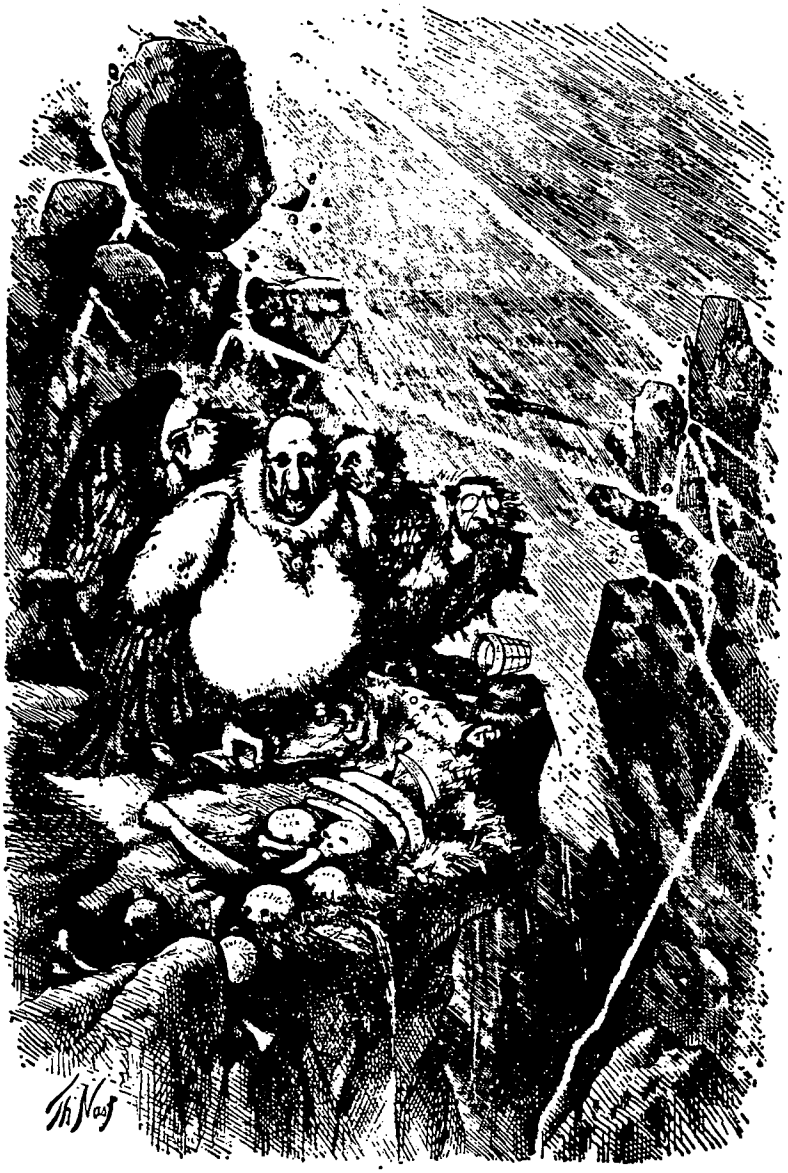
APPENDIX

APPENDIX

Time, midnight.—*Scene*, New York City Hall.
LADY *******. "Out, damned spot! out, I say! . . . Here's the smell of the blood still: all the perfumes of Democracy will not sweeten this little hand. Oh! oh! oh!"

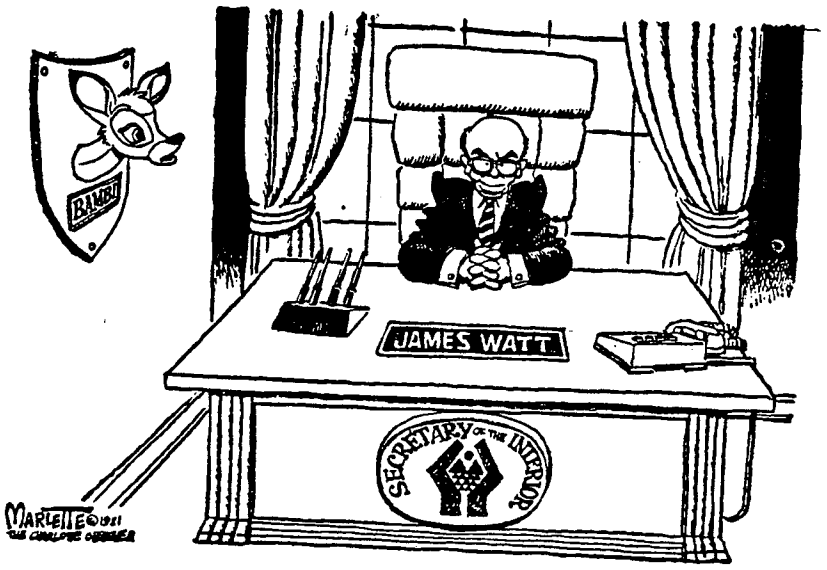
ON TO PHILADELPHIA;

THE MARCH OF THE BREAD AND BUTTER BRIGADE



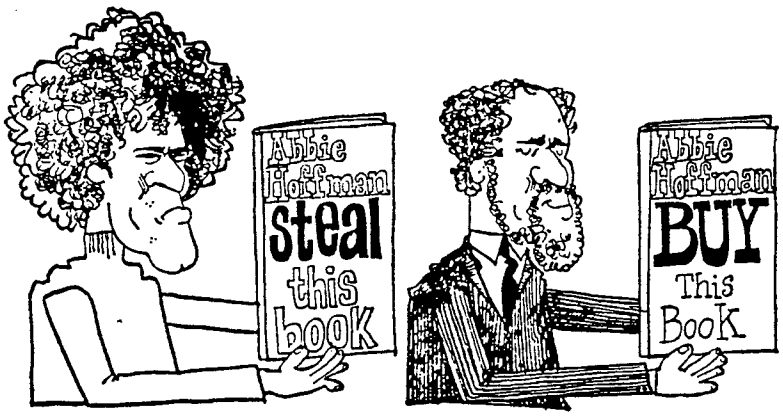
A Group of Vultures Waiting for the Storm to "Blow Over";
Let Us Prey

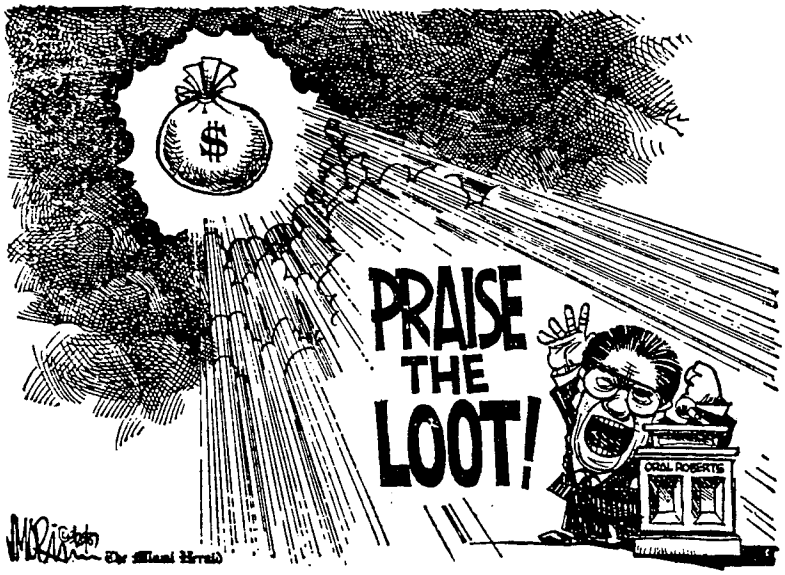

SEE! THEM COME.
It's Miss Boombah!
SIS BOOMBAH?
Miss Sis Boombah
SHE'S A RHODE ISLAND RED -- FROM PROVIDENCE -- NOBODY FROM PROVIDENCE SHOULD SEE ME!
WHY--?
OOG! WHO BEEN KEEPIN' FISH IN THIS BAG?

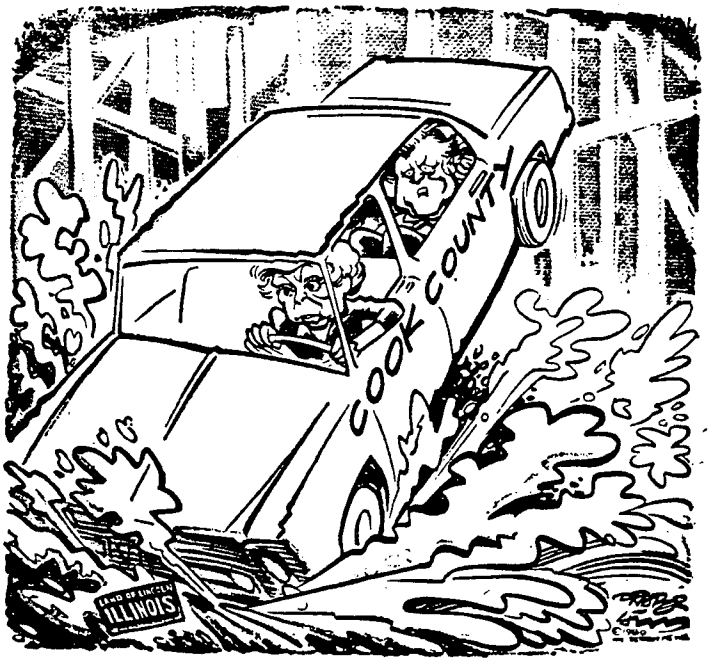

BAMBI
JAMES WATT
SECRETARY OF THE INTERIOR
MARLETTE ©1981

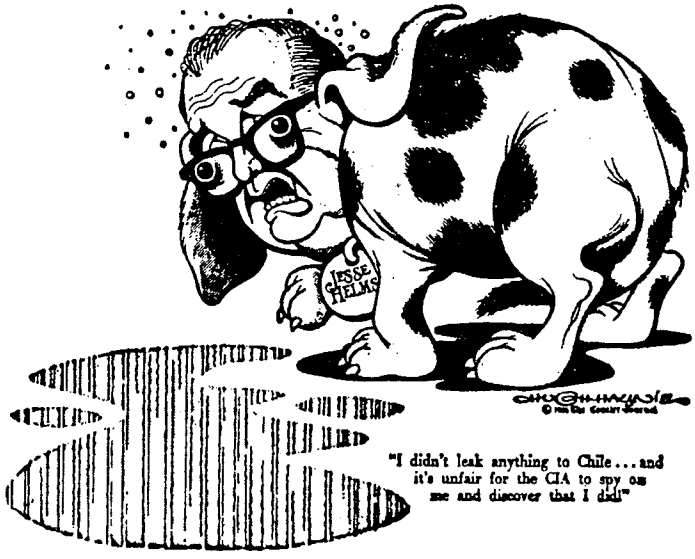

PUT IT BACK, BERT...

"NOW WE COME TO THE OFFICES OF THE HOUSE WAYS AND MEANS COMMITTEE, HEADED BY . . ."


Abbie Hoffman
steal this book
Abbie Hoffman
BUY This Book
1970
1980


$
PRAISE THE LOOT!
ORAL ROBERTS



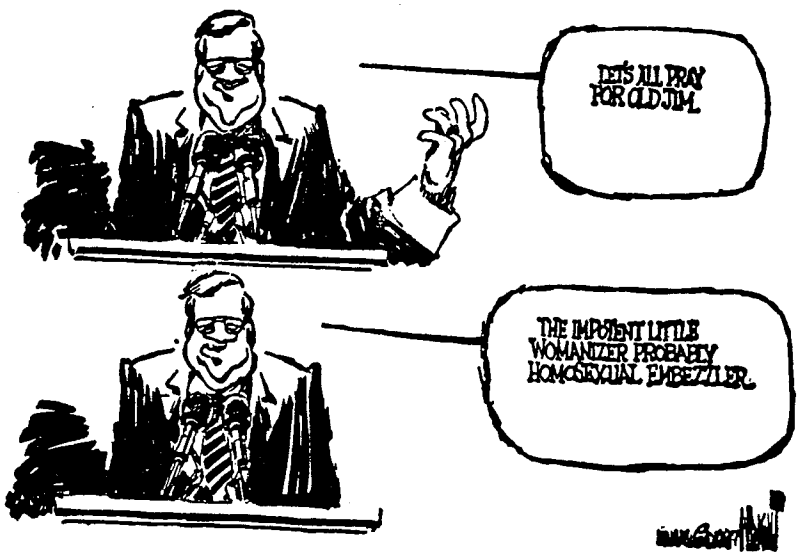


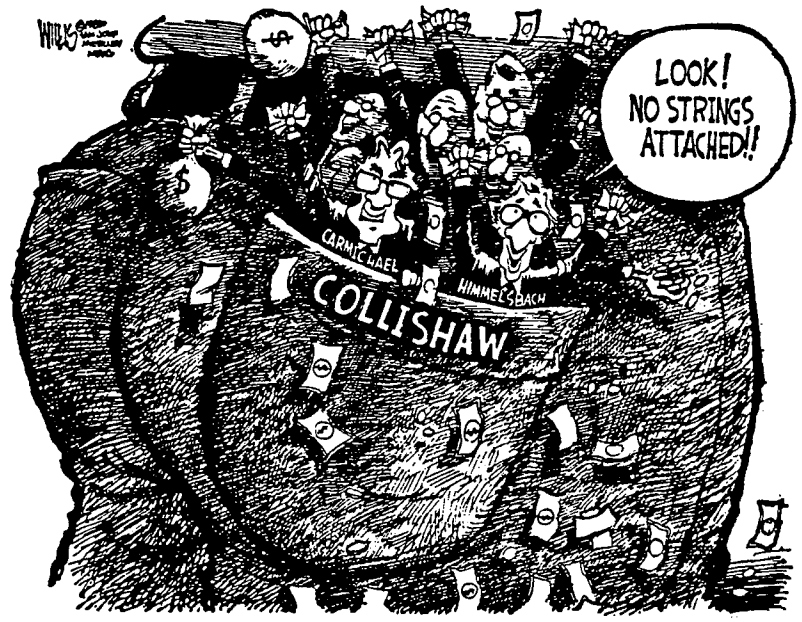
"I didn't leak anything to Chile... and it's unfair for the CIA to spy on me and discover that I did!"

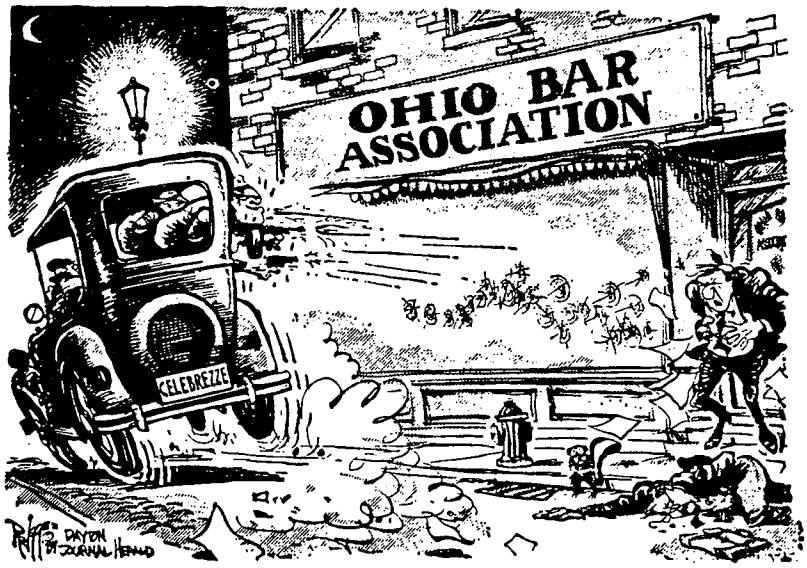

Willie Nelson for FARM AID
On the dole again,
Just can't wait to get on the dole again,
The life I love is when the subsidies roll in,
So I can't wait to get on the dole again...
On the dole again,
Growin' crops that should have never been,
Plowin' under when the guv'ment told me when,
And I can't wait to get on the dole again...
(Chorus:)
On the road again,
Like a band of beggars we march down the highway,
Off to Washington,
Insisting that Congress send more money our way...
On the dole again,
Just can't wait to get on the dole again,
I don't care if it's downright unAmerican,
I can't wait to get on the dole again.


JOE McCARTHY TACTICS
PAT BUCHANAN


HEY! THE BROAD DESERVED IT. SHE WAS COYOTE UGLY.
JUSTICE
SIGN Wilkinson


LET'S ALL PRAY FOR OLD JIM.
THE IMPOTENT LITTLE WOMANIZER PROBABLY HOMOSEXUAL EMBEZZLER.


LOOK! NO STRINGS ATTACHED!!
CARMICHAEL
HIMMELSBACH
COLLISHAW


OHIO BAR ASSOCIATION
CELEBREZZE
DAYTON JOURNAL HERALD

Page

1a. Drawing by Thomas Nast, September 19, 1868, published in *Harper's Weekly*

2a. Drawing by Matt Morgan, June 6, 1872, published in *Frank Leslie's Illustrated Newspaper*

3a. Drawing by Thomas Nast, September 23, 1871, published in *Harper's Weekly*

4a. TOP

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Reprinted with permission. Philadelphia Common Plea Court Judge Bernard J. Avellino referred to an alleged rape victim as "coyote ugly."

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11a. TOP

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BOTTOM

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Excerpt from A. Pope. *Epistle to Dr. Arbuthnot*, lines 305-333

Let *Sporus* tremble— A. What? that thing of silk,
Sporus, that mere white curd of Ass's milk?
Satire or sense, alas! can *Sporus* feel?
Who breaks a butterfly upon a wheel?
P. Yet let me flap this bug with gilded wings,
This painted child of dirt, that stinks and stings;
Whose buzz the witty and the fair annoys,
Yet wit ne'er tastes, and beauty ne'er enjoys:
So well-bred spaniels civilly delight
In mumbling of the game they dare not bite.
Eternal smiles his emptiness betray,
As shallow streams run dimpling all the way.
Whether in florid impotence he speaks,
And, as the prompter breathes, the puppet squeaks;
Or at the ear of *Eve*, familiar Toad,
Half froth, half venom, spits himself abroad,
In puns, or politics, or tales, or lies,
Or spite, or smut, or rhymes, or blasphemies.
His wit all see-saw, between *that* and *this*,
Now high, now low, now master up, now miss,
And he himself one vile Antithesis.
Amphibious thing! that acting either part,
The trifling head or the corrupted heart,
Fop at the toilet, flatt'rer at the board,
Now trips a Lady, and now struts a Lord.
Eve's tempter thus the Rabbins have exprest,
A Cherub's face, a reptile all the rest;
Beauty that shocks you, parts that none will trust;
Wit that can creep, and pride that licks the dust.

Excerpt from Junius, Letter XLI to the Right Honourable Lord Mansfield, 14 November 1770 (Everett, ed., pp. 180-181).

The doctrine you have constantly delivered, in cases of libel, is another powerful evidence of a settled plan to contract the legal power of juries, and to draw questions, inseparable from fact within the *arbitrium* of the court. Here, my Lord, you have fortune of your side. When you invade the province of the jury in a matter of libel, you, in effect, attack the liberty of the press, and with a single stroke, wound two of your greatest enemies—In some instances you have succeeded, because jurymen are too often ignorant of their own rights, and too apt to be awed by the authority of a chief justice. In other criminal prosecutions, the malice of the design is confessedly as much the subject of consideration to a jury, as the certainty of the fact. If a different doctrine prevails in the case of libels, why should it not extend to *all* criminal cases?—Why not to capital offenses? I see no reason (and I dare say you will agree with me that there is no good one) why the life of the subject should be better protected against you, than his liberty or property. Why should you enjoy the full power of pillory, fine, and imprisonment, and not be indulged with hanging or transportation? With your Lordship's fertile genius and merciful disposition, I can conceive such an exercise of the power you have, as could hardly be aggravated by that which you have not.

But, my Lord, since you have laboured, (and not unsuccessfully) to destroy the substance *of the trial*, why should you suffer the form of the *verdict* to remain? Why force twelve honest men, in palpable violation of their oaths, to pronounce their fellow-subject a *guilty* man, when, almost at the same moment, you forbid their inquiring into the only circumstance, which in the eye of law and reason constitutes guilt—the malignity or innocence of his intentions?—But I understand your Lord-

slip.—If you could succeed in making the trial by jury useless and ridiculous, you might then with greater safety introduce a bill into parliament for enlarging the jurisdiction of the court, and extending your favorite trial by interrogatories to every question, in which the life or liberty of an Englishman is concerned.

Musical Parody by Mark Russell

"Mr. Meese Is Coming To Town"

Oh you'd better be nice, not cranky and rude,
And don't ask for things like shelter and food
Mr. Meese is coming to town.

He's making a list of the food that he brings
To all of the hungry who live in Palm Springs
Mr. Meese is coming to town.

He knows if you're on food stamps—or on the welfare rolls

Look in your Christmas stocking and you'll find a lump of coal.

In the soup kitchen he's looking hard
For winos who carry a Master Charge card
Mr. Meese is coming to town.

And see the skid row residents have a gourmet treat

A silver ice-filled bucket of vintage Sneaky Pete.

Why stay at the Waldorf in a big double suite
You can save in the bowery and sleep in the street,
Mr. Meese has spoken
On those words he's chokin'
Mr. Meese is coming to town.